

# **ACCESS**

## **TO KNOWLEDGE IN AFRICA**

### **THE ROLE OF COPYRIGHT**



EDITORS: C ARMSTRONG, J DE BEER, D KAWOOYA,  
A PRABHALA, T SCHONWETTER

# **Access to knowledge in Africa**

## **The role of copyright**



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A PRABHALA, T SCHONWETTER

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Jeremy de Beer  
Dick Kawooya  
Achal Prabhala and  
Tobias Schonwetter

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## ACA2K Project Team

The editors of this book (who are profiled in the 'About the Contributors' section) have served ACA2K as Research Manager (Armstrong) and Principal Investigators (de Beer, Kawooya, Prabhala and Schonwetter).

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## Foreword

The African Copyright and Access to Knowledge (ACA2K) project's researchers are not the first to recognise the problem of the lack of evidence for copyright policymaking, or the urgent need for a better understanding of the impacts of copyright and other intellectual property (IP) laws, policies and regulations on everyday life issues, such as on access to educational and learning materials. However, it is no exaggeration to say that the ACA2K project is the first to deploy a sophisticated interdisciplinary collaborative research methodology and to generate on-the-ground empirical evidence on the impact of copyright on a particular sector across a group of countries.

As early as 2002, the UK Commission on Intellectual Property Rights had observed that 'WIPO ... should give explicit recognition to both the benefits and costs of IP protection and the corresponding need to adjust domestic regimes in developing countries to ensure that the costs do not outweigh the benefits'.<sup>1</sup> In the ensuing debates, including the debates between 2004 and 2007 at the World Intellectual Property Organisation (WIPO) on establishing a 'development agenda' for the organisation, new terminology has emerged to describe the optimum IP policy for developing countries. We have increasingly heard or read phrases like: 'IP is not an end in itself,' 'one size does not fit all,' 'developing countries need flexibilities and policy space,' 'IP rules must take into account the levels of development of each country,' 'IP is a cross-cutting issue,' and so forth. These phrases have become mantras in IP policymaking and scholarship and have had important catalytic effects for international initiatives, such as the WIPO development agenda. But what do these phrases and terminology mean, for example, in the area of copyright?

Copyright laws and policies cover many controversial issues that are linked to different disciplines, in science, culture, technology, economics, law and other fields. The concepts and issues in the field are also approached from different perspectives and with different political and economic agendas, sometimes in a misleading context, and often in an imprecise manner. For this reason, policymaking in the area of copyright, particularly in developing countries, has at best been guesswork and at worst uninformed. At the international level, debates and rule-making on copyright, as with other IP, are punctuated with propaganda, anecdotes and dogma. This is what Nobel Laureate Joseph Stiglitz and others have called 'faith-based' policymaking. Evidence to justify particular policies or laws is rare. Evidence of the

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<sup>1</sup> Commission on Intellectual Property Rights *Integrating intellectual property rights and development policy* (2002) London, at 159.

real world impact of specific copyright or, for that matter, other IP laws or policies, is almost unheard of. The ACA2K project is unique because the work summarised in this book provides evidence both *for* policymaking and *of* the impacts of copyright in the real world.

But this book, and the work of the ACA2K project, is not pioneering only because of the illuminating findings in all the eight study countries. It is pioneering also because of the replicable research methodology developed, and the interdisciplinary collaboration in an area that is usually seen as a preserve of lawyers. The project is also of immense importance because of its focus on education and learning materials in Africa, where copyright is always associated with the positive aspects of promoting African music and culture. This research tells us that while copyright laws and policies might have positive effects in one sector, the same is not necessarily universally true. Other project outcomes, such as building networked research capacity on the areas of IP, knowledge governance and development, and the exploratory work on examining the gender aspects of copyright and access, are also ground-breaking. Finally, the publication of this volume under an innovative open licensing agreement with one of Africa's largest publishers puts the ACA2K project in a special place – because the researchers are walking the talk of access to knowledge by ensuring that this important work is widely available and accessible across Africa and beyond.

The real measure of the success of the work of the ACA2K project and this book will, however, be the extent to which it challenges researchers, scholars, policymakers, civil society, industry players and other stakeholders in the international copyright system, including international organisations such as WIPO, to work to bring meaning to phrases like 'IP is not an end in itself'. The various dissemination events on the preliminary research findings of the ACA2K work at the national and international levels have shown that the project's work is already making a difference. This book promises to amplify the project's impact. Even those who consider themselves experts on IP will benefit immensely from this book and the broader ACA2K project's work. The ACA2K work provides many insights, offers many lessons, gives us a methodology to interrogate the question of benefits and costs of IP laws and policies and, above all, this project proves that copyright policy can immensely benefit from interdisciplinary empirical research and impact studies in the field.

The entire ACA2K project team deserves to be congratulated for taking up, and delivering on, such an ambitious and innovative initiative. The vision and foresight of the International Development Research Centre (IDRC) and the Shuttleworth Foundation, who provided the financial support for the project work, including this book, must also be commended.

**Sisule F. Musungu**

President, IQsensato; and Managing Director, IQsensato Consulting

## Acronyms

A2K: Access to knowledge  
A2LM: Access to learning materials  
ACA2K: African Copyright and Access to Knowledge project  
AMS: Association des musiciens du Sénégal  
ANFASA: Academic and Non-Fiction Authors' Association of South Africa  
ANRT: National Telecommunications Regulatory Authority  
ARIPO: African Regional Intellectual Property Organisation  
ARPAC: Arquivo do Património Cultural  
BA: Bibliotheca Alexandrina  
BADA: Bureau africain du droit d'auteur  
BBBEE: Broad-Based Black Economic Empowerment  
BIO-EARN: East African Regional Programme and Research Network for Biotechnology, Biosafety and Biotechnology Policy Development  
BMDA: Bureau marocain du droit d'auteur  
BSDA: Bureau sénégalais du droit d'auteur  
CAPMAS: Central Agency for Public Mobilisation and Statistics  
CARLIGH: Consortium of Academic and Research Libraries in Ghana  
CCK: Communication Commission of Kenya  
CFI: Canal France International  
CFJ: Centre de formation judiciaire  
CMO: Collective management organisation  
CNRA: Conseil national de régulation de l'audiovisuel  
CoL: Commonwealth of Learning  
COSGA: Copyright Society of Ghana  
DAC: Department of Arts and Culture  
DALRO: Dramatic, Artistic and Literary Rights Organisation  
DoE: Department of Education  
DRM: Digital rights management  
dti: Department of Trade and Industry  
EAC: East African Community  
EBAD: École des bibliothécaires, archivistes et documentalistes  
ECOWAS: Economic Community of West African States  
ECT Act: Electronic Communications and Transactions Act  
EIPRPA: Egyptian Intellectual Property Rights Protection Act  
ENA: École nationale des arts  
EU: European Union



EULA: End user licensing agreement  
FCUBE: Free Compulsory Universal Basic Education  
FDI: Foreign direct investment  
FHSST: Free High School Science Texts  
FORCIIR: Adult Training Course in Computerised Network Information  
FOSS: Free and open source software  
FTA: Free trade agreement  
GAPI: Ghana Association of Phonographic Industries  
GATT: General Agreement on Tariffs and Trade  
GDP: Gross domestic product  
GPI: Gender parity index  
HDI: Human Development Index  
HELB: Higher Education Loans Board  
ICT: Information and communication technology  
IDRC: International Development Research Centre  
IFRRO: International Federation of Reprographic Rights Organisations  
IMF: International Monetary Fund  
IP: Intellectual property  
IPI: Industrial Property Institute  
IPM: Intellectual property management  
IPR: Intellectual property rights  
ITIDA: Information Technology Industry Development Agency  
IUCEA: Inter-University Council for East Africa  
JHS: Junior High School  
KNLS: Kenya National Library Service  
KPA: Kenya Publishers Association  
KU: Kenyatta University  
LDC: Least developed country  
LIASA: Library and Information Association of South Africa  
LINK Centre: Learning Information Networking Knowledge Centre  
MCSK: Music Copyright Society of Kenya  
MU: Moi University  
NABOTU: National Book Trust of Uganda  
NBDC: National Book Development Council  
NIPMO: National Intellectual Property Management Office  
OAPI: African Intellectual Property Organisation  
OER: Open educational resources  
OM: Outcome mapping  
P&DM: Public and Development Management  
PASA: Publishers' Association of South Africa

PDEF: Programme décennal de l'éducation et de la formation  
 PDMs: Print-on-demand machines  
 PEAP: Poverty Eradication Action Plan  
 PLRs: Public lending rights  
 PNDC: Programme national de développement culturel  
 PNDCL: Provisional National Defence Council Law  
 PROMAG: Professional Musicians Association of Ghana  
 RMI: Rights management information  
 RRO: Reprographic rights organisation  
 SACU: Southern African Customs Union  
 SADC: Southern African Development Community  
 SAJIC: *Southern African Journal of Information and Communication*  
 SAP: Structural Adjustment Programme  
 SCCR: Standing Committee on Copyright and Related Rights  
 SHS: Senior High School  
 SOMAS: Sociedade Moçambicana de Autores  
 TCEs: Traditional cultural expressions  
 TPMs: Technological protection measures  
 TRIPs Agreement: Agreement on Trade-Related Aspects of Intellectual Property Rights  
 UCAD: Université de Cheikh Anta Diop  
 UCC: Universal Copyright Convention  
 UCT: University of Cape Town  
 UDHR: Universal Declaration of Human Rights  
 UEM: Eduardo Mondlane University  
 UEMOA: West African Economic and Monetary Union  
 UK: United Kingdom  
 ULRC: Uganda Law Reform Commission  
 UNDP: United Nations Development Programme  
 UNEB: Uganda National Examination Board  
 UNESCO: United Nations Educational, Scientific and Cultural Organisation  
 UNISE: Uganda National Institute of Special Education  
 UPE: Universal Primary Education  
 UPPC: Uganda Printing and Publishing Corporation  
 URTNA: Union of National Radio and Television Organisations of Africa  
 USE: Universal Secondary Education  
 WAK: Writers' Association of Kenya  
 WCT: WIPO Copyright Treaty  
 WIPO: World Intellectual Property Organisation  
 WPPT: WIPO Performances and Phonograms Treaty  
 WTO: World Trade Organisation



# Chapter 1

## Introduction

*Chris Armstrong, Jeremy de Beer, Dick Kawooya, Achal Prabhala  
and Tobias Schonwetter*

### 1.1 The importance of improving African education systems

Education is integral to development. It is a catalyst for poverty reduction and economic growth, a pillar of public health and community building. Beyond its social and economic utility, education betters people's lives by increasing their scope for individual choice and helping to fulfill human potential. The Universal Declaration of Human Rights states unambiguously, 'Everyone has the right to education'.<sup>1</sup> It is a basic human right.

The statistics about education in Africa at all levels—primary, secondary and tertiary—are alarming.<sup>2</sup> Compared to other regions of the world, fewer African children and young adults are in school. Women are less well educated than men in many African countries. A disproportionate number of African students are forced to go abroad for their studies.

Given their profound importance to national and individual development, education systems in Africa must be improved. An 'education index' provided by the United Nations Development Programme (UNDP) provides a sense of where selected African educational systems stand relative to those of the rest of the world and in the context of human development generally.

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1 Article 26(1). Available at <http://www.un.org/en/documents/udhr/> [Accessed 1 December 2009].

2 See, generally, UNESCO *Education for all global monitoring report 2009* (2009). Available at <http://unesdoc.unesco.org/images/0017/001776/177609e.pdf> [Accessed 1 December 2009]; UNESCO Institute for Statistics *Global education digest 2009: comparing education statistics across the world*. Available at [http://www.uis.unesco.org/template/pdf/ged/2009/GED\\_2009\\_EN.pdf](http://www.uis.unesco.org/template/pdf/ged/2009/GED_2009_EN.pdf) [Accessed 1 December 2009]; UNESCO Institute for Statistics *Trends in tertiary education in Sub-Saharan Africa* (2009). Available at [http://www.uis.unesco.org/template/pdf/ged/2009/Fact\\_Sheet\\_2009\\_SSA.pdf](http://www.uis.unesco.org/template/pdf/ged/2009/Fact_Sheet_2009_SSA.pdf) [Accessed 1 December 2009].

**Table 1: UNDP Human Development Index and Education Rankings**

Country	Human Development Index (out of 177 countries)	Education Ranking (out of 177 countries)
Egypt	123	136
South Africa	129	103
Morocco	130	154
Kenya	147	137
Ghana	152	149
Uganda	157	135
Senegal	166	174
Mozambique	172	169

Source: Analysis of UNDP data for 2007, <http://hdrstats.undp.org/en/indicators/93.html>

Achieving the goal of education for all in Africa and interdependent Millennium Development Goals, requires work to be done on many urgent issues: addressing links between education planning and health provision, supporting equity for girls and women and strengthening anti-poverty commitments are examples.<sup>3</sup> Also among the key challenges, according to the United Nations Educational, Scientific and Cultural Organisation (UNESCO), is increasing textbook supply and quality.<sup>4</sup>

The link between education and the availability of adequate learning materials such as textbooks is undeniable: It is difficult to imagine effective learning independent of learning materials, both inside and outside of classrooms.

Learning materials take many forms. Hard-copy books are still the basis of education systems worldwide and are especially so in Africa. Digital materials are, however, quickly becoming learning tools of choice. As information and communication technologies (ICTs) proliferate, the shift from hard-copy to digital learning materials should accelerate. Technology can have a transformative effect on entire systems of education and on individual teachers and learners within those systems. ICTs are potentially democratising, facilitating provision of education to people and communities that are currently marginalised, whether due to gender, ethnicity, socioeconomic class, remoteness or other factors. They can help to overcome physical infrastructure challenges that pose barriers to the acquisition of learning tools and can open access to knowledge that was previously unobtainable.

3 UNESCO *Education for all global monitoring report 2009* (2009) at 6. Available at <http://unesdoc.unesco.org/images/0017/001776/177609e.pdf> [Accessed 1 December 2009].

4 Ibid.

There is reason to worry, however, that as some barriers to education fall, others may remain, or new barriers may arise. Specifically, it is essential to ensure that legal and policy frameworks are well suited to capitalise on, indeed catalyse, opportunities to improve the future of education in Africa. In this respect, copyright environments—consisting of laws, policies and practices—are one significant determinant of access to learning materials and therefore a key component of education systems as a whole.

## 1.2 Connecting education with perspectives on copyright

Copyright is relevant to learning materials in several important ways. One school of thought about copyright, the utilitarian perspective, conceives of it as a necessary incentive for authors to invest time, intellectual effort and money into producing works of creative expression, including learning materials, to benefit the public at large. Publishers and other intermediaries that acquire assignments or licences from authors can also exploit copyright protection to support business models that generate financial returns, some of which are retained as profit and some of which are reinvested to support the production of additional works. Put simply, it is arguable that copyright protection itself facilitates the production and distribution of learning materials. Without copyright, so the argument goes, fewer learning materials would exist and those that would exist would be lower quality.

Another important school of thought conceives of copyright as a natural right of authors to control their creative outputs. This point of view captures many people's sense of natural justice and is reflected, for example, in scholarly norms surrounding attribution of credit and prohibitions on plagiarism. This school of thought is unable to adequately justify marketable rights acquired by legal entities such as publishing companies, but its force is nonetheless powerful in the movement to extend the boundaries of copyright protection.

Both utilitarian and natural rights-based conceptions of copyright are relevant to African education systems and, more specifically, the availability of learning materials. That is because on either or both grounds, copyright provides exclusive legal rights over protected works, including reproduction and dissemination rights. As a result, copyright-owners have the right to control how learning materials are produced, disseminated and used. From the perspective of the owners' ability to control such works, copyright is clearly beneficial.

There is, however, a growing movement of national and international policymakers, private sector industry leaders, researchers and members of civil society who view copyright from a different perspective. Their focus is not only on protecting copyright-owners, for the reasons discussed above. They also pay attention to the externalities of copyright systems; specifically copyright's

implications for enabling or restricting access to knowledge. The term ‘access to knowledge’ or ‘A2K’ has been used to characterise diverse groups of actors’ shared vision for reshaping the contours of existing intellectual property systems.<sup>5</sup>

Framing the interfaces between copyright and education through the lens of access to knowledge does not seek to diminish the value of appropriately designed copyright systems. On the contrary, it recognises copyright’s integral role in the production and dissemination of knowledge. But the ultimate objective of copyright cannot be the protection of creative works for its own sake; copyright serves a nobler role in furthering broad public policy objectives, such as the advancement of learning.

It appears that 20th-century intellectual property policymaking, including copyright policymaking, was dominated by the belief that, because some protection is good, more protection is better. This belief manifested itself in a century’s worth of international treaties, national laws and local practices that continuously raised levels of copyright protection. Harmonisation was the ostensible justification, but it only occurred in one direction: upwards. The result has been criticised as a one size (extra-large) fits all mode of protection.<sup>6</sup>

The beginning of the 21<sup>st</sup> century foreshadows a new phase in global intellectual property governance, characterised neither by universal expansion nor reduction of standards, but rather by contextual ‘calibration.’<sup>7</sup> And systemic calibration is taking place, based on a cognisance of the positive *and* negative implications of intellectual property for broad areas of public policy.

In essence, a newly emerging intellectual property paradigm is based on a richer understanding of the concept of development. While development was once defined as mainly an issue of economic growth, there is now a more nuanced view, a view that emphasises the connections between development and human freedom.<sup>8</sup> A Director-General of the World Intellectual Property Organisation (WIPO) once

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5 A. Kapczynski ‘The access to knowledge mobilization and the new politics of intellectual property’ (2008) 117 *The Yale Law Journal* 804.

6 J. Boyle ‘A manifesto on WIPO and the future of intellectual property’ (2004) *Duke Law and Technology Review* 9. Available at <http://www.law.duke.edu/journals/dltr/articles/2004dltr0009.html> [Accessed 1 November 2009].

7 D. Gervais ‘TRIPS and Development’ in D. Gervais (ed) *Intellectual property, trade and development* (2007) Oxford University Press, Oxford.

8 A. Sen *Development as freedom* (1999) Oxford University Press, New York; and M. Nussbaum *Women and human development: the capabilities approach* (2000) Cambridge University Press, Cambridge.

described intellectual property simply as a ‘power tool for economic growth’.<sup>9</sup> WIPO’s new ‘development agenda’, formally adopted in 2007, is premised on promoting a more holistic appreciation of the real relationships among intellectual property and economic, social, cultural and human development.<sup>10</sup>

### 1.3 Existing research on copyright and education

Underlying the fundamental normative shift in intellectual property discourse that is beginning to occur is a growing body of empirical research. Copyright policies have historically been crafted on the basis of assumptions, rhetoric or political compromise. There is, however, a small but growing body of interrogatory research and evidence-based analysis able to inform policymakers about the probable consequences of their decisions.<sup>11</sup> Researchers’ work in this regard has only just begun.

In the past decade WIPO has commissioned, with increasing frequency, studies describing various aspects of copyright limitations and exceptions.<sup>12</sup> Some of these deal specifically with the education sector and one even deals with the education sector specifically in Africa.

A smaller body of critical, normative scholarship complements the primarily descriptive reports on copyright limitations and exceptions. Research output from Consumers International,<sup>13</sup> for example, includes not only detailed analysis of copyright flexibilities but also recommendations for policy improvements. Chon has properly placed the issue of copyright, education and access to learning materials within a human development framework, which prioritises the development of healthy and literate populations.<sup>14</sup> Other scholars have also broadened their focus

9 K. Idris *Intellectual property: a power tool for economic growth*, (2003) 2ed WIPO, Geneva.

10 J. de Beer ‘Defining the development agenda’ in J. de Beer (ed) *Implementing the World Intellectual Property Organization’s development agenda* (2009) Wilfred Laurier University Press, Waterloo, ON, Centre for International Governance Innovation, and IDRC; WIPO ‘The forty-five adopted recommendations under the WIPO development agenda’ (2007) WIPO, Geneva. Available at <http://www.wipo.int/ip-development/en/agenda/recommendations.html> [Accessed 1 November 2009].

11 Ibid, de Beer citing Fink and Maskus 2005 and Commission on Intellectual Property Rights 2002 as examples.

12 See WIPO-commissioned studies on copyright limitations and exceptions in this chapter’s bibliography by K. Crews (2008), J. Fometeu (2009), N. Garnett (2006), V. Nabhan (2009), J.C. Monroy Rodríguez (2009), S. Ricketson (2003), D. Seng (2009), P. Sirinelli (1999), J. Sullivan (2007) and R. Xalabarder (2009).

13 Consumers International Asia Pacific *Copyright and access to knowledge: policy recommendations on flexibilities in copyright laws* (2006) Consumers International, Kuala Lumpur. Available at [http://www.consumersinternational.org/Shared\\_ASP\\_Files/UploadedFiles/C50257F3-A4A3-4C41-86D9-74CABA4CBCB1\\_COPYRIGHTFinal16.02.06.pdf](http://www.consumersinternational.org/Shared_ASP_Files/UploadedFiles/C50257F3-A4A3-4C41-86D9-74CABA4CBCB1_COPYRIGHTFinal16.02.06.pdf) [Accessed 1 November 2009].

14 M. Chon ‘Intellectual property from below: copyright and capability for education’ (2007) 40 *UC Davis Law Review* 803. Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=971294](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=971294) [Accessed 1 November 2009].



beyond copyright limitations and exceptions, looking at the legal and practical implications of copyright systems as a whole.<sup>15</sup>

The literature that exists in this field demonstrates the need for and value of further empirical research. Conducting such research is an integral part of implementing the recommendations for WIPO's development agenda.<sup>16</sup> It is also the means to building broader research capacity in the area of intellectual property, knowledge governance and development. In that context, Canada's International Development Research Centre (IDRC) partnered with the Shuttleworth Foundation, based in South Africa, to support an ambitious research project designed to objectively investigate the relationships between copyright, education and access to learning materials: the African Copyright and Access to Knowledge project, or ACA2K. For IDRC, ACA2K was to build on more than a decade of supporting policy research and research network development in the area of ICT and access in Africa. ACA2K and several other research projects represented recognition that basic ICT infrastructure and policy frameworks, though inadequate, were available in most African countries. And the Shuttleworth Foundation generally supports initiatives that deepen understanding of the appropriate design of intellectual property systems.

#### 1.4 The ACA2K research project

Moving from conception to launch of the project took nearly 18 months of work, carried out during 2006 and 2007. Initially the vision for the project was to conduct a baseline study aimed at understanding the copyright legal frameworks in Africa with a focus on South Africa. However, the demand for and opportunity to conduct, more comprehensive research in more African countries, to build modestly upon research that had already been done analysing copyright and education elsewhere in the world (especially the Asia-Pacific region), became clear. The project evolved into a pan-continental, comparative analysis of not only copyright legal doctrines but also real-world practices. Designing a suitable research methodology and establishing dispersed but networked teams of researchers were, consequently, major challenges to overcome.<sup>17</sup>

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15 A. Rens, A. Prabhala and D. Kawooya *Intellectual Property, Education and Access to Knowledge in Southern Africa* (2006) TRALAC, UNCTAD and ICTSD. Available at <http://www.iprsonline.org/unctadictsd/docs/06%2005%2031%20tralac%20amended-pdf.pdf> [Accessed 1 November 2009].

16 J. de Beer *supra* note 10; WIPO *supra* note 10.

17 The authors acknowledge Andrew Rens of the Shuttleworth Foundation and Khaled Fourati of the IDRC for their work on the conceptual development of the project.

Network nodes were first established with teams of researchers based in five countries: Egypt, Ghana, Senegal, South Africa and Uganda. The number of country research nodes eventually grew to eight, including Morocco, Kenya and Mozambique. The study countries represent Africa's geographic diversity, as well as its economic, linguistic, religious, cultural and legal differences. The project encompasses some of Africa's most advanced economies, like South Africa, Morocco, Egypt and Kenya, as well as some of its least developed, such as Senegal and Mozambique. There are former colonies of and therefore copyright laws based on systems from, England (Egypt, Ghana, Kenya, South Africa and Uganda), France (Egypt, Morocco and Senegal), Spain (parts of Morocco) and Portugal (Mozambique). The legal systems in the study countries reflect common law and civil law traditions and also the Sharia in some cases. Dominant languages in study countries include a wide variety of indigenous languages as well as English, French, Portuguese and Arabic.

Building a research network to execute the project was possible because of the calibre of the individuals involved. Network researchers come from diverse backgrounds: full-time academics, librarians, graduate students, practising lawyers, consultants, civil servants, judges and parliamentarians. Almost all of the more than 30 people participating are from or based in Africa. The LINK Centre (Learning Information Networking Knowledge Centre) at the Graduate School of Public and Development Management (P&DM), University of the Witwatersrand, Johannesburg, has served as the hub of network management and administration.

Most of the previous scholarly outputs addressing copyright and education are framed exclusively from a legal perspective, such as the aforementioned commissioned reports on copyright exceptions and limitations. ACA2K research goes beyond this body of work by also investigating actual practices pertaining to copyright 'on the ground'. To gather that kind of empirical evidence, researchers adopted methodologies borrowed from non-legal social sciences and humanities, such as impact assessment interviews and focus groups.

But before explaining *how* the research was conducted, it is worthwhile explaining in more detail *why* it was conducted.

## 1.5 Research objectives

The starting point for the project was a long-term vision for copyright regimes in African education systems. Researchers imagined a copyright environment throughout the continent that maximises access to the knowledge contained in learning materials. The mission, therefore, was to create a network of African researchers empowered to assess copyright's impact on access to learning materials and to use the evidence generated to enable copyright stakeholders in Africa to contribute to copyright policymaking.

A series of concrete objectives that would contribute to achieving the project's vision were established. These included:

- building and networking the research capacity of African researchers to investigate copyright environments and access to learning materials (across all formats) within and across countries;
- developing methodological best practices around the relationship between copyright environments and access to learning materials;
- increasing the amount of published scholarship, such as technical reports and peer-reviewed publications, addressing this topic;
- raising awareness of the interface between copyright and access to learning materials and supporting copyright reform processes in relation to access to learning materials and access to knowledge in Africa; and
- building capacity for copyright policy engagement regarding the impact of copyright on scholarly and research environments in universities and related institutions of higher learning.

The project's objectives demonstrate that the intention was not to conduct abstract or theoretical research into copyright. The ACA2K project was, from the outset, geared towards practical, applied research. All project activities were conducted with a specific purpose in mind: to provide empirical evidence that could contribute positively towards copyright reform processes throughout the continent and internationally. The focus on capacity-building recognises that this project is merely the beginning of a long-term engagement.

## **1.6 Research methods, project design, monitoring**

Implementing an ambitious, multinational and multi-disciplinary research project in a relatively understudied area required the use of a strong methodological framework. A custom-designed set of methodologies, therefore, was constructed using tools and systems that the IDRC and other organisations have been working with for several decades.

### **1.6.1 *The three research methods***

The research itself relied on three inter-related techniques: legal doctrinal review, qualitative data gathering and comparative analysis. Underpinning these techniques were a set of research questions to be investigated and hypotheses to be tested. Some of the key research questions are listed in Box 1.

**Box 1: Key ACA2K research questions**

- To what extent does copyright facilitate access to knowledge in the study countries?
- What is the state of study countries' copyright environments and access to learning materials within those environments?
- What exceptions, limitations or other legal means for learning and research are included in study countries' copyright laws?
- How are the relevant stakeholders in study countries using and interpreting exceptions, limitations or other legal means to increase access to learning materials?
- Is there any case law in the context of copyright and learning?
- Who are the key copyright stakeholder groups in study countries and how do they affect (or get affected by) the copyright environment?
- What are the actual experiences of stakeholders in terms of accessing learning materials?
- What is the copyright-related role of information communication technologies (ICTs) in promoting or hindering access? Which materials are affected and how?
- Are there gender dynamics in the interpretation or application of copyright in study countries and if so, how do the gendered aspects of copyright affect access to learning materials?
- What political, legal, social or technical processes could positively affect study countries' copyright environments in terms of access to learning materials?
- What might study countries' optimal copyright environments look like?

The project's two main hypotheses were that 1) study countries' copyright environments do not currently maximise access to the knowledge contained in learning materials and 2) that improvements can be made to the countries' copyright environments in order to increase access. Research methods were designed to respond to the research questions and test the hypotheses using the empirical data collected.

The first of the three research methods, a legal/doctrinal review of copyright law in each of the eight study countries, was at the heart of the research project. The state of the law in any particular jurisdiction is determined by a combination of legislative rules and their judicial or quasi-judicial application. Consequently, the first element of the research was to conduct a review of relevant statutes and decisions and interpreting/applying them in each study country. Copyright laws were of primary relevance to this enquiry but other laws, or even constitutional principles, were also relevant in many countries to the issue of access to learning materials. To guide reviews in each country, an illustrative checklist of legal questions worth considering was adapted from an earlier study prepared for the Commonwealth of Learning (CoL).<sup>18</sup>

Teams of researchers in each study country examined and reported on a variety of aspects of national laws. In addition to basic information, such as the titles and

<sup>18</sup> A. Prabhala and T. Schonwetter *Commonwealth of Learning copyright audit* (2006) Commonwealth of Learning (CoL), Vancouver. Available at <http://www.col.org/SiteCollectionDocuments/COLCopyrightAudit.pdf> [Accessed 1 November 2009].

dates of relevant statutes, researchers situated national laws within the international copyright context of various treaties and agreements. Researchers investigated the criteria for obtaining copyright; the nature, scope and duration of protection; and exceptions and limitations of various sorts. Given the nature of the research topic, copyright exceptions and limitations were particularly important to gauge. Researchers examined national laws for 'fair dealing' or 'fair use' clauses generally, as well as for specific provisions pertaining to teachers, learners, researchers, libraries/archives and persons with perceptual or other disabilities. Non-copyright laws were considered where relevant to the issue of access to learning materials. Researchers also located, catalogued and reported on relevant cases interpreted or applying the statutory provisions.

However, laws do not operate in a vacuum. Understanding what copyright law permits or prohibits *in theory* does not shed much light on what actually happens *in practice*. Investigating copyright's real-world application is especially important in the African context, where anecdotal evidence surveyed prior to commencing the project supported the intuition that there is a tremendous gap between copyright law and practice. The most innovative and arguably most important contribution of the ACA2K project was to utilise a robust research method to gather empirical evidence of copyright's pragmatic effects. This was the project's second research method: qualitative impact assessment interviews with stakeholders, supported by a literature review.

Empirical research into the practical effects of copyright law has seldom been done. One reason for the lacuna may be that such research is difficult, time-consuming and expensive to conduct. Finding financial and human resources to implement the project were manageable challenges thanks to the generous financial support from IDRC and the Shuttleworth Foundation and extensive time commitments from the entire research team.

The third and final research method chosen by the project was a comparative review, through which the results of the eight sets of country research could be brought together and compared and contrasted and learned from.

To familiarise the research teams with a draft set of research methods that were new to many, a multi-day workshop was held at the outset of the project in January 2008 at the LINK Centre, University of Witwatersrand, Johannesburg. The January 2008 methodology workshop consolidated the three research methods and introduced network members to the 'outcome mapping' (OM) technique chosen for the ACA2K project's design and monitoring.

The OM technique focuses a project's efforts on making and monitoring contributions to behavioural change among individuals and institutions that the project comes into contact with. Thus, one of the first steps for researchers in early 2008 at the methodology workshop was identifying stakeholders ('boundary

partners' in the OM lexicon) who were able to affect copyright and access to learning materials at the local, national or international level. Research teams in each study country selected various key boundary partners to be the focus of their research, dissemination and policy engagement work. Also, the boundary partners of the network as a whole were documented by the project management. By tentatively identifying in early 2008 who the boundary partners were for country teams, for the network as a whole and for the project management, ACA2K members were both designing the project (figuring out who to interview for the research and who to reach with the research results) and at the same time developing the monitoring framework (these same boundary partners would be the people/institutions whose behaviour could be later documented to gauge the success of the project in achieving its intended outcomes).

At national level, the boundary partner selections varied from country to country, but most research teams decided to engage with representatives of:

- government departments responsible for copyright law/policymaking;
- government departments responsible for education/arts and culture;
- administrative or enforcement agencies and professionals;
- authors, copyright-owners, collecting societies and industry associations;
- educators, including administrators, teachers and librarians;
- students and researchers; and
- intermediaries such as content distributors or telecommunications providers.

Generally, most constituencies concerned about copyright and access to learning materials could be classified within one of three broad stakeholder groups: 1) policymaking/government/enforcement entities, 2) educational communities and 3) rights-holders. During the research phase of the project, from mid-2008 to early 2009, each national research team supplemented its doctrinal analysis with qualitative 'impact assessment interviews' with members of each of these three boundary partner groupings. Some research teams concentrated engagement with multiple representatives from one category of stakeholders; all research teams engaged with at least one representative of each category. In some cases, discussions took place in focus groups, involving several interviewees simultaneously, to discuss practical issues related to copyright and access to learning materials.

A broad investigation into copyright and access to learning materials through all levels of a country's education system risked becoming conceptually unfocused, logistically unmanageable and practically ineffective. So, while research teams were free to consider all aspects of their country's education system if it was deemed necessary to do so, emphasis throughout the project was placed on tertiary

education. There were three main justifications for this focus. First, studying the tertiary education sector allowed investigation of not only classroom learning but also advanced scholarly research. Second, tertiary education is primarily obtained in urban settings and in contexts where non-copyright barriers (such as the lack of physical infrastructure or extreme poverty) will typically be lower. Third, anecdotal evidence available prior to the commencement of the project pointed to increasing support for access to learning materials and education in general at lower education levels (pre-tertiary) in most African countries, with students, researchers and faculty at tertiary institutions typically not benefiting from government interventions aimed at improving materials access.

To ensure a degree of consistency in data-gathering across study countries, research teams structured their impact assessment interviews using guidelines that were custom-designed for this research project. Interview questions were designed to elicit data regarding two general issues. First, what was/is the *intended* effect of copyright on access to learning materials? And second, what was/is the *actual* effect of the copyright environment on access to learning materials? Research teams were particularly encouraged to focus, where possible, on two more specific topics: the interfaces among copyright, access to knowledge and a) gender and b) ICTs.

Questions were posed and responded to orally, rather than through written surveys, so that teams could engage appropriately with interviewees as the specific circumstances required. Teams kept meticulous records of the interviews, including notes, audio recordings and often transcripts, so that data collected could be organised, reviewed, archived and, if necessary, verified. All researchers followed codes of ethical conduct, with clear guidelines about obtaining informed consent, guaranteeing confidentiality, avoiding undue influence and sharing the benefits of the research with participants. (Avoiding research on children and minors was another reason for investigating tertiary rather than primary or secondary education systems.)

The impact assessment interviews were complemented in every study country by a thorough review of relevant literature. Research teams located, catalogued and synthesised books, academic articles, student dissertations, policy papers, newspaper reports, public relations materials and online information. In combination, these data sources gave researchers an impression of how the law is being discussed in study countries and how the law is being perceived and applied.

Then, by bringing together the findings of the doctrinal research with the findings of the qualitative interviews, each country team was able to develop a picture of the 'copyright environment' in its country. Teams then described and analysed that environment in a published report in each country and later made regulatory and policy recommendations outlined in an executive policy brief.

Finally, using their country reports and executive policy briefs as dissemination tools, teams held national policy dialogue seminars to bring together stakeholders (boundary partners) and engage them in a discussion of ACA2K's findings and recommendations for that country. Between May 2009 and March 2010, nine ACA2K national policy seminars were convened, in Nairobi, Accra, Kampala, Maputo, Marrakech, Cape Town, Johannesburg, Cairo and Dakar.

Meanwhile, as the national research teams were conducting their dissemination and policy engagement, the four ACA2K Principal Investigators operationalised the third ACA2K research method: the comparative review. This comparative review, the results of which are documented in Chapter 10 of this book, was an attempt to draw out the similarities and differences and lessons learned, across the eight study countries and to offer some possible ways forward.

### 1.6.2 Outcome mapping (OM)<sup>19</sup>

As mentioned above, the project adopted the OM framework for its intentional design and monitoring.

Outcome mapping focuses on 'outcomes' rather than 'impacts'. The term 'impact' suggests a causal relation between interventions and results which is in fact impossible to conclusively establish when interventions take place in a complex developmental context and where the interventions have complex objectives related to policy change and developmental goals. Relations between policy interventions and economic, cultural, social and human development are highly complex and typically non-linear. The technique of outcome mapping consciously avoids claiming credit for results that are in truth attributable to a combination of interrelated variables, only some of which, if any, can be linked back to a particular project's activities. Consequently, the technique of outcome mapping focuses on monitoring gradual, incremental change in behaviour by individuals and institutions and on monitoring a particular project's small or large contributions to such change. Assessments map dynamic 'outcomes', rather than more static 'outputs'. Moreover, because the changes that matter most in a development context are those that better people's daily lives, take a long time to happen and depend on human behaviour, outcome mapping is most concerned with assessing changes in behaviour, rather than focusing on possible changes in state.<sup>20</sup>

19 The authors acknowledge Chris Morris of Results and Outcomes Consulting for his role in the development and execution of the ACA2K outcome mapping framework.

20 S. Earl, F. Carden and T. Smutylo *Outcome mapping: building learning and reflection into development programs* (2001) IDRC, Ottawa. Available at [http://www.idrc.ca/en/ev-9330-201-1-DO\\_TOPIC.html](http://www.idrc.ca/en/ev-9330-201-1-DO_TOPIC.html) [Accessed 1 November 2009].



The ACA2K project deployed outcome mapping in two ways. First, outcome mapping was used by the network members to help identify the stakeholders whose behaviour the project wanted to change in order to achieve the project's objectives.

Second, outcome mapping was used to develop a framework to help them monitor the project—that is, to document the behaviour changes, expected and unexpected, among the stakeholders they had identified at the beginning of the project as being possible points of project influence. In particular, the behaviour changes monitored were:

- behaviour changes among stakeholders in the eight study countries (to be monitored by country teams);
- behaviour changes among international stakeholders (to be monitored by the project management, with inputs from the Principal Investigators and country team members active in international fora); and
- behaviour changes among the project members themselves (the Principal Investigators and the country team members), to be monitored by the Research Manager.

At the most general level, the design of ACA2K's research methodology and dissemination/policy engagement plan and the focus of its outcome mapping work, reflected its vision and strategic objective of generating objective, empirical evidence and making the evidence available to policymakers and other actors seeking to craft copyright environments that maximise access to knowledge.

## **1.7 ACA2K and gender**

The ACA2K team became aware early on in the project's life that, given the centrality of gender dynamics to the path of educational development in African countries (and all countries for that matter), a research and policy engagement project such as ACA2K, with a clear educational development orientation, must attempt to interrogate and report on gender issues.

ACA2K accordingly sought to mainstream gender in the project in three ways:

- by building network members' awareness of and capacity to interrogate, gender dynamics in the context of copyright and learning materials;
- by building gender into the design of the project's research data collection and reporting; and
- by trying to monitor gender elements as part of the project's outcome mapping monitoring framework (that is, monitoring stakeholder behaviour change in relation to gender).

The first facet of the ACA2K gender strategy — building awareness and capacity among network members — began during the methodology workshop in Johannesburg in January 2008, where all project members were encouraged to be mindful of and explore, the ways in which gender dynamics might be relevant to the research. These network/researcher empowerment efforts carried on through the finalisation of the *ACA2K Methodology guide* in mid-2008,<sup>21</sup> the Principal Investigators' feedback on draft country reports in late 2008, the Cairo mid-project workshop in 2009, the feedback on the final country reports in mid-2009 and the writing up of outcome mapping project monitoring journals at the end of 2009.

The second facet of the strategy — seeking to capture gender elements within the design and implementation of the research — was concretised in the final draft of the *ACA2K Methodology guide*, which included interview questions about the possible intersection between copyright, gender and learning materials access. The guide also urged research teams to be mindful of and account for, gender diversity or lack of it among their interview subjects. In mid-2008, however, while the interviews were underway, the Principal Investigators realised that little specific data on gender was being uncovered through the interviews. A gender consultant was recruited to advise on how to improve results,<sup>22</sup> and one of the network members, Marisella Ouma of the Kenyan research team, agreed to liaise with the gender consultant to deepen the gender-related ACA2K data collection in Kenya.

The third facet of the ACA2K gender approach — building gender elements into the project monitoring framework — was concretised at the January 2009 mid-project workshop in Cairo, where country teams were urged to include criteria ('progress markers') related to gender when finalising their outcome mapping project monitoring frameworks. A key progress marker for teams monitoring their stakeholders would be stakeholder awareness of the possibility of gender dynamics at the intersection of copyright and access to learning materials. It was expected that some of the people and institutions with whom the research teams made contact in their research and dissemination efforts would come away with an increased or newfound awareness of the possible links between gender, learning materials access and copyright. Meanwhile, the Research Manager decided to monitor the degree to which network members showed recognition of the importance of interrogating

21 *ACA2K Methodology guide* (2008) African Copyright and Access to Knowledge (ACA2K) project, Shuttleworth Foundation, Wits University LINK Centre and IDRC. Available at [http://www.aca2k.org/index.php?option=com\\_content&view=article&id=179&Itemid=61&lang=en](http://www.aca2k.org/index.php?option=com_content&view=article&id=179&Itemid=61&lang=en) [Accessed 24 September 2009].

22 The authors acknowledge the inputs of gender research expert Salome Omamo of Own and Associates in Nairobi, Kenya, who served as gender consultant to the ACA2K project from late 2008 to early 2010 and advised the Kenya ACA2K research team.

gender dynamics as possible elements of influence on the intersection between copyright and learning materials access.

In order to operationalise gender strategies, it was necessary for ACA2K to adopt theoretical frameworks for understanding gender and the possible intersection between gender, copyright and access to knowledge.

The project adopted a concept of gender as referring to social/cultural constructs that assign different behaviours and characteristics to men than to women, often resulting in inequalities. Gender differences are thus intertwined with social structures, which often devalue women and provide men with greater access to resources and power.<sup>23</sup>

But where might gender come into play vis-à-vis copyright and access to knowledge?

Gender issues are an integral part of access to knowledge, given that access to learning materials, as with access to any resource, will be characterised by gender differences in a particular society or context. Accordingly, the gender-related hypothesis developed was that:

- gender influences the intersection between copyright and access to knowledge and specifically access to learning materials.

This hypothesis was grounded in the work of Ann Bartow, who highlights the importance of interrogating the potentially gendered aspects of creating and exploiting copyright works; of intermediary activities such as publishing; and of consumption of copyright materials.<sup>24</sup> Bartow writes, 'Copyright laws are written and enforced to help certain groups of people assert and retain control over the resources generated by creative productivity' and 'those people are predominantly male [...]'. Thus, she continues, the 'copyright infrastructure plays a role [...] in helping to sustain the material and economic inequality between women and men.'<sup>25</sup> Based on Bartow's ideas and the hypothesis above, it was decided that research questions for investigation would relate to:

- differentials between men and women in terms of access to copyright content in a particular country/context; and
- the extent to which such gender differentials could be attributed to the prevailing copyright environment (laws and practices) in that country/context.

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23 Association for Progressive Communications (APC) 'Understanding gender evaluation methodology (GEM)' (2009). Available at [http://www.apcwomen.org/gemkit/en/understanding\\_gem/genderanalysis.htm](http://www.apcwomen.org/gemkit/en/understanding_gem/genderanalysis.htm) [Accessed 21 December 2009]; and S. Omamo and M. Ouma *ACA2K and gender guidelines* (2009) unpublished document, ACA2K project, March 2009.

24 A. Bartow 'Fair use and the fairer sex: gender, feminism and copyright law' (2006) *American University Journal of Gender, Social Policy and Law*. Available at <http://papers.ssrn.com/abstract=902632> [Accessed 1 May 2009]; Omamo and Ouma *supra* note 23.

25 A. Bartow *Supra* note 24.

Chapter 4 of this book — the chapter on the Kenyan research — outlines the results of follow-up interviews in that country. The concluding Chapter 10 outlines some of the gender-related findings in other countries. The ACA2K project cannot claim to have proven the intersection between copyright, learning materials access and gender. But apparent links between gender and learning materials access were uncovered by several of the teams and some initial hints of a possible and empirically verifiable intersection between gender, copyright and access became apparent. More and better designed, focused and implemented research is required in this area before meaningful conclusions can be drawn. Chapter 10 offers some ideas that future researchers interested in this area may follow.

## 1.8 Research results

The ACA2K's research into copyright and access to learning materials conducted in and across the eight study countries has yielded hundreds of pages reporting on statutory and doctrinal data and literature reviews and dozens of hours of recorded engagement documenting the actual experiences of people and institutions. Translating the data into meaningful conclusions and reporting those conclusions in a manner capable of achieving the project's overall objective of facilitating evidence-based policymaking, were challenging tasks.

Written research outputs have included:

- a detailed *Methodology guide* to enable future research on this topic;
- comprehensive country reports documenting doctrinal and practical research results in each study country;
- executive policy briefs for each country, summarising findings and making recommendations for legal reforms and pragmatic steps for improvement;
- briefing papers targeting official representatives, negotiators and copyright policymakers at WIPO and at key organisations working on international copyright policy issues;
- statements about ACA2K findings read to official sittings of WIPO committees (two statements at sittings of the WIPO Standing Committee on Copyright and Related Rights (SCCR) and one statement to a sitting of the WIPO Committee on Development and Intellectual Property (CDIP));
- a peer-reviewed journal article analysing key findings across the eight countries;
- media coverage of the project and its practical importance to contemporary issues and mainstream policy debates; and
- a multilingual website reporting on ACA2K activities and findings.

The project's outputs are all being made openly available online, using Creative Commons licences.<sup>26</sup>

Project researchers have presented their research methods and findings at dozens of conferences, workshops and symposia around the world, including the aforementioned national ACA2K policy seminars in each of the eight African study countries and fora in locations outside Africa including Quebec City, Ottawa, Milwaukee, London, Geneva and Milan. Audiences at the national ACA2K seminars have included key representatives from international organisations, such as WIPO and the African Union, national governments, rights-holders associations and educational communities.<sup>27</sup>

This book represents an attempt to highlight some of the most significant findings from the research project as a whole. There are 10 chapters, including this introduction. Eight chapters that follow report findings from each of the eight study countries: Egypt, Ghana, Kenya, Morocco, Mozambique, Senegal, South Africa and Uganda. The tenth and concluding chapter combines, compares and contrasts findings across the eight study countries, reflects on the project as a whole and offers recommendations.

The result, hopefully, is both a concrete contribution to the understanding of copyright's legal and practical effects on access to learning materials in Africa, as well as a possible model for future empirical research contributing to greater emphasis on evidence-based policymaking in this area.

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26 See <http://creativecommons.org/> [Accessed 1 November 2009].

27 The authors acknowledge the work of Wits University Copyright Services Librarian Denise Nicholson, who, as ACA2K Policy & Dissemination Advisor, has been at the forefront of the project's dissemination efforts and has supported policy engagement activities by country teams.

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# Chapter 2

## Egypt

*Bassem Awad, Moatasem El-Gheriani  
and Perihan Abou Zeid*

### **2.1 Background**

#### **2.1.1 General geography**

Egypt is located in the northeast corner of Africa and has a strategic geographic position connecting the Mediterranean Sea with the Indian Ocean. It is bordered by the Mediterranean Sea to the north, the Red Sea to the east, Sudan to the south and Libya to the west. Egypt is the world's 38<sup>th</sup> largest country, covering an area of about 1 001 450 km<sup>2</sup>. It is divided into 29 governorates, with governors appointed by the President. In terms of land area, it is approximately twice the size of France and four times the size of the United Kingdom. Over 95 per cent of Egypt's land is desert, with the remaining land comprising the Nile Valley and Delta. The majority of the population lives near the banks of the Nile River, in an area of about 40 000 square kilometres, meaning that approximately 99 per cent of the population uses only about 5.5 per cent of the total land area.

#### **2.1.2 Political history**

It is difficult if not impossible to summarise Egypt's long and diverse history in a few paragraphs. What is important for the purposes of this research, however, is the recent political history, which reflects similarities and differences between Egypt and its neighbouring countries. Like its North African sisters, Egypt was part of the Ottoman Empire from the early 1500s. In the late 1700s it became a target for European colonialism and in 1882 the British established military control over the country, though allowing an appearance of political independence by the Egyptian monarchy.

The 1950s were an era of independence and military rule. In 1952, the Egyptian military ousted the King and in 1953 established a Republic. In 1956, Britain withdrew its last soldier. The current political system is a continuation of the 1952 regime, with an increased role for civil society and freedom of movement and speech and with an increasing adoption of capitalist and liberal values.

### 2.1.3 Cultural diversity, education, literacy and ICT use

Egypt is one of the most populous countries on the African continent, with an estimated 82 million people in 2008. Ninety-nine per cent of the population are Egyptians, 0.3 per cent are Nubians and 0.7 per cent are Greeks. Of the entire population, 48.8 per cent is female. The most important demographic trend is the young age of the Egyptian population, with people under 15 representing about 32 per cent of the populace. Arabic is the official language but English and French are widely understood by the educated classes.<sup>1</sup>

The Egyptian education system is divided into three stages: basic, secondary and post-secondary. The basic education is compulsory and lasts for nine grades, split into two stages, primary school (Grades 1-6) and preparatory school (Grades 7-9) and is open to all children aged 6 to 14. The 1971 Constitution asserted in Article 18 that education is a basic right to be provided by the state. Secondary education, which generally comprises three years, is divided into general and technical, with some technical education schools having a five-year system. Only general secondary school graduates (the academic option) may be admitted to university after obtaining their General Secondary Education Certificate (GSEC) or an Advanced Technical Diploma with scores above 75 per cent.

Higher (post-secondary) education is provided by 48 universities and higher institutes of technical and professional training, both public and private.

Responsibility for higher education lies mainly with the Ministry of Higher Education and Scientific Research. Universities have full academic and administrative autonomy, but are supervised by the Supreme Council of Universities. Private universities are entitled to implement their own criteria of admission and to set fees without intervention from the Ministry.

Illiteracy is considered one of the greatest problems hindering citizens' involvement in the knowledge society. According to the Egyptian Central Agency for Public Mobilisation and Statistics (CAPMAS) Census in January 2007,<sup>2</sup> illiteracy rates decreased to 29 per cent in Egypt. The national budget for education in 2009/2010 represents almost 32 per cent of total public expenditure.

Egypt has been utilising information and communication technology (ICT) as part of its provision of education for some time. The state aims to enter the knowledge and information world through several routes and is using new technologies in education, learning and administration by linking 36 926 schools through the Internet, increasing the number of schools equipped with recent

1 Central Intelligence Agency (CIA) *The world factbook—Egypt* (2009). Available at <https://www.cia.gov/library/publications/the-world-factbook/geos/eg.html> [Accessed 18 May 2009].

2 Central Agency for Public Mobilisation and Statistics (CAPMAS) (2009). Available at <http://www.capmas.gov.eg> [Accessed 18 May 2009].

technology to 28 850 and increasing the number of computers in preparatory schools to 84 327.<sup>3</sup>

Recent data show the number of Internet users at 12.57 million subscribers at the end of 2008 and the contribution of the ICT sector to the real GDP is at 3.398 per cent. Of Internet users, 59.19 per cent are male and 40.81 per cent are female. Fifty-five per cent of Egyptian families who have Internet access use it for educational purposes.<sup>4</sup>

#### **2.1.4 The economy**

According to World Bank figures, Egypt currently has the second largest African gross domestic product (GDP) after South Africa. In 2007, the GDP reached US\$431.9 billion, ranking Egypt 29<sup>th</sup> in the world.

#### **2.1.5 Legal environment<sup>5</sup>**

Egypt is a democratic republic, based on a multiparty system. Its current Constitution was first promulgated in 1971. The President of the Republic is elected by general election and governs with the help of a Cabinet that is accountable to an elected one-chamber Parliament.

Egypt's judicial system is a copy of the French system. In addition to the regular court system it has the State Council, which acts as an administrative court and has an advisory role to the government. In 1969, Egypt created a Supreme Constitutional Court to handle issues related to the constitutionality of acts and regulations.

Egypt has been a civil law country since 1883,<sup>6</sup> when it adopted the Codes of Napoleon. Several amendments have been introduced to these Codes and Egypt has allowed itself to develop its own legal system that is based on both French and Islamic law, in addition to benefiting from other legal systems and practices.<sup>7</sup>

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3 Government of Egypt *Egyptian ICT indicators, ICT infrastructure and access* (2009). Available at <http://www.egyptictindicators.gov.eg/default.htm> [Accessed 18 May 2009].

4 Ministry of Communications and Information Technology *Egypt ICT indicators portal* (2009). Available at <http://www.mcit.gov.eg/Indicators.aspx> [Accessed 18 May 2009].

5 See section 2.2 for a detailed doctrinal analysis.

6 The French Codes substituted Islamic law, the law of the land, except for family law matters. The new Codes applied equally to Egyptians and foreigners, thus removing the legal disparity that existed before. In parallel, Egypt established two types of courts: National Courts (al-Mahakim al-Ahliyah) where Egyptian citizens adjudicated their disputes and Mixed Courts (al-Mahakim al-Mokhtalatah), where Europeans enjoying the concessions adjudicated their disputes (but applying the French Codes).

7 In 1937, Egypt and the European countries enjoying the concessions entered into a treaty to put an end to the concession system after an adjustment period of 12 years. In 1949, Egypt started having its unified legal and judicial system, signaled for the most part by the issuing of the New Egyptian Civil Code and the abolition of the two courts system.

Egypt has adopted the French distinction between commercial matters and civil matters. Until recently, issues related to the commercial aspects of intellectual property (patents and trademarks) were assigned to commercial courts or panels while issues related to civil aspects (copyright) were assigned to the civil courts or panels. This situation changed in 2008 when Egypt created an Economic Court to handle several types of cases including all disputes arising out of the application of the Egyptian Intellectual Property Rights Protection Act (EIPRPA) 82 of 2002.

### **2.1.6 Access to Knowledge (A2K) environment**

With respect to the access to knowledge movement, two forces are at play in Egyptian society.

On one hand, the pro-copyright protection movement in Egypt is forceful and influential, especially regarding protection of musical and artistic works. This movement advocates for stringent general application of copyright protection and is lobbying for legislative amendments that adopt 'TRIPs-plus' and 'Berne-plus' provisions (provisions exceeding the minimum requirements of the WTO TRIPs Agreement and the Berne Convention, to be discussed later). The pro-copyright protection movement is supported by large Egyptian and Arab music and movie production companies and well-known book publishing agencies.

On the other hand, several pro-A2K initiatives are in place. 'Reading for All' is Egypt's national programme for increasing access to the written word. It is supported by Egypt's First Lady and has been in place for most of the last two decades. Under the programme, hundreds of books have been translated, published, re-published and sold to the public at very affordable prices. The programme also includes support for public libraries and several activities encouraging people, especially young people, to read, go to the library and research and present papers in competitions for prizes.

In addition to Reading for All, several programmes invest in translating and publishing both literary and scientific books. Most notably, two programmes are funded through the Ministry of Culture or its affiliated councils and administrations: the 'Thousand Book — Second Series' and the 'National Project for Translation.' The two projects have printed hundreds of books in the last two decades.

Bibliotheca Alexandrina (BA) is arguably the main A2K advocate and supporter in Egypt and the Arab world. In March 2008, BA launched its A2K electronic platform. The main objective of the platform is to raise awareness about A2K and its vital developmental role.<sup>8</sup> In its pursuit of that objective, the platform provides the latest studies, articles, news and international agreements that are related to A2K.

8 Bibliotheca Alexandrina *Access to knowledge* (2008). Available at <http://www.bibalex.org/a2k/home/home.aspx> [Accessed 18 May 2009].

Moreover, BA organises a variety of events that aim to create awareness among different related stakeholders.

## **2.2 Doctrinal analysis\***

Several provisions in different legal instruments affect access to knowledge in Egypt. Among the most important are the constitutional provisions related to education and learning. In particular, Article 16 of the Constitution imposes on the state the obligation to guarantee cultural services and to work to ensure these services, particularly for villagers in order to improve the villagers' quality of life. Article 18 of the Constitution states that '[e]ducation is a right guaranteed by the State. It is obligatory in the primary stage [...] and guarantees the independence of universities and scientific research'. Article 20 of the Constitution declares that '[e]ducational institutions shall be free of charge in their various stages,' and Article 21 makes combating illiteracy 'a national duty for which all the people's capacity shall be mobilised'.

Intellectual property issues are addressed in border measures and regulations implemented jointly by the Customs Authority and the Trade Agreements Sector of the Ministry of Trade and Industry,<sup>9</sup> as well as in regulations implementing the Consumer Protection Law.<sup>10</sup>

The most relevant piece of specific legislation, however, is the 2002 EIPRPA, the Egyptian Intellectual Property Rights Protection Act, to which we dedicate most of the next few sub-sections.

### **2.2.1 Development of Copyright Law in Egypt**

Until the late 1930s, Egyptian law was devoid of any rules that organised intellectual property rights in general, or copyright specifically. This was attributed to the foreign concession system that was applied in Egypt at that time, wherein the protection of literary and artistic works required criminal punishment for counterfeiting. Egypt could not punish foreigners except by the minimal penal sanction imposed for minor crimes (infringements). For any sanctions beyond this, courts had to have approval from all foreign countries with privileges.

During this period, the national judicial system tried to fill the gap by protecting intellectual property rights according to the principles of natural law and the rules of justice.

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\* All quotations from legislative texts in this chapter are translations from the official Arabic versions.

9 Articles 27-38 of the Executive Regulations of the Export and Import Law 118/1975 published in the *Egyptian Gazette* 13 October 2005.

10 Executive Regulations of the Consumer Protection Law 67 of 2006. Available at [http://www.cpa.gov.eg/english/legislations\\_rules.htm](http://www.cpa.gov.eg/english/legislations_rules.htm) [Accessed 18 June 2009].

In 1939, with the abolition of the concession system, the first intellectual property legislation was enacted as the Trademark Law 57 of 1939, followed by the Patent and Industrial Designs Law 132 of 1949. Statutory protection of copyright in Egypt was introduced by the Copyright Law 354 of 1954, which was modified several times thereafter. The Copyright Law 354 of 1954 reflected the general principles of copyright protection contained in the Berne Convention for the Protection of Literary and Artistic Works, although Egypt did not join this Convention until 1977. This Copyright Law provided copyright protection for written works, paintings, sculptures and architecture, theatre and musical pieces, photographs and cinematographic films, television and radio works for publication, maps and speeches. A 1992 amendment to the Copyright Law stiffened the penalties available and also provided for protection of video tapes. A 1994 amendment treated computer software as a literary work and guaranteed it a term of protection of 50 years after the death of the author.

As a result of the World Trade Organisation (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), a new phase of the protection of intellectual property in Egypt began. In June 2002, the People's Assembly passed the EIPRPA. This Act enshrined, in a unified piece of legislation, protection of intellectual property rights previously spread over multiple acts of Parliament. The EIPRPA went into force on 3 June 2002 and replaced most of the previous laws related to different fields of intellectual property, including the Copyright Law 354 of 1954. The said law includes almost all the principles set out in the TRIPs Agreement and in some cases exceeds them, as we explain below regarding access to learning materials.

The EIPRPA has four 'Books,' and copyright and related rights are dealt with in Articles 138-188 of Book Three. The Executive Regulations of Book Three related to copyright were issued by Prime Ministerial Decree 497 of 2005 and have been amended by Prime Ministerial Decree 202 of 2006. The Executive Regulations primarily address procedural issues not specified in the law itself.

### **2.2.2 The EIPRPA of 2002**

#### *Protected works*

The EIPRPA generally protects all creative productions whatever their type or mode of expression.<sup>11</sup> In particular, it provides, in Book Three, copyright protection for written works (such as books, booklets, articles, bulletins and any other written works), oral works (lectures, speeches, sermons and any other oral works when

11 Article 138(1) of the EIPRPA defines 'work' as '[a]ny created literary, artistic or scientific product, whatever its type, mode of expression, significance or purpose of its creation'.

recorded), paintings, sculpture, architecture, applied and plastic arts, theatre and musical pieces, photographs and cinematographic films, television and radio works for publication, maps and sketches, video tapes, databases and computer software. The list is not exhaustive, however and other works are protected as long as they meet the general definition of being a creative literary, artistic or scientific product (Article 140).

The protection also extends to derivative works, 'without prejudice to the protection prescribed for the works from which they have been derived. Protection shall cover also the title of the work if it is inventive' (Article 140(13)).

The protection does not extend to mere ideas, procedures, systems, operational methods, concepts, principles, discoveries and data, even when expressed, described, illustrated or included in a work (Article 141). According to Article 141(1) of the EIPRPA, the protection also does not extend to '[o]fficial documents, whatever their source or target language, such as laws, regulations, resolutions and decisions, international conventions, court decisions, award of arbitrators and decisions of administrative committees having judicial competence.' Nor does protection extend to '[n]ews on current events which are mere press information' (Article 141(2)).

Collections of protected works enjoy protection 'if the selection of such collection is creative by virtue of its arrangement or any other personal effort deserving protection' (Article 141).

### *Conditions of protection*

#### **Formal conditions**

The law in Egypt does not require any formalities for copyright protection. In other words, copyright protection in Egypt arises automatically, without official registration or application. Copyright exists as soon as a work is created or a recording is made, as long as certain other substantive criteria are met (see below). As a result, copyright protection subsists from the time the work is created in a fixed and tangible form of expression until the author explicitly disclaims it, or until the term of protection expires. Having said this, in certain instances, keeping a private register for works is required by law. Article 187, for instance, stipulates that any entity 'that puts in circulation works, recorded performances, sound recordings or broadcast programs through sale, rent, loan or licensing' must obtain a licence from the state and pay a fee of up to 1 000 Egyptian pounds for the licence and must maintain a register containing data and year of circulation on each work.

In addition, in terms of Article 186, a book author may file an application and pay a fee, at Dar El-Kotob at the Ministry of Culture to get a serial number and a certificate, which are used to prove that he or she is the author of the book. This

also applies to authors of computer programs and databases. These authors fill in an application at the Information Technology Industry Development Agency (ITIDA) at the Ministry of Communication. Such registration serves as *prima facie* evidence of a valid copyright and enables the copyright-holder to seek statutory damages.

Moreover, Article 149 of the EIPRPA, dealing with the right to transfer economic rights, requires that any such transfer be ‘certified in writing and contain an explicit and detailed indication of each right to be transferred with the extent and purpose of transfer and the duration and place of exploitation’. Article 185 then goes on to require every competent ministry to establish a register ‘in which any act of disposal relating to works, performances, sound recordings and broadcast programs under the provisions of this Law shall be recorded. The Regulations shall determine the procedures for the registration against payment of a fee [...]’. The disposal is not valid with respect to third parties prior to such registration.

It is important to emphasise that the registration and fee requirements just outlined are not requirements for copyright protection as such (which would contravene international treaties), but do serve to increase the cost of publishing a book. Consequently, these requirements have raised problems with international publishing entities that refuse to abide by them.

### Substantive conditions

Protection only extends to works that a) are original and b) have been reduced to material form. Article 138(2) defines creation as ‘[t]he creative nature that confers originality on the work’. In the absence of judicial applications, however, it is very difficult to ascertain how this requirement of ‘creativity’ should be applied.

While Article 138 indicates that the legislature generally requires originality for copyright protection, Article 141 of the EIPRPA presents a different perspective with regard to databases. This Article excludes mere ideas and theories and data but its last paragraph confers protection on collections of such data ‘if the selection of such collection is creative by virtue of its arrangement or any other personal effort deserving protection’.

### *Nature and scope of protection*

#### Moral rights

Moral rights are independent of economic rights and remain with the author even after he/she has transferred his/her economic rights (Article 143). In other words, the rights are perpetual, inalienable and imprescriptible and always belong to the creator of the work, regardless of who the owner of the economic rights is. Creators



cannot assign, waive, transfer or sell their moral rights. Moral rights confer on the original author '(1) [t]he right to make the work available to the public for the first time[;] (2) [t]he right to claim authorship[;]' and (3) the right to object to any distortion, mutilation or other modification of his work that might be prejudicial to his honour or reputation (Article 143).

Two points should be noted. First, in relation to the scope of moral rights, the right to prevent circulation of the work can be exercised by an author only through an application to the competent court, which has the right to accept or refuse such request. The author must present to the court the significant reasons that have arisen to require prevention of circulation and must pay in advance a fair compensation to the person authorised to exercise the economic rights (Article 144). Second, the legislature has given the competent ministry the right to exercise the moral rights conferred on authors and performers in the case of their death without any heir or successor (Article 146).

### Economic rights

Economic rights cover any form of work exploitation. In particular, economic rights include the following rights outlined in Article 147 of the EIPRPA: reproduction; adaptation and translation; distribution; rental and lending; public performance; broadcasting; communication to the public; and making available to the public.

Article 147 however also states that '[t]he exclusive right for computer program rentals shall only apply to the main rental enterprise; it shall not apply to renting audiovisual works inasmuch as the circulation of such copies does not cause material prejudice to the owner of the exclusive right in question'.

Furthermore, Article 147 stipulates that '[t]he author and his successor shall also have the right to control any disposal of the original copy of the work, and shall consequently be entitled to a certain percentage of not more than 10% of the proceedings resulting from every disposal of that copy'.

Three observations on Article 147 can be made with regard to its potential impact on access to knowledge.

First, Egyptian lawmakers conferred on the author a new right which does not exist in the Berne Convention or the TRIPs Agreement. Article 147 gives the copyright-owner the right to prevent a legitimate possessor from lending a protected work without previous authorisation from the rights-holder. Thus, for example, a student who legitimately buys a copyright-protected textbook may perhaps not lend this book to a colleague who may be in need of the book but cannot afford to buy

it.<sup>12</sup> Moreover, providing rights-holders with such a right could inhibit the lending work of libraries.

The second observation concerns the rental right conferred on the author by the EIPRPA. Article 11 of the TRIPs Agreement restricts the rental rights on computer programs and cinematographic works for commercial use. However, Egyptian lawmakers extended the rights to prevent renting to all kinds of works and for all types of commercial as well as non-commercial uses. Therefore, the rights conferred on rights-holders by the Egyptian law go beyond what international treaties require. Such rights are thus 'TRIPs-plus,' 'Berne-plus' rights.

The third observation is related to the right of controlling any disposal of the original copy of works. These resale rights, known also as 'droit de suite,' were first introduced in Egypt by the law of 2002.<sup>13</sup> They provide authors with the inalienable right to receive a royalty based on the resale price of an original work. Resale rights in most countries are not applied to literary works; more often, they are implemented for the visual arts, ie paintings, sculptures, textiles, canvas, etc. Here, again, lawmakers went beyond Egypt's international treaty obligations. Article 14<sup>ter</sup>(1) of the Berne Convention leaves its member states the discretion to provide authors with the right to control any disposal of the original copy only for works of art and original manuscripts. However, Egyptian lawmakers extended this right to all kinds of works, which potentially hampers access to knowledge by imposing an additional financial charge on resellers and second hand purchasers of physical copies of any kind of work.

### *ICTs and anti-circumvention measures*

The EIPRPA contains provisions which prohibit the circumvention of technological protection measures (TPMs) in order to use digital material in ways that are not authorised by the rights-holders. The EIPRPA has adopted the highest level of protection for TPMs. Article 181 forbids manufacturing, assembling or importing any device or tool or any technology that aims to circumvent any TPM. The Article stipulates that, among other things, the following acts are forbidden:

- (5) Manufacturing, assembling or importing for the purpose of sale or rent any device, tool or implement especially designed or made to circumvent a technical

12 The authors of the chapter differ regarding the interpretation of this Article. Lending here is listed under prohibited 'exploitation'. It is not readily obvious that lending to a personal friend, with no remuneration, falls under the strict definition of the term exploitation.

13 The 'droit de suite' was first introduced in France in 1920 as a social welfare measure in response to popular dismay that the family of Jean-François Millet could exist in relative poverty while his paintings were fetching astronomic prices. California followed France in 1977; and in 2001 a European Union Directive (2001/84/EC) required all EU countries to implement a resale royalty for living artists and their heirs by 2006.

protection means, such as encryption or the like, used by the author or the owner of the related right;

- (6) Removing, neutralizing or disabling, in bad faith, any technical protection device used by the author or the owner of the related rights;

Violation of the TPM anti-circumvention provisions is, according to Article 181, 'punishable by imprisonment for a period of not less than one month and by a fine of not less than 5,000 pounds and not more than 10,000 pounds, or any of those sanctions [...]'.<sup>14</sup>

The anti-circumvention provisions adopted in the EIPRPA may have a negative impact on accessing learning materials in Egypt because they potentially restrict access to and impede educational use of, copyright-protected material. The provisions apply not only to TPMs protecting copyright-protected works but also to TPMs protecting works which are not copyright-protected. This means, for instance, that rights-holders can protect their works through the use of TPMs for an unlimited period of time, even after the end of the copyright term. Anti-circumvention provisions have the potential to disturb the balance, between the interests of rights-holders and users, which copyright laws try to achieve. This is because established copyright exceptions and limitations, especially those for educational uses and for the benefit of educational institutions, can now be bypassed by rights-holders employing TPMs whose circumvention is prohibited by law. Egyptian anti-circumvention provisions do not contain explicit exceptions and limitations.

### *Term of protection and the public domain*

#### **Duration of protection**

For most works, the Berne Convention and TRIPs require the duration of copyright to be, at minimum, 50 years after the death of the author.<sup>14</sup> In some countries, however, the duration of copyright protection has been extended to 70 years or longer. In Article 160 of the EIPRPA, Egyptian law has adopted the standard 50-year term of protection set out in international treaties.

In compliance with the relevant international treaties and agreements, the EIPRPA contains different terms of protection for different works. For example, if the copyright-holder is a legal entity, the term of protection is 50 years from the date on which the work was published or made available to the public for the first time, whichever comes first. For works of applied art, the term of protection is 25 years from the date on which the work was published or made available to the public for the first time, whichever comes first. The duration of protection of related/

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14 Article 7(1) of the Berne Convention, which is incorporated into TRIPs via Article 9(1) of TRIPs.

neighbouring rights of performers, record producers and broadcasters is generally the same as for author rights.

### Public domain

Once the duration of the protection of a certain work lapses, it falls automatically into the public domain. The EIPRPA defines works falling into the public domain as follows: 'all works initially excluded from protection or works in respect of which the term of protection of economic rights expires, in accordance with the provisions of this Book' (Article 138(8)).

Despite the fact that the public domain should in theory be freely accessible by any person, Egyptian law requires a licence for any commercial or professional exploitation of such works, with licence fees that are set out in the Regulations. Article 183 states that:

The competent ministry shall grant license for the commercial or professional exploitation of works, sound recordings, performance or broadcast programs that fall into the public domain, against payment of fees, as prescribed by the Regulations, and not exceeding 1,000 pounds.

As a result, in Egypt, one needs to apply to the competent ministry (the Ministry of Culture for literary works; the Ministry of Communication for software and databases) when, for instance, preparing a handbook with public domain works for students of the arts or when using an out-of-copyright poem or a song. Such requirement is not imposed by any international agreement and is therefore an unnecessary and unusual requirement created by the Egyptian legislator. Compounding the problem is the fact that the licensing requirement for public domain materials is vague. Does one need a licence for reproducing a book published a thousand years ago? What about books published a thousand years ago in Syria?<sup>15</sup>

### *Copyright flexibilities*

Egyptian law provides an exclusive list of instances in which users may legally ignore the owner's rights. These exceptions and limitations reflect circumstances that outweigh the necessity of protecting copyright-owners' rights. We now discuss the exceptions and limitations that have a bearing on access to learning materials.

<sup>15</sup> One impact assessment interviewee described the provision as mere 'taxation' or 'collecting money' rather than being related to protection of copyright.

## Educational exceptions

Egyptian law lists instances where users may legally ignore the owner's rights. Several exceptions and limitations have a bearing on access to learning materials.

### *Automatic exceptions*

According to Article 171 of the EIPRPA, authors, after the publication of their work, may not prevent third parties from doing any of the following:

- (1) Performing the work in family context or student gathering within an educational institution, to the extent that no direct or indirect financial remuneration is obtained; [...]
- (6) Reproduction of short extracts from a work for teaching purposes, by way of illustration and explanation, in a written form or through an audio, visual or audiovisual recording, provided that such reproduction is within reasonable limits and does not go beyond the desired purpose, and provided that the name of the author and the title of the work are mentioned on each copy whenever possible and practical.
- (7) Reproduction, if necessary for teaching purposes in educational institutes, of an article, a short work or extracts therefrom, provided that:
  - reproduction is made once or at different separate occasions;
  - the name of the author and the title of the work are mentioned on each copy.

The first exception addresses 'performances' and not only teaching. Accordingly, it would extend to performances for entertainment purposes, as long as they are performed to students and within an educational institution. While it can be possibly argued that the tuition paid to the institution would qualify as 'indirect compensation', the provision more likely means compensation for the performance itself and not to the educational service as a whole. The qualifier 'in educational institutes' is important in Article 171(7). The interesting but yet-unanswered question is whether reproducing the material for the purpose of e-learning would constitute use *in* the institution. Only practice will show the true scope of the exception.

Also, it is important to note the difference between paragraphs 6 and 7 of Article 171. Article 171(6) deals with the production of short extracts for the purpose of illustration, which would usually apply in public lectures or as part of a class. Article 171(7), on the other hand, talks about the reproduction of an entire article or short work in educational institutes. Article 171(7) contains two requirements for such reproduction. Firstly, the reproduction can only happen in educational institutes and not merely in training courses given outside such institutes; secondly, such reproduction must be 'necessary'.

### *Compulsory licence*

In addition to the aforementioned exceptions, Article 170 allows anyone to apply to the competent ministry for a personal licence for reproducing or translating, or both, of any protected work. This may, however, only happen a) for the purposes of fulfilling the requirements of some kind of education; b) against payment of fair compensation to the author or his successors; and c) if such a licence does not contradict ‘the normal exploitation of the work’ and does not unreasonably ‘prejudice the legitimate interests of the author or the copyright holders’.

### **Exceptions granted to libraries and archives**

Article 171(8) of the EIPRPA allows documentation centres, the national archives and non-profit libraries to make one single copy of a work — either directly or indirectly — in the following cases:

- The reproduction is made of a published article, a short work or a derivative of a work, as long as the purpose of reproduction has been in fulfilment of a request made by a natural person, for using in study or research. Such reproduction shall be made once or on irregular intervals; or
- The reproduction is made for the purpose of preserving the original copy or of substituting a lost, destroyed or spoiled copy, where it became impracticable to obtain a substitute thereof under reasonable conditions.

In many countries, so-called public lending rights (PLRs) compensate authors for the potential loss of sales caused by the fact that their works are available in public libraries. The Egyptian legislators have neither in the EIPRPA nor in any other legislation adopted public lending rights or other equivalent clauses.

The EIPRPA does not include any specific provisions for people with a disability, which would be of particular relevance in the context of library and archive use of copyright-protected material.

### **Photocopying for personal use**

In addition to the previous rights granted to educational institutions and public libraries to reproduce works, Article 171(2) of the EIPRPA grants an exception for photocopying for personal use. The Article, however, includes several conditions. Firstly, the Article requires the copy to be: a) a single copy; and b) for one’s exclusive personal use. In addition, the Article requires that such action may ‘not hamper the normal exploitation of the work nor cause undue prejudice to the legitimate interests of the author or copyright holders’.

The wording of the latter qualification was adopted directly from the ‘three-step test’ contained in the Berne Convention and other intellectual property treaties

and agreements.<sup>16</sup> The three-step test is a test against which national copyright exceptions and limitations are to be judged when examining their legitimacy. Egyptian lawmakers were apparently in doubt as to whether an exception allowing the creation of a single copy of an entire work or a large portion of a work for personal uses would always fulfil the requirements of the three-step test. Creating a single copy may not be unduly prejudicial if done by a single individual, but cumulatively may indeed hamper the 'normal exploitation' of the work and interfere with the legitimate interests of the rights-holder. To ensure that the exception complies with Egypt's international treaty obligations, Egyptian lawmakers therefore added the requirements of the three-step test directly into Article 171(2). There has yet to be any judicial interpretation of the provision.

Second, Article 171 allows the author or his or her successor to prevent third parties from carrying out any of the following acts without his or her authorisation. That is, the following are exceptions to the exception:

- Reproduction or copying works of fine, applied or plastic arts, unless they were displayed in a public place, or works of architecture;
- Reproduction or copying of all or a substantial part of the notes of a musical work;
- Reproduction or copying of all or a substantial part of a database or computer program.

This means that the exception applies, in essence, to written material only and not to artistic works and software.

### Exceptions in relation to the media

Article 172 allows newspapers, periodicals or broadcasting organisations, if justified by the purpose, to, without permission of the author, publish excerpts of works already legally made available to the public and excerpts of articles 'on topical issues of concern to the public, unless the author has prohibited such publication', and as long as the author's name and the work's title are cited. Media outlets can also publish 'speeches, lectures, opinions or statements delivered in public sessions of the parliament, legislative or administrative bodies or scientific, literary, artistic, political, social or religious meetings, including statements delivered during public court proceedings' and 'extracts of an audio, visual or audiovisual work made available to the public in the course of covering current events'.

In addition, Article 171(4) of the EIPRPA allows any person 'to make an analysis' of a work, or of excerpts or quotations from a work, 'for the purpose of criticism, discussion or information'.

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16 Article 9(2) of the Berne Convention and reinforced by Article 13 of the TRIPs Agreement.

### Parallel imports

Parallel imports of copyright-protected materials are expressly permitted under Egyptian law without any restrictions. Article 147 states that '[t]he right to prevent third parties from importing, using, selling or distributing his protected work, shall lapse where the copyright owner undertakes to exploit or market his work in any state or authorize a third party to do so'.

### Compulsory licensing of translations

One of the important provisions in the Appendix of the Berne Convention (Paris Act) deals with the right of developing countries to translate copyright-protected works for the purpose of teaching, scholarship or research, without the copyright-owner's authorisation.<sup>17</sup> The Berne Appendix, in Article II(1), enables lawmakers in developing countries to substitute the exclusive right of translations granted to rights-holders for a compulsory licensing system.

The Appendix contains, however, a number of strict requirements and limitations for such substitution. For instance, Article II(2) of the Appendix requires that compulsory licensing can occur only if a translation of a work has not been published by the copyright-holder or other authorised person, in a language in general use in the country in question for a minimum period of three years after the first publication of the work. In the case of translations into a language which is not in general use in a developed country, the minimum period is one year (Article II(3)(a)).

In addition, the translation may be carried out only in printed or analogous form. Moreover, Article IV of the Berne Appendix provides that such licences can be granted only 'if the applicant [...] establishes either that he has requested, and has been denied, authorization by the owner of the right to make and publish the translation or to reproduce and publish the edition, as the case may be, or that, after due diligence on his part, he was unable to find the owner of the right'.

Egypt availed itself of Articles II and III of the Appendix to the Berne Convention on 14 March 1990 (Berne Notification No. 128 to the WIPO). This declaration was, however, effective only until October 1994 and was not renewed. The fact that the declaration has not been renewed has no immediate effect at the national level and Egypt built a compulsory licensing provision for translation into Article 148 of its 2002 law. Any person may continue to make use of the translation rights contained in the national law and Egyptian courts are obliged to apply these national rules. At the international level, the situation is potentially problematic. This is because any member of the WTO could now complain to the Dispute Settlement Body at the

<sup>17</sup> The Berne Convention for the Protection of Literary and Artistic Works is the most important instrument of international copyright law.



WTO, arguing that Egypt is not respecting its international obligations by applying rules to which it has no longer availed itself. Article 148 of the EIPRPA deals with translations as follows:

The protection of an author's copyright and the translation rights of his work into another language shall lapse with regards to the translation of that work into the Arabic language, unless the author or the translator himself exercises this right directly or through a third party within three years<sup>18</sup> of the date of first publication of the original or translated work.

The Egyptian law is distinct from the Berne Appendix, because it states in Article 148 that the work, 'with regards to the translation of that work into the Arabic language,' falls into the public domain by the lapse of the time specified in the Article. In this context, however, Article 183 of the EIPRPA applies, which requires fees to be paid to the state if one wishes to translate a public domain work for commercial or professional purposes.

In sum, the EIPRPA contains two kinds of exceptions related to translations. The first exception is a compulsory licence for translating protected works for educational purposes (Article 170). Interested persons need to apply to the competent ministry.<sup>19</sup> The second exception related to translations (Article 148) concerns foreign works that have not been translated into Arabic within three years after first publication. No permission from the competent ministry is required for such translations, but fees must be paid to the state if the translation is for commercial or professional purposes.

### National folklore

In Egypt, national folklore is considered, according to Article 142 of EIPRPA, 'part of the public domain of the people'. The article also stipulates that '[t]he competent ministry shall exercise the author's economic and moral rights and shall protect and support such folklore'. The fact that the state exercises moral and financial copyright in respect of materials deemed to be in the public domain is paradoxical, as in theory, public domain materials are not subject to any copyright protection whatsoever. Nonetheless, in Egypt, national folklore is defined in Article 138(7) of the EIPRPA as: 'Any expression which consists of distinctive elements reflecting the traditional popular heritage, which originated or developed in Egypt,' and more specifically includes folk tales, poems, songs, dances, rituals, sculptures, architectural forms and more.

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18 It was five years in the Copyright Law 354 of 1954 (Article 8).

19 See this book chapter's section 'Educational exceptions' above.

### ICT-related provisions

In addition to Egypt's anti-circumvention provisions, software is an area that receives special treatment under copyright law. For one example, special rules apply to quotations from computer software. Article 10 of the Executive Regulations of the law indicates that quotations must be used for non-commercial purposes or for the purpose of education or training. Such quotations must, however, not unduly prejudice the legitimate interests of the author of the computer program and must include an indication of the program from which the quotation was taken. Also, Article 171(3) of the EIPRPA allows, in essence, for backup copies of software to be made. And moreover, Article 171(9) includes an exception for ephemeral copying.

#### 2.2.3 *International obligations*

According to the Egyptian Constitution, international agreements are self-executing, meaning that parties can rely upon them directly where national law is vague or non-existent. Egypt became a contracting party to the General Agreement on Tariffs and Trade (GATT) in 1970 and a member of the Berne Convention of 1886 in 1977. Also, Egypt has been a party to the Geneva Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms since April 1978.

Egypt has signed several free trade agreements (FTAs). These include a bilateral treaty between Egypt and the European Union (EU) as well as bilateral trade agreements signed with Arab countries such as Syria (1991), Lebanon (1999), Morocco (1999), Jordan (1999) and Tunisia (2007). In addition, free trade agreements exist with Turkey (2005) and the EFTA states<sup>20</sup> (2007). None of these agreements requires any amendment of the current copyright laws.

In June 1995, Egypt became a WTO member. Since then, Egypt has been bound by the WTO agreements, including the WTO TRIPs Agreement of 1994. Egypt has not joined the Universal Copyright Convention (UCC), nor signed the so-called 'WIPO Internet Treaties,' the WCT and WPPT of 1996, though it has nevertheless implemented their key feature: anti-circumvention provisions.

#### 2.2.4 *Judicial and administrative decisions*

Unlike in some other legal systems, all incidents of IP infringement in Egypt are considered criminal misdemeanours that may be prosecuted following a complaint by the rights-holder, with a civil action available for compensation to an aggrieved party.

There are no recent court cases in Egypt specifically addressing copyright issues in relation to learning materials and court cases generally dealing with copyright law are

<sup>20</sup> The EFTA states are Iceland, Liechtenstein, Norway and Switzerland.

scarce and hard to trace. Arguably the most important recent court decisions in the area of copyright law are *The Ministry of Justice v East Laws* of 2004 [27 April 2004, n°5894/2003] and the *Translation Right* decision of 2005 [22 March 2005, n°791 and 832/72]. In *The Ministry of Justice v East Laws*, the Supreme Court addressed Article 141 of the EIPRPA, which states that official documents such as court decisions generally do not enjoy copyright protection. Collections of such documents, however, may be copyright-protected if the selection of such collection is creative by virtue of its arrangement or any other personal effort deserving protection. It was in this context that the Supreme Court provided useful clarifications regarding the meaning of the terms 'creativity', 'originality' and 'personal effort' in copyright law. In the *Translation Right* decision, the Supreme Court confirmed the right to translate foreign works that have not been translated into Arabic within three years after the first publication of the work without the authorisation of the rights-holder.

Several factors affect the rarity of reported judicial decisions regarding copyright, particularly the manner of reporting judicial decisions in Egypt. Official reports exist only only for the Cour de Cassation (Supreme Court) and very few cases ever reach the Cour de Cassation and those cases that do reach the Court take a long time to do so. As a result, most decisions decided under the new IP law are unpublished. The few copyright cases that have reached the Cour de Cassation and have been published predominantly deal with formalities and do not address or interpret substantive copyright issues. In addition, the Court interprets the law or applies it only in relation to a particular decision of a lower court. Hence, such decisions are not always precedent-setting. Furthermore, because Egypt is a civil law country, the entire system relies on the statutes promulgated rather than judicial theory or application.

Having said this, Egypt strives to promote stronger enforcement of intellectual property rights by maintaining an intellectual property unit in its police force, as well as teams of civil inspectors who are authorised to remove infringing goods from the market. The enforcement authority dealing with copyright and neighbouring rights is distributed between different bodies:

- For the protection of hard-copy material: The Permanent Office for Copyright Protection at the Supreme Council for Culture, affiliated to the Ministry of Culture;
- For the protection of computer programs and databases: The Information Technology Industry Development Agency (ITIDA) related to the Ministry of Communication and Information Technology; and
- For issues in connection with broadcasting organisations: The office of the producers of audio and audiovisual works at the Ministry of Media.

## 2.3 Qualitative analysis

### 2.3.1 Secondary literature

There are dozens of scholarly writings about IP issues in Egypt and in the Arab world in general. A chapter on IP is embedded in every 'Introduction to Law' book assigned to first-year law students. Recent economic and legal developments have heightened interest in IP issues and many treatises, PhD theses and LLM dissertations have been written and published on IP issues, especially in relation to industrial property such as patents and trademarks.

The research team cannot claim to have read or surveyed all available literature on IP in general and copyright specifically. Yet, it is clear that issues of access to knowledge (A2K) within copyright literature are rarely addressed in the Egyptian literature. Books dealing with copyright normally mention the exceptions enumerated in the EIPRPA without clarification or explanation, or with simple reference to their origin in the pertinent treaty. This can be for several reasons, but a strong one is the absence of application in practice, which would require thorough examination of the text and provision of judicial interpretations. The dearth of treatment of A2K issues can also be attributed to the lack of awareness of their importance and the absence of influential lobbying in this respect. Compared to other causes, such as the 'the right to medicine' and 'medicine for all' initiatives, which were lobbied and funded by Egyptian generic pharmaceutical companies who question the stringent measures of the TRIPs Agreement, the A2K cause in respect of copyright-protected works has received relatively less attention.

The Bibliotheca Alexandrina (BA) prepared in 2008, and updated in 2009, the *Access to knowledge toolkit 1*,<sup>21</sup> which assembled different papers by Egyptian and Arab researchers and activists in the field of A2K. Another important study published by the BA was *Copyright in the Egyptian law: an analysis from a development perspective*, written by Hassan Al-Badrawy and Hossam Al-Saghir in 2008. The study can be considered pioneering since it is the first that revisits and analyses Egypt's copyright Book from a developmental perspective. It explains the current protection for copyright-holders under Egyptian law and, specifically, the additional protection that was not required by TRIPs or the Berne Convention. The study discusses the exceptions and limitations provided in the law and suggests amendments to the current law that would respect Egypt's international treaty obligations while making the current law more sensitive to Egypt's needs as a developing country. Among other things, the study suggests eliminating the requirement for fee payment and obtaining approval for reproducing works that

21 Bibliotheca Alexandrina *Access to knowledge toolkit 1* (December 2009) 2ed edited by Hala Essalmawi. Available at <http://www.bibalex.org/a2k/attachments/references/reffileh150fxqxns21ld55djrkde rc.pdf> [Accessed 1 June 2010].

are already in the public domain. It also suggests adopting the broader US-style 'fair use' doctrine instead of the more limited provisions currently in Egyptian law.

More recently, in February 2010, the American University in Cairo launched the Access to Knowledge for Development Center (A2K4D). The launch of the Center was accompanied by the launch of an important comprehensive study edited by Nagla Rizk and Lea Shaver, entitled *Access to knowledge in Egypt: new research on intellectual property, innovation and development*.<sup>22</sup>

### **2.3.2 Impact assessment interviews**

Stakeholders from the following categories were interviewed:

- government (Information Technology Industry Development Agency (ITIDA) and Ministry of Justice);
- education community (graduate students, librarians from public libraries, professors and researchers from different life science fields, university e-learning projects); and
- rights-holders (publishers and the Publishers' Association).

In an attempt to examine access-related difficulties that women and, in particular, people with disabilities may face, the research team interviewed a diverse group, including eight women and one person with a disability.

#### *Knowledge of the law*

Interviewees expressed different levels of knowledge of copyright law. Graduate students, including law school graduate students, showed significant lack of awareness of the law.

One student interviewed admitted to photocopying study material without giving any thought to copyright law. She was surprised when told that her actions could be legitimate under the EIPRPA. We found the same potentially erroneous belief among other students and librarians: that they were infringing when, legally, they might not have been.

Another interviewee discussed the illegitimacy of photocopying and the distribution of photocopies over the Internet, which was perceived to be illegal based on Islamic religious legal concepts. The interviewee did not appreciate, however, that Islamic law in Egypt governs only marriage and personal status and not areas such as copyright.

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22 N. Rizk and L. Shaver (eds) *Access to knowledge in Egypt: new research on intellectual property, innovation and development* (2010) Bloomsbury Academic, London.

One prominent publisher did not know about the Arabic translation compulsory licence provision in the EIPRPA. Once told about it, the publisher considered the exception to be valuable. It is possible that the reason for not knowing about this specific exception was that this particular publishing house had little translation experience. Yet another possible explanation could be that the translation exception is generally disputed. A prominent IP lawyer, for instance, expressed in another interview his dislike for the exception and insisted that the exception is misinterpreted and does not go as far as its literal meaning suggests.

Librarians showed noticeable general understanding of copyright-related issues, of the importance of copyright protection and of the cultural and social impact of copyright, but deep knowledge of the law was sometimes lacking. For example, although the Bibliotheca Alexandrina has begun a books digitisation project and is considered an advocate for A2K within Egypt and beyond, one of its staff members did not know about Egypt's public domain exception and thought that copyright-protected books could not fall into the public domain. Another librarian, in another library, discussed the difficulties the library faces when trying to find out whether a certain activity is permissible or not permissible under the law. Most libraries, if not all, do not have legal divisions and lack legal expertise regarding the EIPRPA.

Professors and researchers, specifically in the field of life sciences, were in general aware of copyright protection but were not well aware of existing copyright exceptions and limitations. For most of them, copyright constitutes a significant barrier to access to learning and research materials because most of these materials are copyright protected. One professor we interviewed made a significant remark when she said that 'even if the exception of personal copying does not exist, I will not stop making personal copies because the other alternative means that I stop accessing important copyrighted works because they are too expensive'. Interviewees from the e-learning sector and from areas related to information technology were relatively more aware of copyright law and, to some extent, its exceptions and limitations.

### *Enforcement of the law*

Most interviewees acknowledged that copyright law in Egypt is not enforced. Ignorance of the law in general, ignorance of its importance and outright corruption were referenced in this context. Some officials expressed concerns regarding the lack of comprehension of the law by users, rights-holders and even the judiciary.

Publishers said they find it necessary to independently track down and report infringers to the authorities. One publisher expressed disappointment with

prosecutors and the judiciary, believing judges are not well aware of the dangers of copyright infringement and do not treat such infringements seriously enough. This publisher mentioned that several cases that he helped to build were not properly examined by the investigating authorities. On the other hand, users believe that stringent implementation of current copyright laws would hamper their access to learning materials.

It was also found that access-restricting library policies are more vigorously enforced than the national laws. In the two libraries we examined, these policies contained restrictions including a prohibition on photocopying that exceeds a certain percentage, typically 10 per cent or 20 per cent of a book. The photocopying prohibitions are more problematic than they otherwise would be because a 'no-checking-out policy' is strictly enforced. The only option for students, therefore, is to conduct all required research while physically present in the libraries. There are, however, several ways to circumvent the policy of no photocopying beyond a percentage. For instance, librarians of Bibliotheca Alexandrina have found entire books with the BA stamp on them scanned and uploaded onto the Internet. Apparently, a library user photocopied the book on several visits and then scanned it and uploaded it to the Internet. The librarian said that such acts, if discovered by the book's author or publisher, would be extremely embarrassing for the library. And public universities' libraries apparently tolerate the photocopying of whole books because many librarians realise that books are not readily available to students.

### *Channels of access to learning materials*

#### **Faculty books and 'memos'**

From the interviews conducted with some university undergraduates we found that they mainly rely on books issued by the faculty in the university they are enrolled in. These books are authored and published by the professors and they exclusively contain the material needed for the exam. It was found that if sold and subsidised through the university, books are affordable, but in all other cases books are expensive. As a result, cheaper alternatives, so-called 'memos', are often commercially available near campuses. These memos contain questions, answers and summaries from the relevant books. In essence, they are copies (abstracts and abridgments) from the book and, thus, illegal. But they are much cheaper and students consider them easier to handle.

#### **Copy shops**

University libraries often do not possess enough material for all students to use and are therefore not seen as a viable source of accessing resources. In most cases,

students photocopy books from photocopying shops, which are usually located near their campus. These copy shops illegally create a few master copies of a book and then routinely photocopy it for students at about one third of the cost of the original book.

### Online materials

In addition to copy shops, an important source for (soft-copy) books and other learning material is the Internet. One interviewee stated that he finds almost all material he needs on the Internet and that he has a huge moving library on his laptop. The student told us the story of an entire industry to copy books and make them available free via Internet. This affects especially old Islamic books. Despite the fact that these books are in the (state-owned) public domain, some publishers who print them still believe they should enjoy quasi-copyright on them. Probably one of the reasons behind such belief is that the EIPRPA requires a licence from and payment of a fee to, the state for any commercial or professional exploitation for works that fall within the public domain. Although the personal or even non-commercial use of the public domain does not require a licence or a fee, this is not widely known.

A masters-level student particularly praised the Google Books project that allows full free access to books that are not copyright-protected and access to snippets of copyright-protected books. He said that although the access to copyright-protected works is limited, the snippets still give him an indication about the 'basic idea of the book'. This would help him in making a decision as to whether or not to search for it in other libraries or even purchase it.

An interesting justification we heard for the unauthorised use of material available on the Internet was that the authors of the material available on the Internet have most likely also infringed copyright. It is felt that a lot of what is published on the Internet is initially published in violation of copyright law.

### *Difficulties in accessing knowledge*

#### Library stocks

A student working on a new research topic told us that she was struggling to find newly published foreign material. Her experience with the library in the Law School in Alexandria University, however, was better than her experiences at Cairo and Ain Shams universities.

Another student found the library in Alexandria Law School sufficient. He also stated that the librarian there often asked students about their needs and tried to find and buy the needed books. This was confirmed by the librarian we interviewed. She told us of the comment of the inspector in the university who said 'Your case is



a rare case of the administration actually cooperating with the library'. The variety of materials available at the Bibliotheca Alexandrina is gradually increasing due to the increase in its acquisitions budget and the BA has thus become more attractive to different types of researchers. One of the most important remarks we received from various library users was that most libraries are very rigid regarding their lending. Most libraries do not allow students to borrow books. Rather, they allow only reading and accessing the book within the library or photocopying a specified percentage of the book or work. This no-borrowing library practice does not relate to copyright law but rather to the fear of destructive behaviour by students, such as not returning material or damaging it. The policy does, however, have a definite impact when coupled with photocopying restrictions attributable to copyright. Some exceptions to these policies exist. For example, two of the BA special libraries, the Children's and Young People's libraries, have offered check-out services since 2005 and 2006 respectively, while the libraries of Alexandria University offer check-out to faculty members.

### Internet access

Access to Internet databases was available in the libraries examined during this particular research. Some libraries, however, have more extensive database access than others, because such access is dependent on a number of economic factors, including the availability of adequate numbers of PCs in the library and the money available for subscription services. Librarians report that the databases, when available, are very attractive to users, especially postgraduates, since they usually include current issues of journals, whereas only hard-copy versions are usually available for older issues.

Some of the researchers interviewed mentioned that the BA provides copyright-free, open-access (yet well-revised) lectures and presentations online via a 'Supercourse' online resource. They appreciated this resource because under the new applied credit system they are required to teach for extensive hours and are obliged to provide their students with updated materials in their field of research or discipline.

### Economic factors

An often-mentioned reason for problems with accessing learning materials is the economic situation of the information-seeker. Publishers argue that the market is small, which drives up prices. However, publishers are also of the opinion that, in absolute terms, prices are not exorbitant. Users from different academic and research fields and levels, on the other hand, criticised the prices of copyright-protected learning materials. Generally, according to these users, all up-to-date foreign books

are unaffordable for most people, regardless of whether the copyright-protected work in question is available in hard-copy or soft-copy.

Consequently, the users interviewed rely mainly on photocopying entire books, which enables them to access up-to-date material at affordable prices. Interestingly, some copy shops even subscribe to electronic periodicals and (illegally) reproduce the articles from there, if requested. Some professors, in a cynical manner, remarked that sometimes they depend on materials which their students from the Arab Gulf countries bring along when they register for masters and doctoral degrees at their institutions.

Notably, this research did not detect that copyright infringements have a detrimental effect on the availability of material in Egypt. In other words, the occurrence of copyright infringement may cost publishers and other rights-holders money, but it does not stop them from publishing and distributing learning materials.

### Educational system

The educational system in Egypt faces a number of problems. These include: 1) massive numbers of students at different educational levels, whether in schools or universities; 2) limited educational budgets; and 3) educational methodologies that do not concentrate on developing the interactive, analytical and reasoning skills of students but instead depend on a single textbook, taught by what one interviewee described as 'spoon-feeding'.

Two interviewees, a graduate student and a publisher, were of the opinion that the illegal reproduction of university books by copy shops does not pose the main threat to the copyrights of authors and publishers. What is of greater concern for rights-holders is the fact that students now resort to the aforementioned, illegally produced summary memos of these books. For example, in the study of law, which is renowned for its long-winded textbooks, some law school graduates or lawyers summarise the relevant textbooks and then sell the summaries to copy shops which, in turn, copy and sell them to students. Usually, the authoring graduate or lawyer obtains in return an agreed amount of money from the copy shop. The existence of memos diverts the students' attention from obtaining and using the actual textbooks. Thus, the issue is not only the cost of the book but also the willingness of the students to make use of an entire book rather than a memo.

One interviewee said that an increasing number of undergraduate students are using the BA for research. This indicates that the availability of materials may indeed encourage the actual use of them. Most of the patrons in the Bibliotheca are undergraduates who come mainly from universities located in Alexandria such as Alexandria University, the Arab Academy for Science and Technology and

Pharos University. Also, a number of postgraduate students, PhD researchers and researchers from different scientific backgrounds and professional posts, come from other Arab countries to use the BA.

### Disabled users

Both libraries studied have a special section for the blind. In this section, software is installed which helps blind learners access learning materials. Alexandria University also has a centre which provides human readers for blind students because some of the students, for various reasons, still prefer this service. The BA provides courses to train the blind to use facilities.

Having said this, the disabled people we interviewed said that they still encounter many difficulties in accessing learning materials. Their difficulties are financial, technical and logistical. One of the interviewees, a lecturer at a faculty of law, explained to us the difficulties he had to undergo to obtain his PhD. He had to convert a great amount of his research data into audio format and although new technologies such as MP3 help people with disabilities, particularly the visually-impaired, many technologies specifically designed to assist disabled people are often unaffordable. More problematically in the context of copyright, these technologies are strictly protected with TPMs. This situation is aggravated by the fact that Article 181(6) of the EIPRPA prohibits any circumvention of TPMs and the EIPRPA does not include any exceptions or limitations to this prohibition.

### Print-on-demand

Print-on-demand machines (PDMs), also called Espresso Book Machines, allow a book to be printed upon a user's request. These machines print, collate, cover and bind a single book in a few minutes. Until recently, there were only two Espresso Book Machines in the world: one in Washington DC at the bookstore of the World Bank and the second one in Alexandria at the BA.<sup>23</sup>

Printing on demand requires that the whole book has previously been digitised. At present, the PDM facilities at BA are not yet open for use by the public. Also, only a small number of books are licensed for reproduction by BA's PDMs. This is apparently partially because publishers are still uncertain about royalty procedures and the impact of printing on demand on their economic rights.

PDMs could play an important role in enhancing access to knowledge materials. They can provide inexpensive materials to users and facilitate the circulation of books issued in other countries. If managed wisely, they also help safeguard the interests

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23 Bibliotheca Alexandrina International School of Information Science *Print on demand: Espresso Book Machine* (2008). Available at <http://www.bibalex.org/isis/FrontEnd/Projects/ProjectDetails.aspx?id=RrxJcG1yfqk7/gaSpiEs4A> [Accessed 30 March 2009].

of rights-holders by protecting their rights and ensuring the quick circulation of their works.

### *Use of exceptions and limitations*

In the context of exceptions and limitations facilitating access to learning material, two of the notable provisions are the Arabic translation compulsory licence exception and the personal use exception.

### **Compulsory licence for translations**

Egypt's permissive translation exception allows translation into Arabic of any work that has not been translated by its rights-holder within three years of its issuance. The exception stretches the limits of the Appendix to the Berne Convention and for that reason has been criticised by some copyright scholars in Egypt.<sup>24</sup> But in practice, the exception has little or no effect on the market. The 'Reading for All' project as well as the 'Thousand Book – Second Series' both rely heavily on translation, but they acquire licences for these translations and do not make use of the translation exception. While it is better-known in legal circles outside Egypt, Egyptian publishers are largely unfamiliar with this exception.

A prominent publisher in Egypt who we interviewed stressed that he would never resort to the translation exception, so as to keep his good reputation and good standing with foreign publishers. However, another prominent publisher, who did not know about the exception, expressed enthusiasm upon hearing about it. He had been trying for quite some time to communicate with a European publisher to translate one of its books, without success.

### **Personal use**

While Egyptian law potentially allows considerable photocopying of copyright-protected material for personal use, library policies are limiting. The BA, for instance, has a strict and inflexible quota system: 20 per cent per day, regardless of the size of the book. And the public university library interviewed has a limit of 10 per cent of a book. When inquiring at the BA about the reason for adopting a 20 per cent daily quota policy, one of the library's officers answered that the policy was adopted as a result of many authors' requests, despite the fact that such limitation is not explicitly required by the law.

<sup>24</sup> This view was expressed in an interview with Prof. Mohamed Hossam Lotfy, a prominent Civil Law and Copyright Professor at the Faculty of Law of Beny Swaif University. Prof. Lotfy said that the translation exception infringes the Berne Convention itself and affirmed his opposition to the exception.

### Electronic learning centres

Egypt started an e-learning project almost five years ago by establishing the National Centre for Electronic Learning. In 2008, the Centre launched its National Project for Electronic Learning. The project's objective is to support and develop e-learning in Egyptian universities by establishing a centre for that purpose in each university. Each university is supposed to have a Production Centre for Electronic Syllabus. The Centre usually employs e-content developers and graphic designers. Professors who are willing to provide their learning materials electronically usually sign an agreement for that purpose, hand their material to the Centre and obtain compensation for their contribution.

Most e-learning courses require enrolment keys, which restrict access to enrolled students only. Electronic learning materials are mostly protected with technological protection measures, including passwords. Egypt's copyright law prohibits circumvention of these technologies, even if the purpose for doing so is legitimate. According to the coordinator of Alexandria University's e-learning centre, he explained that stringent protection measures are implemented due to requests by professors. Paradoxically, however, he also said that the centre intends to declare any software it develops free and open source software (FOSS) to encourage and maximise access and use. Although interviewees in relation to the e-learning project showed, by and large, a fair amount of knowledge with regard to copyright law, they were not fully aware of the exceptions and limitations. They repeatedly raised questions pertaining to what can be considered legal uses.

## 2.4 Conclusions and recommendations

Egyptians face various difficulties when accessing learning material. The economic situation, in particular, of the person seeking access plays an important role. Prices of books, even when subsidised, are relatively high for the average Egyptian. This is even more the case in fields that rely on imported foreign books. The education system in Egypt also plays a role. Students often do not rely on the required textbooks but resort to abridged versions of these books, which infringe copyright. The lack of sufficient stocks in libraries makes it difficult for libraries to satisfy the demand of an ever-increasing number of students and other users. This situation is aggravated by library policies that sometimes hamper individual access opportunities, for example by not allowing patrons to check books out of the library. People therefore try to access material in any manner possible. They resort to mass photocopying, sometimes facilitated by copy shops. Photocopied books are also sometimes scanned, published and exchanged on the Internet.

Several national projects are in place to increase the number of books published and translated and to reduce their cost. Internet access is facilitated and supported

by initiatives that make computers available to citizens, personally or in their workplaces. Restrained enforcement of copyright law may also be a result of this official recognition of the problem.

Awareness-raising of A2K issues in Egypt, particularly in relation to copyright, is still in early stages. Some promising initiatives have emerged, particularly facilitated by staff at the BA, but these have not yet reached beyond the research and academic communities. Interviews with stakeholders revealed a tendency to interpret and apply the current copyright law in Egypt in a protectionist manner. Most stakeholders overstated the copyright-holders' rights and, at the same time, tended to disregard existing exceptions and limitations.

Copyright-holders believe that there is neither ample knowledge nor adequate implementation/enforcement of the law. They also believe that a broad interpretation of existing statutory copyright exceptions and limitations would be a threat to their rights. Users from different academic backgrounds and levels, on the other hand, perceive copyright protection as a threat to their access to knowledge in general and to learning and research materials in particular. The general lack of understanding of copyright law, including its exceptions and limitations, necessitates more educational efforts in this respect. It became clear through the research that, in Egypt, copyright infringement is not, for the most part, intentional; most users are willing to legitimise their behaviour if it achieves, in a satisfactory manner, the objective of acquiring knowledge.

Except for a few provisions, the EIPRPA of 2002 is not designed to increase access to knowledge. Among the few provisions which are guided by the need to increase access, the translation exceptions are the most notable. These exceptions allow anybody to translate works into Arabic without permission after three years of their publication (if they have not already been translated into Arabic), or to acquire a compulsory licence to translate material for educational purposes.

Article 147 of the EIPRPA is currently far wider and greater in scope than necessary. It allows authors to prevent the rental of any kind of copyrighted materials, regardless of the type of rental (commercial or non-commercial). Rental rights could instead be restricted to control the commercial use of computer programs and cinematographic works. Similarly, Article 147 allows rights-holders to prevent lending to third parties — a provision which should be amended. The right to control any disposal of original copies of all types of copyrighted works should be changed to apply only to works of art and original manuscripts, consistent with the Berne Convention.

Among other troubling provisions is the one that requires acquisition of a licence and payment of fees in order to publish books that are already in the public domain. Article 183 of the EIPRPA could be amended in order to allow the Egyptian public uninhibited and free use of the public domain. Obtaining a licence and paying fees for exploitation, even commercial exploitation, of public domain

works is certainly not required by any international agreement and indeed can have adverse impacts on access to knowledge.

Like in other jurisdictions, Egyptian copyright law does attempt to provide exceptions for private research and study. Article 171(2), however, includes several arguably unnecessary conditions, such as the requirement that only a single copy can be made and the copy must be for one's exclusive personal use. In some other national copyright laws, photocopying for personal use, especially for private purposes, is not subject to detailed restrictions.

No provisions address access needs in the context of e-learning or the problem of inaccessibility of learning materials to people with disabilities. This could be changed. In the absence of legislative change, however, policies might be developed to fill the regulatory gap.

In some libraries, services and software help blind people to access learning materials. However, not all libraries have such facilities. All libraries in Egypt could help to facilitate access by disabled users to available materials through hiring qualified personnel to assist them in accessing such materials, ensuring that disabled-compatible materials are available and adopting new ICTs that specifically address this category of users.

Libraries that prohibit checking out books could reconsider borrowing policies and adopt other measures to prevent destructive behaviour by users, to avoid putting patrons in the position of having to (illegally) photocopy materials. Libraries permit photocopying for personal use, but impose restrictions not necessarily required by copyright law. Libraries could refrain from adopting restricting policies that do not stem from the law itself and libraries could be aware of how to maximise use of limitations and exceptions provided within the law. Library codes of ethics have an important role to play, not only in guiding users' behaviour but also in ensuring that librarians and users understand the laws that govern use of resources within a particular library.

It seems that libraries may be imposing photocopying quotas on materials within the public domain. Libraries could develop a mechanism for listing public domain materials. Such a mechanism would allow users to know that the material at hand is not protected with copyright and, accordingly, that they have more freedom to rely on it within their learning and research. The BA, in particular, has the ability to use print-on-demand facilities to make available public domain materials. This may require licences pursuant to Article 183, which may prove to be a useful test (or demonstration of the burden) of public domain materials licensing.

The Internet and Internet-based databases are important tools for access to knowledge. Although access to Internet-based databases was available in the libraries interviewed, it was found that some libraries have more extensive database access than others because of a number of economic factors. More funds could

be allocated to maximising Internet facilities, given their supreme importance in accessing up-to-date learning materials.

E-learning schemes are gaining more popularity and application in Egyptian universities. However, access to the materials is restricted to students who are enrolled in those courses. Such materials could be made available on an open access basis to other Internet users, which may not adversely affect authoring professors since the authors are already well compensated for their contributions. (This model, allowing free Internet-based access to learning modules, is already being followed by institutions such as MIT and Yale University in the United States. MIT's open access learning facility is called Open Courseware, while Yale's is called Open Courses.) And it is important to introduce authors to and inform them of, the existence of flexible copyright protection schemes — such as Creative Commons licensing — which protect the rights to a work but also help in its dissemination.

Finally, the combined results of this research project's doctrinal analysis and impact assessment interviews suggest that a combination of legislative reform and changes in stakeholder behaviour are required in order to improve access.

Copyright enforcement is not at present strong enough to prevent access to learning material. But if and when enforcement tightens, then the access situation will change rapidly and the law will begin to have a direct and negative impact on access. Thus, legal reforms need to be part of the way forward. But equally important are changes in practices within the copyright environment — changes that are not reliant on changes in the law. For instance, the resourcing and lending policies of libraries could be changed in ways that would improve materials access. And user and right-holders awareness of the existing copyright legal framework needs be built, so that there can be wider acceptance of the importance of both the economic rights of right-holders and the free access rights of users.

This research has also found that the copyright environment, while an important variable, is by no means the only variable affecting access to learning materials in Egypt. Measures must be taken — many of which will not be directly related to copyright — to combat socioeconomic barriers to learning materials access. Student poverty needs to be ameliorated. And ways need to be found (some perhaps related to copyright, others clearly not) to boost the local production of affordable tertiary-level learning materials by local publishers.



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# Chapter 3

## Ghana

*Poku Adusei, Kwame Anyimadu-Antwi and Naana Halm*

### 3.1 Background

#### 3.1.1 Country history, economics and politics

The West African country of Ghana (formerly the Gold Coast) is bounded on the north by Burkina Faso, on the east by Togo and on the west by Ivory Coast (Côte d'Ivoire). The southern boundary is the Gulf of Guinea. Ghana's territory covers about 240 000 km<sup>2</sup> and has an estimated population of 22 million. Men constitute 49.5 per cent of the population, whereas women constitute 50.5 per cent. A sizeable proportion of the population (42.1 per cent of those above 15 years of age) is illiterate and the average life expectancy is 58.5 years.<sup>1</sup> In terms of gender, the literacy rate among women is 49.8 per cent and among men is 66.4 per cent.<sup>2</sup> Ghana consists of several tribal groups distinguished largely by their vernacular languages, but the official language is English. As of 2007, the proportion of the population living below the poverty line stood at 28.5 per cent.<sup>3</sup> Recent statistics have confirmed that about half the population lives on less than US\$1 a day and the annual per capita income is estimated at US\$600.<sup>4</sup> The current GDP (purchasing power parity) is estimated at US\$31.33 billion and the GDP growth rate for the 2007 fiscal year stood at 6.3 per cent.<sup>5</sup>

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1 Ghana Statistical Service 'Population data analysis report Vol.1 August 2005' in *Women and men in Ghana: a statistical compendium* (2006). Estimated total population figure in 2005 was 21 134 501. This consisted of 10 670 817 women and 10 463 684 men.

2 Encyclopedia of Earth 'Ghana' (2009). Available at <http://www.eoearth.org/article/Ghana> [Accessed 31 May 2009].

3 Ibid; Ghana News Agency 'Economic growth decline in 2007' (12 November 2008). Available at <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=152940> [Accessed 31 May 2009].

4 *Ghanaian Chronicle* 'Ghana near \$1,000 per capita income – Baah-Wiredu' (12 August 2005). Available at <http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=87871> [Accessed 31 May 2009].

5 Supra note 2; Government of Ghana *Ghana budget highlights* (2008) Available at [http://www.ghana.gov.gh/ghana/budget\\_highlights\\_year\\_2008.jsp](http://www.ghana.gov.gh/ghana/budget_highlights_year_2008.jsp) [Accessed 31 May 2009].

Ghana gained independence from Britain on 6 March 1957; it was the first overthrow of colonial power in a black African country south of the Sahara. Ghana became a republic on 1 July 1960. During the colonial period, Britain exercised control over the then-Gold Coast territory and the laws of the coloniser (Britain) prevailed. Since independence, English common law has remained part of the laws of Ghana, unless otherwise modified by statute. Ghana has experienced five military regimes and five civilian regimes. Presently, Ghana has a functioning democracy based on constitutional rule. After many turbulent years of military intervention, constitutional rule has been in force since 1993.

### **3.1.2 Education**

Ghana's educational system can be divided into roughly five sectors. First is the basic level, which encompasses primary and Junior High School (JHS) education. Normally, pupils spend nine years at the basic level, excluding kindergarten. The basic level is free and compulsory. Second, there is the secondary Senior High School (SHS) level, where students spend four years and receive general education, vocational, technical or agricultural training. At the basic and secondary school levels, the government of Ghana provides free textbooks to students. Third, Ghana has 38 Teacher Training Colleges where qualified SHS graduates may receive three years of formal training to become teachers at the basic schools (upon completion of their training). Fourth are the polytechnic institutions. These institutions run various programmes, spanning between one and three years. There are nine of these polytechnics in Ghana. Fifth, there are the universities. Ghana has six public universities and 13 private universities.<sup>6</sup> The universities run diploma programmes (usually for two years) and degree programmes (for four years).

Ghana has a 10-year strategic education plan. The total funding requirement for this plan is estimated at over US\$12 billion.<sup>7</sup> The government, however, has been falling short of its annual financial target for education. Indeed, in 2009, the government's budget allocation to education was about US\$1 billion.<sup>8</sup>

Although there are more women than men in Ghana, a 2005 report on enrolment at various levels of learning indicates an average of 36.5 per cent female

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6 Information for this paragraph was obtained from the official website of the Ministry of Education, Science and Sports. Available at <http://www.moess.gov.gh> [Accessed 31 May 2009].

7 Ministry of Education, Science and Sports *Report on the education sector annual review (ESAR)* (2006) Government of Ghana.

8 Ministry of Finance and Economic Planning *Ghana's budget statement for 2009* (2009) Government of Ghana. Available at <http://www.mofep.gov.gh/budget2009.cfm> [Accessed 31 May 2009].

enrolment, compared to an average 63.5 per cent male enrolment. At the basic level, male enrolment is 52.3 per cent and female enrolment is 47.7 per cent. At the secondary SHS level, males constitute 55.8 per cent of the enrolment and females make up 44.2 per cent. At the Teacher Training Colleges, males constitute 57.3 per cent and females constitute 42.7 per cent of enrolment. Enrolment in the polytechnics and universities is no different: males form 66.2 per cent, compared to 33.8 per cent enrolment by females.<sup>9</sup>

Efforts are being made to bridge the gap between male and female enrolment in schools and to improve literacy rates. At the JHS level, the government has adopted a Free Compulsory Universal Basic Education (FCUBE) programme in pursuance of the constitutional mandate to make basic education free and accessible to all.<sup>10</sup> The government is also taking progressive steps to comply with its constitutional obligation to introduce free high school education.<sup>11</sup> As an added incentive, the government has introduced free school-feeding programmes for pupils at junior high schools. Additionally, an affirmative action campaign in support of girl-child education is being vigorously pursued to bridge the male-female enrolment gap.

### 3.1.3 *Laws of Ghana*

The laws of Ghana consist of the 1992 Constitution, statutes enacted by Parliament, rules and regulations, the 'existing law' and the common law, including rules of equity and customary law. The existing law comprises all the laws that existed before 7 January 1993 when the Constitution came into force. The common law and rules of equity are 'received laws' based on judicial decisions of the courts in England and other common law jurisdictions. The common law rules serve as persuasive precedents for adjudication in Ghana. It is, however, important to indicate that the validity of all the laws is traced to the Constitution. This means that any law, action or omission can be challenged in court if considered unconstitutional. Thus, important judicial decisions from the High Court, the Court of Appeal and the Supreme Court of Ghana partially shape the dynamics of the copyright regime in Ghana.

9 Ghana Statistical Service 'Enrolment in institutions of learning 2005' in *Women and men in Ghana: a statistical compendium* (2006).

10 Articles 25 and 38 of the Constitution of the Republic of Ghana of 1992.

11 Ibid.

## 3.2 Doctrinal analysis

### 3.2.1 *Statutes and regulations*

#### *Copyright history*

On attaining independence, Ghana inherited a copyright system based on the British Copyright Act of 1911. This use of the British law was reflected in Ghana's Copyright Ordinance of 1914 (Cap. 126) with its enabling Copyright Regulation of 1918. The Ordinance applied the British Copyright Act of 1911 within the colony of the Gold Coast (now Ghana). Protection under the Ordinance focused on literary, dramatic, musical and artistic works. The law made it an offence to sell, make for sale, hire, exhibit or distribute copyright-infringing works in the then-colony. Under the Ordinance, no express mention was made of public exceptions or free uses, but the British Act from which the Ordinance derived its authority permitted 'fair dealing' with any work for the purpose of private study, research, criticism, review or newspaper summary. In addition, no civil remedies were expressly provided for under the Ordinance, but since it implemented the British law in the colony, remedies such as injunctions, damages and accounts were available. There were also provisions that criminalised acts of making hard copies of protected works with the aid of industrial printing machines.<sup>12</sup> The term of protection, as based on the British Copyright Act, was for the life of the author plus 50 years after the author's death.

#### *Copyright Act 85 of 1961*

The Ordinance and its subsidiary legislation were replaced with the Copyright Act 85 of 1961 and the Copyright (Fee) Regulation of 1969 (Legislative Instrument 174) respectively. Act 85 and its L.I. 174 were the first post-independence pieces of copyright legislation in Ghana. The new 1961 Act added more materials as protectable subject matter of copyright. These additional protectable materials included cinematograph films, gramophone recordings and broadcasts.<sup>13</sup> The works were protected if sufficient effort had been expended on the work to give them an original character.<sup>14</sup> For some works, the Copyright Act of 1961 contained relatively shorter terms of protection. In the case of published literary works, copyright protection lasted only until the end of the year in which the author died *or* 25 years (instead of 50 years under the earlier Ordinance) after the end of the year in which the work was first published, whichever was later in time.<sup>15</sup> For unpublished literary works, the 1961 Act offered a term of protection of 25 years *after* the end of the

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12 Section 3(1) of the Copyright Ordinance of 1914.

13 Section 1(1) of the Copyright Act 85 of 1961.

14 Section 1(2) of the Copyright Act 85 of 1961.

15 Section 14 of the Copyright Act 85 of 1961.

year in which the author died.<sup>16</sup> This made the protection granted to unpublished literary works longer than published ones.

Civil remedies, in the form of damages and injunctions, were also provided for in the 1961 Act, in addition to possible criminal sanctions under the law. However, the focus on criminal consequences (as prevailed under the Ordinance) was reduced.

Fair dealing provisions were expressly articulated in the 1961 Act. There was provision for fair dealing for purposes of review or criticism. There was also provision for compiling a collection of portions of literary or musical works for use in educational institutions, if the author was acknowledged in any public use of the work.<sup>17</sup>

One problem with the 1961 Act was that it made writing a prerequisite for protection of works such as musical works, which was counter to the interests of illiterate Ghanaian composers.<sup>18</sup> The writing requirement was changed by the Copyright Law of 1985.

### *Copyright Law of 1985 (PNDCL 110)*

In 1985, a new copyright law, the Provisional National Defence Council Law (PNDCL) 110, was passed to replace the 1961 Act. Under this law, protection for works was extended to cover foreign-made works, in compliance with the international Berne Convention for the Protection of Literary and Artistic Works. The 1985 law contained, in comparison with the 1961 Act, extended terms of protection: the general duration of protection for most works became the life of the author plus 50 years. In the case of other kinds of works owned by a body corporate, protection lasted for 50 years from the date on which the work was made public.

This 1985 law (PNDCL 110) also changed the strict requirement of writing that had existed under the 1961 Act and adopted a more flexible requirement of fixation.

The PNDCL 110 of 1985 also added new materials to the category of protectable subject matter. The newly added protectable materials included works such as sound recordings, choreographic works, derivative works and programme-carrying signals. In addition to the continued protection of economic rights, PNDCL 110 introduced perpetual moral rights (of attribution and of integrity) protection.<sup>19</sup> To some degree, the 1985 law allowed free use for purposes of private research, teaching and inclusion in other works.<sup>20</sup> Under the 1985 PNDCL

16 Section 14 of the Copyright Act 85 of 1961.

17 Section 1(2) of the Copyright Act 85 of 1961.

18 *CFAO v Archibold* [1964] GLR 718; *Archibold v CFAO* [1966] GLR 79.

19 Section 6(2) of the Provisional National Defence Council Law 110 (PNDCL 110) of 1985.

20 Section 18 of PNDCL 110 of 1985.



110, a new legislative instrument (L.I. 1527) was passed, which served to create the Copyright Society of Ghana (COSGA) as an umbrella collective society for copyright-holders.

### *Copyright Act 690 of 2005*

The current substantive copyright legislation in Ghana is the Copyright Act 690 of 2005. It came into force on 17 May 2005. The Act seeks to bring Ghana's copyright regime in line with its assumed international obligations under the WTO TRIPs Agreement. Indeed, the Act introduced a globally oriented system, which incorporates universal copyright standards like those that exist under the statutes of most developed countries. The Act provides protection to works such as computer programs and folklore that were, until then, not expressly protected.

The new Act extends the general term of protection from the life of the author plus 50 years after the author's death to life plus 70 years after death. In the case of anonymous or pseudonymous works, economic rights are protected for 70 years from the date on which the work was made public or published, whichever date is later. If the copyright in a work is vested in a corporate body, protection is, in general, offered for 70 years. For works of folklore, protection is vested in the state and the term of protection is perpetual. The terms of protection for works in Ghana thus exceed the standard duration of copyright protection required under the TRIPs Agreement. These provisions are, therefore, examples of what are known as 'TRIPs-plus' provisions.

### **Requirements and scope of protection**

In Ghana, for a work to be eligible for copyright protection it must be original, in the sense of the work being the independent creation of the author. Under the 2005 Copyright Act, protection is granted to original literary works, artistic works, musical works, sound recording, audiovisual works, choreographic works, derivative works, folklore and computer software or programs. The Act also protects the rights of performers and broadcasting organisations in their programme-carrying signals by granting the exclusive rights to reproduce, translate, adapt, transform, rent, distribute or perform the work in public. It also grants authors perpetual protection of moral rights.

In following the global copyright regime, the Act increases penalties for copyright infringement by adding to the civil remedies provided for under the Act. In addition to civil remedies such as damages, injunction, seizure and destruction of infringing materials, accounting and Anton Piller relief (a court order for search and seizure), the infringer could face a fine or imprisonment of up to three years, or both a fine

and imprisonment.<sup>21</sup> This is different to the PNDCL 110 of 1985, under which the term of imprisonment could not exceed two years.

### Copyright exceptions and limitations

The 2005 Act also contains provisions respecting exceptions and/or permitted uses of copyright works. These provisions include, but are not limited to, Section 19 (permitted use for personal purposes, quotation, teaching, media use), Section 20 (reproduction of a single copy of a computer program as a back-up) and Section 21 (permitted use of copyright materials by a library or archive). It needs to be stressed that the 'permitted use' provisions in the Ghanaian statute bear some relation to the notions of fair use or fair dealing in Anglo-Saxon copyright jurisprudence and in certain instances the Ghanaian statute specifies that a 'permitted use' is subject to the use being 'compatible with fair practice'.

Section 19 makes it a non-infringing act to translate, reproduce, adapt or transform the work for exclusive personal use if the user is an individual and the work has been made public. According to Section 19, copying for personal use does not, however, permit the reproduction of a whole or a 'substantial' part of a book. The restrictions provided under Section 19 apply to the copying of all literary and artistic works, which includes textbooks, articles, dictionaries, paintings, photographs, sculptures, maps and virtually all other learning materials used in educational institutions. No formula has as yet been developed in Ghanaian law to serve as a guide on what constitutes 'substantial' copying. It is likely that what constitutes substantial copying will be determined on a case-by-case basis, depending on both the quantity and the nature of the copying in question.

At present, no special mention is made of copyright exceptions for people with disabilities. (But the practice, as the impact assessment interviews uncovered, is that the universities nonetheless convert some of their learning materials into Braille form for the visually impaired.) In addition, no specific exceptions exist for distance learning. Access for purposes of distance learning is covered only by the general exceptions under the Copyright Act.

Fair dealing for purposes of review and criticism, which was explicit under the 1961 Act, is not mentioned in the Copyright Act of 2005. However, according to Section 19, it is not an infringement to include portions of another's work in one's own work, provided the individual user acknowledges the source and the quotations are in accordance with 'permitted use'. The use of a copyright-protected literary or artistic work is also permitted without authorisation in terms of Section 19 where it is used for teaching or broadcast in educational institutions. Besides acknowledging the source, this must also be in line with 'permitted use'. Section 19 also allows for

<sup>21</sup> Section 43 of the Copyright Act 690 of 2005.

reproduction in the media or communication to the public of political speeches, legal proceedings and lectures for purposes of reporting fresh events. Again, this must be consistent with permitted use in the media and the source must be acknowledged. But the issue of what constitutes permitted use remains undefined. In making a determination on this matter, the practices of a particular industry will likely be a key factor. For instance, academic rules against plagiarism and the rules on incorporation of another person's work into one's own for purposes of scholarship would aid in interpreting its meaning.

Under Section 21, non-commercial libraries and archives are permitted to make a single copy of 'a published article, other short work or short extract of a work' for an individual, as long as they ensure that the individual uses the copy for purposes of study, research or scholarship. However, the manner in which such a supervisory role could be exercised remains unclear. Also, a library or archive may make a single copy of a copyright-protected work to replace or preserve a book that may be lost or destroyed. Copying library books in order to preserve them is a potentially useful strategy to address the issue of vandalism, including tearing of pages, sections or entire chapters of books. When the reproduction is not an isolated instance, however, then a licence for that purpose is required from the copyright owner or collective society of owners.

### *The Constitution and other statutes*

The Constitution of Ghana includes provisions that may concern access to learning materials. Articles 25 and 38 oblige the government to make basic education free and compulsory. The provisions also mandate the government to take progressive steps to make high school education free and accessible. Higher education must also be as accessible as possible.

There is also provision for the passing of a right to information law in order to promote access to information. This law, which is to promote access to public information and documents, has not yet been passed, though discussions on the need for such a law have taken place at several fora. Recently, the Attorney General invited memoranda from the public about the passing of the Right to Information Bill into law. At the time of writing this chapter in mid-2009, the Bill is before Parliament and expected to be passed soon.

The Constitution also makes provision for the protection of academic freedom.<sup>22</sup> It is, however, not known whether a defendant may use a constitutionally guaranteed right to information or academic freedom as a defence in a copyright suit in Ghana. Freedoms related to expression are occasionally invoked as defences to copyright

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22 Articles 21(1)(b), 21(1)(f), 25 and 38 of the Constitution of 1992.

infringement in the United States, but may be less successful in jurisdictions that follow the British tradition, including Ghana.

Interestingly, statutes in Ghana that establish educational institutions do not explicitly talk about policies relating to access to learning materials. It is left to the universities as knowledge-producing and knowledge-consuming institutions to take steps to develop their own copyright policies and research guidelines.

### *International obligations*

Ghana is a member of the Berne Convention, the Universal Copyright Convention (UCC) and the TRIPs Agreement. Ghana has also signed the World Intellectual Property Organisation (WIPO) Copyright Treaty (WCT) of 1996 and the WIPO Performances and Phonograms Treaty (WPPT) of 1996. Among other things, both the WCT and WPPT deal with the protection of digital works by requiring member states to outlaw the circumvention of technological protection measures (TPMs), which are used to control the distribution and copying of digital content. Despite Ghana's accession to the two treaties, no express domestic legislation has been enacted to fully implement *all* of their provisions and there is no debate regarding implementation. It is, however, important to stress that the Copyright Act of 2005 contains some provisions that are called for by the WCT and WPPT. Most importantly, Section 42 contains a TPM anti-circumvention provision, making it an offence to alter any electronic rights management information, or to circumvent any technological measure applied by the rights-holder to protect his/her work. Also, devices to facilitate circumvention are prohibited. Upon conviction, a circumventer or facilitator could face a term of imprisonment of up to three years, a fine, or both, as per Section 43. These provisions on anti-circumvention measures do not allow for any exceptions. The implications of anti-circumvention provisions are discussed in Section 4 below.

### **3.2.2 Judicial decisions**

There is a dearth of relevant judicial decisions on the subject of copyright vis-à-vis access to teaching and learning materials in Ghana. A reading of reported cases in the Ghana Law Reports (1959 to 2000) does not reveal any significant judicial pronouncements on the development of the law of copyright and access. In fact, it may be of interest to note that there have been only seven reported copyright cases in the Law Reports since independence. The reported cases between 1959 and 2000 are: *CFAO v Archibold*;<sup>23</sup> *Archibold v CFAO*;<sup>24</sup> *Ransome-Kuti v Phonogram*

23 [1964] GLR 718.

24 [1966] GLR 79.

*Ltd*,<sup>25</sup> *Ransome-Kuti v Phonogram Ltd*,<sup>26</sup> *Musicians Union of Ghana v Abraham & Another*,<sup>27</sup> *Ellis v Donkor & Another*,<sup>28</sup> and *Copyright Society of Ghana v Afreh*.<sup>29</sup> All these cases concerned musical works. Moreover, some of the principles established in cases such as the *Archibold* case (dealing with the strict requirement of writing as a prior condition for protection) have been changed by subsequent legislation. Since law reporting is running almost a decade behind in Ghana, the research team also searched for unreported cases from the courts for further analysis. One such unreported case is: *The Republic v Ministry of Education & Sports & Others: Ex parte Ghana Book Publishers Association*.<sup>30</sup>

In the *Book Publishers Association* case, the applicants filed an ex parte application with the High Court to challenge the decision of the Education Ministry and the Procurement Board to award a contract for the printing of basic school books to the foreign publisher Macmillan on the grounds of unfairness of opportunity and the lack of open procedure. The High Court accepted the applicant's position that Macmillan had been given an unfair advantage over local producers and therefore revoked the contract. As at the time of writing this chapter, the case was pending on appeal at the Court of Appeal. The appeal notwithstanding, the *Book Publishers Association* case exemplifies the concerns voiced by local book publishers during the field research carried out for this report that their industry is collapsing due to unfair practices by giant international publishers such as Macmillan and not because of inadequate copyright law or enforcement.

### *Explaining the 'lack' of copyright cases*

The paucity of judicial decisions on the subject of copyright is partly due to the preoccupation of most Ghanaians with litigating to protect their *tangible* property rights, rather than their *intangible* property rights, through the courts.<sup>31</sup> Moreover, inordinate delays in the judicial system make it unattractive to spend time over a seemingly less important intangible property right matter such as copyright.

Another factor that has contributed to the dearth of copyright cases was the existence of an arbitration provision under the copyright law of 1985, to which most people resorted in preference to litigation. Thus, once parties involved in a

25 [1976] 1 GLR 220.

26 [1978] GLR 316.

27 [1982-83] GLR 337.

28 [1993-94] 2 GLR 17.

29 [1999-2000] 1 GLR 135.

30 [Suit No. AP11/2006] (the *Book Publishers Association* case).

31 Reported cases prove that land-related cases constitute the bulk of litigation in Ghana. On this point see P. Adusei 'Burden of proof in land cases: an analysis of some recent decisions of the Court of Appeal and the Supreme Court of Ghana' (2000-2002) 22 *University of Ghana Law Journal* 223.

copyright dispute agreed to submit their disagreement to arbitration, the matter was taken over by the Copyright Administrator and the award bound the parties. This arbitration arrangement has, however, been discontinued under the 2005 Copyright Act. During the course of field research conducted by the researchers, copyright stakeholders made no calls for re-introduction of the arbitration system. It is apparently believed that the court system can better resolve copyright disputes, despite the delays and even though the Copyright Office believes that the arbitration processes previously used were effective in resolving disputes.

Recently, judicial procedures have improved. The coming into force of the new High Court Rules (C.I. 47) on 3 January 2005<sup>32</sup> and the establishment of the Commercial Division of the High Court under its Order 58, with specialised rules of enforcement of IP rights, ensure a speedy trial and/or disposal of cases.<sup>33</sup> The Commercial High Court is now staffed by judges who have considerable insight into the dynamics of IP law and the judges are occasionally trained by the Judicial Training Institute. Most straightforward IP-related cases can now be disposed of within a year of initiation. This contrasts sharply with what prevailed prior to 2005, when IP disputes could drag on for several years in the 'regular' high courts in Ghana. A major drawback here is that the Commercial High Court is located only in the Ghanaian capital, Accra. Despite progressive steps being taken, the other nine regional capitals do not yet have a Commercial High Court. Further, although the Commercial High Court now deals with copyright cases more speedily, the long-standing issue of delay in case reporting is still a major concern. This makes it difficult to do any meaningful assessment of the trends, if any, from the courts.

### *Judicial reliance on foreign cases*

Ghanaian courts are often persuaded by cases from other jurisdictions, such as the United States, Canada and the United Kingdom. The Canadian case of *CCH Canadian Ltd v Law Society of Upper Canada*,<sup>34</sup> for example, deals with photocopying activities in a library and by analogy, an educational institution. The defendant (a professional law society) maintained and operated a request-based photocopy service for its members and the judiciary at the Great Library in Toronto, Canada. In 1993, the plaintiffs, publishers of legal materials, commenced a copyright infringement action, claiming that the Law Society had infringed the plaintiff's copyright in terms of the law reports and other legal materials it had published. The Supreme Court of Canada had to decide, inter alia, whether copyright was infringed

32 The High Court (Civil Procedure) Rules 2004 (C.I. 47).

33 Order 63 of C.I. 47.

34 *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13, 2004 S.C.R. 339.

when a single copy of a case report, statute, book or other work was copied for purposes of research. In holding that the defendant did not infringe copyright, the court took account of the library's 'access policy', which had been displayed where the photocopying was done. Indeed, that access policy described the limits of the reproduction that a person may undertake at one time. The access policy proved critical when the Supreme Court of Canada held that the Law Society was not even contributorily liable for the violations of other persons who exceeded the prescribed limit.

If the *CCH* case were cited in a Ghanaian court in a dispute involving photocopying activities on a university campus, it might weigh heavily on the judge's mind. Indeed, the authors of this study have also relied on this case in providing an advisory opinion to the University of Ghana about photocopying activities. More specifically, the lesson for Ghanaian universities is that having access guidelines which disclaim university liability in respect of unauthorised photocopying could save an educational institution from copyright liability.

### **3.2.3 Summary of doctrinal analysis**

Ghana's copyright regime has gone through several major changes since independence from Britain. The copyright system now meets or exceeds the TRIPs Agreement's minimum standards by granting protection to literary, artistic and musical works, computer programs and folklore. Between 1961 and 1985, the term of copyright protection lasted for 25 years; protection increased to at least 50 years in 1985. Since 2005, Ghana has adopted a TRIPs-plus approach, granting protection for the life of the author plus 70 years after the author's death. Moral rights, as well as state-owned copyright in folkloric works, never expire.

Ghanaian copyright protects owners against unauthorised reproduction, public performance, adaptation and distribution. Ghana has also signed the WCT and the WPPT treaties, but has yet to implement either treaty fully in domestic legislation, with the notable exception of the key TPM anti-circumvention provisions included in the 2005 Act. There are no exceptions to permit circumvention for lawful purposes. Other exceptions to infringement exist, but are available only if the category of dealing falls within a narrowly circumscribed purpose and constitutes permitted use.

The few judicial decisions on copyright that exist concern musical works. These cases do not articulate the copyright law of Ghana very well. The establishment of the Commercial High Court, staffed by judges with insight into IP law and regular training of these judges by the Judicial Training Institute, should ameliorate the situation somewhat, at least in Accra. The net effect of these statutory provisions and the rare judicial interpretation of them is that the scope of the public domain

is shrinking and there are minimal flexibilities permitting access to learning materials.

### 3.3 Qualitative analysis

#### 3.3.1 Secondary literature

In Ghana, the subject of copyright has received relatively little attention in academic literature. A primer on the Ghana law of copyright is a commentary by Andrew Ofoe Amegatcher entitled *Ghanaian law of copyright* (1993). This publication is based on the now-defunct PNDCL 110 of 1985. The book has not yet been revised to take account of new developments under the Copyright Act of 2005 and there are no signals that the author will be revising the book in the near future. Paul Kuruk's brief overview of the IP framework of Ghana, published in 1999,<sup>35</sup> is also based on the old PNDCL 110.

There are several journal articles directly addressing Ghanaian copyright law. One is Josephine Asmah's 'Historical threads: intellectual property protection of traditional textile designs: the Ghanaian experience and African perspectives' published in the *International Journal of Cultural Property* (2008). Here, Asmah makes a case for folklore protection in Ghana and urges international cooperation to strengthen the protection of folklore. There are also two recent journal articles on copyright written by Poku Adusei, the leader of the Ghana ACA2K country research team. In 'Cyberspace and the dilemma of traditional copyright law',<sup>36</sup> Adusei articulates the view that digital technologies have upset the social policy objective of copyright law and have further rendered traditional copyright issues, such as jurisdiction, choice of law and enforcement, immaterial. The author rejects the modern approach of locking down online materials with technological protection measures, due to this approach's negative impact on public access. Adusei's second article<sup>37</sup> traces the evolutionary trajectory of Ghana's copyright regime since independence. It posits that the copyright system moved from a purely territorial legal framework to an international system of limited harmonisation of copyright norms, then to the current global system whereby IP issues are considered international trade policies. Throughout this evolution, three substantive copyright statutes have been enacted to establish Ghana's domestic copyright system. However, judicial responses in shaping the law in Ghana have not been encouraging, Adusei argues.

35 P. Kuruk 'Trends in the protection of IPRs: a case study from Ghana' in M. Simensky et al (eds) *Intellectual property in the marketplace* (1999) John Wiley & Sons, Inc, New York, Chapter 18.

36 P. Adusei 'Cyberspace and the dilemma of traditional copyright law: an assessment of the impact on the legal community' (2002-2004) 22 *University of Ghana Law Journal* 202.

37 P. Adusei 'The evolution of Ghana's copyright regime since independence: a critical appraisal' in Mensa-Bonsu et al (eds) *Ghana law since independence: history, development and prospects* (2007) Black Mask Publication, Accra, at 11.



Currently, there is a University of Ghana MPhil research project that relates to copyright and access. It is being undertaken by Emmanuel Darkey, the Librarian of the Law Faculty of the University of Ghana (he is one of the interviewees for this study). Darkey's research examines, among other things, access to (and impacts of) the work of librarians in Ghana. Darkey notes in his unpublished dissertation that his research 'attempts to look at copyright [as to whether it is] as a barrier to access to knowledge and information provision' in Ghana.

### **3.3.2 Impact assessment interviews**

The Ghana research team interviewed 17 individuals or organisations about the Ghanaian copyright environment. The interviewees came from the main stakeholder bodies identified for the research. Those stakeholders are:

- government: the Ministry of Justice (Copyright Office, Legislative Drafting Section and the Law Reform Commission) and the Ghana Education Service;
- educational communities/users: University of Ghana (Balme Library, Faculty of Law Library, administrators and students), KNUST (university library, administrators, lecturers and students); and
- copyright-holders: Ghana Book Publishers Association, Ghana Association of Writers, CopyGhana and Ghana Universities Press.

The following sub-sections present the findings from the interviews and an analysis of the results.

#### *General resource constraints in Ghana*

Interviews reaffirmed that the Government of Ghana has a book policy for the basic and secondary education levels, but not the tertiary education level. Pursuant to this policy, publishers are invited to write textbooks according to the syllabuses of the basic and secondary schools. These manuscripts are then submitted for evaluation and eventual selection. Upon selection, the government negotiates a price and places an order for the quantity to be produced and distributed to the basic and secondary schools.

Concerns were expressed that local publishers sometimes are disadvantaged when big foreign companies like Macmillan participate in the bid for government publishing jobs. As shown by the *Book Publishers Association* case, this perceived lack of fair play prompted the Ghana Publishers Association to take the Ghana Education Service to court over its grievances. That aside, the study found that the book policy has reduced the control of the private textbook publishers (ie, publishers not supplying to government) in the country. Students at the basic and secondary levels buy textbooks published by private publishers in Ghana only if they need

personal copies or if they need to replace lost copies. This, in part, has caused many bookshops to close.

The policy of supplying free books at the basic and secondary levels does not take the specific learning materials needs of the disabled into account. However, it is likely that, with the passing of the disability law in 2007, efforts will be made to ameliorate the situation. The Disability Act seeks to promote policies that will provide fair opportunities for the disabled. Therefore, progressive implementation of both the Disability Act and the Copyright Act should allow issues relating to access to teaching and learning materials for the disabled to be addressed in legislative instruments that implement both Acts.

Mainly as a result of the government's book policy, photocopying of books is not an issue of concern at the basic and secondary levels. However, photocopying is a major issue in the universities and other tertiary institutions.

Interviewees from universities reported that there are insufficient numbers of textbooks to support the large student population. Photocopying is the only way to obtain meaningful access to teaching and learning materials. For instance, in the library at the Faculty of Law at the University of Ghana, two textbooks on a particular subject may serve approximately 130 students. The situation is even worse in the Arts and Humanities departments. Here, 800 to 1 000 students may be sharing two or three copies of a book for a particular course. The probe found that the University of Ghana commits 10 per cent of its academic facility user fees towards the acquisition of books and other materials for the libraries every year. KNUST's total financial allocation to the libraries in 2008 was GH¢300 000 (roughly equivalent to US\$300 000). This sum must cover all administrative overheads in addition to book procurement.

There are particular difficulties procuring electronic materials. The Law Faculty at the University of Ghana paid an undisclosed sum to procure the Digital Attorney (an electronic database for Ghana cases and statutes) and also pays US\$1 500 every year in service fees. However, there are restrictions on the use of this database: technological protection measures make it impossible to copy its contents. Should a student attempt to copy information, the database becomes corrupt and servicing of the database, though covered by the US\$1 500 service fee, is not prompt. As a matter of law, circumventing technological protection measures constitutes an offence under Section 42 of the Copyright Act. There are no exceptions to allow circumvention of technological protection measures for non-infringing purposes. In effect, legally permitted uses of the legal materials in the database become technologically impossible. This is a concrete, real-world example of digital access difficulties. Besides the fact that the Digital Attorney is expensive, encryption makes it difficult for students and researchers to fully use its contents. This restrictive condition, coupled with bad service delivery, impedes access to knowledge.

Books published locally are cheaper than those that are imported. For instance, one librarian suggested that if AKP Kludze's books on equity and succession, published by Kluwer, were published by the Universities Press, they would have been much cheaper. 'The price of a copy published by Kluwer sells at US\$180. It would have cost about US\$60 if published here.' Import duties and taxes are partly to blame. Even though a locally manufactured book may be cheaper, publishers in Ghana who were interviewed expressed concern over taxes on materials used in publishing books. They believe prices of locally produced books would be even lower if taxes were waived on some of the materials, such as printing paper and equipment.

### *Copyright law amid resource constraints*

The librarians interviewed were aware of the copyright law and though they welcomed the copyright system as a mechanism for rewarding creators for their intellectual efforts, they expressed reservations about the narrow scope of uses permitted without the copyright owner's authorisation under Ghana law. The librarian at the Faculty of Law, Legon, expressed his concerns in the following words:

The law says that we can photocopy a single copy of a book for use in the library, and I think that will not work when we have over a hundred students in need of that book. Also, lawyers are coming to use the books. When the books are getting torn, we photocopy and allow students to photocopy as well. So that section of the copyright law dealing with libraries and archives does not favour a librarian, students and researchers.... If we insist on it, we cannot work. Another section of the law that is unworkable is the seeking of permission from authors before we can exceed the limit of copying. We don't know where the authors are so we cannot get to the author.

While the scope of permitted use under the copyright law is legally restrictive, there is no strict enforcement mechanism in place. Because copyright is not enforced, students and researchers do not always feel its full impact. One interviewee reported: 'The law is not strictly enforced and that helps us. If the law enforcement agencies come hard on us there will be a public outcry and that will force the government to take a second look at the copyright system.'

### *Universities and access policies*

Research interviews revealed that the universities in Ghana do not have copyright and access policies. There are also no notices displayed at places where photocopying activities are undertaken — notices that would inform students and other users of the implications of violating copyright law and the quantity of materials that may legally be photocopied. Universities have, however, adopted a convention to guide

staff operating the university-owned photocopiers. The practice is that students are allowed to photocopy a maximum of one chapter out of a book. In the case of journals, a student may photocopy one article. However, students beat the system by showing up at different times and locations until they have what they need. This is only one aspect of the story. Apart from the official university photocopiers, there are many unofficial photocopy machines on university campuses. These unofficial ones are not effectively regulated and they are used for commercial purposes.

Although the universities and their librarians are key players in the copyright industry, they do not play any role in the formulation of copyright policies at the national level. Librarians and university administrators interviewed confirmed that they have never been invited to participate in copyright stakeholder meetings. They expressed their willingness to make a significant contribution if given the opportunity. Most of the private rights-holders interviewed, on the other hand, said that they have participated in copyright policy discussions.

### *Collective societies, CopyGhana and public use*

Copyright law requires that a user obtain permission from the copyright owner or an authorised collective society of owners before photocopying beyond a certain amount. The difficulty in seeking approval from owners brings to the fore questions about collective administration in Ghana.

The new copyright law of 2005 allows for multiple collective societies. This changes the previous system that made COSGA the dominant body. The Copyright Administrator of Ghana, when interviewed, said he sees this as an unfortunate provision, however. In his view, the copyright industry is too small to have multiple collective societies. The Executive Director of the Ghana Universities Press reinforced this sentiment. Other interviewees argued, however, that forcing one collective society on copyright-owners, as was previously the case, infringed freedom of association, which is constitutionally guaranteed in Ghana.

Generally, this research determined that private collective administration is in disarray in Ghana. New collective societies are formed almost every year, especially as splinter groups emerge in the music sector. The dominant society is COSGA, which previously oversaw the activities of all other collective societies. COSGA's monopoly position was criticised as being undesirable and consequently they no longer oversee many societies. Concerns about transparency and alleged financial irregularities resulted in the Attorney General requesting that COSGA's account be investigated for the period commencing June 2008.

There is also the Professional Musicians Association of Ghana (PROMAG) and the Ghana Association of Phonographic Industries (GAPI), among others. The CopyGhana collective society represents literary writers. For purposes of access to teaching and research materials, therefore, CopyGhana is the most important

collective society. CopyGhana is a private collective society of authors, but it works cooperatively with the Copyright Office in matters of administration. Indeed, its office space is shared with (and provided by) the Copyright Office of Ghana. CopyGhana also receives financial and administrative support from Kopinor (Norway's reprographic rights organisation) and from the International Federation of Reprographic Rights Organisations (IFRRO).

Contracts between the universities and private collective societies are still developing. CopyGhana has managed to convince three private universities to charge GH¢2 (almost US\$2) per annum per student as a fee for a blanket royalty scheme. In the case of the public universities, CopyGhana is yet to sign an agreement with any of them. The Executive Secretary of CopyGhana has indicated the society's preparedness to sue students and the universities for infringement of copyright law 'at the appropriate time'. Sections 51 to 53 of the 2005 Copyright Act provide for a Copyright Tribunal to be established to resolve disputes involving royalty rates and licensing schemes when an application is brought before such a body. However, the proposed Copyright Tribunal is yet to be established.

Research revealed that CopyGhana's standard form licensing contracts are nearly exact replicas of the agreements used by societies in Europe and other developed countries. There is almost no customisation to adapt the agreements to the very distinct context of the Ghanaian education system. For example, the study found that in addition to CopyGhana's decision to charge GH¢2 per student each year, CopyGhana wants to limit the extent of copying to 15 per cent of a book. Such a licence would likely be more of a restriction than a benefit since the copyright law of Ghana (especially Section 19) could be interpreted to allow photocopying beyond 15 per cent for private study or research purposes in Ghana. Universities might, therefore, question the 15 per cent restriction in future negotiations with CopyGhana; instead they might argue for an extended per cent (ie, beyond an amount already permitted under copyright law) if they are to accept the requirement to collect the GH¢2 annual payment from each student. Otherwise, there is a risk of liability not only for copyright infringement but also for a breach of the royalty-payment contract. After paying blanket licence fees, photocopying should be free from further substantial restrictions in order to reflect the reality of students' practices. The Executive Secretary of CopyGhana seems to have accepted this principle, though formal institutional arrangements are required to avoid future disputes. Also, if the universities accept having to collect the monies from students on behalf of CopyGhana, they will have to factor in their administrative overhead costs.

At the time of writing this report in mid-2009, there were no established royalty distribution formulae in place among the collective societies. It was thus found that

while CopyGhana has collected some royalties, so far no distributions have been made to rights-holders. This is also the case with COSGA.

### *Pro-access library consortium*

The universities' libraries operate under an association called CARLIGH (Consortium of Academic and Research Libraries in Ghana). Through CARLIGH, they operate an inter-library lending system, allowing students to borrow books from libraries in other universities in Ghana. Also under CARLIGH, the universities pool resources to procure materials such as electronic journals. One interviewee stated: 'The reason for starting with the electronic journals is that they are very expensive. It is only in contributing and sharing that we have been able to do our work well.' This policy, if well implemented, can be used to procure expensive materials which one institution cannot afford alone. After pooling resources to procure the materials, these can be shared by making more copies or through the inter-library lending system.

Based on the doctrinal analysis presented above, however, there are serious concerns about the legality of various modes of collaboration in order to improve access to learning materials. This is particularly true in the context of digital technologies, which may involve electronic reproduction and telecommunication of materials in order to facilitate access.

### *Copyright Office*

The Copyright Administrator is the head of the Copyright Office in Accra. The Copyright Office is statutorily mandated to execute the Copyright Act. The Office registers copyright works, but registration is optional in Ghana. The study found that the Office takes its anti-piracy activities seriously; it is not uncommon to find public notices from the Copyright Office warning people about piracy. The Office has an anti-piracy committee that tracks down alleged copyright violators and prosecutes them. The new law of 2005 envisages a body called the 'copyright monitoring team' doing this anti-piracy work. This monitoring team has not formally been established, however and the Copyright Administrator stated that his Office is still doing the anti-piracy work. The Office's anti-piracy activities have so far focused on the film and music industry, where copyright infringement is rampant. These prosecutions take place in the lower courts and proper records are not kept. The Office does not (yet) define infringing photocopying activities on university campuses as 'piracy'.

On the issue of public education, the Copyright Administrator said that his Office is not required to educate the public on the law, his Office is required to enforce it. The Ministry of Education, he said, must do public education. He added that, in the process of enforcing the law, the Office educates the public indirectly. The Administrator defended the TRIPs-plus requirement (a term of protection of

life plus 70 years) in Ghanaian law on the grounds that Ghanaians are creative and granting protection for a longer period serves 'our' interest. The interview with the Copyright Office also confirmed that 'technical assistance' from WIPO has played a key role in the push for TRIPs-plus obligations in Ghana.

There is some interaction between the Ghana Book Publishers Association, the Ministry of Education and the Copyright Office. These institutions confirmed their involvement in ongoing discussions regarding passing a new copyright legislative instrument. But because the universities are not involved in policy decisions that affect the education sector, it has been difficult to engage them in royalty collection from students for photocopying activities.

When questioned as to whether gender plays any role in copyright administration, the Copyright Administrator answered in the negative, saying that the law is gender-neutral and does not deal with specific gender issues. There was no willingness to consider the possibility of a relationship between the gender gap in enrolment across all levels of education, adequate access to learning materials and the role that copyright might play in exacerbating or ameliorating the gender inequities acknowledged to exist in Ghana's education system.

### **3.3.3 *Summary of qualitative analysis***

There is little up-to-date secondary literature on the copyright law of Ghana in general and no literature on the impact of copyright law on access to learning materials. Generally, academics have not shown interest in writing about IP in Ghana.

Photocopying books is a common phenomenon on university campuses. The extent of such copying can sometimes be the entire book and such copying is, except in very particular circumstances, clearly beyond the scope of permitted use under Sections 19 and 21 of the copyright law of Ghana.

The cost of procuring both electronic and printed materials is a challenge for the universities. The inadequate supply of textbooks results in widespread and often illegal photocopying of materials for study purposes. Librarians and lecturers interviewed say that enforcing copyright to restrict photocopying would undermine teaching and research in the universities.

Although the scope of permitted uses under the copyright law is potentially restrictive, some of the restrictions have not been interpreted in policy, regulation or case law and there is no regime of strict enforcement in place yet (at least not against universities and students). Rights-holders have, however, expressly threatened to commence litigation to enforce copyright 'at the appropriate time'. When that occurs, access to teaching and learning materials could be seriously and adversely impacted.

Though universities are primary users of copyright materials, they have been unable to participate in policy decisions on copyright matters. On the other hand, private rights-holders interviewed said that they had participated copyright law and policymaking discussions.

The research found that the bulk of materials used by educational institutions at all levels in Ghana are printed books. At the basic and secondary levels, electronic materials are not usually relied upon and it is only now that steps are being taken to include ICT in education at these levels. The situation is, however, different at the universities and other tertiary institutions. At the tertiary level, some institutions have limited access to electronic materials in the form of CD-ROMs, databases of literature searches and electronic journals. It was found that while hard-copy books are the most important resource for students, university researchers and faculty members prefer electronic journals and see electronic materials as a supplement to printed books. With respect to copyright infringement of electronic materials, this is not of much interest to private rights-holders since CopyGhana is currently focusing on photocopying activities of hard-copy materials on university campuses.

Sections 42 and 43 of Ghana's Copyright Act, which deal, among other things, with TPM anti-circumvention and penalties for offences, have far-reaching implications. Adusei has argued that the use of technological protection measures to lock up online materials is the newest threat to permitted uses under copyright law.<sup>38</sup> This new approach, of using encryption-based technology to protect copyright materials on the Internet, is considered by Dratler to be a gamble. There are two reasons for this: first, the private sector cannot continue to develop and maintain effective protective technologies to ward off potential infringers; and second, the adoption of technological measures to protect copyright works may obliterate uses that traditionally qualified as non-infringing.<sup>39</sup>

### 3.4 Conclusions and recommendations

This study has shown that, over time, the scope of subject matter eligible for copyright protection in Ghana has increased considerably. The increase has not been unexpected, as Ghana has been striving to follow its international treaty obligations. Also, copyright protection in Ghana reveals a pattern of incremental expansion in the duration of term of copyright protection, to the extent that Ghana has now adopted a TRIPs-plus approach, ie, the life of the author plus 70 years for literary works, instead of the TRIPs standard of life plus 50 years.

38 Supra note 36 at 224.

39 J. Dratler Jr. *Cyberspace: intellectual property in the digital millennium* (2000) Law Journal Press, New York, at 2-6.



It is said by some that the incremental expansion in the scope and duration of copyright in Ghana is intended to promote the creative talents of the citizenry. The practical reality, however, is that the current copyright environment in Ghana makes it difficult for copyright's main objectives — rewarding creativity and at the same time preserving access for teaching/learning material — to be balanced and realised. The problem is threefold. First, there is a general lack of public awareness of the existence, or the contents, of the Copyright Act, so people are not really motivated by copyright to be creative. Second, those who are aware of the content of the Copyright Act primarily seem to use it to promote their parochial interests. Indeed, it is common to find the issuance of 'anti-copyright-violation' orders in the media without any corresponding counter-campaign to enlighten the public about access-enabling flexibilities under the same Act. The effect then is that the public is not encouraged or enabled to take advantage of the exceptions or permitted uses that fall outside the scope of copyright protection. Third, the scope of permitted uses has not been advanced or clarified in any policy document so far. This has made the scope of permitted uses murky, thereby making both the enforcement of the law and legitimate access by users, difficult. The environment can, however, be changed to maximise effective access to learning materials in Ghana.

In attempting to answer the core ACA2K research question (is the copyright environment in Ghana maximising learning materials access?) the study confirms that it would be misleading to assess the impact of the copyright law on access solely from the perspective of formal law (statutes, case law) and academic writing. An appreciation of the practice on the ground is crucial to understanding the impact of the copyright regime. This is because, as the probe found, the practice on the ground is much different from the stipulations provided in formal law. Even though the scope of permitted use under the Copyright Act of Ghana is seemingly restrictive, people do not concern themselves with the requirements of the law when making photocopies or engaging in other pro-access activities. Thus Ghana finds itself in the situation of other ACA2K study countries, which is that both the existing laws and the practices potentially undermine access to knowledge by jeopardising the legitimacy of the entire copyright system. This situation is unfavourable for an effective system of access to copyright-protected materials in Ghana.

The way forward is to ensure that, before there is an enforcement crackdown, there is creation of better protection for learners who access copyright materials for legitimate, non-commercial purposes. Stricter enforcement of the law would, if begun before protection of user rights, undermine some of the key objectives of any progressive copyright system. It would stifle access to teaching and learning, which, in turn, would slow 'creativity' in Ghana. Enforcement mechanisms must be balanced against policies to improve the lot of students and researchers in Ghana.

The media should also take responsibility for the task of educating the public about the details of copyright protection in Ghana. This education, unlike the campaigns promoted by some influential parties thus far, should not be skewed in favour of private rights-holders. It should also promote the public interest in terms of access to teaching and learning materials.

Channels of communication must be created among copyright stakeholders, in order to widen copyright decision-making in Ghana. This would build trust among private owners and public users of copyright materials so as to make copyright administration more effective. The universities, as primary users of learning materials, should participate in policy decisions on copyright.

In order to contribute to policy debates and to manage their interests, the universities may need internal legal offices as part of the library systems, which would advise on copyright issues. It is erroneous for any academic or research institution to assume that it cannot potentially be held liable for excess photocopying by students and unofficial photocopy operators on their campuses. Universities and private rights-holders should collaboratively begin to develop 'access guides' in the tertiary institutions in order to regulate photocopying activities in ways that take full advantage of the copyright exceptions and limitations under the law and to educate students and researchers about copyright restrictions. The universities should disclaim liability, via the guides, for non-permitted photocopying activities on their campuses.

It is a positive development that the private universities have now also joined the public universities' library consortium CARLIGH in order to procure access to learning and research materials at a cheaper cost.

Subject-based collective societies should be established in Ghana in order to avoid the confusion currently surrounding the collective management system and to enable educational institutions and researchers to know where to seek permission when they want to exceed the limits of permitted use under the Act. Ensuring accountability in those collective societies is also necessary to serve as a morale booster for the public when paying for use beyond what is free under the law.

The government's policy on free textbooks should be extended to private primary and private secondary schools and to all tertiary institutions (private and public). Also, the libraries in private academic and research institutions should be supported financially by the Ministry of Education. At the same time, the government should heed the recent calls from the heads of private universities to reduce corporate tax on private universities. This would bring down the cost of higher education at private universities. Local publishing companies, such as the Ghana Universities Press, should be promoted, in order to achieve a sustainable local book industry. Furthermore, reducing taxes on materials used for publishing books locally could reduce the price of books in Ghana, making the local book industry more competitive.

The unnecessarily long term of copyright protection in Ghana restricts the public domain. The term should be reduced to a period of 50 years, the standard required by international law. The Attorney General's Justice Department could, among other things, flesh out the scope of free use, so that the public will know the limits of free use. Policies to implement the Disability Act should include pro-access mechanisms for disabled students and researchers. Such pro-access policies should be included in the subsidiary legislation (the LI) to implement the Copyright Act and the Disability Act. More generally and most importantly, the thin scope of permitted use under Ghana's copyright law deserves re-thinking to include more exceptions and to relax existing stringent exceptions in order to promote access to knowledge in Ghana. In this regard, experiences relating to copyright exceptions in other jurisdictions should serve as a guide.

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# Chapter 4

## Kenya

*Marisella Ouma and Ben Sihanya*

### 4.1 Background

Kenya, in East Africa, has a population of approximately 39 million people, with 42 ethnic communities.<sup>1</sup> English is the official language and Kiswahili is the national language. The adult literacy level is 73.6 per cent.<sup>2</sup> The country's economy relies largely on agriculture and tourism.

Kenya obtained independence from British rule in 1963 and has a multiparty political system. One of the goals of the government at the time of independence was to eradicate illiteracy.<sup>3</sup> The government recognised education as a basic tool to secure human resource development,<sup>4</sup> and it took several steps to provide education to all Kenyans. As a result, primary and secondary education in Kenya is free in public schools.<sup>5</sup> Universal Primary Education (UPE) was introduced in January 2003 and Universal Secondary Education (USE) was introduced in January 2008.<sup>6</sup> The provision of free basic education saw a sharp increase in public primary school enrolment,<sup>7</sup> with a gross primary school enrolment rate of 99 per cent and a total of 1.2 million children absorbed into schools.<sup>8</sup> This influx has heightened the demand for teaching and learning materials in schools.

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1 The World Bank estimated that Kenya's population was 38 million in 2008.

2 UNDP 2007/2008 *Human development report* (2008). Available at <http://hdr.undp.org/en/reports/global/hdr2007-2008/> [Accessed 1 June 2010].

3 B. Sihanya 'How IMF policies constrain policy space in Kenya's education sector' in Ben Sihanya (ed) *The impact of IMF policies on education, health and women's rights in Kenya* (2008) Action Aid International at 46.

4 Ibid.

5 Free Primary Education refers to the waiver of tuition fee and provision of text books and classroom material only.

6 Universal Primary Education (UPE) was first introduced in 1979, but had to be abandoned with the implementation of the Structural Adjustment Programmes (SAPs) in the 1980s. Universal Secondary Education (USE) is a misnomer. Both UPE and USE have faced major financial and administrative challenges.

7 Supra note 3 at 106.

8 Republic of Kenya *Sessional paper No. 5, a policy framework on education, training and research: meeting the challenges of the education, training and research in Kenya* (2006) Government Printers, Republic of Kenya.

The high number of students enrolled at these levels of the system will cause more students to seek tertiary/university education,<sup>9</sup> posing major challenges to access and quality. University education was heavily subsidised by the government until the early 1990s when, as a result of International Monetary Fund (IMF) Structural Adjustment, the conditions and government policy changed. Tertiary students were required to meet their own costs, including tuition, accommodation and the purchase of books and other learning materials.<sup>10</sup>

To ensure that university education was not completely out of the reach of those with no means, the Higher Education Loans Board (HELB) was established in 1995. The Board is mandated to, inter alia, give loans, bursaries and scholarships to needy Kenyan students pursuing their education within and outside Kenya. Initially the loans were available only to students attending public universities' regular or day programmes. In 2007, HELB extended the loan facilities to students attending private universities in the country. About 34 per cent of a HELB loan is earmarked for the student's personal expenses, including books, whereas the tuition loan is directed to universities.<sup>11</sup> Many times, however, the HELB loan allocated for a student's personal expenses is insufficient to cater for all necessary books, as the books are usually very expensive. Many tertiary students therefore photocopy — or purchase photocopies of — entire books, book chapters and other reading materials.

The government has enacted policies that aim to facilitate access to materials, including the National Text Book Policy on Publication, Procurement and Supply of June 1998.<sup>12</sup> The government's expenditure on education is equivalent to 7 per cent of the country's GDP.<sup>13</sup> The government fully subsidises primary school books and other primary-level teaching materials, which are sourced via government procurement procedures.

In order to support lifelong education, the Kenya National Library Service (KNLS) was established to provide reference, teaching and learning materials to the public. It is a state corporation established under the Kenya National Library

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9 Ibid.

10 Ibid.

11 S.O. Odebero, et al 'Equity in the distribution of HELB loans in Kenya in relation to student characteristics: an empirical analysis' (2007) 2:8 *Educational Research and Review* 209, August 2007. Available at <http://www.academicjournals.org/ERR/PDF/pdf%202007/Aug/Odebero%20et%20al.pdf> [Accessed 26 March 2009].

12 D. Rotich 'Textbook publishing in Kenya under a new policy on school textbook procurement' (2000) *Publishing Research Quarterly* 16, 2 June 2000.

13 Ministry of State for Planning, National Development and Vision 2030 *Kenya vision 2030; a globally competitive and prosperous Kenya* (2007).

Service Board Act.<sup>14</sup> KNLS currently runs public libraries in major towns in Kenya, as well as mobile libraries for remote areas.<sup>15</sup> In addition, entities such as the Nairobi City Council, embassies, high commissions and foundations run libraries in Kenya. There are also 'departmental libraries', which are not professionally run and which are rarely used. A departmental health library, for example, which was started about 17 years ago at Pumwani Hospital, is at present non-operational. There are libraries within educational institutions such as universities, colleges and schools. University libraries, in particular, have remained central to the management of scholarly communication.<sup>16</sup>

As mentioned, the introduction of IMF Structural Adjustment policies in Kenya resulted in limited funding for Kenya's public universities.<sup>17</sup> This has had an impact on the development of library and information services in universities. Public university libraries are not equipped to deal with the rising student enrolment numbers. As a result, academics in Kenya and in particular senior faculty members, have increasingly adopted strategies other than using the university library to obtain information. These strategies include: using personal contacts in the developed world to obtain reports, journal articles and reprints; purchasing books during travel outside the country; and the personal purchase of, or personal subscriptions to, journals. Among the academics at Kenyatta University (KU) and Moi University (MU), 50 per cent and 75 per cent, respectively, reportedly never enter the library.<sup>18</sup> With university students, there is increasing dependence on lecture notes and handouts as well as photocopying of textbooks — methods that are felt to be more reliable than depending on the university library.

14 Chapter 225, Laws of Kenya

15 The Kenya National Library Service started in 1967. It has only managed to set up libraries in provincial headquarters and in a few districts. This is short of the objective, which was to build libraries in all districts by 1980.

16 K. Shearer and B. Birdsall *The transition of scholarly administration in Canada* (2002). Available at [http://www.carl-abrc.ca/projects/kdstudy/public\\_html/pdf/bgground.pdf](http://www.carl-abrc.ca/projects/kdstudy/public_html/pdf/bgground.pdf) [Accessed 31 March 2009].

17 Supra note 3 at 107. See also Government of Kenya *Report of the presidential working party on education and manpower training for the next decade and beyond* (March 1988) (Chairman: James Kamunge). This report recommended the adoption of a cost sharing policy for financing education and for receiving loans.

18 J. Muema *University libraries in Kenya: a study of their practices and performance* (2004) dissertation submitted to the University of Humboldt. Available at <http://edoc.hu-berlin.de/dissertationen/kavulya-joseph-muema-2004-02-19/HTML/front.html#front> [Accessed 26 March 2009].



## 4.2 Doctrinal analysis<sup>19</sup>

In Kenya, copyright law is largely a 19th- and 20th-century phenomenon, beginning with the declaration of Kenya as a British Protectorate on 15 June 1895 and a colony in 1920.<sup>20</sup> Kenya's copyright law evolved from the 1842 United Kingdom (UK) Copyright Act through to the 1911 and 1956 UK Copyright Acts. These statutes were applied together with the English common law by virtue of the reception clause under the English East African-Order-in-Council 1897 (which applied to Kenya the substance of the English common law, the doctrines of equity and the statutes of general application in force in England as at that date).<sup>21</sup> The reception clause was substantially re-enacted as the Kenya Judicature Act of 1967. Kenya enacted its first domestic Copyright Act in 1966. The 1966 Kenyan Act consisted of only 20 sections, the last of which declared that the Act and 'any other written law' are the sole copyright regime. The current Act, the 2001 Kenyan Copyright Act, has 52 sections and the interpretation section of the Act states that the Act is an Act of Parliament designed to make provision for copyright in literary, musical and artistic works, audiovisual works, sound recordings, broadcasts and connected purposes.

Today in Kenya, the applicable copyright laws are found in statutes, the English common law and international treaties.<sup>22</sup> The Constitution does not deal with copyright matters directly and statutes are the main body of copyright law.<sup>23</sup>

19 This section is adapted from B. Sihanya's *Constructing copyright and creativity in Kenya: cultural politics and the political economy of transnational intellectual property* (2003) doctoral dissertation, Stanford Law School, Stanford, CA.

20 Ibid. 15 June 1895 is the date Kenya was declared a British Protectorate pursuant to, inter alia, the Berlin Conference of 1884 on the Partition of Africa (otherwise called the 'Scramble for Africa'). Ghai and McAuslan have discussed the political, economic and juridical process of annexing, declaring and exercising jurisdiction over the Protectorate and Colony of Kenya. See Y.P. Ghai and J.P.W. McAuslan *Public law and political change in Kenya* (1970) Oxford University Press, Nairobi; J.B. Ojwang *Constitutional development in Kenya: institutional adaptation and social change* (1990) ACTS Press, Nairobi at 29-34; and H.W.O. Okoth-Ogendo *Tenants of the crown: evolution of agrarian law and institutions in Kenya* (1991) ACTS Press, Nairobi.

21 Section 3 of the Judicature Act (Chapter 8, Laws of Kenya) would simply re-enact the clause in the Order-in-Council. See Ghai and McAuslan supra note 20 at 19-25 and Ojwang supra note 20 at 32-33. See especially R. Seidman 'The reception of English law in colonial Anglophone Africa revisited' (1968) *East Africa Law Review* at 1.

22 Local African case law is still limited in quantitative terms. Moreover, qualitatively, the cases have not developed any clear principles or doctrines to capture the experience and nuances in the cultural, educational and publishing industries. This can be attributed to the limited copyright expertise among members of the Bar and the Bench. For a study of these copyright laws in the context of Africa's political economy and cultural politics, see B. Sihanya *Constructing copyright and creativity in Kenya* (2003) supra note 19.

23 Indeed, the development of the Kenyan Copyright Act 12 of 2001 compares to other states: Tanzanian Copyright and Neighbouring Rights Act of 1999; Nigerian Copyright Act of 1988 (as amended); Malawian Copyright Act 9 of 1989; Zimbabwean Copyright Act, Chapter 26:01 and Ghanaian Copyright Law of 1985 (PNDCL 110). See J.O. Asein *The Nigerian Copyright Act with introduction and notes* (1994) S. Bookman, Ibadan; P. Kuruk 'Protecting folklore under modern intellectual property regimes: a reappraisal of the tensions between individual and communal rights in Africa and the United States' (1999) *American University Law Review* at 769.

The discussion of the sources of Kenya's copyright law must be seen in the context of Section 3 of the Judicature Act, which mandates the legal sources to be consulted in Kenya when determining a legal matter. Accordingly, there are five sources that need to be considered:

- The first source, the Constitution,<sup>24</sup> does not make any specific provision on copyright. Some of its provisions may, however, be read as legislation by metaphor, largely providing a broad framework within which copyright is to be constructed. These provisions include the protection of property (Section 75),<sup>25</sup> and freedom of expression and access to information (Section 79).<sup>26</sup>
- The second source of law mandated by the Judicature Act is statute law. As mentioned, since 1966 Kenya has had its own Act on copyright, with the most recent Act being the Copyright Act of 2001. This is the only statute that specifically applies to copyright.
- A number of doctrines developed under UK copyright statutes continue to apply, especially those under the 1956 UK Copyright Act. In addition, the procedural and evidentiary rules regarding copyright administration and litigation (especially in collecting societies and courts), are drawn directly or indirectly from UK legislation or practice, pursuant to the Schedule referred to in Section 3(1)(b) of the Judicature Act. Kenyan laws that further the application of English law and procedure include the Civil Procedure Act,<sup>27</sup> the Evidence Act,<sup>28</sup> the Appellate Jurisdiction Act,<sup>29</sup> rules of court and judicial precedents.
- The applicability of the common law — which is identified as a source of law in Section 3(1)(c) of the Judicature Act — to copyright is seriously contested.<sup>30</sup> Kenya and most African states liberally apply the common law of copyright, despite the provisions found in some copyright statutes that purport to abrogate the common law of copyright. Such statutes seek to limit which laws apply to copyright. Section 51 of the Kenyan Copyright Act of 2001 specifically states:

24 Constitution of Kenya Act 5 of 1969.

25 This extensively protects private property. It provides for relief including compensation in the case of compulsory acquisition.

26 The few contexts in which constitutional doctrines have been invoked in Kenya include R. Kuloba's reading of the copyright law under the shadow of the Constitution's equal protection clause (Section 82). It is very instructive here. He argues that, although the Constitution does not specifically deal with copyright, its spirit can be taken to prohibit discrimination against illiterate innovators who may not be protected under the doctrine of materiality under the Copyright Act. See R. Kuloba *Principles of injunctions* (1987) Oxford University Press, Nairobi at 124. Under the doctrine of materiality, only original works, which are expressed in tangible, fixed or material form, are protectable and promotable. See B. Sihanya *supra* note 19.

27 Chapter 21 of the Laws of Kenya.

28 Chapter 80 of the Laws of Kenya.

29 Chapter 9 of the Laws of Kenya.

30 No case has actually addressed this 'controversy'.

‘No copyright or right in the nature of copyright shall subsist otherwise than by virtue of this Act or of some enactment in that behalf’. This enactment was first carried out in Kenya as Section 17 of the Copyright Act of 1966, the clause having been copied from the 1911 UK Copyright Act.<sup>31</sup> The marginal note to the section reads, ‘Abrogation of common law rights’.

- The Judicature Act does not specifically mention international law, including treaties and conventions, as a source of law and, therefore, of copyright law in Kenya. This has not arisen as an issue and it is arguable that there was no reason to specifically mention these instruments. Kenya follows the British transformation doctrine, whereby treaties must be ratified and enacted by Parliament to become law.<sup>32</sup> Thus, treaties or agreements like the Berne Convention, the Universal Copyright Convention (UCC), the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement), the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) would, through transformation, constitute part of the written laws of the Kenya Parliament under Section 3 of the Judicature Act.

The development of Kenyan copyright law, beginning with the Copyright Act of 1966, essentially illustrates the (post-) colonial impact on the construction of Kenya’s copyright legal system. This process is discernible in the amendments of 1975, 1982, 1989, 1995 and 2000 and the supersession in 2001. The Copyright Act (Cap. 130) of 1966 marked the declaration of Kenya’s copyright independence to some extent. It repealed and replaced the UK Copyright Act of 1956 and Section 17 of the Act of 1966 sought to abrogate the common law of copyright. This development may be regarded as an attempt to de-link Kenyan from English copyright. The Copyright Act (Cap. 130) as revised in 1975 essentially consolidated national imperatives in an international context, with folklore protected as a literary, artistic or musical work. The intention was to preserve national cultural heritage and economic welfare, especially in the context of an international movement to protect natural and cultural heritage, as well as to promote the then-incipient interest in international trade in cultural products. The copyright amendments of 1982, 1989, 1992 and 1995 mainly introduced new definitions and redefined existing concepts under the Copyright Act, partly as a result of technological changes. These amendments introduced traditional relief for copyright infringement, including judicial remedies

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31 J. Chege *Copyright law and publishing in Kenya* (1976) Kenya Literature Bureau, Nairobi at 98. The 1911 Act sought to abrogate common law copyright in the UK.

32 D.J. Harris, *Cases and materials on international law* (1998) Sweet & Maxwell, London. See also the Vienna Convention on the Law of Treaties, 1969. It came into force, under Article 84, in 1980. Cf. Articles 28, 29 and 29bis of the Berne Convention, noting that as procedural and administrative provisions of Berne, these will not bind members of the World Trade Organisation (WTO), under Article 9 of the WTO TRIPs Agreement.

such as injunctions and damages. Criminal sanctions were also reformed. After Kenya acceded to the Berne Convention in 1993, the Attorney General exercised the rulemaking powers afforded that office under Section 18 of the 1966 Copyright Act and extended the protection of the Act to literary and artistic works belonging to nationals of other Berne member states.<sup>33</sup>

The current Copyright Act of 2001 was drafted mainly to meet the standards established under the TRIPs Agreement of 1994 and the 'WIPO Internet Treaties' (WCT and WPPT) of 1996.<sup>34</sup> It received presidential assent on 31 December 2001.

#### **4.2.1 Statutes and regulations**

Following numerous consultations by government with stakeholders and industry players, the new Copyright Act was passed by Parliament in 2001. It came into force in February 2003. In addition to the minimum standards of protection required by international conventions, the new law sets out stronger administrative structures and enforcement mechanisms. The implementing Regulations were passed in 2005.

##### *Works protected by copyright*

Section 22 of the Copyright Act provides for works that are eligible for copyright protection. These are:

- literary works (including computer programs);
- musical works;
- artistic works;
- audiovisual works;
- sound recordings;
- performances; and
- broadcasts.

33 This had been done in 1966 with respect to nationals of UCC Member States.

34 'WIPO Internet Treaties' is the code expression for the WIPO Copyright Treaty (WCT) of 1996 and WIPO Performances and Phonograms Treaty (WPPT) of 1996. The Bill went through various drafts in 1999, 2000 and 2001. Both of the authors of this chapter participated in these processes. Even after being passed, there were still difficulties regarding the institutional framework, especially the establishment, composition and structure of the 'competent authority'. This amorphous body is a legacy of the Berne Convention, which proposed its establishment and left specifics to individual states. It is also a legacy of the Act of 1966, which was not specific on this matter. Under the Berne Convention, a competent authority should fix equitable remuneration for the exploitation of broadcasting rights in case this is not agreed between parties (Article 11*bis*). Moreover, that authority has a mandate on translations. See Article II(9) of the Appendix to the Berne Convention (the Appendix is entitled 'Special Provisions Regarding Developing Countries'), incorporated to Berne under Article 21. See also Article 36 of the Berne Convention.

### *Nature of copyright*

The nature of copyright is clearly laid out in Sections 26 to 29 of the Copyright Act. Section 30 addresses performances, while Section 49(d) deals with folklore. The Act grants both economic and, in Section 32, moral rights.

Before looking at the precise scope of protection for the different kinds of works, it is noteworthy that the Act contains the following definition of 'copy':

'[C]opy' means a reproduction of a work in any manner or form and includes any sound or visual recording of a work and any permanent or transient storage of a work in any medium, by computer technology or any other electronic means.<sup>35</sup>

This definition covers 'any [...] transient storage of a work in any medium'. This is intended to cover new reproduction and transmission technologies relating to the production and distribution of literary and other copyrightable works. The Act recognises non-material and non-tangible forms of reproduction as well. This definition is significant in that the protection of non-tangible forms of reproduction may negatively impact access to digital teaching and learning materials.

The owner of a literary, artistic, musical or audiovisual work has the exclusive right to control the reproduction, in any material form, of the work, or its translation, its adaptation, its distribution to the public by way of sale, rental, lease, hire or loan, as well to control the importation or communication to the public and broadcasting of the works.<sup>36</sup> Furthermore, the Act stipulates that the term 'work' includes translations, adaptations, arrangements or other transformations of a work and public performance of the work.<sup>37</sup> These exclusive rights are, however, subject to limitations and exceptions, which are discussed below.

The right of making a work available is not yet expressly provided for by the Act, but this is likely to be included in the forthcoming amendments to the law. This right of making available is an extension of the right of communication to the public in the digital environment, which is provided for under the WIPO Copyright Treaty. This right grants the rights-holder greater control of the work when it is distributed over a digital network.

Broadcasting organisations have the right to control the fixation, broadcast and communication to the public of the whole or part of their broadcast.<sup>38</sup> The Act also grants performers exclusive rights to fix and reproduce the fixation of their performances and to broadcast or communicate their fixed performances to the public.<sup>39</sup> The rights-holder in a sound recording has the exclusive right to:

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35 Section 2 of the Copyright Act of 2001. There was clearly a need to capture technological change.

36 Section 26(1) of the Copyright Act.

37 Section 2 of the Copyright Act.

38 Section 29 of the Copyright Act.

39 Section 30 of the Copyright Act.

- reproduce the sound recording in any manner or form;
- distribute it to the public by way of sale, hire, rental, lease or any similar arrangements;
- import it into Kenya; and
- broadcast and communicate the material to the public.<sup>40</sup>

According to Section 33 of the Copyright Act, economic rights are transmissible as movable property by assignment, by licence, by testamentary disposition or by operation of law.

Moral rights apply to authors of literary, artistic and musical works as well as performers. Under Section 32 of the Copyright Act, the moral rights are limited to the right to be named or to claim authorship and the right to object to any mutilation or derogatory treatment that affects the honour or reputation of the author or performer.<sup>41</sup>

Works that are created by employees of the government are deemed to be the copyright of the government.<sup>42</sup> They do not automatically fall into the public domain, except for statutes and judicial decisions.<sup>43</sup>

Other works that automatically fall into the public domain are:

- works whose terms of protection have expired;
- works in respect of which authors have renounced their rights; and
- foreign works which do not enjoy protection in Kenya.<sup>44</sup>

While most government works are protected by copyright, many are accessible to the public for free over the Internet. Some hard-copy government documents, however, have to be purchased from the Government Printer, even though they may be accessed free of charge online.

### *Term of protection*

The term of protection for literary, artistic and musical works in Kenya is 50 years after the end of the year in which the author dies.<sup>45</sup> In the case of audiovisual works and photographs, the term of protection is 50 years from the end of the year in which the work was either first made available to the public or first published, whichever date is the latest.<sup>46</sup> Sound recordings are protected for 50 years after the

40 Section 28 of the Copyright Act.

41 Compared to Article 66 of the Berne Convention on the Protection of Literary and Artistic Works of 1886, Rome and Geneva, moral rights under the Copyright Act in Kenya are limited as the Act only protects the right of paternity and integration.

42 Section 31 of the Copyright Act.

43 Section 25 of the Copyright Act and Section 2 of the Act under definition of 'literary work'.

44 Section 45 of the Copyright Act.

45 Section 23(2) of the Copyright Act.

46 Ibid.

end of the year in which the recording was made.<sup>47</sup> Broadcasts are protected for 50 years after the end of the year in which the broadcast took place.<sup>48</sup> Section 23(3) and (4) contain special provisions for anonymous or pseudonymous works, as well as works of joint authorship. Thus, Kenyan copyright law essentially affords the standard term of protection required by the most relevant international copyright treaties and agreements such as the Berne Convention and TRIPs.

### *Exceptions and limitations*

The Copyright Act contains several general exceptions and limitations to the exclusive rights granted. In particular, in an attempt to balance rights-holders' rights with the interests of users, Section 26(1) of the Copyright Act provides, *inter alia*, that copyright in literary, musical, artistic works or audiovisual works does not include the right to control:

- 'fair dealing' for purposes of criticism, review, scientific research, private use and reporting of current events for as long as the author is acknowledged as such;<sup>49</sup>
- the inclusion of not more than two short passages of a copyright-protected work in a collection of literary or musical works that is for use by an educational institution;<sup>50</sup>
- the broadcasting of a work, or reproduction of a broadcast, for educational purposes in an educational institution;<sup>51</sup> or
- reproduction under the direction or control of the government, or by public libraries, non-commercial documentation centres and research institutions, 'in the public interest' and where no income is derived from the reproduction.<sup>52</sup>

The Kenyan doctrine of fair dealing is problematic, particularly because no definition exists for the requirement of fairness.

Furthermore, for teachers and learners generally, the law does not permit the reproduction of whole works for teaching purposes. Rather, permitted reproductions are limited to the inclusion of only two short passages in collections to be used for instructional purposes. If enforced, this provision would affect the preparation of course packs for use by educational institutions. Any use beyond the two short passages allowed by law requires users to obtain express authority from the right-holders.

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47 Ibid.

48 Ibid.

49 Section 26(1)(a) of the Copyright Act.

50 Section 26(1)(d) of the Copyright Act.

51 Section 26(1)(e) and (f) of the Copyright Act.

52 Section 26(1)(h) of the Copyright Act.

The only entire works that are available for teaching purposes under the exceptions are broadcasts. This provides access to teaching and learning materials by way of broadcasts.

There are no specific provisions for exceptions in relation to distance learning and e-learning.<sup>53</sup>

Regarding the exception listed above for public libraries and archives, the two main issues to be considered are how one defines the 'public interest' and how one defines non-commercial institutions. Private libraries, research institutions and documentation centres would not benefit from this exception as they are normally deemed to be commercial. The issue of public interest can also be subjective.

The exceptions and limitations contained in the Kenyan Copyright Act also do not specifically address people with disabilities, including the visually impaired. Instead, the law makes it clear that the right to control the adaptation and translation of any work vests in the right-holders. This means that before any person translates a work into Braille format, for instance, such a person must obtain permission to do so from the right-holders.

The use of copyright works for purposes of reporting by the media is allowed under fair dealing. Public lectures and speeches can therefore be quoted freely by the media and included in news reports.

The exceptions and limitations as drafted under the current law are vague and, at the same time, quite narrowly construed. This gives the rights-holder more control over the use of their works and at the same time limits the dissemination of information without the rights-holder's authority. The law, however, makes provision for licensing agreements under Section 33 of the Copyright Act. This licensing may also be through collective management organisations (CMOs) such as the reprographic rights organisations (RROs). Libraries and educational institutions are expected to take out licences in order to reproduce copyright-protected works if the use is not covered by the exceptions and limitations. Some licenceors, however, seek royalties and related payments for works already in the public domain or works in which copyright never subsisted in the first place.<sup>54</sup> Other licences simply provide what is already permitted by the Act through copyright exceptions and limitations. KOPIKEN, a reprographic rights organisation, has been developing standard licence templates for the relevant users.

As this chapter is being prepared in mid-2010, the Copyright Act is being reviewed for amendment so as to include improved exceptions and limitations in relation to the visually impaired, libraries and educational purposes. This is an ongoing process

53 B. Sihanya 'Intellectual property, quality assurance and ISO in Kenyan universities' (2008) 4:1 *Law Society of Kenya Journal* at 35.

54 Supra note 19.



that is expected to be completed in 2010. By virtue of their academic work and work for the Kenya Copyright Board, ACA2K researchers Marisella Ouma and Ben Sihanya, the authors of this chapter, are already deeply involved in this Copyright Act review process.

### *Parallel importation*

Importation of any copyright work into Kenya remains under the control of the rights-holder. As a result, save in the case of sound recordings, without the express authority of the rights-holder, a third party may not, without the express authority of the rights-holder, import copyright-protected works into Kenya which have been legitimately released in other countries.<sup>55</sup> This, for instance, affects access to learning materials that are produced outside Kenya but are being sold at higher prices in Kenya than elsewhere.

### *Compulsory licensing*

There is no specific provision on compulsory licensing. However, Section 26(1)(h) permits:

the reproduction of a work by or under the direction or control of the Government, or by such public libraries, non-commercial documentation centres and scientific institutions as may be prescribed, where the reproduction is in the public interest and no revenue is derived there from.

From the above, it is clear that the government or a public library may order the reproduction of a work in the case of the public interest being served. However, the Act does not define what constitutes the public interest.

### *Digital rights management (DRM) and technological protection measures (TPMs)*

Although the Act recognises copyright in computer software, the law does not include specific provisions in relation to exploitation of copyright works in the digital environment. Rather, the provisions contained in the law are presumably seen to apply to the digital environment as well. The relevant provisions include those covering communication to the public, rental and distribution of copyright-protected works.

However, having said this, there is one important set of provisions directly targeting the digital environment in Section 35(3) of the Copyright Act, which states that copyright is infringed by anyone who:

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<sup>55</sup> Section 26(1) of the Copyright Act.

- (a) circumvents any effective technical measure designed to protect works; or
- (b) manufactures or distributes devices which are primarily designed or produced for the purpose of circumventing technical measures designed to protect works protected under this Act; or
- (c) removes or alters any electronic rights management information; or
- (d) distributes, imports, broadcasts or makes available to the public, protected works, records or copies from which electronic rights management information has been removed or has been altered without the authority of the right holder.

This legal protection of technological protection measures (TPMs) is problematic. TPMs have serious consequences for access. TPMs are already limiting access to e-books, articles, databases, newspapers and other educational materials that would otherwise have been accessible. The ongoing discussions to amend the Kenya Copyright Act are unlikely to repeal the protection of TPMs, but reforms could be enacted to limit the scope of TPMs and reduce their adverse impact on access to educational materials. There was no clear or reasoned justification for the aforementioned legal protection of TPMs in the Kenyan context at the time of enactment of the 2001 Copyright Act. It may be that the main intention of the legislators was to bring Kenya's law in line with international standards, especially the WIPO Internet Treaties (the WCT and WPPT of 1996, which, however, Kenya has not ratified).

A case can be made to review the legal protection of TPMs because they jeopardise existing statutory limitations and exceptions. While TPMs enhance enforcement of rights in the digital environment, they also have the potential to limit access to works that would, in the non-digital sphere, be available to users under exceptions and limitations. TPMs, in effect, negate the purpose of exceptions and limitations, as the law makes it illegal to circumvent any technical devices that have been installed by right-holders to prevent use by third parties. Users are thus expected to seek the permission of right-holders in order to access the information, even if the intended use falls under the exceptions and limitations recognised by law.<sup>56</sup>

Protection of TPMs will become an even bigger issue if and when the exceptions and limitations accorded by the law in Kenya are expanded. At the moment the

56 Debate in the United States led to the proposed 'Cohen Doctrine' (named after Prof J.E. Cohen), which states that one has a right to hack copyright systems in order to secure fair use, to the effect that the US Digital Millennium Copyright Act should not criminalise measures that circumvent DRM or TPMs to facilitate access to non-copyright materials. See J.E. Cohen 'Some reflections on copyright management systems and laws designed to protect them'; L. Lessig *The future of ideas: the fate of commons in a connected world* (2001) Random House, New York at 163; and P. Goldstein *Copyright's highway: from Gutenberg to the celestial jukebox* (2003) Stanford University Press, Stanford, California, esp. Chapter 6 'The answer to the machine is the machine'.

exceptions and limitations are very narrow, allowing the rights-holder to have firm control over the use of copyright-protected works.

### *Traditional cultural expressions (TCEs) and other works*

The provisions for the protection of traditional cultural expressions (TCEs) under the Act are limited. TCEs are governed by Section 2 and Section 49(d). Section 49(d) provides that if one wishes to make use of TCEs for commercial purposes, the person has to seek authority from the Attorney General. Therefore, the use of TCEs for educational purposes is not subject to any restrictions as long as the usage is non-commercial.

### *International obligations*

Foreign works are granted the same protection as local works by extension of the provisions of the Copyright Act under Section 49. These provisions are implemented through the Copyright Regulations of 2005. However, this extension of protection is restricted to copyright-protected works from countries that are party to international conventions to which Kenya is also a party. Kenya is party to several international treaties and conventions dealing with copyright and related rights, most importantly:

- The Berne Convention; and
- The WTO TRIPs Agreement

### **Berne Convention of 1886 (Paris Act 1971)**

Kenya is a member of the Berne Convention for the Protection of Literary and Artistic Works of 1886 (Paris Act 1971). The Copyright Act of 2001 incorporates provisions of the Berne Convention which provide for a minimum standard of copyright protection in Berne member states. However, the Kenyan Copyright Act contains no specific provisions in relation to the Berne Appendix. The Berne Appendix provides for a compulsory licensing regime for translation and reproduction of texts—a regime available only to developing countries. Under Section 26, the Act grants the exclusive right of creating adaptations and translations to the rights-holder, subject to the aforementioned copyright limitations and exceptions. One reason for the non-use of the Berne Convention Appendix in Kenya is, arguably, that the medium of instruction in educational institutions in Kenya is English. The compulsory licensing provisions of the Berne Appendix are useful only where the works are to be translated into a local language other than widely spoken languages such as English, Spanish and French.

### TRIPs Agreement of 1994

Kenya is a member of the World Trade Organisation (WTO) and was therefore required to comply with the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) by January 2000. It did, however, not meet the deadline in most aspects of IP. The Copyright Act of 2001 was passed and assented to in December 2001 to ensure that the copyright law was in line with existing international laws on copyright and related rights.

### WIPO Internet Treaties (WCT and WPPT) of 1996

Although Kenya participated in the WIPO Diplomatic Conference of 1996, which adopted the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), the country has not yet ratified these treaties. The Copyright Act has, however, made provisions to incorporate some sections of the treaties into Kenya's copyright law. For instance, Section 35 already contains far-reaching protection of TPMs which, as mentioned above, have the potential to become a major barrier to accessing digitised educational material.

### *Laws outside copyright*

Apart from the Copyright Act of 2001, there are several other laws that potentially have an impact on access to teaching and learning materials in Kenya. Such laws can be categorised as follows: education and training laws; library and archival laws; communication laws; and laws on museums.

### Education and training laws

Kenya's education and training laws affect access to knowledge directly and indirectly, in so far as they regulate access to education, which, by and large, guides individuals as to where and how to acquire knowledge and what knowledge to acquire. The relevant laws include, but are not limited to, the Education Act (Cap. 211), the Universities Act (Cap. 210B), the Board of Adult Education Act (Cap. 233) and the Council of Legal Education Act (Cap. 16A).

### Library and archival laws

Public libraries play a vital and unique role in assisting the independent learner and are key deliverers of literacy from the earliest age. The legislation in Kenya that governs libraries includes the Kenya National Library Service Board Act (Cap. 225) and the McMillan Memorial Library Act (Cap. 217).

### *Kenya National Library Service Board Act, Chapter 225 of the Laws of Kenya*

This legislation establishes the Kenya National Library Service Board, whose functions, among others, are to promote, establish, equip, maintain and develop

libraries in Kenya as a national library service. The Board further acquires books produced in and outside Kenya and such other materials and sources of knowledge necessary for a comprehensive national library. It also publishes the national bibliography of Kenya to provide bibliographical and reference services.

#### *McMillan Memorial Library Act, Chapter 217 of the Laws of Kenya*

This Act establishes the McMillan Memorial Library, the objectives and scope of which include the establishment, maintenance and development of a reference library, a reading room and a lending library in Nairobi. Furthermore, the library is mandated to circulate books.

#### **Communication laws**

The media play an important role as a source of information and education and entertainment. The following acts are relevant in this context:

#### *Kenya Communications Act 2 of 1998, as amended in 2008*

The controversial Kenya Communications Act has been widely criticised because it is generally seen as limiting access to knowledge. The Act gives the government the power not only to seize telecommunications equipment, but also to remove radio and television stations from the air at will. The law authorises the state-funded regulator, the Communication Commission of Kenya (CCK), to control all aspects of programming, from content to scheduling. It further gives sweeping powers to the Minister of Internal Security to seize broadcasting equipment as and when the Minister feels public tranquillity is threatened. Thus, this Act inhibits access to knowledge because it curtails journalists' freedom of expression and the independence of the media. The Kenya Communications (Amendment) Act of 2008 is being debated because of the foregoing and related issues.

#### *Media Act 3 of 2007*

This is an Act of Parliament for the establishment of the Media Council of Kenya. It also addresses the conduct and discipline of journalists and the media, as well as self-regulation of the media. The Media Council was established to promote and protect freedom and independence of the media and to promote professional standards among journalists. The Act's objectives of promoting freedom and independence of the media have the potential to play a key role in ensuring access to knowledge.

#### *Books and Newspapers Act, Chapter 111 of the Laws of Kenya*

This Act provides for the registration and deposit of books and newspapers, the printing of books and newspapers and the execution of bonds by printers and

publishers of newspapers. Significantly, the Act requires authors to deposit their works with the Registrar of Books and Newspapers, copies of which are sent to the National Archives and libraries.

#### Laws on museums

##### *National Museums and Heritage Act 6 of 2006*

This Act provides for the establishment of National Museums of Kenya whose functions, among others, are: to serve as national repositories for things of scientific, cultural, technological and human interest; to serve as places where research and dissemination of knowledge may be undertaken; and to protect and transmit the cultural and natural heritage of Kenya. It is quite clear from the foregoing that museums are seen as playing a key role in the preservation and dissemination of knowledge.

#### **4.2.2 Judicial and administrative decisions**

There are several copyright cases that have been decided by the Kenyan courts. Some of these cases could, however, not be accessed by the researchers as they are unreported in the relevant law reports and are not documented elsewhere.<sup>57</sup>

##### *Alternative Media Ltd v Safaricom, Civil Case 263 of 2004*

In this case, the plaintiff asserted ownership of copyright in an artistic work. The plaintiff, a media communication and advertising company, brought a suit against Safaricom, a mobile phone network in Kenya that dispenses mobile phone airtime to its customers through the sale of scratch cards. The plaintiff's case was that the defendant had used the plaintiff's artwork on scratch cards without the plaintiff's authority. The plaintiff claimed that the defendant had infringed the plaintiff's copyright and asked the court for compensation and to permanently restrain the defendant from committing further infringement.

The court held that the plaintiff had proved it was the owner of the copyright in the artistic works in issue and that the defendant had infringed this copyright. The court therefore granted an injunction to restrain the defendant from infringing the plaintiff's copyright. The defendant was ordered to destroy all infringing copies of the scratch cards. The court in this case addressed the issue of ownership of copyright and decided that the rights-holder has the exclusive right of reproduction of copyrighted works.

<sup>57</sup> Most of the cases, many of which are unreported or not officially published, are reported and analysed in B. Sihanya *supra* note 19. Cf. B. Sihanya 'Copyright law in Kenya' (in press, June 2010) *International Review of Intellectual Property and Competition Law*, Journal of the Max Planck Institute for Intellectual Property, Competition and Tax Law, Germany.

*Jiwani, Nevin v Going Out Magazine & Another, Civil Suit 336 of 2003*

The plaintiff in this case was the author and owner of the copyright in *Go Places Magazine*, *Go Places Restaurant Guide* and *Having Fun Magazine*. The plaintiff complained that the defendant infringed the plaintiff's copyright in *Go Places Magazine* and *Go Places Restaurant Guide* by reproducing and authorising the reproduction of artistic works and text without obtaining permission or licence. The artistic works in question were photographs, a logo, design and text from the plaintiff's magazine. The second complaint was that the defendant was passing off its magazine as being that of the plaintiff, thereby injuring and causing loss to the plaintiff.<sup>58</sup>

The defendant's case was that it had not infringed the plaintiff's copyright, as claimed, because: the plaintiff did not have copyright in the photographs, logo and textual script in question; and that even if the copyright was vested in the plaintiff, this did not preclude the defendant from creating similar works, provided the defendant had done so by working independently.

The defendant argued that for one to have copyright it was necessary for one to show that knowledge, judgment, labour and skill had been brought to bear and sufficient originality had been bestowed thereon. Furthermore, the defendant argued that: copyright does not confer monopoly in the authors and it was permissible for another person to reproduce the same work by independent endeavour; and that there was no offence in photographing an object that had been photographed previously by someone else. The defendant argued that the photographs belonged to Pavement Café, where it had acquired the photographs; the wording in dispute had been received from the client restaurant itself and did not belong to the plaintiff.

The court was persuaded that the plaintiff's works were copyrightable as sufficient labour and skill had gone into them by way of design, formatting, collection, photography and development. The court thus held for the plaintiff, saying that the defendant's work was a case of 'plain copying and reproduction of the plaintiff's work, including the errors therein'. It therefore refuted the defendant's argument that the work had been done by an independent mind. The court granted the plaintiff's application for an interim prohibitive injunction.

Most importantly for purposes of this report, the court addressed the issue of ownership and infringement. From this and other cases, it is clear that course packs consisting of copyrightable materials cannot be compiled by simply copying and packaging another person's works without permission. The compilation may be done only if the course pack contains material that was utilised in accordance with the aforementioned copyright exception, which allows two short passages of a

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58 Ibid.

copyright-protected work to be used without the permission of the rights-holder. In the case at hand, the plaintiff's actions did not fall within the scope of any copyright exception and limitation under the Copyright Act. Therefore, these actions would have required express authority from the rights-holder.

*Paul Odalo Abuor v Colourprint Ltd & Text Book Centre Ltd (2002) (unreported)*<sup>59</sup>

In this case, the High Court in Nairobi issued an ex parte order restraining Colourprint Ltd and Text Book Centre Ltd from printing, selling or distributing a book entitled *White highlands no more—a modern political history of Kenya*. Search and seizure orders were also granted. The plaintiff was permitted to enter the premises and inspect and photograph all documents and equipment relating to the printing, sale or supply of the book.

This case illustrates that courts in Kenya uphold the rights of copyright-holders as provided for under the Copyright Act. Once it is proved that a person has copyright in the work, the court may grant an order that will stop the distribution of the copyright works. The case also shows that infringement or piracy is institutionalised in Kenya and is not merely the work of streetwise actors or gangs. There is a market and huge demand for pirated products, especially where educational materials are concerned. The high demand for education, as discussed above, partly explains the high incidence of infringement and piracy.

*Margaret Ogola & 3 Others v David Aduda and Another (unreported)*<sup>60</sup>

Margaret Ogola, a medical practitioner, wrote a novel entitled *The river and the source*. It was, at one time, a literature set book for secondary school students in Kenya. The defendant authored a students' guide book to the novel and used, inter alia, the picture of a child from the cover of the original novel. Ogola and her publisher sued Aduda and his publisher for copyright infringement. In the interlocutory proceedings, the defendants pleaded fair dealing on the grounds of criticism and review. The court declined to grant an interlocutory injunction, arguing that there were triable facts. This case is significant, especially in relation to education, entertainment and cultural development: the defendant had used the plaintiff's work for purposes of review through a guide book for students, which is allowed under Section 26(1) of the Copyright Act in terms of fair dealing.

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<sup>59</sup> Ibid.

<sup>60</sup> Ibid.



*Music Copyright Society of Kenya v Parklands Shade Hotel t/a Klub House, Civil Suit 1458 of 2000*

The plaintiff in this case filed a suit against the defendant seeking an injunction restraining it from playing or broadcasting any music, either recorded or performed by a live band, which is the subject of an agreement between the plaintiff and its members. The application was based on the grounds that the defendant had continued to publicly perform music without obtaining the required licence from the Music Copyright Society of Kenya (MCSK). It further sought damages for infringement of copyright and conversion, together with costs and interest. The plaintiff simultaneously filed an application seeking a temporary restraining order pending the hearing and determination of the suit.

The defendant opposed the applications on the basis that the MCSK was not the sole licensing body of copyright in all musical works in Kenya and, further, that MCSK could enforce only the rights of members who had assigned their rights to MCSK. The defendant also argued that they had continually paid satellite broadcast provider MultiChoice Africa the requisite copyright fees and that a collection of royalties would amount to double taxation.

The court held that the plaintiff was not the sole licensing authority that enforces copyright in all musical works. According to the court, only the owner of copyright has the right to enforce compliance. The court did not grant the plaintiff the injunction sought on the basis that the plaintiff had not established a *prima facie* case with a probability of success and the defendant would suffer irreparable damage should the order sought be granted.

Collective management is recognised by copyright law, especially in areas where the individual rights-owner cannot collect royalties from users individually. The court, in this case, failed to address the copyright issues enshrined in the law and the judgment in this case is bound to have far-reaching effects on collective management in all areas of copyright, including reprographic rights.

As discussed above, the exceptions and limitations in the Copyright Act of 2001 are narrowly crafted. Users must usually obtain a licence to access the copyright-protected work to ensure they do not violate copyright law. It is not clear from the record, however, whether the defendant claimed to have obtained such a licence from another CMO.

Essentially, this case points to the problem of proliferation of CMOs or RROs. The existence of too many CMOs is detrimental to institutional practices and the ability to exploit licences. It defeats the purpose of having a one-stop centre for rights clearance if it is not clear who manages which rights.

*Macmillan Kenya (Publishers) Ltd v Mount Kenya Sundries Ltd, Civil Suit 2503 of 1995*

The plaintiff brought a case against the defendant seeking judgment for, first, an injunction stopping the defendant from selling or offering for sale the Kenya Pictorial Tourist Map. Second, the plaintiff sought an order for delivery up of such maps or any map based on the Kenya Pictorial Tourist Map. Third, an inquiry was sought as to damages or alternatively an account of profits and payment of all such sums found and due upon completing such inquiry. Fourth, the plaintiff requested interest and the costs of the suit.

The plaintiff alleged that the defendant's map, Kenya Pictorial Tourist Map, infringed on its copyright in maps named the Kenya Tourist Map and Kenya Traveller's Map. The court, in granting the plaintiff's request, held that: infringement of copyright arises not because a person's work resembles another but because one has copied all or a substantial part of another's work.

The judgment in this case affirms that authors have exclusive rights of reproduction and that anyone who copies a substantial part of a copyright-protected work or the whole work will be liable to legal action. As a result of the limited scope of existing copyright exceptions and limitations, educational institutions and libraries may not reproduce all or substantial parts of a work for use by students if they have not obtained a licence.

#### **4.2.3 Summary of doctrinal analysis**

The copyright law in Kenya grants exclusive rights to the right-holders, subject to specific exceptions and limitations. In general, any third party who wishes to use the works has to obtain permission from the right-holders, which would be in the form of a licence or an assignment. Licences for reprography have to be taken out by educational institutions and libraries through a reprographic rights organisation, in this case KOPIKEN. The scope of protection is very broad and use of a copyright-protected work, even where the use is to facilitate access to teaching and learning materials, will therefore usually constitute copyright infringement.

The following factors, in conjunction with this strict copyright protection regime, further impede access to learning materials in Kenya:

- the current copyright law has narrow exceptions and limitations;
- access to digital learning materials via circumvention of TPMs and devices to facilitate access, are prohibited;
- the law has no clear provisions on incentives for building the commons (or the public domain);
- parallel importation is not allowed under Kenyan copyright law; and

- although the law has provisions for licensing through KOPIKEN, the provisions are narrow and have not been invoked to deal with the issue of access to learning materials and no records of decided cases on compulsory licensing are available.

The Kenyan copyright law complies with Kenya's obligations under the Berne Convention and TRIPs. It is noteworthy, however, that in some instances the protection awarded by Kenya's Copyright Act goes beyond what is required by the treaties and agreements. The legal protection of TPMs under Section 35(3) of the Copyright Act is arguably the most relevant example for the purposes of this report. This is because the legal protection of TPMs by means of anti-circumvention provisions further marginalises the already insufficient body of copyright exceptions and limitations, as TPMs do not usually distinguish between uses that require authorisation and uses that fall under one of the statutory copyright exceptions and limitations.

Judicial decisions in the area of copyright are scarce. One of the reasons advanced is the unwillingness of rights-holders to pursue copyright infringement through the court system. Lack of, or limited, knowledge on copyright and related rights is also a contributory factor. The courts, as discussed above, rarely address copyright issues. If they do, they either fail to apply the law as required or merely repeat, in a non-interpretive manner, what the law states. So far, there have been no decided cases on access to teaching and learning materials. The closest is the inconclusive case of *Margaret Ogola & 3 Others v David Aduda and Another*.

From the case of *Music Copyright Society of Kenya v Parklands Shade Hotel t/a Klub House*, it is clear that the courts recognise that users have to seek authority from rights-holders to use their works. Educational institutions and libraries are required to obtain a licence from the right-holders where possible, through the CMOs, in order to reproduce educational material, when reproduction does not fall under the exceptions and limitations in Section 26(1) of the Copyright Act.

It should be noted that the decisions of the higher court are binding on subsequent cases. So, where the court fails to properly address the legal issues at hand, such decision, unless overruled by the highest court, will affect subsequent cases.

### **4.3 Qualitative analysis**

In order to assess the practical impact of copyright law and other laws on access to learning materials in Kenya, it was necessary to examine secondary materials on the subject in Kenya. This secondary literature review was then augmented by qualitative impact assessment interviews with selected subjects.

### 4.3.1 Secondary literature

The secondary literature we gathered covers various copyright issues, such as copyright protection, licensing and enforcement. It is notable, however, that some of the books are written by book publishers who look at copyright from the publisher's point of view and thus a (generally) protectionist perspective.

Henry Chakava, in his book *Publishing in Africa: one man's perspective*,<sup>61</sup> addresses book publishing in diverse works and fora, including the dependence of Kenya's book publishing industry on UK publishing houses. Chakava is an author, leading publisher and chairman of East African Educational Publishers (EAEP), the successor of the British Heinemann Educational Books. Chakava looks at the role of private publishing ventures, Africa's losses arising from the skewed international copyright regime, obstacles to the reading culture in Africa and book marketing, distribution and pricing. With regard to copyright, the author analyses African and international copyright noting that copyright laws in Kenya and Africa are generally not administered equitably. He argues that Africa has 'very little or nothing to sell to the outside world'.<sup>62</sup> According to the author, textbooks, which constitute nearly 90 per cent of Kenya's total publishing output, can barely travel within national boundaries, let alone outside Africa. Chakava observes that a large proportion of textbooks and fiction works are published by European publishers or their African branches, which means that copyright is essentially held by publishers in the North.

Chakava argues that rights-holders in the global North cling to their rights. Those who grant rights to their African counterparts limit these rights to a particular territory, so that works cannot be circulated or reprinted in other areas. Meanwhile, African authors do not have the capacity or experience to defend their copyright. However, NGOs such as the African Publishers Network have become more involved in the publishing industry and enforcement of copyright laws.

The author states that compulsory licensing is regarded by some as a tool that can be used to protect Kenya's economic, educational and cultural interests. Chakava is of the opinion that compulsory licensing should be applied where foreign (especially British) publishers have declined to publish textbooks locally or to issue licences for major textbooks.<sup>63</sup>

Relatedly, in *Copyright law and publishing in Kenya*,<sup>64</sup> John Chege discusses the evolution of copyright law in Kenya in the context of developments in printing technology and Anglo-American economic, political and cultural imperialism.

61 H. Chakava *Publishing in Africa: one man's perspective* (1996) East African Educational Publishers, Nairobi.

62 Ibid.

63 Supra note 63 at 75-94.

64 J. Chege *Copyright law and publishing in Kenya* (1976) Kenya Literature Bureau, Nairobi.

The author argues that the country's copyright regime has prevented the rise of indigenous publishing, which is outdone by foreign competition. He states that Kenya suffers from the 'illusory reciprocity' represented in the Berne and Geneva Conventions.<sup>65</sup> He is of the opinion that an abrogation of international copyright treaties, such as the Berne Convention and the Geneva Convention and a subsequent nationalisation of foreign publishing interests, might encourage growth of the local publishing industry.

In their book *Publishing and book trade in Kenya*,<sup>66</sup> Ruth Makotsi and Lily Nyariki expound on the difficulties experienced by Kenyan publishers in marketing, promoting and distributing books. The authors point to the fact that copyright law does not protect unpublished works from infringement. Compared to publishers, most authors are not in a financial position to institute lawsuits against those involved in plagiarism of unpublished manuscripts. The book also states that some university lecturers exploit students by asking them to carry out research and later the lecturers convert the manuscripts into their own publications. The authors contend that copyright law in Kenya does not safeguard the interests of such authors.

Ben Sihanya, in his article 'Copyright law, teaching and research in Kenya',<sup>67</sup> looks at the role of copyright in technological, economic and cultural innovation and in creativity and development, in Kenya. The author focuses on the development of copyright law, the implementation of the Copyright Act of 2001 and teaching and research on copyright in Kenya. He argues that Kenya's copyright law is largely Western-oriented as a result of colonialism, neo-colonialism and the fact that many of Kenya's economic and legal actors, who have shaped Kenya's copyright law, have internalised values and interests embodied in Western and international copyright law. According to the article, copyright-owners are losing millions of shillings due to infringement, piracy and counterfeiting. This he attributes to the fact that Kenya does not have a way of monitoring copyright transactions and the role of identifying infringers is largely left to the copyright-owners. Sihanya further argues that the penalties provided for copyright infringement are not sufficient to control infringement. He urges African governments to pursue copyright issues with the same vigour they show towards issues of IP and access to public health.

Marisella Ouma gives an overview of copyright law in Kenya in light of the enactment of the Copyright Act of 2001. She briefly analyses the impact of the then-

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65 See the Geneva Convention 1971.

66 R. Makotsi and L. Nyariki *Publishing and book trade in Kenya* (1997) East African Educational Publishers, Nairobi and Kampala.

67 B. Sihanya 'Copyright law, teaching and research in Kenya' (2005) *East African Law Journal* 2.

new law on rights-holders as well as on users.<sup>68</sup> In her article, 'Optimal enforcement of music copyright in Sub-Saharan Africa, reality or myth', the author gives an in-depth analysis of copyright protection and enforcement in the music industry in Africa.<sup>69</sup>

Sihanya, in *Constructing copyright and creativity in Kenya: cultural politics and the political economy of transnational intellectual property*, evaluates copyright and the infrastructure for literary creativity in Kenya.<sup>70</sup> In his research, the author finds that the public, private and non-profit sectors do not efficiently support training of authors, writing, publishing, distribution and access to literature. He also notes that the construction of literary copyright denies (budding) authors, composers and performers efficient and equitable recognition, compensation or protection. Free-riders exploit creativity and investment of skill, judgment, time, money and labour. Access by readers, authors and researchers is also constrained through technologies and laws such as the digital anti-circumvention laws enacted under the WIPO Copyright Treaty of 1996 (which Kenya has signed, but not yet ratified) and the Kenya Copyright Act of 2001. The author argues that the textured nature of copyright, creativity and sociocultural development require inter-disciplinary approaches among creative writers, cultural historians, political economists, IP lawyers and constitutionalists. Other proposals from the same author for reconstructing copyright and the infrastructure include conducting a cost-benefit analysis of the industry for efficient investment; strengthening community and mobile libraries; encouraging authors through training, prizes and commissions; facilitating international co-publishing arrangements; registering and documenting Kenyan creativity and copyright; and ensuring the Kenya Copyright Board operates efficiently and with integrity.

Nancy Karimi, the Chair of the Kenya Publishers Association (KPA), notes in her paper that the majority of people are ignorant about the existence of copyright relating to books, music and films and that the high level of piracy has become a barrier to the publishing industry in Kenya.<sup>71</sup> Karimi stresses the importance of copyright protection in the development of the publishing industry. A strong protection of copyright would be an important way of fostering the growth of knowledge, while contributing to the expansion of creative industries and protecting cultural diversity in developing countries. She argues that copyright

68 M. Ouma 'The Copyright Act 2001: a new era for copyright protection In Kenya' (2004) *UNESCO Copyright Bulletin*, July-September 2004.

69 M. Ouma 'Optimal enforcement of music copyright in Sub-Saharan Africa, reality or myth' (2006) 9:5 *Journal of World Intellectual Property Law* 592.

70 Supra note 19.

71 N. Karimi 'Copying exceptions and their impact on publishers in less developed countries' (2008) paper presented at the International Publishers Association 2008 Congress in Seoul, Korea.

exceptions should serve the needs of both users and creators in a fairly balanced manner. According to the author, the Kenya Copyright Act is long overdue for review in line with changes at the international level.

The idea that copyright law affects access to knowledge is captured by Marisella Ouma in a paper presented at the 3<sup>rd</sup> Annual Access to Knowledge Conference in 2008.<sup>72</sup> In this paper, Ouma argues that copyright laws and policies that only protect and promote the proprietary right of the copyright owner, without recognising the need to facilitate access to knowledge, can be detrimental.

As a result of the rampant piracy in the country, particularly of entertainment products (music and software), as well the alleged unwillingness of the government to deal with the problem, Kenya was mentioned in the International Intellectual Property Alliance Report in 2006.<sup>73</sup> The Alliance identified the following priority actions for Kenya in 2006: activating the Kenyan Copyright Board and providing dedicated staff for the Board; shutting down street vendors and exhibition halls selling pirated goods; banning importation of copyright goods except from rights-holders; seizing and destroying all pirated products within the country; copyright enforcement against duplicating facilities and Internet cafés using unlicensed products or providing piracy services; introducing, passing and aggressively implementing a new Counterfeit Goods Act; and, finally, combining offences in criminal charges.

Newspaper articles on copyright in Kenya mainly concentrate on the music industry or stories that are more appealing to the media houses than learning materials. One exception was a piece by Mwenda Micheni, a journalist. He wrote an article on licensing by CMOs—including KOPIKEN—that collect and distribute royalties from users such as libraries and, generally, educational institutions.<sup>74</sup> In another article, Mark Okuttah highlights the anti-piracy actions against cyber cafés in Kenya.<sup>75</sup> Okuttah notes that most cyber cafés in Kenya use Microsoft software without valid licences. The raids on the cyber cafés came after the expiry of a deadline set by the Kenya Copyright Board. During the raid, computers containing unlicensed Microsoft software were confiscated. Cyber café operators, Okuttah reports, are torn between legalising their Microsoft operating system, shifting to open source, or closing shop altogether following the crackdown on illegal software. The Microsoft initiative on fighting software piracy

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72 M. Ouma 'Law, technology and access to educational material' (2008) paper presented at the 3rd Annual Access to Knowledge Conference, 10-12 September 2008, Geneva.

73 International Intellectual Property Alliance '2006 Special 301: Kenya' 13 February 2006 at 467-468.

74 M. wa Micheni 'Copyright Board appoints team to collect royalties' (2008) *Business Daily*, Nairobi, 8 October 2008.

75 M. Okuttah 'Copyright Board takes piracy war to cyber cafes' (2007) *Business Daily*, Nairobi, 27 November 2007.

and counterfeiting of its products in Kenya has been widespread but discreet. A Nairobi businesswoman mentioned in the article attributed the use of pirated software to ignorance.<sup>76</sup>

### **4.3.2 Impact assessment interviews**

To gain qualitative insights into the Kenyan copyright environment in relation to access to learning materials, representatives of the following organisations were interviewed: government policymakers, including enforcement entities; educational communities; and copyright-holders.

#### *Policymaking/government/enforcement entities*

- the Kenya Copyright Board (policymaker and enforcement body)
- the Ministry of Higher Education, Science and Technology

#### *Educational communities*

- Strathmore University (private university)
- University of Nairobi (public university)
- Kenya National Library Service (KNLS)
- university libraries

#### *Copyright-holders*

- Kenya Publishers Association (KPA)
- Mountain Top Publishers
- Jomo Kenyatta Foundation
- Writers' Association of Kenya (WAK)
- KOPIKEN (collective management organisation)
- National Book Development Council (NBDC)

#### *Policymaking/government/enforcement*

The Kenya Copyright Board is a state corporation with a mandate to administer and enforce copyright in Kenya and act as a focal point within the copyright industry. The Board is mandated to review and propose changes to copyright law and it thus has a central role in policymaking. The respondents interviewed at the Kenya Copyright Board were lawyers specialising in copyright and related rights. One respondent was the Executive Director of the Board (and also one of the authors of this study) and the other was the head of the enforcement unit within the Board. (It

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<sup>76</sup> Ibid.



was not possible to secure interviews with other law enforcement agencies, such as the police, lawyers or judicial officers.)

The other interviewee in this category was from the Ministry of Higher Education, Science and Technology, which has an oversight role regarding institutions such as the University of Nairobi. The Ministry is responsible for formulating education policies that have an impact on access to teaching and learning materials. The respondent was a senior education officer.

The Kenya Copyright Board interviewees said the Board does not have any empirical data on the effect of copyright on learning materials. The administration and enforcement of copyright have to date not been carried out effectively in Kenya, but the Board argues that once the law is effectively enforced copyright will become an issue in relation to access to teaching and learning materials. This is because the exceptions and limitations granted under the Copyright Act of 2001 are narrow and do not sufficiently allow for reproduction of materials for teaching and learning purposes. The current regime does, however, provide for licensing schemes to allow for access by universities and other institutions of learning. At the time of the interviews in late 2008 and early 2009, the Board was reviewing the law. One of the amendments the Board proposed was the expansion of exceptions and limitations, especially for educational and library use. The formulation of copyright law and policy is done by the Kenya Copyright Board, through the State Law Office and in consultation with the relevant government ministries and stakeholders.

The respondents in this category said that while there was no copyright policy in place, there was a draft Intellectual Property Policy awaiting adoption. The policy seeks to provide guidelines for optimum utilisation of intellectual property rights (IPRs) in Kenya to ensure that IPRs significantly contribute to national growth by improving the technological, industrial, social and economic development of Kenya. The policy would establish the procedures for effective facilitation of intellectual creation, protection, commercialisation and enforcement of IPRs in the best interests of the public, the creator and the research sponsor.

Although no survey has been carried out by the Kenya Copyright Board on the impact of the existing copyright law on access to teaching and learning materials, one of the Board interviewees said there is a correlation between the Copyright Act and access to teaching and learning materials, because the right to reproduce for teaching and learning purposes is limited under the Act.

Meanwhile, one of the interviewees in this category argued that copyright enforcement is not satisfactory, as there are very few convictions, despite the many cases prosecuted. On the other hand, the respondent was of the opinion that access to learning materials should be enhanced, via the following measures:

- wider and better-defined provisions within the Copyright Act on limitations and exceptions;

- more efficient licensing schemes; and
- changing the government's tax policies to promote the book trade within the country.

With regard to the introduction of licensing schemes by KOPIKEN, one of the Kenya Copyright Board respondents noted that there were many universities that contacted the Board's office to determine the basis of the licensing regime and who were apparently unaware of the licensing provisions in the Copyright Act. Universities even admitted to photocopying material without consideration of the amount of photocopying that might be allowed by law and providing the copies to their students. Since they were not aware of the legal provisions under the Act, they assumed that it was within the law. The cost of these photocopies was covered by institutions as well as students. This reinforces the earlier assertion that the impact of copyright on access to teaching and learning materials will be felt only once the law is properly enforced.

The respondents in this group also pointed out that there are many socioeconomic factors that have an impact on access to knowledge. Some of these factors are perhaps linked to copyright law (eg, price-related issues) and others are clearly not. For instance, due to high levels of poverty and the high cost of books, there are instances where users have to prioritise their needs and access to learning materials is considered less important than health, food and other basic necessities.

### *Educational communities*

The interviews in this category uncovered the fact that the public University of Nairobi produces some of the materials used by its students and lecturers. However, its students rely heavily on foreign literature, especially in specialised courses such as engineering, law and business studies. Strathmore University, a private institution, mainly uses publications from outside the university and prepares course packs for students.

The university respondents noted that the institutions now offer teaching and learning materials in hard and soft copies, which may be accessed on and off campus. The universities have introduced e-learning to accommodate users who do not have direct access to libraries. There are, however, certain challenges in terms of access, such as cost and limited availability, especially at the University of Nairobi. Certain interviewees, especially students who have some knowledge of copyright law, attribute these challenges to the current law. Some said that copyright law does not promote access in any way. Others said that while the law facilitates access through limitations and exceptions to some extent, the limitations and exceptions in relation to the use of educational materials are too narrow.

Most of the respondents had a general idea as to what copyright is and attempted to describe the nexus between copyright and access.

Few respondents were aware of the existence of university intellectual property policies, although both Nairobi and Strathmore Universities have such policies. None of the interviewees was involved in the process of formulating the policies. The policies primarily seek to protect and promote the interests of creators, as well as the relevant universities and are not framed to promote access.

It is worth mentioning in this context that the University of Nairobi has developed policies that ensure the provision of low-priced editions of various books at the university's UNES Bookstore in order to provide access to otherwise expensive texts. However, even the reduced prices are apparently still prohibitive for many students.

In general, respondents in this educational communities category recommended the following to enhance access to teaching and learning materials:

- review copyright law in order to balance the interests of rights-holders and access by users in educational institutions;
- expand the educational limitations and exceptions under the Copyright Act;
- increase the volume of teaching and learning materials within educational institutions;
- expand the use of ICTs for access to learning materials;
- reduce the cost of educational books and ICT equipment; and
- provide government subsidies for the production of educational materials at tertiary level.

### *Copyright-holders*

From the interviews in this category, it was clear that rights-holders expect users of their materials to pay for the use of their works. Consequently, KOPIKEN, the collective management organisation, is currently negotiating licences with various universities and other institutions of higher learning to enable these institutions to use the works, on a royalty-paying basis, within the confines of the copyright law.

Rights-holders argue that copyright is not strictly enforced and, unlike the educational communities, rights-holders are of the opinion that the existing copyright exceptions and limitations are sufficient. One interviewee even suggested that the scope of exceptions and limitations should be reduced. Rights-holders decry the lenient penalties for copyright infringement and argue that copyright law in Kenya does not confer adequate protection to rights-holders. To show the extent of the problem, they point to the high levels of unauthorised use of their work. They feel copyright does not impede access to teaching and learning materials.

Very few of the interviewees could concretely relate copyright law to access to teaching and learning materials. This may be one of the reasons why rights-holders are of the opinion that copyright does not hamper access to teaching and learning materials.

Lack of, or limited, knowledge of copyright by rights-holders was also evidenced by the absence of copyright litigation initiated by the interviewees' entities.<sup>77</sup> One interviewee mentioned that his organisation had been involved in such litigation, in relation to HIV drugs — meaning that the interviewee was ostensibly confusing copyright with patents.

The general perception among copyright-holders is that, despite the existence of copyright law, protection is still under-achieved because of poor implementation. Rights-holders interviewed recommended the following:

- strict law enforcement, copyright community policing and the fostering of a responsible public;
- mitigation or subsidisation of the cost of production to encourage the generation of teaching and learning materials;
- CMOs, including RROs, issuing licences to learning institutions that would allow them to photocopy in return for royalties;
- various forms of incentives — eg, awards — to encourage the creation of learning materials; and
- review of the Copyright Act to better provide for digital works.

### **4.3.3 Summary of qualitative analysis**

It became apparent in the secondary literature review component of the qualitative analysis that most of the literature on copyright in Kenya addresses copyright matters from a rights-holder's perspective and focuses on the enforcement of rights. The literature makes only limited reference to permitted uses under copyright exceptions and limitations contained in the Copyright Act.

The impact assessment interviews found that for some stakeholders, copyright in Kenya is an impediment to access to teaching and learning materials due to its narrow educational limitations and exceptions. Others do not see copyright as an impediment to access because, they say, it provides for access without infringement through exceptions and limitations and through licensing schemes.

According to rights-holders, copyright infringement is a major problem, in that it affects rights-holders who publish books for the local market and has an impact on creativity, as authors may not be motivated to produce relevant materials.

<sup>77</sup> It is notable that the slow process of litigation could also be a contributory factor leading to the dearth of copyright cases in Kenyan courts.

Generally, it was observed from the interviews that knowledge of copyright and its impact on teaching and learning materials is limited. Several interviewees were not familiar with copyright law and the flexibilities it offers in relation to access.

The interviews also uncovered the view that there are other factors, not necessarily primarily attributable to copyright, that are limiting access to teaching and learning materials in Kenya. These factors include the cost of learning and teaching materials, a poor reading culture and attendant socioeconomic factors. Additional access-limiting factors include the high student population and the scarcity of authors writing educational materials. Although local books are often fairly priced — while foreign works are unaffordable — the majority of the population still cannot afford to purchase books.

From the interviews, it was evident that ICTs could make a major contribution to enhancing direct access to teaching and learning materials. The Internet and other electronic resources are used for research and teaching. Lecturers in public and private universities use electronic resources such as the Internet to access electronic journals and related materials.

However, this ICT-based access is limited, especially in public universities, due to limited (or lack of) connectivity, slow Internet speed and limited equipment. Private universities, however, have Internet hotspots where any student can connect a laptop and access educational materials from the institution's website.

ICT innovations within the universities and other institutions of learning could improve access further by lowering the cost of teaching and learning materials and widening the scope, thus making materials accessible to more students within and outside the institutions of higher learning. However, as mentioned earlier, the use of digital resources is potentially undermined at present by the Copyright Act's protection, without clear exceptions, of technological protection measures (TPMs) and by the lack of provision for distance learning or e-learning.

#### **4.4 Gender-specific findings**

Among the interviewees, there were those who understood gender to mean biological differences between men and women. Others defined gender as the differences between men and women in terms of the social construct of roles assigned to them based on their sex. It was found that, to some extent, social and income disparities between males and females have an impact on creativity and on access to learning materials in Kenya. It was found that the superior positions and resources of males often give them more opportunities than females. And it was found that the ratio of men to women in most public institutions was between 1:1 and 3:1. In most cases, however, not much attention had been given by the interviewees to gender disparities.

With respect to the copyright law itself, respondents felt that there were no gender issues to be addressed in framing legislation, because copyright law is seen to be gender-neutral. And interviewees were unable to cite examples of how the implementation of copyright law, or practices in relation to it, revealed or perpetuated gender differences.

However, gender issues have been central in the formulation of education policy. For instance, admission rules at some universities allow for female students to be admitted with one percentage point lower than the set cut-off mark for admission. This is meant to encourage more female students to register at the public universities in Kenya. In addition, the Ministry of Education has a policy governing the generation of school textbooks, in line with the government's overarching Gender Policy, whereby authors are proscribed from entrenching gender stereotypes in the content of their works. The Ministry also collaborates with other partners to reduce impediments that may hinder girl-child education. Tuition fees are provided for girls who obtain placement within national secondary schools.

Several other steps have been taken by government to ensure that gender disparities are addressed, particularly with regard to education policies. Some of these are: the Re-entry Policy that permits the resumption of school by girls who become pregnant; the government provision of sanitary towels to girl students; and the Affirmative Action in Arid and Semi-Arid Regions programme to promote the welfare of the girl-child. These policies ensure enrolment, retention, completion of studies and the proliferation of the principle of equality.

Given that the initial interviews conducted for this report failed to generate significant inputs on the possible intersection between copyright, gender and access to learning materials, a round of follow-up interviews with a specific gender focus was undertaken, with specialised consultative assistance from a gender expert.<sup>78</sup>

The team decided upon a participatory interview approach for the gender follow-up interviews. (The initial interviews had been conventional question-and-answer, semi-structured qualitative interviews.) The participatory approach aims to achieve an element of transformation in the interviewee and requires the interviewer to employ elements of devil's advocacy and information sharing.<sup>79</sup> The Kenyan team updated its interview guide and the revised guide contained general gender-related

78 The authors gratefully acknowledge inputs into the gender follow-up interview process from Salome Omamo, research associate with Own and Associates in Nairobi, who served as the ACA2K project's gender consultant.

79 The participatory interview also involves the use of questions aimed at getting explanations and clarifications. The interviewer is also required to use reflective summaries during the interviews; to give suggestions, indicate agreement, provide reassurance and guide the respondent.

questions for policymakers, educational communities, copyright-holders and enforcement agencies.

This follow-up interview phase presented various challenges. It was found that even with the restructuring of the interview questions and modification of the approach used to interview the respondents, it was difficult to get information on gender. Gender seemed to be a concept that was hardly understood. The respondents gave short answers and not much could be done in terms of the follow-up questions and generating a participatory interview.

There are several possible explanations for the challenges the Kenyan researchers faced. Some interviewees may have been confused by and perhaps uncomfortable with, the need for subsequent interviews. In fact, some respondents who had already been interviewed in the first round of the Kenyan research declined a second interview, as they were of the opinion that they were unlikely to have anything to add beyond what they had given during the first interview.

Moreover, conducting gender research through interviews is very difficult and inherently complex. Extensive training and fieldwork experience (beyond the scope and human resource capacity of the ACA2K project) are necessary for fully effective research using participatory interviews. It is also often necessary to build longer-term relationships between researchers and stakeholders for this kind of research to yield dividends.

Another challenge was the dearth of women in copyright policymaking positions in Kenya. It is a matter for speculation whether and how copyright and access policies might be different if there were more women occupying positions of influence over policymaking. Ideally, to get a meaningful gender perspective on the research project, it would have been advisable to mostly interview women, as they are the ones presumed to be disadvantaged in relation to access to learning materials. But for the policymaking/government/enforcement interview category, this was not possible in Kenya.<sup>80</sup> The fact that women do not typically occupy positions of influence over copyright and access to learning materials in Kenya is, however, itself an interesting and important observation about the gender dynamics affecting the issues under investigation. There are, however, important exceptions to this general observation, including the fact that the current Executive Director of the Kenya Copyright Board is a woman. She is currently involved in this research project and is a co-author of this chapter. Her experience could offer insights into possible strategies for increasing the proportion of women in positions of influence over copyright policymaking and concrete steps that may be taken toward empowerment and sustainable change.

Some of the findings from the Kenyan follow-up interviews were as follows.

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80 S. Omamo and M. Ouma *ACA2K and gender guidelines* (2009) unpublished document, ACA2K project, March 2009.

#### **4.4.1 *Policymaking entities***

Kenyan policymakers consulted in the follow-up interviews reaffirmed their statements from the first round of interviews that, to some extent, income disparities between men and women have an impact on creativity and access to learning material.

It was said that, at the institutional level, merit overrides gender in terms of training opportunities and that, in theory, access to education is equal to both men and women. However, in relation to learning materials, interview respondents opined that women have less access due to ingrained cultural denigration.

#### **4.4.2 *Educational communities***

Interview respondents reaffirmed their earlier view that they did not see any link between gender and copyright, but that there are gender issues at play in terms of access to learning materials and that these issues are primarily social and economic. For instance, it was noted that most communities favour the education of the male child even at the expense of the female child, for various (unacceptable) social, cultural and economic reasons. This creates disparities in access to education, which is carried over from the lower levels of education to the universities. Furthermore, in Kenya men generally have more resources, which can translate into better access to education.

However, it was pointed out that the Higher Education Loans Board (HELB), which grants educational loans, is helping to increase women's access to university education, as the HELB loans are disbursed on merit. Interviewees also pointed to policies to improve gender balance within universities, such as the public University of Nairobi's policy that provides for the admission of women students with grades 1 per cent lower than the admission requirement.

Access to university libraries, computers and Internet resources was said to be open to all who have access to the university. The respondents said that these facilities are used equally by men and women as the environment is seen to be non-discriminatory. They also noted that there was no difference in availability of teaching and learning material between the male and female students. Significant questions remain unanswered, however, suggesting the need for follow-up research. For instance, what are the societal obligations on women that might affect their ability to access teaching and learning materials on campus? And to what extent are household responsibilities that are typically borne by women, such as childcare and housekeeping, starting to be shared by men? How are these societal and access issues different for married women and mothers, compared to single women without children?



It was said by some interviewees that gender roles have an impact on choices of subjects for academic study, which in turn is likely to have an impact on access to different kinds of learning materials. For instance, women are expected to take the 'soft' courses, such as arts and nursing, while the 'hard' courses that are typically more financially rewarding, such as engineering and medicine, have more male students. And it was speculated that access to learning materials may be more readily available in courses such as engineering and medicine than in the female-dominated courses.

Interviewees reported that photocopying of educational material was done by students as well as lecturers, regardless of gender. However, at Strathmore University some said that the female students do more photocopying than the male students, but the reason for this was not clear. One (untested) hypothesis may be that male students are more financially able to purchase learning materials and female students' generally poorer economic circumstances require more reliance on the lower-cost access channel provided by photocopying. Further research into such a hypothesis would be beneficial.

#### **4.4.3 Copyright-holders**

It was said that there are more male than female authors in Kenya and consequently, more male than female holders of copyright in learning materials. Some felt this might just be a cyclical reality. But other interviewees said that because there was poorer access to learning material for female children (due to negative cultural biases and practices) it could be assumed that this inferior access (as readers) to learning materials would result in more limited production as authors of learning materials.

#### **4.4.4 Conclusion from follow-up interviews**

As with the first round of interviews, the responses did not establish very much in the way of clear intersections between gender, access and copyright in Kenya. However, it was found that gender differences do almost certainly generate differences in access to learning materials and that, accordingly, there are elements of the intersection between gender and materials access and between gender and copyright, that would benefit from further research.

### **4.5 Conclusions and recommendations**

The research found that copyright is indeed one of the factors that can affect access to teaching and learning material in Kenya. The rights of copyright-holders are very broad in the law and the legal exceptions and limitations are very narrowly constructed. This does not facilitate maximum access to teaching and learning

material. In addition, while ICT potentially enhances the dissemination of teaching and learning material, it is hampered by economic and technical constraints — and is potentially undermined by legal protection of anti-circumvention activities in the Copyright Act. Also, the possible intersection of gender dynamics, learning materials access and copyright-related practices is not currently on the agenda of Kenyan copyright stakeholders.

The copyright law in Kenya has so far not been strictly enforced, allowing users a reasonable degree of access through photocopying, which in most cases amounts to infringement under the current copyright law. However, as the existing legal rights of copyright-holders become more effectively enforced, they could significantly impede access to teaching and learning material. Already, with the establishment of CMOs, educational institutions and libraries are starting to have to obtain licences to reproduce work for educational purposes — an indication of increased enforcement by right-holders. The ongoing legal reforms provide a window for redefining statutory exceptions and limitations in favour of access to learning materials.

Based on the empirical evidence presented in the previous sections, the Kenyan team makes the following recommendations focusing on regulatory and legal reforms as well as recommendations that are not of a regulatory or legal nature.

Section 26 of the Copyright Act provides limitations and exceptions to the exercise of exclusive rights by the copyright-owner, including a ‘fair dealing’ provision in Section 26(1)(a). However, the fair dealing provision — for purposes of criticism, review, scientific research, private use and reporting of current events — is uncertain at present due to lack of formal interpretation. Meanwhile, the other exceptions are quite limited and narrowly drafted, especially in relation to access to teaching and learning material.

The Section could be revised to cover the following:

- the Section could include provisions for people with disabilities, such as exceptions to allow for access by the visually impaired;
- Section 26(1)(d) provides for the exclusion from protection of work consisting of not more than two passages of a work for educational purposes. It is appropriate to review this provision to allow for the use of increased amounts of works for educational purposes, such as in course packs, instead of limiting this to two short passages;
- the Section could better specify the provisions relating to non-commercial library and educational use. Section 26(1)(h) currently provides for reproduction of copyright-protected works, under the direction of the government or non-commercial libraries and documentation centres, where reproduction is deemed

to be in the public interest. This has the potential for narrow interpretation, locking out users where there is deemed to be no public interest;

- exceptions and limitations are needed in relation to non-commercial digitisation of copyright-protected works for archival purposes and library use; and
- the exceptions and limitations could include all educational institutions and libraries and not be limited to those established under the Education Act.

Section 35(3) makes it an infringement to circumvent TPMs. The law should be reviewed to ensure that it does not negate teaching, learning and fair dealing exceptions and limitations. Amendments to this Section could include the following:

- there could be provisions to exclude from the anti-circumvention rules the use of works within the confines of the fair dealing exceptions contained in the Act;
- the Section could have a proviso to exclude, from anti-circumvention rules, the use of copyright-protected works in the digital environment by disabled people such as the visually impaired; and
- the Section could ensure that the anti-circumvention provisions do not extend to works already in the public domain.

Both the University of Nairobi and Strathmore University have intellectual property policies, but the policies are silent on copyright and access to knowledge and only acknowledge the rights of the rights-holder. The policies could be re-examined to ensure that, among other things:

- copyright awareness creation is included in the policies formulated and in the policy formulation process, so members of the university community become increasingly aware of the copyright exceptions and limitations that are relevant to them as users in an educational setting; and
- students and faculty have increased access to digital content generated by their respective institutions.

Policymakers such as the Kenya Copyright Board and the Ministry of Higher Education, Science and Technology could formulate clear policies on copyright and access to teaching and learning material, appropriately bolstered by further empirical studies. There is a need to ensure that the copyright law and other laws do not impede the right of access to knowledge, but rather facilitate it. Every learner in Kenya — male or female, able-bodied or visually impaired, on-campus or learning from a distance — should have equal access to education and tools such as books, libraries, journals and digital content. These policies may be used to guide and inform the amendment of the Copyright Act and other laws. Among other things, the ongoing debate on the National Intellectual Property Policy provides

an opportunity to address access to educational materials across many sectors via various legal and regulatory means. As mentioned above, the Copyright Act of 2001 provides for the criminalisation, without exception, of circumvention of TPMs, even in cases of fair dealing and use by people with disabilities. The Ministry of Higher Education, Science and Technology, as well as the Kenya Copyright Board (in the State Law Office), could ensure that there is a policy that provides access for all, including the visually impaired. This will thus help to drive the push for legal exceptions to the current provisions prohibiting circumvention of TPMs.

The Ministry of Higher Education, Science and Technology could also formulate policies that ensure government provides the necessary teaching and learning materials at tertiary level. The provision of universal primary and secondary education is a step in the right direction, but needs to be complemented with the provision of books and other relevant learning material at tertiary institutions. Although affirmative action raises the number of women enrolled in higher education institutions, it is important to put policies in place that ensure the girl-child is not disadvantaged at any level within the education system. A policy change could ensure that once students enter tertiary institutions they have maximum access to learning materials without any impediment. This would include the provision of affordable books locally, especially for highly specialised areas where books are not available locally. Also, ICT forms an integral part of access to teaching and learning materials. It is not enough to create general policies for the incorporation of ICT; a targeted policy could make it mandatory for institutions to provide tools such as computers and Internet access.

The National Book Development Council (NBDC) recognises that the information base in a country is crucial for self-identity and cultural preservation. The Council further recognises that the country does not have a strong reading culture, as research indicates the majority of Kenyans rarely read beyond their formal education. In order to foster personal and national development, the NBDC, in conjunction with the Ministry of Higher Education, Science and Technology, could create a policy that promotes a book-reading culture within the country. Also, the local publication of books should be encouraged through government-subsidised printing services where publishers have their own printing presses.

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<sup>81</sup> Cited and analysed in 'The press and the law, Hilary Ng'weno and Peter Kareithi in court. *Weekly Review v Financial Review*. Of competition, contract and the law', (1988) *Nairobi Law Monthly* April at 27-32.

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# Chapter 5

## Morocco<sup>\*</sup>

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### 5.1 Background

#### 5.1.1 General elements

The Kingdom of Morocco is a constitutional monarchy with a population of 30 million, located in the northwest of Africa. The King is the supreme representative of the nation and the protector of civil rights and he ensures that the Constitution is respected. Morocco is a developing country and poverty is a serious issue, despite the fact that the poverty rate in the country fell from 19 per cent in 1998 to 11 per cent in 2006.<sup>1</sup>

#### 5.1.2 Social and human context

Poverty in Morocco is primarily a rural phenomenon. The World Bank reported in 2004 that almost one out of four Moroccans was poor in rural areas, but only one out of 10 was poor in urban areas.<sup>2</sup> Morocco has, for nearly 10 years now, been in a phase of reforms and revisions aimed at achieving social, political and economic goals. However, the country has recently regressed in the human development ranking of countries. It was ranked 123<sup>rd</sup> in the Human Development Index (HDI) in 2006 and descended to 128<sup>th</sup> in 2008.<sup>3</sup>

Some of the social problems the country is battling with are illiteracy, unemployment and lack of housing. Another problem is gender inequality and efforts are being made to balance the power of men and women, through, for instance, the new Family Code, which aims to enhance the rights of women to play their full and appropriate role in society. Society and attitudes must also evolve. Moroccan women have succeeded to some extent in entering the workforce, both

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

1 Government declaration before the Chamber of Representatives relating to the conclusions of its action on 17 July 2007.

2 N. El Moujaddidi and A. Fadel 'La pauvreté au Maroc. Du concept à la réalité' in H. Zaoual and T. Dagbri (eds) *Développement humain et dynamiques territoriales : vers des savoirs recomposés* (2008) Édition l'Harmattan.

3 UNDG '2006 Resident Coordinator Annual Report' (2006) United Nations Development Group (UNDG) at 160.

in the private and the public sectors.<sup>4</sup> However, and despite the progress achieved, the integration of women in economic activities remains limited. In 2006, women's employment rate at the national level was 27.2 per cent as opposed to 76.4 per cent for men. This rate reflects 19.3 per cent against 71.4 per cent in urban areas and 38.4 per cent against 83.4 per cent in rural areas.<sup>5</sup>

Morocco committed in the 1980s to a World Bank/International Monetary Fund (IMF) Structural Adjustment Programme (SAP) in order to create the level of competition that a liberal economic perspective requires. Morocco has signed free trade agreements (FTAs) with the European Union, Arab countries (Tunisia, Egypt, Jordan), Turkey and the United States. Since the 1990s, a reform of the legal and institutional framework of the economy has been carried out. This has led to a series of legal and regulatory measures that have, among other things, boosted the liberalisation of key sectors.

Access to knowledge, as well as contributions to knowledge production and dissemination, remain closely linked to public and private investments, as well as to foreign direct investment (FDI). It is evident that investment in training and innovation, education, research and development, information and communication technologies (ICTs) and the industrial sector contribute to knowledge production, since such investment provides a favourable environment for it. Investment also contributes to knowledge dissemination and evolution through job creation, the distribution of income and improvements in standards of living.

Investment in infrastructure is also a determining factor. The production and dissemination of knowledge need an enabling environment as well as appropriate resources and instruments. FDI can enable the transfer of knowledge, of know-how and of skills relating to complex technologies, coordination, management and production. FDI is also a means to create employment and to distribute income through the creation of businesses to ensure the well-being of citizens.

The public investment rate in Morocco, which varies between 22 and 24.5 per cent,<sup>6</sup> is insufficient to be the driving force for strong and sustainable growth. Public sector efforts, which are mostly focused on funding social and economic infrastructure programmes, are not supported enough by the private sector, whether in Morocco or abroad. Also, it is obvious that investments play a crucial role in access to knowledge. This is necessarily linked to education, which in itself depends on basic infrastructure, employment and income. These are the main axes of human

4 Haut Commissariat au Plan (HCP) 'Femmes et hommes au Maroc: analyse de la situation et de l'évolution des écarts dans une perspective de genre' (2003) study conducted by the HCP and presented on 18-19 March 2003.

5 Ministère de l'Économie et des Finances et UNIFEM *Examen exhaustif des statistiques sensibles au genre au Maroc* (2007) at 89.

6 Ibid.

development. Indeed, countries that have accumulated a substantial delay at these levels are those that 'do not have enough financial resources for public investments that would cause an increase in human development investment and growth fast-tracking'.<sup>7</sup>

Access to knowledge is increasingly understood as connected to human rights, which cannot be exercised in conditions of poverty. The fight against poverty must occur through the acquisition and the development of 'capabilities', as Amartya Sen puts it.<sup>8</sup> Education and teaching are essential pillars to accomplish this, but they also depend on the level of income, which in turn depends on the level of national and foreign public/private investment. 'Access to higher education remains a privilege that benefits mainly high-income countries. Today's inequalities in terms of education are bound to be tomorrow's global social and economic inequalities'.<sup>9</sup>

### 5.1.3 State of education

Morocco's education sector is faced with two major issues: the high number of illiterate people and the high number of unemployed graduates. Although 4 million children are schooled (in a total population of 30 million) and 230 000 students are registered in the 11 universities in the country, it is estimated that half of persons more than 10 years old are illiterate. This state of education has prompted the implementation of a new policy that considers the fight against illiteracy and the promotion of informal education as chief priorities. This reform particularly targets girls and the rural population between 10 and 45 years of age. It is estimated that 34 per cent of men and 62 per cent of women are illiterate; these rates reach 63 per cent and 78 per cent respectively in rural areas.<sup>10</sup> Morocco has committed to completely eradicating illiteracy by 2015.<sup>11</sup>

Since 2002, schooling has been compulsory and free for all children aged 6 to 15, but there are still a number of obstacles that prevent some children from attending school and/or completing their studies, such as families' financial difficulties linked to the cost of school stationery, transport and school meals. In rural areas, the situation is more complex than in the urban areas: in the 'douars' and villages, which are widely dispersed, getting to school every day is

7 Ibid at 51.

8 A. Sen *Un nouveau modèle économique* (1999) Odile Jacob, Paris.

9 ONU *Rapport mondial sur le développement humain* (2007) at 27.

10 General information available on the website of the Ministère de l'Enseignement Supérieur. Available at <http://www.enssup.gov.ma> [Accessed 10 February 2010]. The statistics used by the Ministry are those provided by the Direction de la statistique, based on the Census of the Moroccan population.

11 Ministère des Finances et de la Privatisation 'Tableau de bord social' (2005). Available at <http://www.leconomiste.com/upload/document/social2272005.pdf> [Accessed 25 July 2009].

a real problem. Quitting school is sometimes not a choice but rather an unavoidable reality.

### *Pre-school education*

The net rate of schooling in 2003-2004 for 4- to 5-year-olds was only 50 per cent and the system generally serves boys better than girls and urban areas better than rural ones.<sup>12</sup>

### *Primary education*

According to statistics provided by the Department of National Education in the Ministry of National Education, Higher Education, Professional Training and Scientific Research, the number of pupils from 6 to 11 years old attending public and private primary schools reached 1 810 898 in 2007-2008. If we compare this number to the total number of children in this age bracket according to the Census of 2004, the net rate of schooling would have been 83.7 per cent in 2004, up from 60.2 per cent in 1993-1994.<sup>13</sup> A sustained improvement has thus been achieved in primary education, largely due to the schooling effort carried out in the previous decade. This has especially benefited girls. However, a large number of these children have not finished their primary school cycle due to problems linked essentially to poverty. In urban areas, the schooling rate for girls has nearly reached that of boys (89.8 per cent for girls and 91.2 per cent for boys).<sup>14</sup> In a similar fashion, in rural areas, the discrepancy in schooling between boys and girls has decreased. The rate of participation for girls has more than doubled.<sup>15</sup>

### *High school education*

At the high school level, an increase in the percentage of educated girls was achieved between 1990-1991 and 2003-2004.

In 2006-2007 and 2007-2008, the numbers of schooled children and the number of girls at the various levels, were as follows:

12 The mid-project evaluation of the implementation of the Education and Training Charter has identified this problem and has suggested new measures to reach the objective of full attendance, including through compulsion.

13 Statistics from the Ministère de l'Éducation Nationale. Available at <http://www.men.gov.ma/stat2008/> [Accessed 25 July 2009].

14 Besides the official data from the general Census, we also used the extrapolations carried out by the Haut Commissariat au Plan, the Ministère de l'Éducation Nationale and the Ministère des Finances as well as other departments. There are discrepancies in the data and these are due to the difference in the methods used by the various departments.

15 Supra note 5 at 73.

	2006-07			2007-08		
Pupils	Urban	Rural	Total	Urban	Rural	Total
Primary school	1 698 888	1 910 415	3 609 303	1 635 164	1 896 897	3 532 061
Number of girls	818 168	856 590	1 674 758	788 203	859 401	1 647 604
Lower high school	1 039 867	308 737	1 348 604	1 040 595	338 305	1 378 900
Number of girls	495 534	109 213	604 747	496 369	120 695	617 064
Senior high school	577 785	60 465	63 250	602 237	69 627	671 864
Number of girls	287 052	22 806	309 858	302 003	27 237	329 240
Total	3 316 540	2 279 617	5 596 157	3 277 996	2 304 829	5 582 825
Number of girls	1 600 754	988 609	2 589 363	1 586 575	1 007 333	2 593 908
Percentage that are girls	48.3%	43.4%	46.3%	48.4%	43.7%	46.5%

Source: <http://www.men.gov.ma/stat2008/> [Accessed 25 July 2009]

Regarding the rate of pupils remaining schooled to the end of high school, there is evidence of a greater capacity by girls to pursue their studies and to succeed: 55.2 per cent of urban female pupils and 22.7 per cent of rural female pupils finish the school cycle, whereas the completion rates for male pupils are respectively 44.8 per cent and 17.4 per cent.<sup>16</sup>

### *Higher education*

Higher education has regressed in terms of the number of registered students in public universities as opposed to private institutions. This can be explained by the preference of students for private higher education institutions, not only for the perceived higher standard of study but also in terms of the nature of the training offered, which is seen as responding better to market demands. Public university training has gained a poor reputation from the ever-increasing numbers of unemployed public university graduates.

<sup>16</sup> Ibid.

## 5.2 Doctrinal analysis

### 5.2.1 *The Copyright legal environment in Morocco*

With the arrival of the French Protectorate system in 1912 and the introduction of the modern printing press, a law regarding industrial, commercial and literary property was passed. The 23 June 1916 Dahir guaranteed for the first time in Morocco the right of the author to his or her work, whatever the nationality.<sup>17</sup> This Law was followed by those of 9 November 1926 and 16 February 1927. These two laws were repealed and replaced by the 29 July 1970 Law (hereafter the 1970 Law), which was later itself repealed by Law 2-00 of 15 February 2000 (hereafter the 2000 Law) and published in the Government Gazette on 18 May 2000. This Law came into force on 18 November 2000.

In the context of national and international demands and in order to better tackle the challenges caused by technological progress, amendments have been added to the 2000 Law, through Law 34-05 promulgated by the 1-05-192 Dahir of 14 February 2006. (The 2000 Law, as substantially amended in 2006, is hereafter referred to as the Copyright Law.)

Morocco's dynamic intellectual property legislative process, however, has not been accompanied by supporting doctrinal, scientific or policy research. To some extent because of this scarcity of research publications on the topic, attitudes and assumptions favour stronger protection. These attitudes are in spite of the alarming poverty faced by the majority, which suggests a need for free and open access to knowledge.

Economic rights are protected by constitutional principles. Morocco's Constitution states in Article 15 that '[t]he right to ownership and the freedom to undertake are guaranteed'. However, the exercise of this right is not absolute, as the second paragraph of the same Article says: '[t]he law may limit the scope and exercise of this right if the nation's social and economic development so require'.

At the institutional level, copyright, royalties and related rights are managed by a public agency, the Bureau marocain du droit d'auteur (BMDA, the Moroccan Copyright Office). The BMDA is a collective management organisation under the Minister of Communication and is the 'only institution in Morocco in charge of receiving and redistributing copyright income under all forms current and future'.<sup>18</sup>

17 A dahir is a royal law through which the Sovereign of Morocco takes decisions within his competence, ie the promulgation of bills passed by Parliament.

18 Décret n° 2-64-406 du 8 mars 1965, B.O. n° 2732 du 10 mars 1965.

The BMDA's scope of work is very wide since it relates not only to large institutions such as theatres and cinemas, but also to coffee shops, restaurants and other places where music is played publicly. The receiving of fees is carried out according to three categories: broadcast and television rights, general rights and mechanical reproduction rights.

The BMDA's activities include:

- collective management and distribution of royalties among rights-holders;
- representation of Morocco in international institutions concerning artistic and literary property and signature of conventions with foreign author organisations to enforce the rights of Moroccan authors abroad;
- staging of awareness campaigns;
- monitoring of the use of works;
- licensing use of protected works;
- licensing use of folklore when use is commercial or outside the traditional or customary context;
- legal actions for the defence of moral and economic rights;
- seizure of illegal reproductions and equipment used to create illegal reproductions;
- cooperation with customs and tax authorities to ensure seizure of goods suspected of being counterfeited or pirated; and
- coordination with Internet service providers for identification of authors who may have infringed the Copyright Law.<sup>19</sup>

### ***5.2.2 Structure and main orientations of the Copyright Law***

In 2006, Law 34-05 amending the 2000 Law completely changed the national legal environment in the area of copyright. New elements in the 2006 Law modified the 2000 Law relating to copyright and neighbouring rights in the following ways:

- extension of the standard term of economic rights protection for authors from 50 to 70 years after the death of the author;
- a stronger role for the BMDA, the government and customs authorities in controlling and enforcing rights, including tighter measures for the suspension of the free circulation of goods suspected to be illegal or to be infringing copyrights and neighbouring rights;
- strong legal protection against the bypassing of technological protection measures (TPMs), including civil and criminal procedures and sanction for the individuals committing infringement, except for some specific cases involving

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<sup>19</sup> Further details on the activities of the BMDA are available at <http://www.bmda.org.ma> [Accessed 25 July 2009].

non-profit entities, such as libraries, archives, educational institutes and broadcasters that are non-profit;

- increased penalties for infringement, from seizure and fines to imprisonment; and
- a new system of limited liability for service providers (eg Internet service providers) in order to implement measures against copyright or other neighbouring rights infringement, especially quick measures to prevent such acts as well as penal and civil sanctions.

These changes were made to harmonise national laws with Morocco's international commitments in general and its free trade agreement (FTA) with the United States in particular. Another central objective of the 2006 amendments was to tackle piracy. The average piracy rate in the software, music and cinema sectors had reportedly reached 70 per cent and, reportedly, resulted in economic losses to rights-holders of up to 2 billion dirham in Morocco.<sup>20</sup>

The Copyright Law is divided into six parts and each part is subdivided into several chapters. The first part is entitled 'Copyright' and has eight chapters. Chapter 1 includes definitions, Chapter 2 determines the object of protection, Chapter 3 is about protected rights, Chapters 4 and 5 define the limitations of property rights and the duration of protection, Chapter 6 determines the owners of the rights, Chapter 7 defines the conditions of the assignment of rights and the way licences are regulated and Chapter 8 is reserved for the provisions particular to the publication contract market.

The second part has five chapters and deals with neighbouring rights: rights of performers, record producers and broadcasting organisations. The third part of the Law is about collective management. The fourth part deals with recourse and sanction measures regarding piracy and other infractions. The fifth part is about the scope of the application of the Law, with various final clauses in the last part.

The Moroccan legislator has taken care to describe in the first chapter of the Copyright Law, entitled 'Introductory Provisions', the legal terminology used when taking into account the new trends and commitments of the country at the international level. Some notions are defined: that of 'author' and 'work' in all its forms, as well as 'expressions of folklore', 'computer programme' and 'database'.<sup>21</sup>

20 Information taken from a document distributed to the delegates of a meeting organised by the Department of Communication and the Bureau marocain du droit d'auteur (BMDA).

21 Article 1, paragraphs 1 to 23 of the Moroccan Copyright Law of 2000 as amended in 2006: *daahir* n° 1-00-20 du 15 février 2000 portant promulgation de la loi n° 2-00 relative aux droits d'auteur et droits voisins and *daahir* n° 1-05-192 du 14 février 2006 portant promulgation de la loi n° 34-05 modifiant et complétant la loi n° 2-00 relative aux droits d'auteur et droits voisins.



### *Protected works*

The Moroccan Law protects 'literary and artistic works (thereafter termed 'works') that are original intellectual creations in the artistic and literary field...' (Article 3).

In order to qualify for copyright protection, a work must first and foremost be in a material form. Only an idea that has been materialised can result in a work protected by copyright. An oral work also qualifies for protection, which starts from the moment of creation of the work even if it is not fixed in physical format.

A second condition is that the form must be original. The current Copyright Law does not define the term 'original', whereas the old 1970 Law was clearer in terms of original work: 'the work whose characteristics and/or form can help to identify and individualise its author'. This means that the work must bear the mark of the personality of its author. This is not in any case about novelty. The creator just needs to have made artistic choices (of style or structure, for example) that can help distinguish his/her creation from others.

The Moroccan Copyright Law largely follows the categories included in Article 2 of the Berne Convention. The following are therefore considered copyright-protectable works in Article 3 of the Copyright Law:

- a) works expressed in writing;
- b) computer programs;
- c) conferences, conference papers, sermons and other works including words or expressed orally;
- d) musical works, whether or not they include any accompanying text;
- e) dramatic or musical dramatic works;
- f) choreographic works and pantomimes;
- g) audiovisual works, including movies and videogames;
- h) fine arts works, including drawings, paintings, engravings, lithographs, leather prints and any other fine arts work;
- i) architectural works;
- j) photographic works;
- k) applied arts works;
- l) illustrations, geographical maps, plans, sketches and three-dimensional works relating to geography, topography, architecture or science;
- m) expressions of folklore and works inspired by it;
- n) drawings and creations from the clothing sector.

The Copyright Law has also classified works into categories with provisions applicable to each of them: individual works; collective works (Article 1(3)); collaborative works (Article 1(4)); composite works; (Article 1(6)) and derived works (Article 1(5)).

The Copyright Law also grants protection to databases. This type of protection is included in the general copyright framework. (Copyright protection for databases is provided in Europe but is not required under the Berne Convention or provided in the United States.)

Under the title ‘Works Not Protected,’ Article 8 of the Moroccan Copyright Law stipulates that:

The protection offered by this law does not extend to:

- a) official texts of a legislative, administrative or judicial nature, nor to their official translations;
- b) news of the day;
- c) ideas, processes, systems, methods of functioning, concepts, principles, discoveries or simple data, even if all these are mentioned, described, explained, illustrated or incorporated in a work.

This exception for the free use of works of a legislative, judicial and administrative nature does not explicitly cover the studies or reports produced by the government or by a public institution, or documents whose production is funded by the government. And thus, despite a public entity having participated in the funding and/or creation of these works, it would appear that these works are protected by copyright rules.

### *Conferred rights*

The Moroccan legal system is one of civil law as opposed to common law, hence the importance of moral rights on par with economic rights.

#### **Moral rights: a perpetual right**

Article 9 of the Copyright Law gives the author perpetual and inalienable moral rights in relation to his/her work, common to countries inspired by French law. Moral rights are attached to the author and only after the author’s death can his/her heirs claim these rights.

Moral rights include three types of rights: (1) the right to claim paternity of the work, especially the right to respect the name of the author for any public use of his/her work; (2) the right to stay anonymous or use a pseudonym bearing a false name; and (3) the right to have the work’s integrity respected (this right aims at protecting the work itself and as such the work cannot be modified, altered, mutilated or taken out of its context).

Unlike the economic rights outlined below, these moral rights never cease; they exist in perpetuity.

## Economic rights

Concerning economic rights, according to Article 10 of the Copyright Law as amended by the Law of 2006, the author of a work has the exclusive right to do, forbid or authorise the following acts:

- a) reprint and reproduce the work in whatever manner and in whatever form, permanent or temporary, including temporary electronic archiving,
- b) translate the work;
- c) prepare adaptations, arrangements or other transformations of the work;
- d) carry out or authorise the rental or public lending of the original or the copy of the audiovisual work, of the work being integrated in a phonogram, computer program, database or visually represented musical work (music sheets), whoever the owner of the original work or the copy subject of the rental or the public lending;
- e) carry out or authorise the distribution to the public through the sale, rental, public lending or any other transfer of property or of ownership, of the original or copies of the work whose distribution was not duly authorised by him/her;
- f) represent or execute his work in public;
- g) import copies of the work;
- h) radio-broadcast the work;
- i) communicate the work to the public by cable or any other means.

Rights-owners also have the exclusive right to monitor the distribution and/or rental and/or communication/availability of their work. In this regard, the Law makes temporary reproduction of the work conditional on authorisation from the copyright-owner or from the Law. According to Article 47, the author may also demand, at least once per year from the publisher, a statement including information such as the number of copies manufactured with the dates and the production size, the number of copies in stock and the sale price in force.

In terms of Article 11, the author or his/her assignee (any other physical or moral person to whom the rights have been attributed) may benefit from the economic rights outlined in Article 10. Moreover, the Law entrusts the BMDA with the task of exercising the author's economic rights should there be no known assignee or rights-owners. The duration of economic rights protection covers the whole of the author's life and is extended, by virtue of the 2006 amendments, for 70 years from the first day of the calendar year that follows his/her death. In the case of collaborative works, this 70-year period begins at the death of the last living co-author. Collective works are protected for the duration of the last surviving author's life and 70 years after his/her death. For certain works, the duration of the protection is not based on the author's life. Audiovisual works and those published under a pseudonym or anonymously have a duration of protection of 70 years from the first day of the

calendar year that follows their publication. Should a work not be published, the point of departure is the end of the year that follows the making of the work.

For audiovisual works, economic rights are protected for 70 years from the end of the calendar year when such a work was lawfully published for the first time or, should such an event not occur within 50 years from the making of this work, 70 years from the end of the calendar year when such a work was made accessible to the public or, should such events not occur within 50 years from the making of the work, 70 years from the end of the calendar year in which the work was completed.

Regarding works of applied art, Article 29 of the Copyright Law once again goes beyond what the Berne Convention and the TRIPs Agreement prescribe: the duration of the protection of the works is 70 years from the end of the calendar year when the first authorised publication was released, or should such a publication not take place within 50 years from the creation of the works, 70 years from the end of the calendar year of its creation.

The 70 years of protection goes beyond international norms (typically 50 years) dictated by the key international instruments related to copyright: the Berne Convention for the Protection of Literary and Artistic Works and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement). This extended term may result in depriving the public domain of a substantial number of works and could therefore impede access to knowledge.

### Technological protection measures (TPMs)

Technological protection measures (TPMs) are defined as any technology, system or component that, within the normal framework of its operation, is aimed at preventing or limiting, regarding works and other protected objects, actions not authorised by the copyright-owner, or actions protected by neighbouring rights.

The clauses relating to technological protection measures were largely modified by the 2006 amendments to the Moroccan Copyright Law, in accordance with the requirements of Morocco's FTA with the United States. With the 2006 amendments, the legislator significantly raised the level of protection for the benefit of copyright-owners and content distributors. There is now a wide variety of prohibited acts in relation to TPMs. Article 65 prohibits all devices or methods that circumvent or make TPMs inoperable and devices or methods to decode programming signals. Receiving and redistributing decoded signals is also illegal, as is circumventing any TPM or rights management information (RMI). There are prohibitions on distributing or communicating works, performances, phonograms or broadcasts from which RMI has been removed or tampered

with. Overall, Morocco's anti-circumvention provisions are among the strongest anywhere in the world.

The legislator has, in the 2006 amendment of the Copyright Law, limited the application of these anti-circumvention clauses for the benefit of some non-profit entities. Article 65.1 indicates that libraries, archive services, education institutions or radio and television broadcast organisations, provided the entities are non-profit, are not subjected to penalties for the performing of TPM circumvention acts described in the relevant subsections of Article 65. Use of these exceptions may be practically impossible, however, without access to prohibited devices or methods that make such acts possible. There is no specific mention of disabled users, who sometimes need to circumvent TPMs in order to convert works from one format to another. In fact, disabled users are not mentioned anywhere in the Copyright Law.

### *Limitations and exceptions to copyright*

In order to maintain a balance between the interests of copyright-holders and users and under the heading 'Limitations of Economic Rights,' the Moroccan legislator has enumerated limitations and exceptions to the exclusive rights conferred to the author of a protected work.

#### **Private use**

The first limitation is the provision for free reproduction of works for private use. According to Article 12 the reproduction of a lawfully published work for the exclusive and private, non-commercial use by the user is allowed without the authorisation of the author and without the payment of remuneration. However, Article 12 indicates that free reproduction for private use does not apply:

- a) to the reproduction of architectural works under the form of buildings or other similar types of construction;
- b) to the reprographic reproduction of an entire book or a musical work in a visual format (music sheets);
- c) to the reproduction of the whole or parts of databases in a digital format;
- d) to the reproduction of computer software except for cases indicated in Article 21;
- e) to any other reproduction of a work that would affect the regular exploitation of the work or would cause unjustified prejudice to the legitimate interests of the author.

The Article contains three key points. Firstly, reproducing an entire book is forbidden. This means that a student cannot copy an entire protected work in order to use such a book for his/her studies.

The second point deals with the 'three-step test' in international copyright law,<sup>22</sup> which permits countries to allow reproduction of works 'in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.' This three-step test was extended to all economic rights in Article 13 of the TRIPs Agreement. Article 12.2 (e) in the Moroccan Law strictly follows the three-step test logic with its provision that neither normal exploitation nor the legitimate interests of the author should be affected by any reproduction for private use.

The third point is that the reproduction or adaptation of computer programs for private purposes is not authorised except when the copying or adaptation of a computer program by the rightful owner is for one of the purposes outlined later in the Law, in Article 21. Article 21 specifies that reproduction or adaptation of a computer program is permitted when:

- a) necessary to the use of the computer program for purposes for which the program was purchased;
- b) necessary for archiving purposes and to replace a legal copy should the latter be lost, destroyed or made unusable.

No reproduction or adaptation of a computer program is permitted for any other reason than the two reasons just cited, as contained in Article 21.

### Use for information purposes

Article 19 concerns provisions for use for information purposes. The Copyright Law allows the reproduction by the press or via a radio broadcast or communication to the public of an article of an economic, political or religious nature published in newspapers or journals having the same character, on condition that the right to reproduction, radio broadcast or communication to the public is not exclusively reserved. Such reproduction/communication is also permitted for reporting purposes, to reproduce or to make accessible to the public current events materials by way of photograph, cinematography, video or radio broadcast or cable if justified by the objective of obtaining information. It is also permitted to reproduce, via the media or certain other public communication means, political speeches, conferences, conference papers, sermons and other works of a similar nature delivered in public. Authors maintain only the right to publish collections of these works.

### Reproduction taking the form of a quotation

The Moroccan Copyright Law also allows permission-free quotation of an integral part of any type of copyrighted work (if lawfully published) in another work,

<sup>22</sup> Article 9(2) of the Berne Convention and Article 13 of the TRIPs Agreement.

whatever the aim of the quotation is. This freedom is limited by three conditions: 1) the source and the name of the author, if in the source, must be indicated; 2) the quotation must comply with principles of appropriate use; and 3) the length of the quotation must not exceed the length justified by the objective being reached (Article 14).

### Education and teaching

Article 7(2)(c), concerning the protection of expressions of folklore, stipulates that the provisions of protection do not apply when the works are only used for 'direct teaching or scientific research purposes,'

The Copyright Law adds, in Article 15, entitled 'Free Use for Teaching,' that:

[I]t is permitted, without the author's authorisation and without any remuneration payment, but subject to the indication of the source and the name of the author if the same name is indicated in the source:

- a) to use a lawfully published work as illustration in publications, radio broadcast programmes or sound or visual recordings destined for teaching;
- b) to reproduce through reprographic means for teaching or for exams within educational institutions for which the activities do not directly or indirectly see a commercial profit, and to the extent justified by the objective sought, the isolated articles lawfully published in a journal or regular publication, short excerpts of a lawfully published work or a short work that has been lawfully published.

And Article 23(b) allows for the public performance of a work when this is done within the framework of 'the activities of an educational institution, for the personnel and students of such an institution, if the audience is composed exclusively of personnel and the students of the institution, or the parents or the supervisors or other persons directly linked to the institution's activities'.

Several observations on the limitations and exceptions regarding education and teaching can be made. First, the free use of a complete work in the field of education is allowed only in cases where the work is performed in private or in public and only within the framework of the activities of an educational institution under certain conditions.

Second, the use of protected works in online teaching and distance education is not included in the Law. With the technological revolution in the field of communication and the appearance of new teaching techniques, it is necessary to extend the limitations and exceptions relating to education and teaching for these new modes of learning.

Third, there is no provision in the Copyright Law for compulsory and/or statutory reproduction licences for education purposes. The granting of such a licence, for translation and/or publishing of a work by an entity other than the rights-holder, can allow the state to rectify abnormalities in the market. Compulsory or statutory

licences can be an important mechanism to create access when the protected work in question is not available, or is not affordable, or is not available in a widely spoken local language. Moroccan law thus favours the interests of copyright-holders at the expense of access to knowledge by prohibiting the possibility of obtaining such a licence.

### Library and archive services

Libraries and archive services benefit from a special regime in the Moroccan Copyright Law. Article 16 is dedicated to these two types of entities, authorising them to carry out reproduction of isolated copies of a work on the condition that such an act is not directly or indirectly aimed at commercial profit and in one of the following cases described in the Law:

- a) When the reproduced work is an article or a short work, or is composed of short excerpts of a work other than a computer program, with or without illustrations, published in a collection of works or in a journal or periodical, or when the aim of the reproduction is to satisfy the request of a physical person;
- b) When the copy is produced in order to preserve and, if necessary (in case it would be lost, destroyed or rendered unusable), to replace it within the permanent collection of another library or another archive service, to replace copies that are lost, destroyed or unusable.

The Moroccan Law does not include provision for ‘public lending rights’ or similar clauses.<sup>23</sup>

### Parallel imports

Parallel importing occurs when a protected work legally acquired in one country is imported into another country without the copyright-owner’s permission in that other country. Article 10(g) of the Copyright Law forbids parallel importation, providing the rights-holder with the exclusive right to forbid or authorise the importation of copies of his/her work from another market. Only one exception to this general rule is provided, in Article 24, which authorises the importation of one copy of a work by a person for private purposes. This restrictive rule favours a monopoly system whereby Moroccan users cannot import books already being sold at cheaper prices than the prices in Morocco in other countries such as Algeria, Tunisia or Egypt.

<sup>23</sup> Public lending rights allow authors of protected works to be financially compensated for the presence of their works in public libraries. The first public lending remuneration system was implemented in Denmark in 1946. Twenty-eight countries currently have such a system, through which libraries pay fees to rights-holder representatives.



### *Other laws relating to copyright*

Morocco has in recent years initiated numerous legal and institutional reforms related to intellectual property in general, required due to Morocco's international commitments.

Among the laws linked to intellectual property are:

- border control measures via a Joint Order by the Minister of Finance and Privatisation and the Minister of Industry, Trade and Economic Renewal, Joint Order 206-06 of 6 February 2006;
- Circular 4994/410 of 1 April 2006 relating to new customs regulations and measures at borders aiming at reinforcing the protection of intellectual property rights; and
- Circular Letter 5051 relating to border measures to fight against counterfeiting and piracy. These measures concern literary and artistic works when they are imported, exported or in transit, or when they are stored on a physical device such as a book, CD, DVD or a painting canvas. For the purposes of this circular letter, the customs and indirect tax authorities may, at border posts, suspend the circulation of goods suspected to be counterfeited or pirated.

The border control measures against suspected counterfeiting or pirated goods may be initiated upon the written request from a copyright owner or his/her representative or by the Bureau marocain du droit d'auteur (BMDA), in compliance with the amended Article 60 (amended in 2006) of the Copyright Law; or upon the government's initiative.

### **National Library of the Kingdom of Morocco**

With the adoption of Law 67-99,<sup>24</sup> the general library has become 'the National Library of the Kingdom of Morocco'. The National Library is responsible for, among other things:

- collection, valuation and conservation of the cultural and documentary heritage;
- attribution of ISBN and ISSN numbers;
- communication and dissemination via its collections and bibliographical research tools;
- adding value to these collections via publications, exhibitions and cultural events;
- coordination of the national network of Moroccan libraries in order to implement programmes for processing, saving and disseminating the documentary legacy;

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24 Dahir n° 1-03-2000 du 11 novembre 2003, B.O. n° 5184 du 5 février 2004.

making the collections available to the public, subject to intellectual property legislation;

- supplying specialised document and informational services for disabled people; and
- ensuring the reception and management of mandatory deposits, in compliance with the regulations in force.

Law 68-99 mandates deposit in the library of any printed document, graphic, photographic, audio, audiovisual or multimedia work, as well as databases, software and firmware. The Dahir of 2003 promulgating mandatory deposit Law 68-99<sup>25</sup> indicates that the purpose of the repository is to collect, preserve and conserve printed, graphic, photographic, sound, audiovisual and multimedia documents,<sup>26</sup> as well as databases, software and firmware. It should be noted that among the documents excluded from this procedure is research carried out within an academic context such as dissertations and theses. The availability to the public of the documents subject to mandatory deposit is governed to some extent by the provisions of the Copyright Law.

The National Library currently has a modern digitisation laboratory equipped with highly sophisticated facilities and it has started a digitisation programme for its most precious, fragile and rare collections. More than 20 000 documents have already been digitised. The National Library has also acquired a new restoration laboratory — for both mechanical and manual restoration — that not only restores the library's documents but also assists other Moroccan and foreign institutions in this field.

### Functions and organisation of the national documentation centre<sup>27</sup>

Besides its main mission, which is to supply stakeholders with information in all forms and formats (written, audiovisual, magnetic or multidimensional), the National Documentation Centre is also responsible for the collection, processing and diffusion of all the documents and information relating to the social and economic development of Morocco.

### 5.2.3 *International conventions and agreements*

Morocco has been a signatory to the Berne Convention since 1917, with the exception of Articles 1 to 21 of the Stockholm Act. Morocco has recognised the Universal Copyright Convention of 6 September 1952 since 1972. In 1971 the

25 Dahir n° 1-03-201 du 11 novembre 2003.

26 B.O. n° 5184 du 5 février 2004.

27 Décret n° 2-97-286 du 7 avril 1999, B.O. n° 4696 du 3 juin 1999.

country also adopted the convention which created WIPO.<sup>28</sup> The ‘WIPO Internet Treaties’ of 1996 — WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) — are currently in the process of being ratified. As a member of the WTO, Morocco has modified its national laws in accordance with the clauses dictated by this organisation. A WTO TRIPs Council assessment found that Morocco had complied with all its TRIPs obligations.

Indeed, the Moroccan Law goes beyond international minimum standards. For instance, the Copyright Law (as amended in 2006) and other legal instruments related to intellectual property, provide for:

- a term of protection of 70 years for most works, well beyond the 50-year international standard;
- special requirements for border protection;
- broad legal protection against circumvention of technological protection measures (TPMs);
- strong civil and criminal sanctions for copyright violations; and
- a limited liability regime for communications service providers in order to make it easier for authorities to take action against infringements.

According to Article 68 of the Copyright Law, ‘should there be a conflict between the clauses of the present law and those of an international treaty which the Kingdom of Morocco has signed, the clauses in said international treaty shall apply’.

### *Free trade agreement (FTA) with the United States*

Morocco has signed several important bilateral agreements and treaties, but the recent free trade agreement (FTA) with the United States, signed in June 2004 and in force since January 2006, is most important for this study.<sup>29</sup>

In Morocco, the negotiations for this agreement provoked much debate, among the intelligentsia and, in particular, politicians. The opponents of the agreement felt that it was unbalanced and benefited the US only, given the weak production, export and upgrading capacity of the Moroccan economy. The defenders of the agreement — the government, the majority party in power and their media, as well as employers — saw it as an opportunity for Moroccan companies to access the American market and therefore diversify export markets, dominated until then by the EU countries, especially France, Spain and Germany.

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28 Dahir n° 1-73-378 du 8 janvier 1974, B.O. n° 3204 du 23 mars 1974. Dahir n° 1-76-599 du 17 décembre 1976, B.O. n° 3359 du 16 mars 1977.

29 Free trade agreement signed between the US and Morocco on 15 June 2004, in force on 1 January 2006.

Despite dissent from civil society and the international mobilisation that accompanied the negotiation of the FTA, the agreement was signed and has been in force since 2006. Obligations contained in the agreement that relate to copyright are as follows:

- compliance with the highest international standards, in other words the standards common to countries that export technology. For instance, according to Article 15.1.2(g) and (h) of the FTA, Morocco has accepted to adhere to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT);
- forbidding circumvention of technological protection measures (TPMs);
- protection against unauthorised parallel importations, according to Article 15.5.2;
- compelling the relevant authorities, in terms of Article 15.11.23, to implement measures at the borders regarding the import, export or transit of goods suspected to affect an intellectual property right, without requiring a formal complaint from a private party or from the rights-owner;
- forbidding, in terms of Article 15.11.27, the trafficking of false labels put or destined to be put on a phonogram, a copy of software, a document or packaging for a computer program, the copy of a movie or any other audiovisual work, or knowingly trafficking false documents; and
- imposition of a minimum duration for copyright protection of 70 years for most rights.

Morocco has thus relinquished its right to use many of the copyright flexibilities granted to countries by the WTO. It is not surprising, then, that the US Advisory Council feels that the weak points that featured in the US free trade agreements with Chile and Central America were mostly eliminated in the FTA with Morocco. The US FTA with Morocco has become a template for other US FTAs to follow.

The challenges connected to the US-Morocco FTA are numerous. In the field of knowledge/learning materials, Morocco's public education system is already fragile and sensitive to the price of foreign publications. The strengthening of copyright included in the agreement may, among other things, restrict access to these publications.

#### **5.2.4 Judicial and administrative decisions**

There is a shortage of judicial decisions in the area of copyright in Morocco, which can be explained by two things. The first is that most cases which relate to copyright find solutions in alternative arrangements such as mediation or amicable settlement.

The second is that most rights-holders seem to consider the sanctions contained in the Law as insignificant and thus not worth formally pursuing.

The lack of case law means that Morocco risks not addressing important questions about access to knowledge as a means to economic and social development in the knowledge economy. Furthermore, practice has shown that measures taken by the authorities against infringement — for instance, infringement by families who depend on piracy to make a living, or students doing infringing photocopying — are ineffective. Attempts at draconian controls, arbitrary interventions, heavy fines and the seizing of equipment used for these crimes have shown that such tactics do not seem to produce any desired results. New policies based on sound development policies are required. The cornerstone should be access to knowledge rather than the existing, flawed market logic that primarily benefits foreign multinational corporations.

### ***5.2.5 Summary of legal environment***

The laws and regulations in Morocco relevant to copyright have been developed along international norms, which are included in the various conventions signed by the Kingdom of Morocco, particularly the Berne Convention and the WTO TRIPs Agreement and to some extent the two ‘WIPO Internet Treaties’ — the WCT and WPPT — which Morocco is in the process of ratifying. But Morocco has recently adopted, particularly after signing the FTA with the US, measures that go beyond international norms. The 2006 amendments to the Copyright Law were primarily aimed at addressing technological evolution, allowing Morocco to fulfil its commitments in terms of its FTA with the US and relieving general pressure by international powers. Indeed, the system created by these reforms seems likely to ensure more protection of works, but will such protection be positive for Moroccan social development, given the current needs of Moroccan society? What about access to knowledge in general and access to learning materials in particular?

## **5.3 Qualitative analysis**

### ***5.3.1 Copyright literature***

Morocco suffers from a scarcity of copyright research, except for a very limited number of theses and dissertations. There are fewer than 10 works regarding copyright. The research studies carried out, even though they are academic, tackle the topic from the point of view of the protection of the author’s absolute property. They focus on the lack of compliance with copyright, often blaming lax state controls.

In his PhD thesis published in 1997 under the title ‘Notion de droit d’auteur et les limites de sa protection pénale’, Abdelhafid Belkadi recommends the strengthening of criminal sanctions for copyright violations. Meanwhile, Abdessaid Cherkaoui

writes that: 'Morocco has fallen into the trap of globalisation when it implicitly recognised multinational companies as an author. In fact, there is nothing Moroccan about the BMDA: it only manages the various interests of multinational companies on the national territory'.<sup>30</sup> But in his more recent work entitled 'ABC de la mondialisation',<sup>31</sup> the same author abandons his critical position and aligns himself with the overwhelming majority in terms of copyright, by adopting a protectionist perspective that does not take into account access to knowledge.

Ahmed Mikou, the head of an academic course on intellectual property at the Hassan II University, published an article in the *Revue marocaine de droit et d'économie du développement* entitled 'Le rôle de l'État dans la promotion et la défense de la propriété intellectuelle', advocating a similar protectionist perspective that de-emphasises access to knowledge.<sup>32</sup> However, since the 2004 signing of the FTA with the US, stakeholders have started being more critical in terms of copyright. In his article entitled 'ALE entre le Maroc et les États-Unis: impact sur la protection de la propriété intellectuelle', Mohamed Elmassloumi reflects this new trend. The privatist approach, which refuses to take into account fundamental rights, is starting to recede.

For its part, the BMDA reflects the idea that protection is a source of creativity. On their side, public administrators give their positions on their websites and in brochures. These brochures are internal documents which limits their impact. And the brochures reveal that there is a lack of coordination from the public services across the board, due to the absence of a multidimensional strategy regarding the links between intellectual property, copyright and access to knowledge.

### 5.3.2 Impact assessment interviews

With interviewees chosen on the basis of their connection to access to knowledge and copyright, we interviewed representatives of:

- the Ministry of Higher Education (now a Department of the unified Ministry of National Education, Higher Education, Training Programmes and Scientific Research);
- the Programming Division of the Ministry of National Education (now a Department of the unified Ministry of National Education, Higher Education, Training Programmes and Scientific Research);

30 A. Cherkaoui 'Droits d'auteurs: Le BMDA, un organisme bénéficiant d'une période d'exception qui dure depuis 1970' *L'opinion* (10 January 1998) at 4. Available at <http://www.cherkaoui.net/fichiers/journaux/j2-fr.html> [Accessed 26 February 2010].

31 A. Cherkaoui 'ABC de la mondialisation: règles et exceptions' *L'opinion* (31 January 1998). Available at <http://www.cherkaoui.net/fichiers/journaux/j4-fr.html> [Accessed 26 February 2010].

32 A. Mikou 'Le rôle de l'État dans la promotion et la défense de la propriété intellectuelle' (2001) 44 *Revue marocaine de droit et d'économie du développement*.

- the National Library;
- university libraries at the Faculties of Law at Salé and at Marrakech;
- Marsam publishing house;
- the Bureau marocain du droit d'auteur (BMDA) (several meetings but not an official interview with the Director and one unofficial interview with a Bureau manager); and
- teachers and students.

From these interviews, we were able to see the lack of awareness on the part of most of the interviewees (all except the interviewees from the BMDA) regarding copyright and its legal framework. This lack of awareness made it necessary for almost all interviews to take the form of a general discussion. Such a situation reflects the general environment and the dominant culture in terms of copyright in Morocco. Copyright is a preoccupation of major corporations and the elites and revolves around protection and promotion of authors' and rights-holders' property rights.

Other overall findings from the impact assessment interviews were:

- a lack of a sense of the connection between copyright law and access to knowledge;
- a lack of understanding of the evolution towards strengthening of the protectionist elements of the Copyright Law;
- generalised lack of compliance with the Copyright Law, particularly via illegal photocopying of books and use of pirated software;
- the view that it is the state's responsibility to ensure access to knowledge, but with the precise nature of necessary state intervention remaining uncertain for most interviewees;
- the view that weak economic conditions and poverty are the main explanations for the lack of respect for copyright, eg infringing purchasing of illegally photocopied works at very low prices;
- support for improvement and maximisation of access to knowledge, especially in the area of learning materials and teaching; and
- the need for more open and free access to digital resources, which remain scarce except at the National Library.

Below is a more detailed look at some of the interview findings.

### *The role of copyright*

Most of the interviewees had difficulty conceiving of a link between copyright and access to knowledge. According to them, even though they are convinced of the necessity of the right to knowledge for citizens, this right has to be limited by almost absolute copyright in works.

According to the interviewees, copyright is a necessary obligation, to motivate creativity and innovation. Publishers, representatives of the BMDA and representatives of the National Library say they ensure compliance with copyright and consider it a factor that favours access to knowledge, not the contrary.

For one of the Education Ministry officials interviewed, copyright is not a priority: copyright is the business of publishers. The Ministry is not concerned with this topic, in terms of its jurisdiction. The first priority of the Education Minister is to ensure that all citizens can access knowledge at a minimal cost, but the Ministry does not consider copyright to be a part of the solution. The Ministry feels it plays its role, which it wishes to strengthen further, by working with the publishers, who are willing to collaborate and who are considered by the Ministry to be civic-minded corporations. These publishers are committed to paying for copyright in the works they publish, even before they know whether their projects are accepted by the Ministry's monitoring committee. According to the interviewee, the Minister does not deal with copyright; he deals with the right to knowledge.

It is significant that expressions such as 'protection obligation' and 'state intervention to impose respect for the law' were typical in all the interviews. The reasons for non-compliance with the Law did not generate any spontaneous curiosity among the interviewees. Rather, the issue for the interviewees was how to empower the state and require strong intervention on its part in order to guarantee respect for authors and rights-holders. But once the discussion went into more detail, many interviewees did say that copyright infringement likely has its roots in poverty and the high cost of books and learning materials.

It is our view that the lack of compliance with the Law – by those, for instance, who illegally photocopy entire books for commercial purposes – can indeed be explained by factors such as poverty, the high prices of books and by the almost total lack of infrastructure in public libraries and public cyber-spaces.

### *Economic factors*

Economic factors have a crucial impact upon access to knowledge. According to the publishers we interviewed, the author gets only 8 to 10 per cent of the retail price of the book in return for giving copyright to the publisher. The costs of publication and distribution should also be taken into consideration. Indeed, it would seem all stakeholders are suffering in the present market, which does not always function optimally. Publication and distribution costs are high, economic conditions do not allow many citizens to purchase the books they are interested in and copyright payment from a publisher is not enough in itself for authors to make a decent living.

In order to facilitate access to knowledge, books need to be produced at lower costs to allow Moroccans to benefit from them. But, say the publishers, such



low-cost books would also need to be quality products. Librarians, on the other hand, say they facilitate and maximise access to knowledge for educational and scientific purposes in a manner that does not impact the economics of book production. Their concern is the lack of materials in their libraries and the lack of finances to purchase books. Meanwhile, according to Education Ministry officials, the essential thing is to prevent the government from deregulating the prices of school books. At present, many school books (pre-tertiary-level books) are made somewhat affordable by government subsidisation of publishing and distribution of these books.

Meanwhile, the BMDA takes a different view of the economic realities. For the BMDA, copyright limitations and exceptions have the potential, if expanded, to undermine the economic returns for producers, innovators and inventors of materials, who would then lose one of their main motivating factors.

### *Copyright limitations and exceptions and access to knowledge*

According to the BMDA, current copyright limitations are largely sufficient and allow for access to knowledge fairly easily in the case of learning materials, research, or personal and non-commercial use. The National Library interviewees agreed. As far as adaptation of copyright works goes, the National Library confirmed that some provisions are made to facilitate access to knowledge for disabled people or people with particular needs. Individuals suffering from a physical disability have no problem accessing the library and can therefore access any kind of work without any difficulty. People suffering from sensory disability, such as the visually impaired, can magnify the pages they read 16 times, which facilitates their reading. The blind have access to the necessary equipment to read in Braille. They can also use audio equipment to listen to an audio version of a book instead of reading, though relatively few books are available in audio format and converting and/or accessing audio books may constitute copyright infringement or require the illegal circumvention of TPMs.

An interviewee at the National Library confirmed that he was willing and able to make recorded versions of copyrighted works for blind individuals who request this. This type of request has never been made, however. Regarding the copyright aspect of this type of adapting of an entire work (actually not permitted by the Copyright Law without authorisation from the copyright-holder), the official did not think that there was a single author who would refuse such an adaptation should it be to help disabled people, but he indicated he would ask for the author's permission beforehand. Should there be royalties to pay, the National Library would pay them. Finally, membership at the National Library is free for all disabled people.

Despite libraries being places where knowledge can be disseminated, the interviews with library officials revealed the deep need for training and awareness

in terms of copyright. There is little awareness of the issues of maximising access to knowledge or taking advantage of legal exceptions. Only after our interviews did the National Library start to be aware of the importance of copyright and the library has now committed itself to organise, in the near future, a study on copyright. The National Library has also decided to liaise with the BMDA to find out more about the BMDA's mission and to potentially create a partnership in order to contribute to the development of policies and strategies in this area.

The interviewees at the National Library now believe the topic of copyright deserves special interest in order for the National Library to:

- better know and understand copyright, its environment and its impact on access to knowledge in order to allow the National Library to play its role in facilitating and maximising access to information and knowledge in general; and
- be able to participate in the formulation of strategies relating to access to knowledge, which is something the National Library had never thought of doing before. (In order to do this, the National Library was, at the time of writing this report, preparing a study day on copyright in which the BMDA, experts in the area and academics would participate.)

The interviewees from the teaching community, although more aware than other interviewees of the impact of copyright on access to knowledge, said it was the state's responsibility. For them, the state alone must take the necessary decisions in order to maximise access. The members of the teaching community interviewed did, however, recognise their own obligations to disseminate a copyright culture regarding the inalienable rights of authors as well as the limitations to these rights in order to provide for user access.

The Education Ministry officials highlighted the inequality women suffer and how this situation illustrates why the schooling of girls is essential. There should not be a choice between 'sending either the boy or the girl to school'. According to the officials, girls must receive improved means of access to knowledge. Only knowledge will give them the opportunity to fully play their role in society and to share the right to contribute to decision-making.

According to one Education Ministry official we interviewed, the key access to knowledge barrier is the poor state of the country's educational systems in general, which has not yet reached the required level. According to this official, it is likely that big cities provide a more or less acceptable education, but this is not the case in the rest of the country. Even in some of the big cities, some educational institutions operate in unacceptable conditions, especially in deprived areas. How, the official asked, is it then possible to stabilise the country and to make it reach a higher level of development if the poorer parts of the population do not have the adequate public and cost-free facilities for access to knowledge?

The private sector, namely the publisher interviewed, indicated that the situation regarding copyright and access to knowledge is paradoxical, especially in the area of publishing. Inexpensive books are desirable for all, but they must also be of good quality. How is it possible to produce quality goods without incurring additional costs? How can sufficient royalties be paid if book prices are low? How can creators be motivated to produce if they do not receive good payments? According to the publisher, local authorities need to intervene and play a role in this area. Local authorities need to create library collections for each district and, said the publisher, buy large collections of books, which they should make available to the public.

At the university libraries, managers complained that their budgets do not allow them to fulfil the access objectives entrusted to them. At the same time, however, the interviews revealed that library employees, including management, do not know much about copyright and do not have strategies for increasing access to knowledge. It was thus found that libraries are isolated from decision-making processes and the formulation of national policies and legislation in terms of copyright.

Regarding photocopying in university libraries, this service tends to be provided independently from the libraries' operations. Reproduction (sometimes of entire books) and adaptation are carried out on the basis of managers' personal opinions and not on the basis of agreements and conventions signed with the relevant institutions.

This situation at university libraries reflects the problem of access to knowledge. On the one hand, the Copyright Law forbids the photocopying of an entire work except for special circumstances such as library preservation. On the other hand, because of the poverty of users, photocopying entire books remains an important means of access, regardless of what the Law says.

Teachers interviewed said they feel that the right to access to knowledge is far from being achieved and is even threatened by the current trend towards free trade. They are afraid that knowledge will be transformed into a simple good regulated by free market principles.

### *Information and Communication Technology (ICT)*

According to statistics provided by the Agence nationale de réglementation des télécommunications (ANRT, National Telecommunications Regulatory Authority),<sup>33</sup> there are roughly 20 million mobile telephony subscribers, 2 393 million fixed-line telephone subscribers and 526 080 home Internet subscribers in Morocco.

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33 M. Siraj 'Le taux de pénétration d'Internet au Maroc ne dépasse pas 1,72%.' Available at <http://www.bladi.net/16798-taux-penetration-internet-maroc.html> [Accessed 26 February 2010].

In addition, according to one study, about 12 per cent of the total population, or about 3.7 million people, access the Internet outside their home.<sup>34</sup> The low rates of home Internet connection are due partially, according to the study, to the negative perception of the Internet and the underdevelopment of electronic commerce. Also, in rural areas, lack of access to the Internet was said by most respondents (63.3 per cent) to be largely a function of illiteracy or a lack of education, while others (37.7 per cent) cited the high prices of the equipment needed to connect to the Internet at home. In urban areas, the price factor was the main reason users cited (58 per cent) for not having access to home Internet, while some urban users also cited the lack of access to a computer (38 per cent).

ICTs, according to most interviewees for our research, generally constitute a powerful means of communication and dissemination of all kinds of knowledge. All interviewees agreed that these technologies are relevant in the area of knowledge, but nobody raised the question of access controls and the cost of access to knowledge through ICTs.

### *Gender*

According to most interviewees, the issue of gender and copyright law was not a point that required attention. Most interviewees said the Copyright Law is the same for all and there is no particular circumstance or measure that indicates differences in gender consideration. However, there was acknowledgement of gender dynamics in access to knowledge.

One Education Ministry interviewee had much to say about gender. He pointed out that various training sessions had been arranged for the benefit of managers and officials at the Ministry, in order to make them aware of the gender issue. The Ministry asked the trainers to make them aware and to train those authors who contribute to the development of school books. The focus is on making authors aware that 'the traditional lines' separating men from women are outdated and should not be replicated in school materials. A new logic based on principles of equality and equity must be generated and mainstreamed in texts, images and all school books. These orientations appear in the specifications delivered to publishers and are therefore available for authors, who then take this gender perspective into account when they write. The commission tasked with the evaluation of government-procured books is particularly interested in this aspect, so much so that it will reject any book project that does not comply.

34 A. Bounar 'Adoption d'un projet de plan d'action pour le développement du web au Maroc.' Available at <http://www.aedev.org/spip.php?article1203> [Accessed 25 July 2009].

It is important to highlight that gender relations in Morocco have received a boost due to profound recent modifications to 'Moudawana', the Moroccan Family Code. However, there are discrepancies between men and women that continue to exist, especially in terms of education, employment and income. A national budget study conducted in Morocco in 1998 helped clarify this situation. It was found that 22 per cent of women's time was dedicated to household tasks and the maintenance of the family.<sup>35</sup> Such a situation leaves a certain bitterness regarding the time women spend on domestic chores and the education of children. These efforts are currently not evaluated in Morocco. Only remunerated professional activities are counted; domestic work is considered a traditional obligation.

Women's economic empowerment is necessary as a source of social respect and opportunity to participate in public life. It is also a source of financial support and contribution to the social and cultural environment. Such economic autonomy can occur only if women have the same chances to access knowledge that men have. In this regard, the state has a fundamental role to play: it must work to liberate women and girls from traditional chores that prevent them from benefiting from the same opportunities as men in terms of schooling and education.

Factors such as family attitudes and traditions still play an important part in society, especially in poor families and particularly in rural areas. In fact, when having to make a choice, in poor families, between schooling a boy or a girl, the decision is spontaneously made: it is the boy who will go to school. In all such cases, the girl will be neglected, whereas statistics have shown that in the field of education, from the primary to the secondary level, girls are in fact more successful than boys in completing their education once they have been given a chance to start. Thus one cannot ignore the gender aspect in any policy or strategy.

That being said, there is nothing specific in the Copyright Law related to women: the Law is written in a way that appears to be the same for all. But, as just outlined, there are many reasons not directly related to copyright that make access to knowledge not as easy for women as it is for men. And thus it could be argued that a copyright environment with greater limitations and exceptions would particularly benefit women and girls, as they currently face greater learning access challenges than men and boys.

## **5.4 Conclusions and recommendations**

In terms of the legal framework adopted by the state, the copyright environment in Morocco clearly leans towards protection, or over-protection, of intellectual

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35 N. El Moujaddidi 'Les fondements de la budgétisation du genre au Maroc.' See also A. Paternov, G. Gabrielli and A.V. d'Addato 'Travail des femmes, caractéristiques familiales et sociales: le cas du Maroc.' Available at <http://www.demogr.mpg.de> [Accessed 25 July 2009].

and knowledge-related products. Consequently, access to knowledge is limited for poorer populations, hence the use of less costly access alternatives, such as illegal photocopies of books and pirated software.

The topic of copyright in Morocco remains an elite one even though its negative impact affects all of society. This situation is partially explained by a conception common to Moroccan society at large, which considers intellectual property as a luxury product, or as a concept that only large companies are interested in. The scarcity of research in this area is but one example that confirms this reality.

The reality of copyright in Morocco is that there are paradoxes at play: on the one hand, the legislation is very heavy in terms of protection, inspired by theories that are not even fully applied in their countries of origin. On the other hand, it is evident that compliance with copyright is an exception. In public services, for instance, it is known that employees work with pirated software, whereas the state is in principle the enforcer of the Copyright Law in this regard. Users of books and software who are vulnerable to economic conditions are in an untenable situation. Their lack of financial capacity does not allow them to afford the prices of the works, be they on paper or digital and the user must at the same time abide by the Copyright Law. This dead-end situation explains the choices that result in non-compliance with the Law in order to avoid marginalisation and exclusion.

What is required is a thorough examination of the copyright legal framework through the lens of the universal values and principles recognised by Morocco — principles such as the right to education and the right to knowledge. Such an examination should focus on fundamental rights. This type of analysis could help unlock some of fundamental principles in intellectual property, in particular the fact that intellectual property rights are limited rights.

To analyse copyright through the lens of fundamental rights would lead to understanding that there are property rights for copyright-owners and there are also fundamental rights for users, such as the right to expression, to information and especially to knowledge. All these rights have value. It is therefore necessary to find the correct balance between these rights.

Recent amendments to the Copyright Law essentially focus on expanding the field of protection, strengthening enforcement through legal mechanisms and tougher border controls, and strengthening the role of the BMDA. The results we observed have enabled us to make the following recommendations.

The Copyright Law should be reviewed in order to take into account the rights of users — not only the rights of rights-holders. The law should maintain a balance of interests between copyright-holders and users in the following ways:

- it is necessary to expand the scope of exceptions and limitations related to education, in order to include the objectives of distance education and

e-learning, as well as to give the possibility of obtaining compulsory and statutory licences for educational purposes. Compulsory and statutory licensing could be employed when protected works are not available, or are not affordable, or are not available in a widely-spoken local language. With such licences, the copyright-holder would then be obliged to assign his or her rights to another entity, such as the state or an individual publisher;

- access to knowledge differs from one social category to another and thus it is necessary to introduce exceptions and limitations for groups with specific needs, such as people with disabilities;
- libraries should be granted more flexibility in the amount of photocopying they can do for the benefit of students and researchers; and
- exceptions and limitations relating to parallel importation should be introduced to allow for the free importation of works that are already distributed abroad by the rights-holder at a lower price than in Morocco. Parallel importation would allow access to protected works at prices that are affordable for a larger part of the population.

The 1965 Decree constituting the BMDA should be reviewed in order:

- to ensure total control by the state over the Bureau's budget in order to avoid the latter's dependence on contributions from knowledge producers; and
- to allow for collective management of copyright royalties, by repealing Article 3 in the Decree which states that the BMDA 'alone is tasked with collecting and distributing the royalties derived from copyright in all its forms current or future...'

Libraries, which are sources of knowledge, must benefit from the implementation of a special status that will allow them to contribute to policymaking and become active facilitators of access to knowledge.

Universities and schools are currently excluded from any involvement in copyright policymaking. This negatively impacts access to knowledge. Universities and schools should enjoy political freedom to determine their own internal copyright policies and they should be integrated into government copyright policy decision-making processes.

In terms of public policies in general, the access to knowledge situation requires:

- promotion of the objectives of access to knowledge and provision of information to users about the limitations and exceptions to copyright;
- review of policies that inform the publication of school books to avoid market-based strategies and to prioritise policies that favour access to knowledge; and
- provision to educational institutions of access budgets specifically aimed at promoting the use of new technologies in education.

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## Chapter 6

# Mozambique

*Fernando dos Santos, Julieta Nhane and Filipe Sitoi*

### 6.1 Background

#### 6.1.1 Country history, politics, population and economics

Mozambique is a multicultural society consisting of different ethnic groups who arrived at different times in the history of the country. Bantu speakers migrated to Mozambique in the first millennium and Arab and Swahili traders settled the region thereafter. It was explored by Vasco da Gama in 1498 and first colonised by Portugal in 1505. By 1510, the Portuguese had control of all of the former Arab sultanates on the East African coast. After being under Portuguese colonial rule for 470 years, Mozambique became independent in 1975.

Mozambique is located in Southern Africa with an area of 790 380 km<sup>2</sup>. According to the last census carried out in 2007, the population was 20 530 714.<sup>1</sup> More than 50 per cent of the population was aged 6-24 years and 52 per cent were women.<sup>2</sup> The principal ethnic groups are, in the north, the Yao, Makonde and Makua; in the centre, the Thonga, Chewa, Nyanja and Sena; and the Shona and Tonga in the south. Small numbers of Swahili people live along the coast. People of European, mixed African and European and South Asian descent make up less than 1 per cent of the population. About 40 per cent of the inhabitants of Mozambique are Christian (Roman Catholic and Zionist Christian), while about 18 per cent follow traditional religious beliefs and another 18 per cent are Muslims (most living in the north). Although Bantu languages are widely spoken, Portuguese is the official language.

In terms of economic performance, Mozambique has had a gross domestic product (GDP) annual growth rate in the region of 7 per cent for the last 10 years,<sup>3</sup>

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1 Instituto Nacional de Estatísticas 'Estatísticas de Moçambique' (2008). Available at <http://www.ine.gov.mz> [Accessed 15 March 2009].

2 Assembleia da Republica, Resolução nº 16/2005 aprova o Programa Quinquenal do Governo para 2005-2009 at 168. Available at [http://www.portaldogoverno.gov.mz/docs\\_gov/programa/Plano\\_Quinquenal\\_%20do\\_Gov\\_Moc\\_2005\\_2009.pdf/view](http://www.portaldogoverno.gov.mz/docs_gov/programa/Plano_Quinquenal_%20do_Gov_Moc_2005_2009.pdf/view) [Accessed 7 June 2009].

3 World Bank 'Mozambique at a glance' (2008). Available at [http://devdata.worldbank.org/AAG/moz\\_aag.pdf](http://devdata.worldbank.org/AAG/moz_aag.pdf) [Accessed 15 March 2009].

but it remains one of the poorest countries in the world, with a per capita income of about US\$310 per year.<sup>4</sup> About 70 per cent of the population lives in rural areas. Due to heavy public investment in education, health and water provision programmes, the poverty rate was reduced from 69.4 per cent in 1997 to 54.1 per cent in 2003.<sup>5</sup>

The national illiteracy rate in Mozambique is 53.6 per cent and the rate is higher in rural areas (65.7 per cent) than in urban areas (30.3 per cent). The illiteracy rate among women is 68 per cent. The capital city of Maputo has lower illiteracy rates, with illiteracy at about 15.1 per cent, while the remote province of Cabo Delgado in the north registers 68.4 per cent.<sup>6</sup> The government programme for 2005 to 2009 established the goal of reducing illiteracy rates by 10 per cent in the referred period.<sup>7</sup> The Strategic Plan for Education and Culture 2006-2011<sup>8</sup> sets as a target 'provision of primary education school to 97 per cent of the population in 2010'.

### 6.1.2 Education system

The National Education System in Mozambique was defined in 1992 and provides for three different kinds of education:<sup>9</sup>

- 1) Pre-School System — for children below six years;
- 2) School System — which is divided into:
  - general system: primary and secondary school;
  - technical and professional system;
  - university and equivalent;
- 3) Special System — which consists of:
  - special education for the disabled;
  - vocational education for highly talented people in different areas;
  - adult education;

4 UNICEF 'Moçambique em perspectiva' (2009). Available at <http://www.unicef.org/mozambique/pt/overview.html> [Accessed 7 June 2009].

5 M. Mouzinho and D. Nandja 'A alfabetização em Moçambique: desafios da educação para todos' background paper prepared for the *Education for all global monitoring report 2006—literacy for life* (2006) UNESCO. Available at <http://unesdoc.unesco.org/images/0014/001462/146284por.pdf> [Accessed 1 November 2008].

6 Ibid at 6.

7 Resolução nº 16/2005 aprova o Programa Quinquenal do Governo para 2005-2009 at 68-70. Available at [http://www.portaldogoverno.gov.mz/docs\\_gov/programa/Plano\\_Quinquenal\\_%20do\\_Gov\\_Moc\\_2005\\_2009.pdf/view](http://www.portaldogoverno.gov.mz/docs_gov/programa/Plano_Quinquenal_%20do_Gov_Moc_2005_2009.pdf/view) [Accessed 7 June 2009].

8 As translated from the original Portuguese in Plano Estratégico da Educação e Cultura 2006-2011 (Junho 2006) Ministério da Educação e Cultura. Available at <http://www.mec.gov.mz/img/documentos/20060622060602.pdf> [Accessed 7 June 2009].

9 Lei nº 6/92 de 6 de Maio que aprova o novo Sistema Nacional de Educação.

- distance learning;
- training for teachers.

Primary schools in Mozambique together enrol more than 4 million students. These numbers shrink at higher levels of education. University programmes account for only 56 000 students. Enrolment levels for girls in early primary school (Grades 1 to 5) have been rising recently, with the percentage of females rising from 42 per cent in 1998 to 47 per cent in 2008.

### *Education system and access to knowledge*

Mozambican students face three important and interrelated challenges with regard to access to learning materials: expensive learning materials, few and poorly resourced libraries and a weak domestic publishing industry.

### **Cost of learning materials**

Learning materials in Mozambique have the potential to be too expensive for local students. Indeed, due to the high rates of poverty, meagre resources are often devoted to basic needs, particularly in rural areas. In order to overcome this difficulty, the government undertook to produce learning materials through the Ministry of Education and Culture. Learning materials are free for the seven years of compulsory education in Mozambique.<sup>10</sup> The Plan of Action of the Strategic Plan for Education and Culture 2006-2011<sup>11</sup> established as a target the provision of one book per subject per student by 2011 at the primary school level.<sup>12</sup> For the remaining years, students have to bear the heavy burden of purchasing books.

At university level, other than a few students who benefit from government scholarships, most must purchase books from their own resources. The learning materials required at universities are expensive because they mainly originate from Portugal and Brazil. The university libraries generally possess one copy only of each book, which is meant to be consulted by all lecturers and students. As a consequence, there is a flourishing reprography (photocopying) industry in the university faculties. There is an average of three photocopy machines in each faculty. In Maputo city alone, there are some 136 small reprography companies with four

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10 Article 6 of Lei nº 4/83 de 23 de Março de 1983.

11 Plano Estratégico da Educação e Cultura 2006-2011 (Junho 2006) Ministério da Educação e Cultura. Available at <http://www.mec.gov.mz/img/documentos/20060622060602.pdf> [Accessed 7 June 2009].

12 Ibid at 35.

to six photocopy machines each, as duly registered in the Ministry of Industry and Trade.<sup>13</sup>

Photocopied books have proven to be more accessible to students than the originals. Each photocopied page is priced at US\$0,04 to US\$0,06. University education is therefore based mainly on photocopied materials. The reprography industry constitutes an activity legitimately licensed by the competent authorities of the Ministry of Industry and Trade. During the process of licensing, the authorities only take into account the trade activity itself—without due consideration of the 2001 Copyright Law and (ultimately) the piracy implications of the illegal photocopying of entire copyright-protected books for commercial gain.

#### **Lack of public libraries and limited resources in existing libraries**

Currently, primary and secondary schools lack internal libraries for their students, due to a lack of resources to establish specialised libraries for those levels. Universities usually have one library for each faculty, which specialises in the subject matter of the faculty. These libraries are the main resources for university students. However, the library collection is often outdated with only a few books.

The Eduardo Mondlane University (UEM)—the main and oldest university in Mozambique—has undertaken a profound reform of its library system, integrating the different faculty libraries into one Central Library. The Central Library currently stocks more than 180 000 books and publications, which is largely as a result of donor funds. The state has not provided sufficient funds for new books in the last 10 years.

#### **Weak publishing industry**

The local publishing industry is extremely weak. Fewer than 200 books are published per year. These are mostly literary works, not textbooks and a typical print run for each book is approximately 1 500 copies, due to the inadequate market for books. Table 6.1 shows the number of books published in Mozambique and the number of publishing companies registered between 2000 and 2006.

13 B. Afonso *Relatório de Moçambique sobre direito de autor e direitos conexos* (2007) Training Programme on Copyright, Harare 23-27 April.



**Table 6.1: Number of registered books and publishing companies in Mozambique, 2000-2006**

Year	Registered Books	Publishing companies registered
2006	223	4
2005	216	2
2004	179	3
2003	176	7
2002	134	4
2001	143	3
2000	125	5

Source: Instituto Nacional do Livro e do Disco

The same trend can be witnessed in the case of other reading materials such as newspapers and magazines. Although Mozambique is characterised by a free press and has seen a rapid increase in the number of new newspapers and magazines, these numbers still have to be improved in order to develop the publishing industry and truly begin to spread information and knowledge. Almost all the magazines and periodicals in existence deal with general information. Scientific and specialised periodicals are still scarce.

**Table 6.2: Types of publications and their number in 2006**

Type	Quantity
Newspapers	77
Magazines	38
Periodic publications	74
Total	189

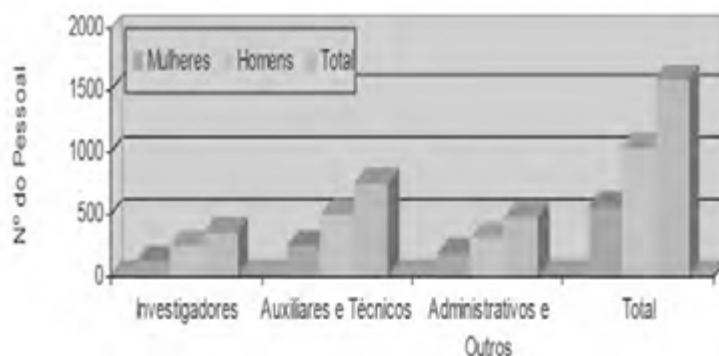
Source: Instituto Nacional do Livro e do Disco

### *Education and gender*

Disparities exist between men and women in the basic education system in Mozambique. Although 52 per cent of the Mozambican population is female, girls comprise only around 47 per cent of enrolments in the first level of primary school, and fewer than 40 per cent at the second level of primary school. Girls are more likely to repeat grades than boys and less likely to complete the full basic education cycle.

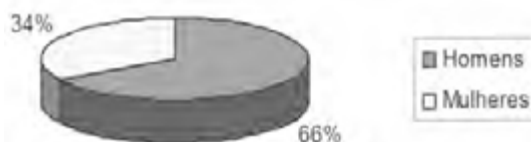
Only about 25 per cent of the teachers in the basic education system are women. Additionally, girls tend to drop out from school more than boys and the result is a gender gap, particularly in the northern and central regions. Social factors such as domestic obligations, premature marriages and pregnancies and long distances to schools contribute to low rates of enrolment and high numbers of dropouts. There is also the problem of the low number of female teachers who can serve as role models.

The low rates of women involved in education can also be found in research activities. The graphs below<sup>14</sup> show clearly that the number of women ('mulheres') engaged in research is lower than that of men ('homens'). Specifically, Figure 6.2 demonstrates that only 34 per cent of Mozambican scientific researchers are women. Long commuting distances and unavailability of research documentation inhibit women's access to knowledge, as much of their time is taken up by domestic responsibilities.



**Figure 6.1: Distribution of personnel engaged in research by type of activity and gender**

Source: Ministério da Ciência e Tecnologia



**Figure 6.2: Percentage of personnel engaged in research by gender**

Source: Ministério da Ciência e Tecnologia

<sup>14</sup> Ministério da Ciência e Tecnologia *Indicadores de ciência tecnologia e inovação 2008* (2008). Available at [http://www.mct.gov.mz/pls/portal/docs/PAGE/NEWS\\_EVENTS/CONSELHO\\_COORDENADOR/INDICADORES-08.PDF](http://www.mct.gov.mz/pls/portal/docs/PAGE/NEWS_EVENTS/CONSELHO_COORDENADOR/INDICADORES-08.PDF) [Accessed 15 March 2009].

## 6.2 Doctrinal analysis\*

### 6.2.1 Statutes and regulations: introduction to legal framework

The regulation of intellectual property in Mozambique can be traced to the time before independence, through two different instruments: the Industrial Property Code<sup>15</sup> and the Law on Copyright and Related Rights.<sup>16</sup> These two instruments were complemented by the 1966 Civil Code, which also contained some provisions related to intellectual property.<sup>17</sup> However, the establishment of a legal framework was not accompanied by the establishment of robust institutions to implement the law. All industrial property issues were addressed by a small division of the General Directorate of Industry, which merely channelled applications related to industrial property rights to the National Institute of Industrial Property located in Lisbon, the capital of Mozambique's colonial rulers, Portugal. No local copyright office was set up.

When Mozambique gained independence from Portugal in 1975, the government embraced a centrally planned economy which placed particular importance on collective ownership of property. Private property was discouraged and intellectual property totally lost its relevance in the new context. Though no formal changes were made and the Copyright Code was not expressly revoked, the law was simply ignored.

Since independence, Mozambique has enacted three constitutions, in 1975, 1990 and 2004. The first, inspired by the ideology of collective ownership, did not include any provision on intellectual property.<sup>18</sup> In 1986, a new government pledged to develop a market-oriented economy,<sup>19</sup> and in 1990 enacted a new Constitution to shift from a single-party regime to a multiparty democracy with the citizen at the heart of the state system. The 1990 Constitution expressly provided for freedom of expression and information (Article 74), the right to education (Article 92) and private ownership of property.<sup>20</sup> The 1990 Constitution also expressly

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\* All quotations from legislative texts in this chapter are translations from the official Portuguese versions.

15 Decreto nº 30.679 de 24 de Agosto de 1940, which became applicable to Mozambique further to enactment of Portaria nº17043 de 20 de Fevereiro de 1959.

16 Decreto nº 46.980 de 27 de Abril de 1966, which became applicable to Mozambique further to enactment of Portaria nº 679/71 de 7 de Dezembro.

17 The Código Civil (Civil Code) was approved on 25 November 1966 by Decreto-Lei nº 47344 and was extended to Mozambique through Portaria nº 22869 de 18 de Dezembro de 1967.

18 Open Society Initiative for Southern Africa (OSISA) *Moçambique: o sector da justiça e o estado de direito* (2006) OSISA, London, at 4. Available at [http://www.sarpn.org.za/documents/d0002240/Mozambique\\_Justica\\_Sept2006.pdf](http://www.sarpn.org.za/documents/d0002240/Mozambique_Justica_Sept2006.pdf) [Accessed 22 June 2009].

19 Answers.com. *Mozambique, history of* (n.d.). Available at <http://www.answers.com/topic/mozambique> [Accessed 22 June 2009].

20 Article 86 of the Constitution of 1990 states: '1. The State shall recognise and guarantee the right to ownership of property.'

provided for the protection of intellectual property rights, in Article 79.<sup>21</sup> In 2004, another Constitution was enacted and recognised some new rights, namely: use of electronic data (Article 71), consumer rights (Article 92) and cultural heritage (Article 81). The same intellectual property provision was simply re-numbered from Article 79 to 94.

It was not until implementation of the 1994 World Trade Organisation (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) that an intellectual property system was put in place in Mozambique.<sup>22</sup> As a least developed country (LDC), Mozambique was not required to fully comply with TRIPs until a 2006 deadline that was later extended to 2013 or 2016 (depending on the right at issue).<sup>23</sup> Nevertheless, the country undertook concrete steps to comply with TRIPs far ahead of the scheduled deadline, not taking advantage of the TRIPs flexibility allowing delayed implementation.

In compliance with the TRIPs provision requiring member states to establish a legal framework for intellectual property, the Mozambican government enacted the Industrial Property Code in 1999<sup>24</sup> and the Copyright Law in 2001.<sup>25</sup>

In further compliance with TRIPs, the Mozambican government created a Department for Industrial Property under the Ministry of Industry and Trade in 1995. The industrial property system was further strengthened through establishment of an autonomous entity responsible for administration of patents and trademarks, the Industrial Property Institute, created in 2003.<sup>26</sup> In May 2000, the collective management society of Mozambique, Sociedade Moçambicana de Autores (SOMAS), was established. The Instituto Nacional do Livro e do Disco (National Institute for Books and Records), which was established in 1975 and originally entrusted with press responsibilities, was expanded in 2001 to include the Copyright Office, by virtue of Government Decree 4/91. Concurrently, Mozambique has undertaken to adhere to all relevant international organisations active in the

21 Article 79 states: '1. All citizens shall have the right to freedom of scientific, technical, literary and artistic creativity. 2. The State shall protect rights relating to intellectual property, including copyright, and shall promote the practice and dissemination of literature and art.'

22 The Mozambican Government approved accession to WTO via Resolution of the Council of Ministers no. 31/94 of 20 September 1994.

23 This deadline was further extended to 2013 for all the least developed countries and the Doha Declaration on TRIPs and Access to Medicines of 2001 exempted least developed countries from TRIPs compliance in relation to pharmaceutical patents until 2016.

24 Through Decreto n° 18/99 de 4 Maio de 1999. The Code was comprehensively reformed in 2006: the new Industrial Property Code of Mozambique was enacted through Decreto n° 4/2006 que aprova o Código da Propriedade Industrial (publicado no BR I Série—n° 15 de 12 de Abril de 2006).

25 Lei n° 4/2001 de 27 de Fevereiro que aprova os Direitos de Autor (publicado no BR I Série—n° 8 de 27 de Fevereiro de 2001).

26 The Instituto da Propriedade Industrial (Industrial Property Institute) was established by Decreto n° 50/03 de 24 de Dezembro de 2003.

intellectual property system, namely the World Intellectual Property Organisation (WIPO) (agreed to adhere in 1996)<sup>27</sup> and the African Regional Intellectual Property Organisation (ARIPO) (agreed to adhere in 1999).<sup>28</sup>

However, the legal framework for protection of copyright in Mozambique (currently provided by the 2001 Copyright Law) has not yet been augmented by detailed regulation. Most of the rights are, therefore, lacking clear and concrete implementation guidelines. This lack of regulation limits the utility of the legal flexibilities provided for by the Law.

### *International Obligations*

#### **WTO TRIPs Agreement**

In 1994 Mozambique signed the Marrakech Agreement, thus joining the World Trade Organisation<sup>29</sup> and through the 'single undertaking' mechanism automatically ratified the Annex containing the WTO TRIPs Agreement.<sup>30</sup> The TRIPs Agreement sets the minimum standards for the protection of intellectual property rights. The minimum standards comprise:

- establishment of a legal framework for the protection of intellectual property rights;
- the administration and enforcement of intellectual property rights through the establishment of intellectual property offices, judicial institutions and border measures against intellectual property rights infringement; and
- definition of the minimum term of protection of intellectual property rights.

The TRIPs Agreement took into consideration existing discrepancies and asymmetries in terms of the development of WTO Member States and the difficulties that could derive from the uniform enforcement of provisions contained in TRIPs. Certain flexibilities were defined to cater to these asymmetries:

- time-based flexibilities—phased implementation according to whether the country classified itself as developing, in transition or least developed; and
- substantive flexibilities—for example, compulsory licences, parallel importation, exceptions and limitations.

For the 32 least-developed countries (LDCs) belonging to the WTO, including Mozambique, the time-based flexibilities originally provided considerable lead-time to create enabling conditions for enforcement of an intellectual property regime.

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27 Ratified by Government Resolution no. 12/96 of 18 June 1996.

28 Resolution of the Council of Ministers no. 34/99 of 16 November 1999.

29 Through Resolution of the Council of Ministers of no. 31/94 of 20 September 1994.

30 S. Namburete *A Organização Mundial do Comércio—uma visão Africana* (2005) Almedina, Coimbra at 19.

However, Mozambique did not take advantage of these TRIPs flexibilities allowing delaying implementation.

The Mozambican Copyright Law of 2001 served to implement several TRIPs principles, including:

- protection for the expression of ideas;
- copyright term of protection of 70 years beyond the author's life (even though the TRIPs minimum is life plus 50 years);
- protection of computer programs; and
- protection of performers, phonogram producers and broadcasting organisations.

Mozambique did not take full advantage of the TRIPs flexibility related to the term of copyright protection for authors' moral and economic rights, for broadcasts and for works of applied art. For all these works, the term of protection specified in Mozambique's 2001 Copyright Law goes beyond the minimum term of protection imposed by TRIPs — without any apparent justification for the extended term.

### The Berne Convention

Further to incorporation of an intellectual property provision in the 1990 Constitution and adherence to the World Trade Organisation in 1994, in 1997 Mozambique expressed willingness to adhere to the Berne Convention of 1886 by enacting the Resolution of the Council of Ministers 13/97 of 13 June 1997. Notwithstanding that Resolution, the instrument of ratification was not deposited at WIPO. There are official statements from the government to the effect that the Berne Convention is in force in Mozambique, but WIPO is not aware of the fact. The failure to deposit the instrument of ratification at WIPO seems to be a mere bureaucratic omission that could be easily solved. In 2001, four years after the enactment of the Resolution to adhere to the Berne Convention, Parliament passed the Copyright Law of 2001. Although Mozambique has not adhered formally to the Berne Convention, it complied fully with its principles in the Copyright Law, by virtue of adhering to the TRIPs provisions.<sup>31</sup>

Mozambique has not incorporated the Berne Appendix into its copyright framework. The Berne Appendix allows for compulsory licensing of translations under certain circumstances, but there is no official position on this matter. To some extent, this could be because Portuguese-language publishers dominate the Mozambican market and Portuguese is a European language not covered by the Appendix.

31 Article 9(1) of TRIPs states: 'Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto.'

## WIPO Internet treaties

Mozambique did not sign either of the so-called 'WIPO Internet Treaties': the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). Accordingly, digital issues are not specifically addressed to any great extent by the Mozambican Copyright Law. In particular, there are no specific provisions in the Mozambican Law prohibiting circumvention of technological protection measures (TPMs).

## *National statutes, strategies and policies*

### The Constitution

As stated before, the Mozambican Constitution of 2004 provides, in Article 94, an express statement regarding intellectual property. This Article focuses on promotion and dissemination of knowledge and arts,<sup>32</sup> referring to 'intellectual property, including copyright', thus aiming to ensure copyright is clearly incorporated.

The Constitution also provides, in Article 88, for the right to education for all citizens. Access to knowledge is undoubtedly one way to provide this right to education.

### The Civil Code<sup>33</sup>

The Civil Code contains some provisions with regard to copyright. Article 48 establishes the principle of territoriality of copyright law. Article 1303 states that copyright will be regulated by a special law.

### The Penal Code

The Penal Code enacted in the colonial period is still valid in Mozambique. It contains two relevant provisions regarding copyright, namely: Article 457 dealing with counterfeiting and Article 462 addressing illegal performance of music.

### The Copyright Law

The updated Copyright Law enacted in 2001 revoked the old Copyright Code, which had been unenforced, but not repealed, when the state promoted a centrally planned economy. The new 2001 Copyright Law is a complex law, incorporating 79 articles and an Annex with 32 definitions.<sup>34</sup>

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32 Article 94 states: 'The State shall protect rights relating to intellectual property, including copyright and shall promote the practice and dissemination of literature and art.'

33 Supra note 17.

34 Mozambican Copyright Law of 2001: Lei nº 4/2001 de 27 de Fevereiro de 2001 que aprova os Direitos de Autor.

### National intellectual property strategy

In 2007, the Mozambican Government approved the National Intellectual Property Strategy and its Action Plan.<sup>35</sup> The approval was achieved through an inclusive process of consultations between the public and private sectors, academic institutions, rights-holders and civil society. Therefore, the Intellectual Property Strategy represents the vision of all those stakeholders of an intellectual property regime that may serve the national interests in terms of economic, social, technological, scientific and cultural development of the country. But the context in which the Strategy was drafted was characterised by concern for protection of the rights of the creator and capturing value from local products. The Strategy therefore does not provide measures to safeguard access to knowledge by users.

### Eduardo Mondlane university research policy

In June 2007, the Eduardo Mondlane University (UEM) adopted a Research Policy<sup>36</sup> which establishes that research activities are governed by internationally accepted ethical principles, demanding respect for intellectual property. The Policy is clear in terms of the need to protect intellectual property. However, it lacks detail with regard to ownership of copyright and benefit-sharing for the results of the research. The document also lacks provisions that safeguard access to knowledge by researchers and students. The document simply sets out broad principles but does not contain detailed provisions on the management of intellectual property. UEM will soon enact a specific IP Policy in which such issues will be tackled.

### *Flexibilities in the Mozambican Copyright Law of 2001*

#### Kinds of copyright-protected works

The copyright system provides the owners of protected works with a temporary monopoly for the economic exploitation of their works. The monopoly allows the creators or the copyright-owner to benefit financially through selling or lending.

Article 4 of the Copyright Law establishes the kinds of works that are copyright-protected, namely:

- a) written works, including computer programs;
- b) lectures, addresses, sermons and other works consisting of words and expressed orally;
- c) musical works, with or without accompanying words;
- d) dramatic and dramatico-musical works;

35 Estratégia Nacional da Propriedade Intelectual (2007) Conselho de Ministros, Maputo.

36 Eduardo Mondlane University Research Policy (2007) University Press, Maputo.



- e) choreographic and mimed works;
- f) audiovisual works;
- g) works of fine art, including drawings, paintings, sculptures, engravings and lithographs;
- h) works of architecture;
- i) photographic works;
- j) works of applied art;
- k) illustrations, maps, plans, sketches and three-dimensional works relating to geography, topography, architecture or science;
- l) expressions of folklore.

It shall also apply to derived works that by reason of the selection or arrangement of their subject matter constitute intellectual creations, namely:

- a) compilations of works;
- b) translations, adaptations, arrangements and other transformations of original works.

The Copyright Law also provides for the protection of related rights in Article 41(1), namely rights to performances, phonograms, videograms and broadcast programmes.

### Scope

In Articles 7 and 8, the Mozambican Copyright Law outlines the scope of economic and moral rights. According to Article 7, the economic rights comprise reproduction; translation; preparation of adaptations, arrangements and other transformations; making copies of the work available for sale to the public, or any other form of transfer of ownership, for rental and for public lending; presentation or performance of the work in public; import or export of copies of the work; and communication to the public for broadcasting by cable or by any other means.

Article 8 lists the following as moral rights:

- a) the right to claim authorship of his work, in particular the right to ensure that, as far as possible, his name is mentioned in the usual way on copies of the work in relation to every public use of his or her work;
- b) the right to remain anonymous or to use a pseudonym;
- c) the right to object to any distortion, mutilation or other modification of his work, or any derogatory action, that might be prejudicial to his honor, or reputation, or to the authenticity or integrity of the work.

### Term of protection

Both the Berne Convention and the TRIPs Agreement set the minimum period of protection of copyright (economic rights) at 50 years after the life of the author

in the case of most works. In Mozambique, however, according to Article 22 of the 2001 Copyright Law, protection of copyright lasts for 70 years from the death of the author. The Berne Convention and the TRIPs Agreement also define the minimum period of protection for moral rights as at least the term of economic rights. Mozambique, however, provides perpetual protection for moral rights.

Table 6.3 compares the terms of protection of the different rights in the Mozambican Copyright Law with the minimum standards set by the TRIPs Agreement, the Berne Convention and the WIPO Performances and Phonograms Treaty (WPPT) of 1996 (even though Mozambique is not a signatory to the WPPT).

**Table 6.3: Comparison of terms of protection**

Right	TRIPs (Years) *	Berne Convention (Years) *	WPPT (Years) *	Mozambique Copyright Law (Years) *
Moral rights	N/A	50	N/A	Unlimited
Economic rights	50	50	N/A	70
Cinematographic work	N/A	50	N/A	N/A
Photographic work	N/A	25	N/A	N/A
Applied art	N/A	25	N/A	70
Performances	50	N/A	50	50
Phonograms	50	N/A	50	50
Broadcast	20	N/A	20	25
Anon/pseudonymous work	N/A	50	N/A	N/A
Folklore	N/A	N/A	N/A	Unlimited

(\*) After lifetime of the author

Article 7(6) of the Berne Convention provides that signatories may grant terms of protection in excess of those provided by the Convention and the Mozambican Copyright Law of 2001 does so in the case of moral and economic rights, broadcasts and works of applied art. But no specific reasons have been offered for these extended terms. Mozambique could have adopted the standard terms so that works would fall in the public domain more quickly, thus facilitating easier public access in a shorter period of time.

## Limitations and exceptions

The Berne Convention and TRIPs<sup>37</sup> also include several provisions related to exceptions and limitations, but leave application of these provisions to the discretion of each country. However, the discretion is narrowed by the fact that detailed conditions are defined for limitations and exceptions.<sup>38</sup> Those conditions largely consist of the so-called 'three-step test',<sup>39</sup> which prescribes that:

- the exception or limitation is set under certain special cases;
- there is no conflict with normal exploitation of the work; and
- the exception or limitation cannot unreasonably prejudice the author's interests.

Therefore, the 2001 Copyright Law followed the exceptions and limitations established by the Berne Convention.<sup>40</sup> The Copyright Law provides for exceptions and limitations to copyright in Articles 9 to 21 and for the related rights in Articles 47 to 49.

## *Reproduction for private purposes (Article 9(1))*

The monopoly that vests in the author does not encompass prohibition of private use of the work.<sup>41</sup> Private use excludes any economic exploitation of the work. The Mozambican Copyright Law allows reproduction of a 'published work exclusively for the user's private purposes without authorisation by the author or payment of remuneration'.

37 TRIPs Article 13 states: 'Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.'

38 K. Crews *Study on copyright limitations and exceptions for libraries and archives* (2008) WIPO Standing Committee on Copyright and Related Rights, Geneva, XVII Session, Geneva 3-7 November 2008 (WIPO doc SCCR/17/2). Available at [www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=109192](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=109192) [Accessed 15 November 2008].

39 'This test found in international intellectual property treaties such as the Berne Convention for the Protection of Literary Works; the Trade Related Aspects of Intellectual Property Rights (TRIPS) of the WTO; to mention a few requires that limitations of or exceptions to rights granted to copyright owners must be in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author. The cumulative nature of this test ensures that exceptions and limitations and therefore the public interest are severely threatened. It is difficult to imagine which exception and limitation that does not for example impact on the income of an author. If the three step test is pursued to its logical conclusion, copyright will become an exclusive protection for authors.' E.S. Nwauche 'Open access and the public interest in copyright' (2008) presentation to Conférence sur la publication et la diffusion électronique; *La Mise en ligne des revues scientifiques africaines: Opportunités, implications et limites* 6-7 October 2008, Dakar at 8. Available at [http://www.cadesria.org/Links/conferences/el\\_publo8\\_Eng/enyinna\\_nwauche.pdf](http://www.cadesria.org/Links/conferences/el_publo8_Eng/enyinna_nwauche.pdf) [Accessed 10 November 2008].

40 As indicated before, although Mozambique did not adhere formally to the Berne Convention, its 2001 Copyright Law fully follows its principles. This may derive from the fact that Mozambique, as member of the WTO, is bound by Article 9 of TRIPs, which establishes that members shall comply with the Berne Convention with regard to copyright.

41 J. de Oliveira Ascensão *Direito civil—direito de autor e direitos conexos* (1992) Coimbra Editora, Coimbra at 200.

*Quotations (Article 10)*

Quotation of a legitimately published work in another work is allowed without authorisation by the author or payment of remuneration, subject to the condition that the source and author's name are mentioned. However, the quotation has to conform to the 'normal custom and practice' and its extent must not exceed what is necessary to achieve its purpose. But what is 'normal custom' is not indicated; no specific regulations were enacted to clarify the issue. There is a need for regulations in support of the Copyright Law, clarifying the legislation.

*Reproduction for educational purposes (Article 11)*

Article 11 is the most important exception directly related to access to learning materials. It states that:

It is permitted, without authorisation by the author or payment of remuneration, but without prejudice to the obligation to mention the source and the author's name if it appears in the source: [...]

b) to reproduce by reprographic means for educational purposes or for examinations within educational establishments whose activities are not directly or indirectly profit-making and to the extent justified by the aim to be achieved, isolated articles lawfully published in a newspaper or magazine or short extracts from a lawfully published work or short work, provided that such use conforms to normal custom and practice.

The exception allows reprography<sup>42</sup> of isolated articles and brief excerpts of a work. However, the Copyright Law does not specify how short the work or the extract shall be in order to fit within the exception. Some of the academics interviewed indicated, informally, that 10 per cent of a work would seem to be a fair amount of reproduction.

*Reprographic reproduction for libraries and archive services (Article 12)*

An exception in Article 12 for libraries and archives allows the reproduction of part of, or entire, works (according to the specific case) if the activities of the institutions 'are not directly or indirectly profit-making'. Entire works may be reproduced by those institutions but only in isolated cases (such as replacement or preservation), meaning that the library may not put the work at the disposal of everybody for free reproduction at any time they want. In addition, Article 12(2)(b) clarifies that, if repeated, reproduction must occur on separate, unrelated occasions, meaning that multiple copies cannot be made on a single occasion.

42 Definition 32 set out in the Annex to the Copyright Law states that: "'reprographic reproduction of a work" means the production of facsimile copies of originals or of copies of the work by means other than painting. The production of reduced or enlarged facsimile copies is also considered "reprographic reproduction"."

According to Article 12(3), reproduction of an entire work is possible when such a copy is intended to preserve,<sup>43</sup> or if necessary replace,<sup>44</sup> a work in the permanent collection of a library or archive service, if the work has been lost, destroyed or rendered unusable, as long as the work is not available in reasonable condition or the reproduction is an isolated act or, if repeated, it occurs on separate, unrelated occasions.

Partial reproduction may be allowed to the library/archive where the purpose of the reproduction is to respond to a request from a natural person and the library or archive service ensures that:

- the copy will be solely used for research purposes;
- the reproduction is occasional; and
- a collective licence may not be obtained.

Commercial libraries do not qualify for the exception, but there seem to be none in Mozambique anyway. Indeed, the majority of the libraries are public or connected to a university. Some financial institutions also provide documentation centres that collect important pieces of knowledge, but they generally allow free access. Some diplomatic missions also provide cultural centres, including libraries accessible to the public.<sup>45</sup>

The Law also allows non-commercial libraries/archives to lend a copy of a written work to the public solely for consultation, without authorisation by the author or payment of any remuneration.

### *Visually impaired people*

More than 700 000 people are affected by visual difficulties in Mozambique. Among them 200 000 are blind, but only around 500 are able to read in Braille and only three hold university degrees.<sup>46</sup>

The Mozambican Copyright Law is silent regarding exceptions for the benefit of people with disabilities, meaning that any use or adaptation of a work to allow access by disabled people has no protection in the Law and therefore needs permission from the author.

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43 'Preservation generally involves the making of a copy of a work before it has been lost for any reason, in order to ensure its continued availability.' Crews *supra* note 38 at 51.

44 'Replacement...usually involves the making of a copy specifically to replace an item that already has been lost from the library collection, or [if] the original is for other reasons no longer suited for general use.' *Ibid.*

45 The UK Government provides the British Council Library in Mozambique. The diplomatic missions of the US, Portugal and Brazil also provide some important libraries in Mozambique.

46 Lusa: Agência de Notícias de Portugal 'Governo moçambicano lança edição da Constituição em braille' (2008) 14 August 2008.

A study presented at the Fifteenth Session of the Standing Committee on Copyright and Related Rights (SCCR) of WIPO in 2006 gave evidence that, in some countries, the lack of specific exceptions to copyright for the benefit of visually-impaired people is not seen as a problem as there is very little understanding of the restrictions that might arise because of copyright protection and often very little recognition of the needs of visually impaired people.<sup>47</sup> A 2006 case study looking specifically at Mozambique concluded that:

Libraries in general are very few in Mozambique and there are no libraries at all for visually impaired people. Some material does exist in Braille, but it is unlikely to have a local source. The beginning of a greater recognition of the needs of visually impaired people is, however, emerging. For example, in June 2006 a currency with a change in the face value was launched and it is possible to find information about this in Braille.<sup>48</sup>

At this point in time there is, therefore, no particular concern in Mozambique about any problems due to copyright with the production and dissemination of accessible formats of copyright works for visually impaired people. It does, however, seem very likely that, at some point in the future, as recognition of the needs of those which visual impairment continues to grow, copying it will become a problem.<sup>49</sup>

Most recently, in August 2008, the Head of State of Mozambique, Armando Guebuza, launched the Braille version of the Mozambican Constitution. As the adaptation was made by the Ministry of Women and Social Activities and the content was a legal document in the public domain, no copyright issues were raised. This research was not able to identify any cases of Braille adaptation of Mozambican documents protected by copyright.

### *Digital works (Articles 4 and 16)*

The Mozambican Copyright Law deals in only a minor way with digital issues, making express reference to computer programs in Article 4(1)(a).<sup>50</sup> And Article 16 allows 'the legitimate owner of a copy of a computer program' to 'make a copy or adaptation of that program', without authorisation by the author or payment of separate remuneration, as long as the copy or adaptation is: '(a) necessary for the use of the computer program according to the purposes for which it was obtained';

47 J. Sullivan *Study on copyright limitations and exceptions for the visually impaired* (2006) Fifteenth Session of the Standing Committee on Copyright and Related Rights of WIPO (SCCR/15/7) 11 to 13 September 2006, Geneva. Available at [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=75696](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=75696) [Accessed 1 November 2008].

48 Ibid.

49 Ibid.

50 Article 4(1) states: 'This Law shall apply in particular to literary, artistic and scientific works that are original intellectual creations in the literary, artistic and scientific fields, namely: a) written works, including computer programs; ...'

and ‘(b) necessary for purposes of archiving and for replacing the lawfully held copy in the event of its being lost, destroyed or rendered unusable’.

Mozambique is not party to the 1996 ‘WIPO Internet Treaties’ (WCT and WPPT) and thus is not obliged to develop provisions with regard to other digital issues.

Although the issue was not expressly stated in the 2001 Copyright Law, it may be inferred that the authorisation for reproduction, adaptation or performance may be applied both to physical and online works. Once again, clear regulation of the issue could be helpful.

#### *Judicial and administrative proceedings (Article 13)*

The Copyright Law allows reproduction of a work for judicial or administrative proceedings without authorisation by the author or payment of remuneration.

#### *Reproduction for information purposes (Article 14)*

To encourage freedom of expression, the Copyright Law allows reproduction of an article on economics, politics or religion published in newspapers or periodical reviews, or a broadcast work of similar character, without authorisation by the author or payment of any remuneration, but subject to the obligation to mention the source and the author’s name if it appears in the source.

An exception related to reporting current events means it is possible to reproduce or make available to the public ‘by means of photography, cinematography or video, or by broadcasting or communication by cable to the public, work seen or heard during the said event’ (Article 14(b)). Article 14(c) provides for an exception whereby ‘speeches, lectures, addresses, sermons and other similar works delivered in public, as well as speeches made during legal proceedings,’ may also be reproduced in the press, broadcast, or communicated to the public, as part of news reporting. The Copyright Law does not provide expressly for the amount of a work that a user can use for information purposes. It is supposed that that specification should be incorporated in the regulations of the Law, which still have not been enacted.

#### *Related rights (Article 47)*

Article 47 sets out conditions for ‘free use’ of performances, phonograms, videograms and broadcasts without authorisation of the rights-holders, namely the performers, producers of phonograms and broadcasting organisations.

Article 47 covers:

- a) private use;
- b) the reporting of current events, provided that only short extracts from a performance, phonogram or broadcast programme are used;

- c) use intended exclusively for education and scientific research;
- d) quotations, in the form of short extracts, from a performance, a phonogram or a broadcast programme, provided that such quotations conform to custom and practice and are justified by their informative purpose;
- e) any other uses that by virtue of this Law constitute exceptions in relation to works protected by copyright.

### *Government works (Article 5)*

According to Article 5(a), there is no copyright in the ‘official texts of a legislative, administrative or judicial nature, or official translations thereof.’ Those documents fall immediately into the public domain.<sup>51</sup>

There is no express provision in the Copyright Law regarding other government works or works that are created by government employees or officers, or that are government-funded. However, Article 32 provides for cases of works created under a contract of employment. The Article states that:

In the case of a work created by an author ... under a labour contract in the context of employment, provision of services or piecework, the primary owner of the economic and non-economic rights is the author, unless otherwise provided in the contract, but the economic rights in the work shall be considered transferred to the employer to the extent justified by the normal activities under the contract.

This provision could also apply in a case where the corporate entity that employs the author is the government, whereby the government would own the economic rights while moral rights would still vest in the author.

### *Expressions of folklore (Articles 31 and 50)*

The Mozambican Copyright Law provides, in Article 31, for ownership of the copyright in works of folklore to be vested in the state, which exercises its rights through the Council of Ministers.<sup>52</sup> The state’s copyright in folklore lasts for an unlimited period of time, according to Article 50. However, the Copyright Law does not provide any detailed regulation, including any eventual remuneration to the state or to communities from which that folklore derives.

<sup>51</sup> Prints of the official Government Gazette may be acquired and used freely. However, only one section related to business companies is accessible digitally at <http://www.portaldogoverno.gov.mz/Legisla>. The full text of the online official Gazettes is only available, against payment, in a private database, <http://www.atneia.com>.

<sup>52</sup> Article 31 of the Copyright Law establishes: ‘Ownership of the copyright in works of folklore vests in the State, which shall exercise its rights through the Council of Ministers, without prejudice to the rights of those who collect, transcribe, arrange or translate them, provided that the collections, arrangements or translations are original and respect the authenticity of the works.’



The Mozambican government has established an entity which is responsible for the management of cultural heritage, the Instituto de Investigação Sócio-Cultural — ARPAC (Arquivo do Património Cultural), under the Ministry of Education and Culture. Protection of folklore extends to performances, as its expression is made through performance and communication to the public. Folklore includes a huge body of knowledge and its communication to the public represents an important method of access to knowledge and, in return, creation of wealth to the local communities. Incorporation of the protection of folklore constitutes an important innovative approach of the Copyright Law. However, because the incorporation of the provision was not followed by clear regulations, no concrete implementation was made.

### **6.2.2 Judicial and administrative decisions**

Mozambique's legal system is civil law-based, so legislation is the primary source of law. Courts base their judgments on legislation and there is no binding precedent as understood in common-law systems. Nonetheless, the 2004 Constitution recognises the existence of legal pluralism. In other words, there are other normative systems that intertwine with the formal civil-law-based system.<sup>53</sup>

In practical terms, only two copyright-related disputes have come to the attention of the research team and even with these cases there was no clear indication that allowed their identification in the courts. One case was related to a book by a Mozambican author connected with teaching methodologies that was copied by a local typography company. The case seems to be pending in an unidentified court in Maputo. The second case was related to a South African citizen representing the interests of Pearson Publishers and of the authors Paul D Leedy and Jeanne Ellis Ormrod regarding the book *Practical research: planning and design*, which had been completely reproduced by a Mozambican citizen. It is not clear if the case was handed to the courts.

Therefore it would appear that there are no copyright cases in the courts and no precedents as such around copyright and access to knowledge. Also, it seems lawyers usually discourage such cases because the courts usually do not make a decision on cases related to intellectual property.

## **6.3 Qualitative analysis**

### **6.3.1 Secondary literature**

Literature on the Mozambican legal system is generally thin. When the research focus is narrowed to copyright, it becomes difficult to find references.

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53 P. Rainha 'Republic of Mozambique—legal system and research' (2008) GlobalLex. Available at <http://www.nyulawglobal.org/globalex/Mozambique.htm> [Accessed 20 November 2008].

Three monographs have been written at the graduate level of Eduardo Mondlane University (UEM) by Miguel Chissano, Orlanda Gisela Gonçalves Fernandes de Oliveira Graça and Vânia Francine Sigava de Jesus Xavier and one at the Polytechnic University in Maputo by Jaime Joel Jaime Guambe. Two of these monographs deal with copyright in general<sup>54</sup> and the others specifically with the collective management system<sup>55</sup> and music reproduction rights.<sup>56</sup> Also, important contributions have been made by Boaventura Afonso, the head of the Copyright Office. His works are unpublished papers presented in different seminars organised in Mozambique and abroad, illustrating the Mozambican copyright system.

Two important studies by foreign authors focus specifically on the exceptions and limitations with regard to Mozambique. One of those studies was produced by Enyinna Nwauche, whose 'Open access and the public interest in copyright' makes express reference to the issue of free use in regard to the Mozambican Copyright Law. The second, by Judith Sullivan, *Study on copyright limitations and exceptions for the visually impaired*, points out the lack of specific exceptions to copyright in Mozambique for the benefit of visually impaired people.

### 6.3.2 Impact Assessment Interviews

Impact assessment interviews were conducted with different stakeholders with regard to experiences on the ground in relation to implementation of the Mozambican Copyright Law.

These interviews involved the Copyright Office, SOMAS (the Mozambican collective management society), students, lecturers, distance learning centres, documentation centres of the university, publishers, university and public libraries and a university press. The findings of the interviews are summarised below.

#### *Awareness of the Copyright Law*

The interviewees from the Copyright Office and collective management society SOMAS were the most sensitised and informed on copyright, that being their daily activity. The other stakeholders indicated that they had become aware of copyright in recent years mainly through university courses, or from what they had read and heard. In general, all these stakeholders demonstrated awareness that copyright exists, albeit with different levels of detailed knowledge.

54 M.S.A. Chissano *Direito de autor em Moçambique: uma reflexão* (1995) TFC-UEM, Maputo; and Orlanda Gisela Gonçalves Fernandes de Oliveira Graça *Direito do autor e direitos conexos na ordem jurídica* (2002) Moçambicana-TFC-UEM, Maputo.

55 V. Xavier *A gestão colectiva dos direitos de autor* (2005) TFC-UEM, Maputo.

56 J.J.J. Guambe *Protecção dos direitos do autor no ordenamento jurídico Moçambicano: o caso do disco* (2008) TFC-ISPU, Maputo.

### *Impact of copyright on professional and academic activities*

The institutions dealing daily with copyright, namely the Copyright Office and the collective management society SOMAS, are the ones who understood the impact and importance of copyright in their institutions. Indeed, those institutions depend on the royalties collected from the exploitation of copyright. In particular, the collective management society depends exclusively on those royalties, while the Copyright Office depends partly on public funds and partly on the amounts paid for the purchase of each copy of copyrighted works.<sup>57</sup>

The National Library also indicated awareness of the impact of copyright, as it receives daily requests to use copyrighted materials. The library indicated that it does not impede copying of the materials but draws attention to the existence of the limitations on copying of copyright-protected works contained in the 2001 Copyright Law.

Copyright-holders also showed knowledge of the impact of copyright, indicating that this is the source of their income. Some publishers even stated that the voluntary implementation of copyright obligations which require that the works be reproduced upon authorisation of the authors through licences allowed them to compensate the authors, thus giving incentives for production of works of better quality.

In some cases, especially in academic institutions, the interviewees showed that they understood copyright prohibitions. In particular, the lecturers showed that they were aware that some practices related to access to learning materials and their distribution should be curbed by the existing copyright prohibitions. They admitted that they knew their behaviour was often illegal, but explained that there was no alternative.

### *Types of learning materials used or produced*

There are clear difficulties in the local production of learning materials and therefore foreign learning materials are adopted, especially in the universities. For the primary and secondary schools, the government, through the Ministry of Education and Culture, produces the materials. In the past, copyright was owned by the state, but in recent years, private authors and publishers have become involved, thus owning the corresponding copyrights.

An increasing amount of digital material is being used by students. The digital works are easier to obtain and are cheaper than printed books. The Central University Library of the Eduardo Mondlane University (UEM) is now subscribing

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57 Decreto nº 27/2001 de 11 de Setembro de 2001, aprova o Regulamento de aposição obrigatória do selo nos fonogramas e atribui ao Instituto Nacional do Livro e do Disco a competência de autenticar os fonogramas produzidos no país e os importados, através da aposição de selos.

to 23 000 digital scientific journals and magazines, spending US\$80 000 each year. Those journals from different universities in the world are now freely accessible to students, researchers and lecturers of the university. The National Library is also preparing to launch a new digital platform to give its users access to some of its collections, including legislation.

Distance learning courses recently adopted by UEM will bring new challenges and will require new and innovative types of materials. There will be a process of digitisation of some printed materials for them to be accessible to the enrolled students. This will be a very challenging issue in terms of copyright in the coming years.

### *Ownership of copyright materials*

Most reading materials used at universities are produced by foreign authors and publishers. Due to language limitations, there is a preference for scientific works produced in Portugal and Brazil. One student indicated that almost 95 per cent of his research is based on the work of Portuguese authors.

With regard to monographs or theses produced by the students, the university considers the reproduction rights surrendered to it, as the student proceeds to deposit the work in the Central Library. The university is now drafting an internal regulation concerning the deposit of students' final dissertations. According to the new rules, deposit of the final dissertation in the Central Library will be compulsory and imply surrender of reprography rights.

The Distance Learning Centre of UEM adopts, as reading materials, modules produced by lecturers or researchers of the faculties hired especially for this purpose. The authors are compensated for their works and the copyright in the works is transferred to the Centre.

### *Obligations and rights under the copyright system*

One interviewee from the UEM Central Library indicated that it is as if the Law does not exist at all. The interviewee indicated that, although he is aware of the fact that reproduction of a complete work is in almost all cases a violation, he has never prevented people from making copies.

But other librarians interviewed said they viewed their obligations as protection of copyright and prevention of prohibited reproduction of works. One of the librarians was also aware that the prohibition on copying an entire work was not absolute and that he was entitled to reproduce some entire works for preservation purposes and for substitution of old works.

Academics interviewed seemed to know of the protection of copyright, but they stated that in many cases they have used illegally copied materials due to high prices and unavailability in the market.

Student interviewees did not see any obligation on their side in relation to copyright.

The publishers identified their obligation under the Copyright Law as payment of royalties to the authors.

The interviewee from the collective management society SOMAS said that while the activities of SOMAS should encompass all copyright areas, it is currently active only in the music sector. There are no royalties collected in relation to exploitation of other kind of materials such as books.

### *Copyright as an obstacle to access to knowledge*

Our research has found that the Mozambican Copyright Law is not the single obstacle to access to knowledge, for five important reasons:

- the Copyright Law is not implemented in Mozambique;
- there is not much production of knowledge in Mozambique;
- reproduction of books through reprography is also expensive for Mozambicans and thus copyright infringement itself does not come cheaply, though it happens;
- reading culture is low, as people are more concerned with basic needs rather than publications; and
- the main obstacles to knowledge are the lack of learning materials and their cost.

The majority of stakeholders indicated that the high price of and lack of, books are the main obstacles to access to knowledge. Photocopying is not viewed as a violation but as a unique opportunity to access knowledge.

The Distance Learning Centre, using materials produced under contract by local teachers, does not see any influence of copyright on the price of the materials. The lecturers are paid to produce the materials and immediately transfer their rights.

On the other hand, publishers connect the cost of the books to copyright. They compensate the authors for the works and keep paying a percentage from the sale of the works and thus the price of the book includes the copyright cost.

Meanwhile, some learning institutions and library interviewees indicated that copyright acts as a limitation on their freedom to provide access to knowledge. Libraries receive some requests for complete reproduction of works, which some librarians restrain themselves from doing due to the Copyright Law.

### *Legal actions against copyright infringements*

Although many interviewees acknowledged that violations of copyright occur frequently, even in a systematic way, they were unanimous in saying that they had never been threatened or prosecuted for those infringements. As stated earlier, many

stakeholders act as if there was an absence of copyright law and the authorities are also silent in the implementation of the Law.

### *Intellectual property policies*

It was found that there are seldom intellectual property policies in place at institutions, including at academic and research institutions. However, UEM has adopted a Research Policy<sup>58</sup> that deals with intellectual property issues in paragraphs 4.6 and 4.7. As this recently approved policy lacks regulations, there is still no concrete impact at the university.

Paragraph 4.6 states: 'Research activities are governed by internationally accepted ethical principles, which demand: ... respect of intellectual property.' Paragraph 4.7 (Intellectual Property and Authorship Rights) states: 'Scientific research activity at UEM shall respect the application of the legislation in force in Mozambique concerning intellectual property and authorship rights.'

UEM protects the research that is carried out as follows:

- ii) Innovations resulting from research carried out at UEM are the property of the said institution and that of the researcher(s);
- iii) The protection of intellectual property and authorship rights are subject to signed agreement between the UEM and other partners, as well as international tools that regulate the issue and of which Mozambique is signatory; and
- iv) For the effect of intellectual property protection, innovations shall be registered and patented in the competent bodies by the Scientific Directorate of the UEM.

The National Intellectual Property Strategy suggests that all academic and research institutions should adopt internal intellectual property policies. UEM will soon embark on that initiative and it is hoped it will incorporate into the policy a vision of intellectual property that balances protection with access.<sup>59</sup>

### *Copyright and ICTs*

ICTs are having a great impact on access to learning materials. Publishers indicated that digital works are important. However, ICTs are still in the initial phases and many students have no access to the Internet or a computer. However, the institutionalisation of distance education, the use of online sources by researchers and students and publication of research findings, monographs and dissertations and books in digital formats will certainly enhance the use of ICTs. Both positive impacts in terms of easier access to learning materials and negative

<sup>58</sup> Supra note 36.

<sup>59</sup> Supra note 35.

impacts related to copying and illegal dissemination of learning materials, are expected to result.

There is a new practice in the universities, whereby lecturers post some materials on the Internet, giving easier access to all students. However, not all the materials posted are self-produced, which may raise issues of violation of copyright.

As mentioned above, the 23 000 digital scientific journals subscribed to by the UEM Library give free access to its students, researchers and lecturers. The National Library is now involved in a project of digitisation of the legislation, which should allow full access to Mozambique's legislation in electronic format.

The National System of Education in Mozambique established in 1992 includes distance learning as one of the special education systems. The UEM Centre for Distance Learning is a pioneer institution in distance education in Mozambique (and in Africa) and uses innovative online instruments such as digitised modules, digitised materials, an e-learning platform, online tutoring, CD-ROMs, an online forum, chat and online conferences, including use of peer-to-peer network applications like Skype. However, this distance learning system will bring in new challenges in terms of protection of copyright in the coming years.

One of the most debated issues during the process of establishing the Centre was the kind of learning materials to be adopted and the mechanism for their production.<sup>60</sup> The initial idea was to adopt so-called 'Readers', whereby different materials were compiled and put at the disposal of the students. Issues of copyright were not dealt with because the Centre was not aware that it was necessary to have procedures for requesting authorisation from each of the authors incorporated in the 'Readers' materials.

Eventually, the approach adopted was to hire lecturers who were responsible for the conception of the modules for the university. The authors transferred the copyright on the work for up-front compensation. Any future adaptation and modification of the work was the responsibility of the Centre without any need for authorisation from the authors. Any other additional reading materials are scanned from books available and put at the disposal of the students. Obviously, this poses the issue of authorisation from the authors of the scanned works. The Centre argues that no copyright objections may be raised as the works are scanned only partially, in an allowed proportion. Although the Mozambican Copyright Law does not specify a precise proportion of copying that is allowed, the Centre's position suggests that there is at least growing awareness of potential copyright issues.

In December 2000, the Government of Mozambique published the National ICT Policy,<sup>61</sup> which seeks, in part, to achieve national ICT literacy and the development

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60 Interview with the head of the Distance Learning Centre of Eduardo Mondlane University.

61 Política de Ciência e Tecnologia (2003) Ministério da Ciência e Tecnologia. Available at [http://www.mct.gov.mz/pls/portal/docs/PAGE/PORTALCIENCIATECNOLOGIA/PUBLICACOES/POLITC\\_T\\_0.PDF](http://www.mct.gov.mz/pls/portal/docs/PAGE/PORTALCIENCIATECNOLOGIA/PUBLICACOES/POLITC_T_0.PDF) [Accessed 7 June 2009].

of ICT human resources. Within the frame of ICT policy, the Ministry of Education established the SchoolNet Mozambique programme to promote education through information and communication technologies (ICTs). Through this programme computers are introduced in primary and secondary schools, although the numbers of computers are still low at public schools, particularly at primary ('primario') and lower secondary ('secundario 1º ciclo') levels and outside the capital city Maputo ('Maputo cidade'), as shown in Table 6.4 and Figure 6.3.

**Table 6.4: Percentage of schools with IT infrastructure at primary ('primario') and secondary ('secundario') levels**

Tipo de Escola	No Total de Escolas Publicas	Percentagem de Escolas com sala de Informática
Ensino Geral Primário 1°	8,700.00	0.02 %
Ensino Geral Primário 2°	1,320.00	1.14 %
Ensino Geral Secundário 1° Ciclo	156.00	9.62 %
Ensino Geral Secundário 2° Ciclo	35.00	91.43 %

Source: Ministério da Educação e Cultura



**Figure 6.3: Number of computers in public schools per region**

Source: Ministério da Educação e Cultura



### *Participation in drafting or discussing national copyright policies*

Apart from the public institutions tasked with dealing with copyright, the public or private entities from which interviewees were drawn generally have never been consulted in relation to national policies concerning copyright. The Faculty of Law of the UEM used to be consulted by the government to give advice on some legal instruments adopted by government or Parliament, but the Faculty has never been consulted on the question of copyright.

Multi-stakeholder involvement in the national processes of drafting policies and legislation is instrumental in generating ownership of the legal framework and its implementation by stakeholders. Thus it is not surprising that some interviewees stated that they work ‘as though there was no law on copyright’.

### *Awareness of limitations and exceptions*

Interviews revealed some understanding that photocopying of copyright-protected works is allowed in some circumstances without authorisation. But nobody was able to indicate to what extent photocopying is allowed and which were the provisions of the Copyright Law indicating the limitations. (The reality, of course, is that these limitations are vaguely set out in the Law.) During the interviews conducted for this research, some of the academics expressly indicated that they were not aware of the amount of a work that can be copied.<sup>62</sup>

The libraries are aware of the fact that as repositories of knowledge they are allowed to store and to some extent copy, some materials. The senior employees of the libraries were able to locate the library/archives exception provided for by Article 12 of the Mozambican Copyright Law.

However, the expression ‘exceptions and limitations’ was not known to all stakeholders interviewed. As previously stated, the Copyright Law itself does not outline, fully or clearly, the exceptions and limitations permitted by, or outside of, relevant international instruments.

### *Actions for change*

The interviews revealed that the government has taken the following valuable steps:

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62 In an interview for this research, one of the lecturers of the Eduardo Mondlane University stated (as translated from the original Portuguese): ‘I am aware that the copyright is not unlimited and partial use is possible...’. On the other side, one of the student interviewees said (as translated): ‘I am not aware (of the free use) but I am aware that it is possible to reproduce some materials for educational purposes. I am convinced that the reproduction for educational purposes causes less damage than other uses. I am aware of the fact that partial use of the work is possible...’.

- approval of some important legal and policy instruments, namely: National Intellectual Property Strategy (August 2007), Copyright Law (February 2001), 'Lei do Mecenato' (September 1994);<sup>63</sup>
- activities in the field: dissemination activities, book fairs and exhibitions around the country;
- tax exemptions for import of machinery for industry (including for the publishing industry);
- tax exemptions for imported books ('Lei do Mecenato'); and
- tax exemptions for paper, ink and other materials for the publishing industry.

The interviewees called for additional actions, including calling for the government to:

- implement the National Intellectual Property Strategy;
- take advantage of the Appendix of the Berne Convention in order to facilitate translations into local African languages;
- raise awareness of copyright issues, including implementation of exceptions and limitations;
- adopt Copyright Regulations to further provide details on the implementation of the copyright system;
- adopt internal copyright policies, especially in academic and research institutions;
- create Intellectual Property Units in relevant institutions, especially academic and research institutions;
- extend the activities and responsibilities of the collective management society (SOMAS) to other areas of copyright, especially books, currently neglected by the entity;
- set mechanisms related to licensed use of copyright works, including licensed reprography and payment of royalties by the reprography companies;
- create a mechanism to compensate authors through government funds;
- promote use of digital works;
- extend tax exemptions available for printed learning materials to digital materials;
- devote public investment to public libraries for acquisitions;
- devote public investment to purchasing learning materials for poor and vulnerable people; and

63 This Law introduces basic principles that allow individuals, private institutions and public institutions to improve their initiatives in favour of development of arts, culture, science and social activities in Mozambique. (Lei nº 4/94 de 13 de Setembro de 1994 que aprova a Lei do Mecenato.)

- set mechanisms to allow compulsory deposit of copies of Mozambican works in the public libraries in general and in the National Library in particular.

## 6.4 Conclusions and recommendations

The doctrinal analysis has confirmed that the Mozambican legal framework does not maximise access to knowledge because Mozambique has adopted international instruments without any deep analysis of the advantages or disadvantages of these systems for the local circumstances.

The haphazard nature of copyright law-making is demonstrated by the nature of the country's observance of the Berne Convention. The government approved a Resolution for ratification of the Berne instruments, but this Resolution was never deposited with WIPO. And yet the Copyright Law follows the Berne Convention as if it were in force. Another possible example of the weak copyright policymaking environment is the fact that the government did not make use of the allowance by the WTO for delayed implementation of TRIPs provisions.

Even more problematic is that the Copyright Law of 2001 in some cases exceeds the minimum terms set out by TRIPs, for instance through the provision of a copyright term of the life of the author plus 70 years when the TRIPs minimum is life plus 50 years. If knowledge access had been its priority, the government could have adopted the minimum standards for terms of protection in order to allow works to fall into the public domain more quickly.

Access to knowledge could also have been facilitated further by a Mozambican Copyright Law which applied a wider and more expansive range of exceptions and limitations and was accompanied by regulations making exceptions and limitations easier to operationalise.

Contrary to some other systems (but similar to other civil law jurisdictions), the Mozambican Copyright Law does not incorporate a provision that makes express reference to a general 'fair dealing' provision. This choice does not allow flexibility in the defences that can be relied upon for the use of copyright works. Instead, the Copyright Law defines the exceptions and limitations in great detail. Although the exceptions and limitations aim to be clear, their content lacks clarity and would require further elaboration (for example, through regulations) in order to clearly promote access to knowledge.

In addition, there are some important possible exceptions and limitations — such as those related to disabled people (especially the visually impaired), parallel imports and provisions for digital works — which are not included in the Copyright Law at all.

Turning to practical implementation of the Law, the views are contradictory. In general, there is a perception that copyright does not hinder access to knowledge because the Law is never implemented. The practical reality suggests that if the Law

as it exists were enforced, then there should be serious concerns in terms of access to knowledge. In the meantime, in the absence of enforcement of the access-unfriendly Copyright Law, the main obstacles to access to knowledge in Mozambique are related to the scarcity of books and their prices.

The second conclusion is that the copyright environment in Mozambique could indeed be changed in order to maximise effective access to learning materials. The starting point is the legal framework. Mozambique must ratify the Berne Convention by depositing the instrument of ratification with WIPO. The government approved the Resolution for the instrument in 1997.

The government might also consider notifying WIPO of the use of the Appendix to the Berne Convention to allow for compulsory licensing of translations of Portuguese-language copyright works into indigenous Mozambican languages. This could boost the local publishing industry, as there are more than 40 indigenous languages spoken in Mozambique.<sup>64</sup>

With regard to ICTs, the Copyright Law does not recognise the WIPO Internet Treaties (Mozambique has not signed them) and digital issues are not adequately considered in the Law. There is only the statement in Article 4(1)(a) that the Law applies to computer programs and the reference in Article 16 that clarifies the right of reproduction of computer programs. The legal framework needs to follow the pace of the society and comply with digital principles. However, this framework must be developed with caution, so as not to undermine user access. Adherence to the WIPO Internet Treaties calls for national copyright law to include anti-circumvention provisions which make the circumvention of technological protection measures (TPMs) illegal. The problem is compounded by the fact that the dominant interpretation of these treaties into national law (such as in the US) has been in a manner that does not permit circumvention of TPMs for purposes legitimated by national copyright law, such as use by a student conducting research or a sensory-disabled person adapting the format of a copyright-protected work from text to audio. Before a decision is made on compliance with the Internet Treaties, an in-depth analysis of the advantages and disadvantages of the Treaties is needed in light of national circumstances and interests.

In terms of limitations and exceptions, the Mozambican Copyright Law does not incorporate a general 'fair dealing' or 'fair use' provision but instead lays out exceptions and limitations in great detail. A disadvantage of this system is a limitation of the margin of manoeuvre for the courts in determining permitted uses. At the same time, the exceptions and limitations that are specified in the Copyright Law need to be improved/clarified in order to better serve access to knowledge.

64 'Languages of Mozambique' in M. P. Lewis (ed) *Ethnologue: languages of the world* (2009) 16ed Dallas, TX. Available at <http://www.ethnologue.com> [Accessed 31 March 2009].

For example, the exception that allows reproduction for educational purposes does not clearly answer some crucial questions such as: What portion of a work can be reproduced?

The copyright environment also depends on implementation and practices. The National Intellectual Property Strategy, approved by the government in 2007, contains important recommendations on the improvement of the intellectual property environment and exploitation of copyright to serve development, namely:

- establishing efficient mechanisms for remunerating authors;
- technical and legal assistance to authors on negotiation, management and commercialisation of IP-related contracts;
- improving the collective management system;
- economic exploitation of folklore;
- establishing anti-piracy measures; and
- developing cultural industries.

Further recommendations, from the authors of this chapter, on the improvement of the copyright environment include:

- incentives for licensing works;
- action to monitor the sale of potentially infringing materials such as blank CDs, photocopy machines and other infringing machinery;
- improving the mechanisms of compensation of authors through governmental funds;
- incentives to use and circulate digital works; and
- public investment in public libraries for purchasing learning materials.

The Mozambican government, in collaboration with academic institutions, civil society and copyright-owners, drafted the National Intellectual Property Strategy with the assistance of WIPO. The Strategy was approved by government in July 2007. Unfortunately, the Strategy does not take into account the access to knowledge dimension. The incorporation of an access to knowledge vision is necessary.

Meanwhile, another policy instrument currently under discussion is the 'Books Policy' drafted by the Ministry of Education and Culture. Again, it is crucial that an access to knowledge dimension is incorporated in this Policy in order to guide all the actions aiming at promoting book production and dissemination and facilitating book access by the majority of the population.

Mozambican academic and research institutions lack internal policies dealing with copyright. The Eduardo Mondlane University (UEM) has a Research Policy that provides some guidance on intellectual property and the UEM is now busy drafting its own stand-alone IP Policy. A positive outcome of this initiative is

crucial in order to encourage other academic and research institutions to adopt similar policies. If proper precautions are not taken immediately, the UEM policy may end up focusing too much on the protection of the rights of the creators and leaving aside the interests of the people wanting/needing to access the created knowledge.

The 2001 Copyright Law should be subjected to policy interventions that could promote the Law's revision in order to address the interests of users. For example, Article 11(b) of the 2001 Copyright Law establishes that it is lawful:

to reproduce by reprographic means for educational purposes or for examinations within educational establishments ... isolated articles lawfully published in a newspaper or magazine or short extracts from a lawfully published work or short work, provided that such use conforms to normal custom and practice.

However, the Law does not indicate specifically what is intended by the words 'normal custom and practice'. If the Copyright Law aims to effectively promote A2K, the provision needs to be changed in order to define this exception more clearly. And a clear policy needs to be defined to underpin such a change to the Law.

Concerning disabled people (especially the visually impaired), parallel imports and digital works — which impact on many people and many areas — it has already been stated that provisions catering to these areas were not included in the Law. The concrete action needed in this regard is to call for policies that may promote the change of the Law by introducing provisions that address those categories, all potentially A2K-enabling.

In sum, the reform of the Mozambican copyright system may be achieved by targeting the following policy instruments:

- the National Intellectual Property Strategy, under the responsibility of the government as a whole, although its adoption was driven by the Ministry of Science and Technology;
- the 'Books Policy' under the responsibility of the Ministry of Education and Culture;
- the 2001 Copyright Law — enacted by Parliament following the proposal tabled by the government through the initiative of the Ministry of Education and Culture; and
- IP policies at academic and research institutions.

The key entity for issues related to copyright is the Ministry of Education and Culture and specifically the Ministry's Copyright Office (in the National Institute for Books and Records).

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# Chapter 7

## Senegal<sup>\*</sup>

*Assane Faye, Nogaye Ndour and Mamadou Seye*

### 7.1 Background

#### 7.1.1 *Political and economic context*

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

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

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

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

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

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

### 7.1.2 Social, educational and ICT context

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The 2001 Constitution, in its Preamble, also affirms:

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

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

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

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

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

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



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

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

## **7.2 Doctrinal analysis**

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

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

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

#### *The 1973 Law*

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

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

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

### *The 1986 Amendment Law*

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

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

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

### *The 2008 Law*

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

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

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

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

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

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

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

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

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

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

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

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

### *Moral rights*

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

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

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

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

Moral rights are of four types:

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

### *Economic rights*

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

#### **The right of exploitation**

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

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

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

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

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

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

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

### **The resale right**

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

### *Transfer of rights*

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

### *Term of protection*

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

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

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

### *Limitations and exceptions*

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

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

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

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

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

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

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

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

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

### Teaching

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

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

### Analysis and quotation

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

### Use for information purposes

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

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



### Use of official texts

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

### Parallel importing

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

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

### Disabled people

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

### Libraries and archives

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

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

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

*Technological protection measures (TPMs) and electronic information*

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

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

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

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

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

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

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

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

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

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

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

### **7.2.3 Case law**

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

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

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

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

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

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

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

## **7.3 Qualitative analysis**

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

### **7.3.1 Impact assessment interviews**

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

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

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

### **7.3.2 Interviewees**

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

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

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

### **7.3.3 Interview findings**

#### *Government*

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

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

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

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

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

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

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

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

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

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

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

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

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

### *Educational community*

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

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

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

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

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



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

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

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

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

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

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

### University libraries

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

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

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

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

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

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

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

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

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

### Students and lecturers

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

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

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

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

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

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

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

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

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

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

## 7.4 Conclusions and recommendations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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# Chapter 8

## South Africa

*Tobias Schonwetter, Caroline Ncube and Pria Chetty*

### 8.1 Background

South Africa is the world's 25th-largest country by surface area,<sup>1</sup> and 24th-largest by population.<sup>2</sup> It is located at the southernmost region of Africa and divided into nine provinces: Limpopo, North West, Gauteng, Mpumalanga, KwaZulu-Natal, Free State, Northern Cape, Western Cape and Eastern Cape.<sup>3</sup>

South Africa's colonial past dates to the 16<sup>th</sup> century. Slavery was widespread by the 17<sup>th</sup> century and was not abolished until the mid-19<sup>th</sup> century.<sup>4</sup> Racial discrimination was rampant during the apartheid era between 1948-94, when South Africa was governed by the National Party.<sup>5</sup> After protracted negotiations, the first democratic elections were held under an Interim Constitution in 1994. This negotiated transition from apartheid to democracy has been hailed as both 'one of the most astonishing political achievements of our time' and 'a miracle'.<sup>6</sup> Since 1994 the government has been led by the African National Congress (ANC), which won democratic elections in 1999, 2004 and 2009. Since 1994 the government has pursued democratisation, socioeconomic change and reconciliation.

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1 United Nations Statistics Division *Demographic and social statistics, demographic yearbook* (2006) Table 3. Available at <http://unstats.un.org/unsd/demographic/products/dyb/dyb2006/Table03.pdf> [Accessed 30 March 2009].

2 World Population Division of the Department of Economic and Social Affairs of the United Nations Secretariat *World population prospects: the 2008 revision* (2009) Table A.3. Available at [http://www.un.org/esa/population/publications/wpp2008/wpp2008\\_text\\_tables.pdf](http://www.un.org/esa/population/publications/wpp2008/wpp2008_text_tables.pdf) [Accessed 30 March 2009].

3 Section 103(1) of the South African Constitution.

4 Government Communication and Information System (GCIS) *2006/2007 South Africa yearbook* (2007) at 31.

5 Ibid at 31-44.

6 World Bank *South Africa—country brief* (2009). Available at <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/SOUTHAFRICAEXTN/0,,menuPK:368086~pagePK:141132~pPK:141107~theSitePK:368057,00.html> [Accessed 30 March 2009]; B Kalima-Phiri *South Africa's trade policy: country background paper for CUTS-CITEE's trade, development and poverty (TDP) project* (2005) Southern African Regional Poverty Network at 4.

As of July 2008, South Africa's population was estimated to be 48.7 million, with 79.2 per cent of the population being black African, 9 per cent 'coloured', 2.6 per cent Indian and 9.2 per cent white. The country has 11 different official languages.<sup>7</sup>

Sections 30 and 31 of the South African Constitution protect the people's right to 'use the language and to participate in the cultural life of their choice' and the right to practice their religion. Section 29(1) of the Constitution provides that 'everyone has the right to a basic education, including adult basic education and further education, which the State, through reasonable measures, must progressively make available and accessible'. Section 29(2) of the Constitution provides for the right to receive educational instruction in the official language or languages of one's choice.

South Africa's national budget for 2008/09 provided for government expenditure of ZAR716 billion,<sup>8</sup> of which ZAR121.1 billion was set aside for educational purposes.<sup>9</sup> South Africa spends more than 5 per cent of the country's GDP on education. This educational expenditure (as a proportion of GDP) is roughly at OECD levels<sup>10</sup> but falls short of the 6 per cent figure recommended by UNESCO for developing countries. Almost 17 per cent of total South African government spending is allocated to education. Both aforementioned proportions for educational expenditure in South Africa (percentage of GDP and percentage of total government spending) have been declining in recent years. The absolute amount spent on education has, however, risen significantly in this time. In spite of all these efforts, the performance of South African learners in comparative tests with other countries remains poor.<sup>11</sup>

South Africa has a single national education system, which is managed by the national Department of Education (DoE) and the nine provincial education departments.<sup>12</sup> The education system is divided into three stages, namely General Education and Training (GET), Further Education and Training (FET) and Higher Education (HE). The GET stage begins with Reception Year (Grade R) and is capped at Grade 9. There is an equivalent Adult Basic Education and Training

7 Section 6 of the Constitution of the Republic of South Africa of 1996.

8 ZAR = South African Rand, which at the time of writing was valued at approximately ZAR7.5 to US\$1.

9 SA National Treasury *Budget at a glance* (2008). Available at <http://www.treasury.gov.za/documents/national%20budget/2008/guides/Budget%20at%20a%20glance.pdf> [Accessed 30 March 2009].

10 In 2005, the Organisation for Economic Cooperation and Development (OECD) average expenditure on educational institutions, as a percentage of GDP, from public and private sources was at 5.8 per cent, see OECD *Education at a glance 2008: OECD indicators* (2008) chapter B indicator B.2. Available at [http://www.oecd.org/document/9/0,3343,en\\_2649\\_39263238\\_41266761\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/9/0,3343,en_2649_39263238_41266761_1_1_1_1,00.html) [Accessed 30 March 2009].

11 OECD *Reviews of national policies for education: South Africa* (2008) at 129.

12 After the initial drafting of this report, the Department of Education was split into the Department of Basic Education and the Department of Higher Education.

(ABET) qualification. The FET stage begins at Grade 10 and is capped at Grade 12. The HE stage consists of a range of degrees, diplomas and certificates up to and including postdoctoral degrees. Only Grades 1 to 9 are compulsory. Learners usually begin Grade 1 at the age of 6. Therefore, if their studies are uninterrupted and they complete a grade each year, they should complete Grade 9 at the age of 14 or 15.

By mid-2007, there were 26 592 public schools in South Africa and 23 HE institutions. Altogether, 12.3 million learners were in South Africa's education system.<sup>13</sup> The number of children aged between 5 and 14 by mid-2007 was estimated to be 10 088 100.<sup>14</sup> It is said that the gross enrolment rate is at 100 per cent at primary school level and still very high up to Grade 9. The OECD averages are at 98.5 per cent and 81.5 per cent respectively.<sup>15</sup> These figures indicate very high levels of access to the compulsory stage of formal education in South Africa.

However, older members of the population who were of school-going age during the colonial and apartheid eras had much less access to education. And the need to correct the economic distortions due to the education and skills deficit of the majority of the older population remains one of the greatest challenges facing the government today.<sup>16</sup> Largely as a result of past poor access to education, there are high levels of illiteracy. For example, in 2004 it was said that at least 3 million adults were completely illiterate and between '5 to 8 million were functionally illiterate — unable to function adequately in the modern world due to under-developed reading and writing skills'.<sup>17</sup>

According to the 'Development Indicators 2008' issued by the South African Government, the Gender Parity Index [GPI] for total school enrolment (Grade 1 to Grade 12) indicates that gender parity has been achieved. The 2007 GPI for secondary education shows a disparity in favour of girl learners, while for primary education the picture is reversed, with more boys in primary schools than girls.<sup>18</sup> The 'Development Indicators' do not provide similar statistics or analysis for

13 Supra note 4.

14 Statistics SA *Mid-year population estimates 2007* (2007) at 9. Available at <http://www.statssa.gov.za/publications/P0302/P03022007.pdf> [Accessed 30 March 2009].

15 Supra note 10.

16 B. Khalima-Phiri supra note 6 at 4.

17 E. Sisulu 'The culture of reading and the book chain: how do we achieve a quantum leap?' 2004, keynote address at the Symposium on Cost of a culture of reading, 16-17 September 2004. Available at <http://www.nlsa.ac.za/NLSA/News/publications/culture-of-reading> [Accessed 30 March 2009].

18 The Presidency of the Republic of South Africa 'Development Indicators' 2008 (2008) at 46. Available at <http://www.info.gov.za/view/DownloadFileAction?id=84952> [Accessed 30 March 2009].

tertiary education. The United Nations has however compiled the following data for South Africa:<sup>19</sup>

**Table 8.1: Gender Parity Index in tertiary level enrolment in South Africa**

1991	1999	2000	2001	2002	2003	2004	2005	2006
0.83	1.16	1.24	1.15	1.16	1.17	1.19	1.21	1.24

(last updated: 14 July 2008)

Applying the principle that gender parity is attained when the GPI is between 0.97 and 1.03, a growing gender disparity in favour of female students can be observed in tertiary education enrolment in South Africa.

According to the International Monetary Fund (IMF), South Africa has the world's 25<sup>th</sup>-largest economy by GDP (PPP).<sup>20</sup> This makes South Africa the leading economy in Africa and a leader for developing countries on the world stage.<sup>21</sup> South Africa's economy has demonstrated sustained growth that recently reached an all-time high.<sup>22</sup> The country's tax collection and financial and debt administration are lauded by the World Bank as following 'international best practice'.

That said, a large portion of the population remains steeped in dire poverty. Former President Thabo Mbeki said South Africa has two economies or nations, 'one nation, white and rich and the other, poor and black'.<sup>23</sup> Unemployment in September 2007 stood at 22.7 per cent,<sup>24</sup> and still remains very high. Efforts are needed to 'correct the distortions that the apartheid policy created within the economy', such as the 'exclusion from the formal, "first" economy, the education and skills deficit of the majority of the population, the racially biased distribution of wealth, services and infrastructure and worsening poverty amongst the majority of its black population'.<sup>25</sup>

19 United Nations Millennium Development Indicators *Gender parity index in tertiary level enrolment* (2008). Available at <http://mdgs.un.org/unsd/mdg/SeriesDetail.aspx?srid=614> [Accessed 30 March 2009].

20 International Monetary Fund *World economic outlook database (April 2008—data for 2007)*. Available at <http://www.imf.org> [Accessed 30 March 2009].

21 World Bank *supra* note 6.

22 T. Contogiannis 'Economic growth: constraints and prospects for the South African economy' (2007) 35 *Discourse* at 42; GCIS *supra* note 4 at 157.

23 W.J. Breitenbach 'The Presidencies of Nelson Mandela and Thabo Mbeki compared: implications for the consolidation of democracy in South Africa' (2006) 36 *Africa Insight* at 177.

24 Statistics SA *Labour force survey—September 2007* (March 2008) at iv. Available at <http://www.statssa.gov.za/publications/P0210/P0210September2007.pdf> [Accessed 30 March 2009].

25 B. Khalima-Phiri *supra* note 6 at 4.

## 8.2 Doctrinal analysis

### 8.2.1 Statutes and regulations

*Primary legislation: The Copyright Act 98 of 1978*

#### Historical background

The current Copyright Act 98 of 1978 stems from the British Copyright Act of 1911, which was enacted in South Africa under the title 'Imperial Copyright Act'.

South Africa did not accede to any of the international copyright treaties created from the 1940s onwards, with the exception of the administrative provisions of the Paris text of the Berne Convention adopted in 1971. Specific requirements incorporated from the Berne Convention include:

- that copyright be an automatic right;
- that an author or creator obtains the right as soon as her work has been 'fixed' without the author having to declare or assert it;
- an 'international reciprocity for copyright works' which means that a work that is created in one country is automatically protected by copyright in any other country that is also a signatory to the convention; and
- that copyright exceptions and limitations meet the requirements of the so-called 'three-step' test and that moral rights are protected.

#### Eligibility for copyright

The question of which works are eligible for copyright forms an important backdrop to understanding the restrictions on the use of those works in which copyright is held and in the converse, understanding the exceptions to such restrictions that may promote access to knowledge.

In accordance with Section 2 of the Copyright Act, the following original works are eligible for copyright protection in South Africa: literary works, musical works, artistic works, sound recordings, cinematograph films, broadcasts, programme-carrying signals, published editions and computer programs.

Section 2(2) requires works other than broadcasts and programme-carrying signals to be reduced to material format, recorded, represented in digital data or signals or otherwise. A potential broadcast is not eligible for copyright until it is actually broadcast and a programme-carrying signal must be transmitted by satellite in order to qualify for protection.

Save for cinematograph films which may be registered at the copyright-holder's discretion (it is optional), copyright subsists automatically in all other works, provided that the work is eligible for copyright. Registration of copyright in cinematograph films is provided for by the Registration of Copyright in Cinematograph Films Act 62 of 1977.

## Exclusive rights

The Copyright Act vests exclusive rights to do or authorise specific acts in respect of a work with its copyright-holder. In the absence of a valid exception to the rights, or permission from the copyright-holder, the exercise of any of the exclusive rights by anyone other than the rights-holder qualifies as copyright infringement. Table 8.2 outlines key exclusive rights in the South African Copyright Act. Whilst any of the works listed may qualify as knowledge, literary works are the most important category for the purposes of this study, in the context of learning materials.

**Table 8.2 Key exclusive rights in the South African Copyright Act**

Section	Work	Exclusive rights
6	Literary or musical works	<ul style="list-style-type: none"> <li>(a) Reproduce;</li> <li>(b) Publish;</li> <li>(c) Perform;</li> <li>(d) Broadcast;</li> <li>(e) Transmit in a diffusion service unless such service transmits a lawful broadcast, including the work, and is operated by the original broadcaster;</li> <li>(f) Make an adaptation of the work; and</li> <li>(g) Do, in relation to an adaptation of the work, any of the acts specified in relation to the work in (a) to (e) above.</li> </ul>
7	Artistic works	<ul style="list-style-type: none"> <li>(a) Reproduce;</li> <li>(b) Publish;</li> <li>(c) Include the work in a cinematograph film or a television broadcast;</li> <li>(d) Cause a television or other programme, which includes the work, to be transmitted in a diffusion service, unless such service transmits a lawful television broadcast, including the work, and is operated by the original broadcaster;</li> <li>(e) Make an adaptation of the work; and</li> <li>(f) Do, in relation to an adaptation of the work, any of the acts specified in relation to the work in (a) to (d) above.</li> </ul>
8	Cinematograph films	<ul style="list-style-type: none"> <li>(a) Reproduce including making a still photograph;</li> <li>(b) Cause the film, in so far as it consists of images, to be seen in public, or, in so far as it consists of sounds, to be heard in public;</li> <li>(c) Broadcast;</li> <li>(d) Cause the film to be transmitted in a diffusion service, unless such service transmits a lawful television broadcast, including the film, and is operated by the original broadcaster;</li> <li>(e) Make an adaptation of the work;</li> <li>(f) Do, in relation to an adaptation of the work, any of the acts specified in relation to the work in (a) to (d) above; and</li> <li>(g) Let, or offer or expose for hire by way of trade, directly or indirectly, a copy of the film.</li> </ul>

Section	Work	Exclusive rights
9	Sound recordings	<ul style="list-style-type: none"> <li>(a) Make, directly or indirectly, a record embodying the sound recording;</li> <li>(b) Let, or offer, or expose for hire by way of trade, directly or indirectly, a reproduction of the sound recording;</li> <li>(c) Broadcast the sound recording;</li> <li>(d) Cause the sound recording to be transmitted in a diffusion service, unless that diffusion service transmits a lawful broadcast, including the sound recording, and is operated by the original broadcaster; and</li> <li>(e) Communicate the sound recording to the public.</li> </ul>
10	Broadcasts	<ul style="list-style-type: none"> <li>(a) Reproduce;</li> <li>(b) Rebroadcast; and</li> <li>(c) Cause the broadcast to be transmitted in a diffusion service, unless such service is operated by the original broadcaster.</li> </ul>
11	Programme-carrying signals	Undertake or authorise, the direct or indirect distribution of such signals by any distributor to the general public or any section thereof in the Republic, or from the Republic.
11A	Published editions	Make or authorise the making of a reproduction of the edition in any manner.
11B	Computer programs	<ul style="list-style-type: none"> <li>(a) Reproduce;</li> <li>(b) Publish;</li> <li>(c) Perform;</li> <li>(d) Broadcast;</li> <li>(e) Cause the computer program to be transmitted in a diffusion service, unless such service transmits a lawful broadcast, including the computer program, and is operated by the original broadcaster;</li> <li>(f) Make an adaptation of the work;</li> <li>(g) Do, in relation to an adaptation of the work, any of the acts specified in relation to the work in (a) to (e) above;</li> <li>(h) Let, or offer or expose for hire by way of trade, directly or indirectly, a copy of the computer program.</li> </ul>

## Moral rights

In compliance with the Berne Convention, Section 20 of the Copyright Act provides for the protection of moral rights. This includes the right to claim authorship as well as the right to object to any distortion, mutilation or other modification of the work where such action is or would be prejudicial to the honour or reputation of the creator.

A possible concern with moral rights is that the inability to locate the author (as in the case of orphan works) to attribute the work to the author and the resulting fear of violation of a moral right, may at times result in a decision not to use a



work. There is also ambiguity about the definition and scope of moral rights among copyright stakeholders.

### Term of copyright

Pursuant to Section 3 of the Act, copyright in literary, musical and artistic works (other than photographs) subsists for the duration of the life of the author plus 50 years from the end of the year in which the author dies. If before the death of the author no publication, public performance, sale to the public or broadcasting of the work has occurred, the term of copyright is 50 years from the end of the year in which such act takes place. Copyright in other works, such as cinematograph films, photographs, computer programs, sound recordings, broadcasts and others, is also 50 years from some specified date, usually a date relating to first publication or public circulation of the subject matter. The same is true in the case of anonymous or pseudonymous works (which, in the United States, are protected for 120 years from their creation).

The copyright term impacts the date on which a work falls into the public domain and is used freely, ie without authorisation from the copyright-holder or payment of royalties. Although the term of copyright in South Africa is shorter than in the European Union and the United States, it is still very long. Under the Berne Convention, the signatory states (including South Africa) are required to provide copyright protection for a minimum term of the life of the author plus 50 years, but there is no legal reason that registration of copyright could not be made compulsory at some early stage after an initially automatic vesting. Compulsory registration might further access to knowledge, since, in the absence of renewal of registration, works could fall into the public domain.

### Orphan works

The long term of protection and lack of registration requirement have created a problem with 'orphan works' — works which are still copyright-protected but whose owner is not identifiable or locatable. While the copyright-holder of an orphan work is entitled to the benefits of copyright, the fact that the owner is unknown prevents any transaction to secure the rights to use the work. In South Africa, the problem of orphan works is not sufficiently discussed at the moment. In other countries and regions where discussions of the issue have begun, however, solutions have been proposed that might also work for South Africa. For instance, the Copyright Act could be amended to permit use of orphan works on reasonable terms when copyright-owners cannot be identified or located to negotiate voluntary licences.

### Specific provisions for libraries or archives

The current Copyright Act Regulations contain specific provisions for libraries and archives.<sup>26</sup> Any (unreasonable) restriction on libraries and archives can be expected to negatively affect access to learning materials.

Section 3 of the Copyright Regulations stipulates that a library or archives depot (or any of its employees acting within the scope of their employment) may reproduce a work and distribute a copy if:

- the reproduction or distribution is made for non-commercial purposes;
- the collections of the library or archive depot are open to the public or available to researchers; and
- the reproduction of the work incorporates a copyright warning.

The library/archive reproduction rights in Section 3 of the Regulations are, in many cases, subject to the provisions of Section 2, which require that the reproduction must be of a 'reasonable portion' of the work and must 'not conflict with the normal exploitation of the work'.

Section 3 of the Regulations further states the conditions under which an unpublished work may be reproduced and distributed for preservation, for security or for deposit purposes in other libraries and archive depots. In addition, Section 3 of the Regulations generally allows the reproduction of a published work for the purpose of replacement of a copy that is deteriorating or that has been damaged, lost or stolen, if an unused replacement cannot be obtained at a fair price.

Also, Section 3 of the Regulations stipulates that a library or archive depot may make copies for users upon request from the users of another library or archive depot. Such copies are confined to one article or other contribution to a copyrighted collection or periodical issue, or to a copy of a 'reasonable portion' of any other copyrighted work. In addition, the library or archive depot must have a notice that the copy is not going to be used for purposes other than private study or personal or private use.

Lastly, Section 3 of the Copyright Regulations allows, upon request, the copying of an entire work or substantial parts of it by a library or archive depot for their users and other libraries or archive depots if an unused copy of the copyrighted work cannot be obtained at a fair price. Section 3 requires, however, that the copy must become the property of the user and the library or archive depot has not had notice that the copy would be used for purposes other than private study or the personal or private use of the person using the work.

<sup>26</sup> Section 3 of the Copyright Regulations, 1978, as published in GN R1211 in GG 9775 of 7 June 1985 as amended by GN 1375 in GG 9807 of 28 June 1985.

The Copyright Regulations regarding libraries and archives can be problematic for a number of reasons. Crucial terms such as ‘reasonable portion’ are not defined and the requirements for specific copyright exceptions and limitations are restrictive. The general usefulness of these provisions has, therefore, been doubted.<sup>27</sup> Practically, the adoption of more specific guidelines is necessary, especially for the key issue of multiple copying. Also, under the current Regulations, libraries may not translate, adapt or convert material into other formats. And digitisation issues are not addressed, so libraries lack clarity on whether they may distribute works in a digital format within the allowed ambit of the Regulations.

### Specific provisions in respect of sensory disabilities

The Act does not include specific provisions that deal with the needs of sensory-disabled people. This is problematic because people with sensory disabilities face additional barriers accessing learning materials. The law should make accommodations in this respect. Whether or not conversion into Braille, for example, should be allowed without seeking permission from or paying royalties to the copyright-holder is, however, a contentious issue.

### ‘Fair dealing’ and specific provisions for educational purposes

When trying to make use of copyright-protected material without the permission of the rights-holder, learners and researchers alike will most likely invoke the general ‘fair dealing’ provision contained in Section 12(1) of the Act.<sup>28</sup> Section 12(1)(a) stipulates that ‘copyright shall not be infringed by any fair dealing with a literary or musical work [...] for the purposes of research or private study by, or the personal or private use of, the person using the work.’

There are various more specific provisions available for educational uses. It goes without saying that specific provisions for educational uses are relevant for access to learning materials. First, Section 12(4) of the Act provides that a work may be used ‘to the extent justified by the purpose, by way of illustration in any publication, broadcast or sound or visual record for teaching: Provided that such use shall be compatible with fair practice and that the source shall be mentioned, as well as the name of the author if it appears on the work.’ Section 12(11) of the Act deals with translation and states that translation of works for the purposes of educational use is allowed.

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27 D.J. Pienaar *Statutory defences against actions for infringement of copyright* (1988) LLM thesis University of South Africa at 95-7.

28 The concept of fair dealing must, however, not be confused with the much broader ‘fair use’ doctrine as utilised, for instance, by the US Copyright Act (Copyright Act of 1976, 17 U.S.C. § 107).

The Copyright Regulations linked to Section 13 of the Act also contain specific exceptions for educational purposes. The Regulations permit the making of multiple copies for classroom use, not exceeding one copy per pupil per course.<sup>29</sup> Furthermore, Regulation 8 allows the making of a single copy by or for a teacher for the purpose of research, teaching or preparation for teaching in a class. Both the 'multiple copies' exception in Regulation 7 and the 'copies for teachers' exception in Regulation 8 are subject to the provisions of Regulation 2. Hence, reproductions are permitted only if not more than one copy of a reasonable portion of the work is made and 'if the cumulative effect of the reproductions does not conflict with the normal exploitation of the work to the unreasonable prejudice of the legal interest and residuary rights of the author'.<sup>30</sup>

The educational exceptions provided for in the Regulations present a few challenges. First, it is unclear what constitutes a 'reasonable portion'. As a result, students would often be unsure of how much they could lawfully photocopy. Furthermore, copies may not be made for purposes other than classroom use. This, of course, prevents productive distance learning, where learners are not in possession of the original copy in order to exercise the right granted under the Regulations.

### Media freedom and freedom of expression

Several provisions of the Copyright Act have a bearing on media freedom and freedom of expression.

Section 12(1)(b) of the Act allows 'fair dealing' reproduction for review and criticism of literary and musical works and is applied to other works: artistic works, cinematograph films, sound recordings, broadcasts, published editions and computer programs.

Section 12(8)(a) provides that '[n]o copyright shall subsist in [...] speeches of a political nature'. Section 12(6)(a) provides that 'copyright in a lecture, address or other work of a similar nature which is delivered in public shall not be infringed by reproducing it in the press or by broadcasting it, if such reproduction or broadcast is for an informatory purpose'.

Section 12(3) permits quotation of literary and musical works and the provisions of Section 12(3) are applied to other works: cinematograph films, sound recordings, broadcasts and computer programs.

Section 12(1)(c) provides that copyright shall not be infringed by any 'fair dealing' with a literary or musical work for the purpose of reporting current events in a newspaper, magazine or similar periodical; or by means of broadcasting or in a cinematograph film. The provisions of Section 12(1)(c) are applied to other

<sup>29</sup> Regulation 7 of the Copyright Regulations.

<sup>30</sup> Regulation 2(b) of the Copyright Regulations.

works: artistic works, cinematograph films, sound recordings, broadcasts, published editions and computer programs. Section 19 provides that copyright in programme-carrying signals shall not be infringed by the distribution of short excerpts of the programme so carried that consist of reports of current events; or as are compatible with fair practice and to the extent justified by the informatory purpose of such excerpts. These provisions do not apply to programmes that consist of sporting events.

### Other relevant exceptions and limitations

The following are some of the other exceptions to copyright infringement as provided for in the Copyright Act which can have relevance to learning materials access:

- uses related to judicial proceedings;<sup>31</sup>
- uses relating to official texts of a legislative, administrative or legal nature and political and legal speeches;<sup>32</sup> and
- back-up copies of computer programs.<sup>33</sup>

### Anti-circumvention provisions

The South African Copyright Act does not contain any provisions prohibiting the circumvention of technological protection measures (TPMs). South Africa is not obliged to introduce such provisions since it has not yet ratified (though it has signed) the 'WIPO Internet Treaties'. However, the Electronic Communications and Transactions (ECT) Act of 2002 contains a provision that can be interpreted as an anti-circumvention provision (see p. 245).

### Parallel importation

A parallel import refers to a copyright-protected product placed on the market in one country, which is subsequently imported into a second country, without the permission of the copyright-holder in the second country, to compete with the copyright-holder or licensees in that second country.<sup>34</sup> These imported or 'grey goods' are often cheaper than the authorised goods.<sup>35</sup> The relationship between parallel import and access to knowledge lies in the extent to which parallel import of, say, a mathematics textbook, can make such a textbook affordable in a country where it is otherwise not. The WTO TRIPs Agreement permits countries to allow parallel importing. But in South Africa, Section 28 of the Copyright Act provides

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31 Section 12(2) of the Copyright Act 98 of 1978.

32 Section 12(8)(a) of the Copyright Act.

33 Section 19B(2) of the Copyright Act.

34 O.H. Dean 'Parallel importation infringement of copyright' (1983) 100 *SALJ* 258.

35 O.H. Dean 'Copyright v grey goods in South Africa, Australia and Singapore' (1994) 111 *SALJ* 746.

that the owner of any published work or the exclusive licensee of a published work (who has the licensed right to import such work into South Africa) may request the Commissioner of Customs and Excise to declare any other importation of the work prohibited. This provision effectively blocks parallel importing.

### Non-voluntary (compulsory and statutory) licences

South Africa's Copyright Act addresses non-voluntary licensing in only a very few instances. Copyright is not infringed if an act is conducted in compliance with a licence granted by the South African Copyright Tribunal, thus providing the Tribunal with some scope to issue non-voluntary licences. Pursuant to Sections 29-36 of the Act, a function of the Tribunal is to resolve disputes between licensors and licensees.<sup>36</sup> And the Tribunal may grant a licence where the refusal to do so by the copyright-holder is unreasonable. In addition, Section 45 of the Copyright Act could form the basis for future non-voluntary licence schemes, as it allows regulations by the Minister in respect of circulation, presentation or exhibition of any work or production. The copyright-owner, however, must not be deprived of his or her right to reasonable remuneration, determined in accordance with the agreement applicable (failing which, by arbitration).

### *Intellectual Property Rights from Publicly Financed Research and Development Act 51 of 2008*

Legislation was prepared in 2008 intended to facilitate better use of intellectual property emanating from publicly financed research and development and to establish a National Intellectual Property Management Office (NIPMO), an Intellectual Property Fund and technology transfer offices at relevant institutions. These institutions include universities and public research institutes such as the Medical Research Council, the Human Sciences Research Council, the South African Bureau of Standards and the Water Research Commission. At the time of writing of this chapter, the Act and Regulations have not been put in force.

Salient points under the Act are:

- a recipient has a choice regarding retention of ownership of intellectual property emanating from publicly financed research and development. If electing not to retain ownership, subject to certain conditions, it will fall into the hands either of NIPMO, or a private organisation that provided funding, or the creator;

<sup>36</sup> Section 30 of the Copyright Act.

- a recipient has specific obligations and disclosure duties including ensuring that intellectual property emanating from the aforementioned funds is appropriately protected before the results of such research and development are published or publicly disclosed by other means as per Section 5(b);
- a recipient must assess the intellectual property to determine whether it merits statutory protection and, where appropriate, apply for and use best efforts to obtain statutory protection;
- a recipient has the duty to license and otherwise transfer rights in respect of the pertinent intellectual property, as well as manage commercialisation of the intellectual property;
- affected institutions must establish technology transfer offices;
- creators and their heirs are granted specific rights to portions of revenues accrued to the institution;
- there is a preference for non-exclusive licensing and licensing to Broad-Based Black Economic Empowerment (BBBEE) entities;
- for intellectual property relevant to the health, security and emergency needs of South Africa, the state must be granted an irrevocable and royalty-free licence authorising the state to use the intellectual property anywhere in the world; and
- for offshore transactions, NIPMO must be satisfied that there is insufficient capacity in South Africa to develop or commercialise the intellectual property locally and South Africa will benefit from such offshore transaction.

‘Intellectual property’ is qualified under the legislation as any creation of the mind that is capable of being protected by law from use by another person, whether in terms of South African law or foreign intellectual property law and includes any rights in such creation, but excludes copyrighted works such as a thesis, dissertation, article, handbook or other publication which, in the ordinary course of business, is associated with conventional academic work. A ‘recipient’ under the Act refers to a legal or natural person that undertakes research and development using funds allocated by the state or a state organ or agency, except scholarships and bursaries. ‘Commercialisation’ means the process by which any intellectual property emanating from publicly financed research and development is used to provide any benefit to society or commercial use on reasonable terms.

The legislation impacts access to knowledge in several ways. Significantly, it does not support publicly funded research falling into the public domain. It also establishes a regime that may not be endorsed by research partners in other countries, which may frustrate international research collaborations. Although the Act excludes many kinds of copyright-protected works by excluding these works from the definition of ‘intellectual property’ in Section 1, the Act defines intellectual

property in such a way that it could be read to prohibit granting access to databases, software and medical diagnostic methods. It also prohibits the disclosure of research while the research is scrutinised for patentability by bureaucrats who are unlikely to be experts in the research field in question. This may result in significant delays in local knowledge becoming available.

Some commentators suggest that the Intellectual Property Rights from Publicly Financed Research and Development Act, together with its Regulations, may even be unconstitutional.<sup>37</sup> This is because the Constitution of South Africa provides in its Section 16(1) that '[e]veryone has the right to freedom of expression, which includes — [...] (d) academic freedom and freedom of scientific research'. This freedom may be compromised if South Africans, as a result of the Act and its Regulations, can no longer participate in important international research consortia. Having said this, the Act and its Regulations do not directly proscribe access to copyright-protected works in South Africa as the Act expressly excludes scholarly copyright-protected works from its scope.

Yet, if it turns out to be true — as feared by some — that the introduction of the Act and its Regulations will result in less research being generated in South Africa, then, inevitably, less research-related writing will be published in the country, which is problematic from an access to knowledge perspective. More generally, by merely focusing on the potential financial rewards from intellectual property creation, the new legislation seemingly disregards the many other advantages that intellectual property creation brings about for society as a whole. And by reinforcing a protectionist culture in relation to intellectual property, the Act certainly conflicts with the principles of openness and access that are investigated in this report.

### *Electronic Communications and Transactions Act 25 of 2002*

The Electronic Communications and Transactions Act 25 of 2002 ('ECT Act') may have the effect of overriding certain copyright exceptions and limitations, including the fair dealing provisions, contained in the Copyright Act,<sup>38</sup> and may attach criminal liability for use of a work that is legitimated by the Copyright Act.

Section 86(3) of the ECT Act states that:

a person who unlawfully produces, sells, offers to sell, procures for use, designs, adapts for use, distributes or possesses any device, including a computer program

37 R. Khan 'Draft Intellectual Property Bill could be the end of South African scientific research' (2009). Available at <http://sacsis.org.za/site/News/detail.asp?iData=295&iCat=1446&iChannel=1&nChannel=News> [Accessed 6 July 2009].

38 See the discussion by T. Pistorius in 'Developing countries and copyright in the information age—the functional equivalent implementation of the WCT' (2006) 2 *Potchefstroom Electronic Law Journal*. Available at [http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/issues/2006\\_2\\_\\_Pistorius\\_art.pdf](http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/issues/2006_2__Pistorius_art.pdf) [Accessed 30 March 2009].



or a component, which is designed primarily to overcome security measures for the protection of data, or performs any of those acts with regard to a password, access code or any other similar kind of data with the intent to unlawfully utilise such item to contravene this section, is guilty of an offence.

Section 86(4) states: 'A person who utilises any device or computer program mentioned in subsection (3) in order to unlawfully overcome security measures designed to protect such data or access thereto, is guilty of an offence.' By way of protecting data, Section 86 of the ECT Act essentially prohibits the circumvention of technological protection measures (TPMs) designed to protect material (copyrighted *and* non-copyrighted material) in digital form.

This protection of TPMs exceeds the requirements of the WIPO Internet Treaties and the protection granted in most other countries. Effectively, such blanket protection of rights-holder TPMs can have the effect of undermining existing and well-established copyright exceptions and limitations — if such permitted uses are blocked through TPMs.

### *Counterfeit Goods Act 37 of 1997*

This Act introduced measures against the trade in counterfeit goods so as to further protect owners of copyright (as well as owners of trademarks and other marks) against the unlawful application, to goods, of the subject matter of their respective intellectual property rights and against the release of such goods ('counterfeit goods') into the channels of commerce. Section 2(1) outlines a wide range of activities that constitute offences if conducted in relation to trade in counterfeit goods, including possession, production, selling, hiring, bartering, exchanging, exhibiting, distributing or importing/exporting.

While the Counterfeit Goods Act offers publishers the advantage of increased protection, the opposite effect is achieved in respect of users of learning materials. The stringency of the Counterfeit Goods Act and the additional offences imposed by the legislation increase the exposure of users of learning materials to possibilities of legal sanction where the exceptions under the Copyright Act are insufficient for the purposes of accessing learning materials.

### *Free and Open Source Software (FOSS) Policy*

On 22 February 2007 the South African Cabinet approved a policy and strategy for the adoption in government of free and open source software (FOSS). All new software developed for or by the government will be based on open standards and government will migrate all current software to FOSS. While the Policy refers specifically to the adoption of FOSS in government, this decision will impact on the use of FOSS in South Africa, as it will encourage all entities engaging with

government to use compatible software. The FOSS Policy of South Africa has positive implications for access to knowledge. By endorsing open source software and open standards, the intention is to lower barriers for accessing information and communication technologies.<sup>39</sup>

#### *Promotion of Access to Information Act (PAIA) 2 of 2000*

The Preamble of the PAIA states that the purpose of enactment of the Act is to foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information; and to actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights. While the concept of access to information is not synonymous with access to knowledge, the importance of information to enabling the meaningful exercise of rights is akin to the importance of knowledge in relation to the right to education.

#### *National Archives and Records Service Act 43 of 1996*

Archives are a source of learning materials for some disciplines and as such, any regulation of archives is of significance to access to learning materials. The main legislation regulating archives is the National Archives and Records Service Act.

#### *Legal Deposit Act 54 of 1997*

The Legal Deposit Act 54 of 1997 provides for legal deposit of published documents in order to ensure the preservation and cataloguing of and access to, published documents emanating from, or adapted for, South Africa and to provide for access to government information. As with other legislation in South Africa that pertains to repositories of information, specific permissions, such as the permission to reformat the published editions available, are not present.

#### *South African Library for the Blind Act 91 of 1998*

In view of the responsibilities of the South African Library for the Blind, as stipulated in Section 4(1) of the South African Library for the Blind Act 91 of 1998, the Library for the Blind is an important promoter of access to knowledge for sensory-disabled people. The ability to produce documents for blind people in Braille and audio formats may, however, be inhibited by the lack of corresponding legislative provision for such reformatting in the Copyright Act.

39 Policy on Free and Open Source Software Use for South African Government. Available at <http://www.info.gov.za/view/DownloadFileAction?id=94490> [Accessed 1 June 2010].

### *The Constitution*

The South African Constitution of 1996 supersedes all other laws in the Republic. In respect of the supremacy of the Constitution, Section 2 of the 'Founding Provisions' states that the 'Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled'. Section 39(2) provides as follows: 'When interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.' It is therefore required that any and every piece of legislation be interpreted in accordance with the intentions of the Bill of Rights (Chapter 2 of the Constitution, containing Sections 7 to 39), rather than against it. This makes the rights detailed below important interpretative guides. Moreover, the Bill of Rights binds the legislature, the executive, the judiciary and all organs of state,<sup>40</sup> and any natural or legal person if and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.<sup>41</sup>

The right to equality in the Bill of Rights is particularly relevant in the context of legislative exceptions that could be introduced into the Copyright Act and other acts to fulfil equal rights of access to education for disabled people, as well as equal rights of access to education for men and women. Section 9 of the Constitution (in the Bill of Rights) provides that 'everyone is equal before the law and has the rights to equal protection and benefit of the law' and that 'equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken'. Further, the Section provides that 'the State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth'.

Under Section 16 and of importance to access to knowledge specifically, everyone has the right to freedom of expression, which includes the freedom to receive or impart information or ideas, academic freedom and freedom of scientific research.<sup>42</sup>

Section 29 provides that everyone has the right to a basic education, including adult education and further education which the state through reasonable measures must make progressively available and accessible. An important aspect of the right to education is the right to access learning materials, a necessary condition required

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40 Section 8(1) of the South African Constitution.

41 Section 8(2) of the South African Constitution.

42 Section 16(1) of the South African Constitution.

to fulfil the right to education. In respect of the possible need for an exception under the Copyright Act for translation of works into a language of choice, it is useful to note that under the South African Constitution, everyone has the right to receive education in the official languages of their choice in public educational institutions, where that education is reasonably practicable.

### **8.2.2 *International and regional treaties and agreements***

In 1928, South Africa became a signatory of the Berne Convention for the Protection of Literary and Artistic Works. But there is no evidence of South Africa availing itself of the Berne Convention's Appendix, which allows compulsory licensing of certain translations.<sup>43</sup>

As a WTO member, South Africa is a party to the Agreement on Trade-Related Aspects of Intellectual Property (TRIPs Agreement) of 1994.

South Africa is signatory to, but has not yet ratified, the 'WIPO Internet Treaties' of 1996: the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). International treaties are not binding locally unless they have been ratified and incorporated into domestic legislation.

South Africa is not a party/signatory to the other relevant international copyright treaties such as the Universal Copyright Convention of 1952; the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations; the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of Their Phonograms; or the Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite.

It is noteworthy in this context that free trade negotiations between the United States and the Southern African Customs Union (SACU)<sup>44</sup> have stalled, partly because of the demands made by the United States in relation to broader intellectual property rights protection. Free trade agreements (FTAs) with the United States usually impose strict copyright protection regimes.

There are no cooperative copyright treaties within the Southern African Development Community (SADC) region, nor is there any harmonisation of copyright laws in SADC.

43 The Berne Appendix provides that under certain circumstances—and subject to the compensation of the rights-holder—for a system of non-exclusive and non-transferable non-voluntary licences in developing countries regarding (a) the translation for the purposes of teaching, scholarship or research and for use in connection with systematic instructional activities and (b) the reproduction of works protected under the Berne Convention.

44 The five members of SACU are South Africa, Lesotho, Botswana, Namibia and Swaziland.

### 8.2.3 Judicial and administrative decisions

There are many reported cases on copyright in South Africa. However, there is a dearth of case law on copyright infringement related to learning materials. This is surprising in the light of publishing industry estimates of a significant extent of copyright infringement in relation to learning materials. For example, in 2002, it was estimated by the then-President of the Publishers' Association of South Africa (PASA) that 'approximately 40-50 per cent of the potential ZAR400-million market [wa]s lost to piracy and illegal photocopying'.<sup>45</sup> This was said to affect mostly international works and the copyright infringers were identified as students, educational institutions which issue course packs with infringing material and copyshop owners.<sup>46</sup>

The copyright subject matter in cases ranges from blank audio cassettes<sup>47</sup> to computer programs<sup>48</sup> to academic texts.<sup>49</sup> The cases relate to legal standing,<sup>50</sup> parallel importation,<sup>51</sup> ownership,<sup>52</sup> authorship<sup>53</sup> and plagiarism.<sup>54</sup> Despite some challenges in relating general copyright cases to the specific issue of access to learning materials, there are some cases that are clearly relevant.

A particularly significant case is *Frank & Hirsch v Roopanand Brothers (Pty) Ltd*,<sup>55</sup> which dealt with parallel importation of blank audio cassettes. The court held that such importation amounted to indirect copyright infringement, because the production of those cassettes in South Africa would have amounted to direct copyright infringement. Therefore, it appears that importing learning materials would be considered indirect copyright infringement if the production of those books in South Africa (by the importer or other person) would have been direct copyright infringement.

45 B. Wafawarowa *Legislation, law enforcement and education: copyright protection in developing region* (2002) Bellagio Publishing Network (BPN) Newsletter 30. Available at [www.bellagiopublishingnetwork.com/newsletter30/wafawarowa.htm](http://www.bellagiopublishingnetwork.com/newsletter30/wafawarowa.htm) [Accessed 30 March 2009].

46 Ibid.

47 *Frank & Hirsch (Pty) Ltd v Roopanand Brothers (Pty) Ltd* 1993 (4) SA 279 (A); 457 JOC (A).

48 *Northern Office Micro Computers (Pty) Ltd and Others v Rosenstein* 1981 (4) SA 123 (C); *Prism Holdings Ltd and Another v Liversage and Others* 2004 (2) SA 478 (W); *Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd and Others* 2006 (4) SA 458 (SCA).

49 *Juta & Co Ltd and Others v De Koker and Others* 1994 (3) SA 499 (T).

50 *Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* 1987 (2) SA 1 (A).

51 *Frank & Hirsch* supra note 47; *Golden China TV Game Centre and Others v Nintendo Co Ltd* 1997 (1) SA 405 (A).

52 *Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd and Others* 2006 (4) SA 458 (SCA).

53 *Peter-Ross v Ramesar and Another* 2008 (4) SA 168 (C).

54 *Juta v De Koker* supra note 49.

55 Supra note 47. It is important to note that this case was decided on an earlier version of the Copyright Act. However, the amendment does not change the essence of the relevant provision (Section 23) and the ruling would have been the same had the case been decided under the current Act.

There was a much-lauded successful prosecution in 2001. However, it is not reported in the law reports. The facts pertaining to this matter have therefore been gleaned from interviews and publications.<sup>56</sup> A 'pirate photocopying shop' operating in Empangeni, KwaZulu-Natal was engaged in large-scale infringing reproduction of copyright-protected works. A group of publishers pooled financial resources and worked together to obtain evidence, lay criminal charges and meet with the prosecutor assigned to the case. A conviction was obtained, with the infringer being sentenced to three years' imprisonment or a fine of ZAR30 000 (of which only half was payable).

Another publicised incident occurred in 2003 in the Western Cape. This matter did not result in criminal prosecution or a civil claim for damages. Like the case discussed above, the facts outlined here are gleaned from publications<sup>57</sup> and interviews. The Dramatic, Artistic and Literary Rights Organisation (DALRO) collecting society requested a police raid of two shipping containers located near tertiary education institutions from which a large-scale illegal photocopying business was being run. Infringing copies, master copies and the copying equipment were confiscated by the police. However, neither criminal nor civil action was taken thereafter.

Unlike in some other African countries, perhaps, it cannot be said that the dearth of case law regarding copyright in learning materials is due to a general lack of confidence in the courts. It has been suggested instead that there are several difficulties that learning materials rights-holders encounter in pursuing remedies for infringement.<sup>58</sup> For one, the complexity of copyright and evidence laws makes it difficult for rights-holders to litigate. And infringement remedies are inadequate, in that fines imposed after convictions have historically been low and proving civil damages is an almost insurmountable task due to the lack of statistical data. Moreover, the views and attitudes of police, customs officials and prosecutors, who feel that copyright infringement in learning materials (as opposed to entertainment products such as videos and music) is not a serious offence, mean that rights-holders do not have meaningful support in pursuing criminal copyright infringement. Some educational institutions take a similar view and are thus unwilling to assist rights-holders to enforce their rights.

It appears, therefore, that many copyright infringement matters related to learning materials are disposed of by settlement or the abandonment of claims by rights-holders. The resultant lack of case law means that there are no authoritative judicial findings in relation to copyright in learning materials.

56 Frank & Hirsch *supra* note 47; E. Gray and M. Seeber *PICC report on intellectual property rights in the print industries sector* (2004) at 57. Available at [http://www.publishsa.co.za/docs/Intellectual\\_Copyright\\_Report.pdf](http://www.publishsa.co.za/docs/Intellectual_Copyright_Report.pdf) [Accessed 30 March 2009].

57 Ibid Gray and Seeber at 56.

58 Ibid.

## 8.3 Qualitative analysis

### 8.3.1 Secondary literature

Although emphasis in this literature review is placed on South African and southern African materials, it must be noted that international materials and materials from outside Africa, referenced at various points throughout this book, significantly influence the current debate regarding the relationship between copyright laws and access to learning materials. In South Africa, as with many developing countries, copyright law is only beginning to be recognised as an important aspect of development policy. As a result, copyright law in general and, more specifically, the correlation between copyright law and access to knowledge/learning materials, are under-explored in South Africa's (legal) secondary literature.

Very few books are entirely devoted to South African copyright law. Notable exceptions are OH Dean's continuously updated loose-leaf *Handbook of South African copyright law*, A Smith's *Copyright companion* of 1995 and AJC Copeling's rather outdated *Copyright and the Act of 1978*. Naturally, these books address copyright law from a fairly broad perspective. Emphasis is placed on general issues such as requirements for copyright protection, nature and scope of copyright protection, ownership and transfer of copyright, duration of copyright and infringement of copyright. This is not to say, however, that the subject of access to learning materials is ignored. On the contrary, achieving a fair balance between the interests of rights-holders and users is singled out as a major objective of copyright law.<sup>59</sup> Moreover, copyright exceptions and limitations as the main access-enabling tools for users are dealt with in detail.<sup>60</sup>

Apart from the above books, copyright law is often briefly discussed in single chapters in textbooks dealing with commercial law.<sup>61</sup> Access to learning materials is usually not specifically addressed in these chapters. Mention is, however, typically made of the legitimate interests of users safeguarded by copyright exceptions and limitations.<sup>62</sup>

In recent years, copyright law in general and the issue of access to learning materials in particular have started to attract more academic attention in South Africa. One spur for this increased interest was the Access to Learning Materials (A2LM) Southern Africa project in 2004-05. The Johannesburg-based project was run through the Consumer Institute South Africa, supported by the Open Society

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59 See, for instance, O.H. Dean *Handbook of South African copyright law* (1987) at 1-2.

60 Ibid at chapter 9.

61 See, for instance, J.T.R. Gibson *South African mercantile and company law* (2003) chapter 15; D. Collier-Reed and K. Lehmann *Basic principles of business law* (2006) chapter 17. See also, for Internet-related copyright issues, F. Cronje and R. Buys *Cyberlaw@SA II: The law of the Internet in South Africa* (2004) chapter 1.

62 See, for instance, J.T.R. Gibson *supra* note 64 at 723.

Institute and included an international conference in Johannesburg in January 2005. Outputs from the project included two research papers:

- A. Prabhala, 'Economic analysis of income and expenditure patterns in South Africa: implications for the affordability of essential learning materials'; and
- A. Prabhala and C. Caine, 'Memorandum on the free trade agreement negotiations between the United States and the Southern African Customs Union'.

The first paper essentially argues, on the basis of household survey data from South Africa, that certain basic needs (such as food, water, electricity/energy, transport and shelter) need to be taken into account when determining the affordability of learning materials. The paper concludes that at 'current prices for learning materials, a vast number of poor South Africans are excluded from education'. Consequently, providing low-cost learning material would be an attractive policy tool for stimulating education.

The second paper, by Prabhala and Caine, voices a number of concerns against the proposed free trade agreement (FTA) between the United States and the Southern African Customs Union (SACU). In particular, the authors criticise the draft FTA's proposed extension of the copyright term, impediments to educational licensing and adaptations, impediments to parallel trade and protection of technological protection measures (TPMs). The authors conclude that a US-SACU FTA 'has the potential to undermine access to learning materials and consequently, affect access to education in SACU member countries'. Particularly, the adoption of the TPM provisions in the SACU-US FTA would increase the cost of accessing information and therefore widen the knowledge gap between developed and developing countries. The FTA was not signed and the talks have stalled.

Also in 2005, the Commons-Sense Conference was convened by the LINK Centre, Graduate School of Public and Development Management (P&DM), Wits University, Johannesburg — the same institutional host as for this ACA2K research project. The conference drew together African stakeholders concerned with finding alternative approaches to copyright and digital knowledge resources. As well as numerous conference papers, the conference resulted in the publishing of *The digital information commons: an African participant's guide*.<sup>63</sup> The guide, among other things, deals with important global players, processes, issues and projects in this field, such as WIPO, the WTO, UN agencies, activists, exceptions, compulsory licensing, parallel importation and open access. The guide also identifies and briefly summarises a number of African players, processes, issues and projects.

63 C. Armstrong et al *The digital information commons: an African participant's guide* (2005). Available at <http://www.sivulile.org/workshops/commons-sense/Digital%20Commons%20Guide-19-May-05.doc> [Accessed 30 March 2009].



In connection with the Commons-Sense Project, a special 'African digital information commons' edition of the Wits LINK Centre's *Southern African Journal of Information and Communication (SAJIC)* was published in 2006.<sup>64</sup> This edition included the following access to knowledge-related contributions:

- C. Armstrong and H. Ford, 'Africa and the digital information commons: an overview';
- A. Rens and L. Lessig, 'Forever minus a day: a consideration of copyright term extension in South Africa';
- T. Schonwetter, 'The implications of digitizing and the Internet for "fair use" in South Africa';
- C. Visser, 'Technological protection measures: South Africa goes overboard. Overboard.';
- C.A. Masango, 'The future of the first sale doctrine with the advent of licences to govern access to digital content';
- W. Baude, et al, 'Model language for exceptions and limitations to copyright concerning access to learning materials in South Africa'.

Other relevant law journal articles were, for instance, published by V van Coppenhagen ('Copyright and the WIPO Copyright Treaty'), with specific reference to the rights applicable in a digital environment and the protection of technological measures<sup>65</sup> and T Pistorius ('Developing countries and copyright in the information age — the functional equivalent implementation of the WCT'<sup>66</sup> and 'Copyright in the information age: the catch-22 of digital technology'.<sup>67</sup>)

Of particular importance for the purposes of this research is a report penned by Rufus in 2005. In her report titled *Sub-Saharan Africa, education and the knowledge divide: copyright law a barrier to information*,<sup>68</sup> Rufus addresses some of the barriers that the current copyright regime creates for education and research in developing countries, particularly in South Africa. The author first discusses selected problems for the lack of access to knowledge in Sub-Saharan Africa, such as the lack of translation rights and the absence of provisions for the benefit of the disabled. Thereafter, Rufus points out that while the advent of digital technologies has, on

64 (2006) 7 *SAJIC*. Available at <http://link.wits.ac.za/journal/journal-07.html> [Accessed 1 April 2010].

65 (2002) 119:2 *SALJ* 442.

66 T. Pistorius *supra* note 41.

67 (2006) 1 *Critical Arts* 47. Professor Pistorius also delivered a related paper at the South African Commercial Law in a Globalised Environment Workshop 2006, titled 'Digital copyright law: the impact on access to information'.

68 T. Rufus *Sub-Saharan Africa, education and the knowledge divide: copyright law a barrier to information* (2005). Available at [http://afro-ip.googlegroups.com/web/rufus.pdf?gda=4pDtEDsAAADTaftu43V1xrklMoxl309csEP-hbXGfaQ6AHs74euGNgpFILAnNl1PbA8jWbuU\\_owGRdr3QrylPkw2aRbXD\\_gF&hl=en](http://afro-ip.googlegroups.com/web/rufus.pdf?gda=4pDtEDsAAADTaftu43V1xrklMoxl309csEP-hbXGfaQ6AHs74euGNgpFILAnNl1PbA8jWbuU_owGRdr3QrylPkw2aRbXD_gF&hl=en) [Accessed 1 June 2010].

the one hand, increased access possibilities, 'these advances have also stemmed new possibilities for the control and increase of knowledge gaps within societies'.<sup>69</sup> Subsequently, Rufus argues that 'the international knowledge system is a highly imbalanced state of affairs, which prioritise[s] the economic rights of information providers, by monopolising societies' need to gain access to knowledge'.<sup>70</sup> In her conclusion, Rufus essentially states that (a) suppressing knowledge into the straitjacket of a Western world intellectual property system is a wrongdoing of developed nations and that (b) the profit-oriented approach currently followed with regard to intellectual property needs to be modified.<sup>71</sup>

Apart from the above-mentioned efforts and publications, a growing number of theses on both LLM and PhD/LL.D levels address copyright-related issues such as copyright exceptions and limitations and technological protection measures. D.J. Pienaar's LLM thesis entitled *Statutory defences against actions for infringement of copyright* (1988) and M. Conroy's LLD thesis entitled *A comparative study of technological protection measures in copyright law* (2006) are but two examples. Masters and doctoral theses related to copyright can best be found in institutional digital repositories such as UCT's lawspace (<http://lawspace2.lib.uct.ac.za/>) or the UnisaETD (<http://www.unisa.ac.za/Default.asp?Cmd=ViewContent&ContentID=15350>). In addition, there are various other electronic resources for theses, some of which are subscription based.

The majority of secondary literature in South Africa dealing with copyright law and access to learning material issues originates from, or is contained in, a relatively large number of independent reports and articles published in media other than law journals.

Arguably the most important South African reports dealing with the copyright environment that the ACA2K project strives to examine are:

- the *PICC report on intellectual property rights in the print industries sector* (2004)<sup>72</sup> by E. Gray and M. Seeber;
- the *Intellectual property, education and access to knowledge in Southern Africa* report (2006)<sup>73</sup> by A. Rens, A. Prabhala and D. Kawooya; and
- the recent '*South African open copyright review*' (2008).

69 Ibid at 12.

70 Ibid at 16.

71 Ibid at 20.

72 Available at [http://www.publishsa.co.za/docs/Intellectual\\_Copyright\\_Report.pdf](http://www.publishsa.co.za/docs/Intellectual_Copyright_Report.pdf) [Accessed 30 March 2009].

73 Available at <http://www.iprsonline.org/unctadictsd/docs/06%2005%2031%20tralac%20amended-pdf.pdf> [Accessed 30 March 2009].

The PICC report probes the impact of copyright protection on growth and development in the print industries sector and makes recommendations for further action that could contribute towards growth. It is primarily meant as a theoretical underpinning for rights-holders in the print industry sector who want to engage in a dialogue with users of copyright-protected material.

The *Intellectual property, education and access to knowledge in Southern Africa* report examines the responsibility of intellectual property legislation for hurdles to access to learning materials in countries of the Southern African Customs Union (Botswana, Lesotho, Namibia, Swaziland and South Africa). Furthermore, the report audits domestic copyright exceptions and limitations which are relevant in the context of access to learning materials. The report concludes that ‘neither does copyright legislation in SACU countries make significantly positive provisions for access to learning materials, nor does it take full advantage of the flexibilities provided by TRIPs.’<sup>74</sup>

The ‘*South African open copyright review*’ report provides a section-by-section review of the provisions of the South African Copyright Act of 1978, with emphasis on sections impacting access to knowledge. The following recommendations are contained in the review report:

- do not extend the term or scope of exclusive rights granted under copyright beyond what is required by the international treaties by which South Africa is bound;
- expand and adapt the current set of exceptions and limitations to better enable access to knowledge. State exceptions and limitations clearly. Exceptions and limitations should address new technologies;
- protect the public domain;
- address the problem of orphan works;
- explicitly permit circumvention of technologies that jeopardise the balance of copyright by preventing users from exercising their rights under exceptions and limitations;
- permit parallel importation of copyright-protected material;
- provide that all government-funded works which do not immediately fall into the public domain are freely available on equal terms to all South Africans;
- define licence so as to explicitly allow for free copyright licences;
- commence a government inquiry into a provision that authors can reclaim title to works which subsequent rights-holders fail to use over long periods of time, eg five years; and

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74 Ibid.

- commence a government inquiry into the feasibility of making use of the Berne Appendix special provisions for developing countries.<sup>75</sup>

Relevant material in South Africa has also been produced for or by different advocacy groups, especially library associations such as IFLA and publishers/authors associations such as the Publishers' Association of South Africa (PASA) and the Academic and Non-Fiction Authors' Association of South Africa (ANFASA).

In addition, numerous reports and papers have been created by PASA and others to describe the South African publishing market. Of particular interest is the Genesis. 'Factors influencing the cost of books in South Africa' report of 2007, commissioned by the South African Department of Arts and Culture through PICC.<sup>76</sup> The Genesis report makes mention of copyright protection in two instances. First, it states that obtaining permission to use copyright-protected material is part of the origination costs for a publisher, ie costs that a publisher has to incur to create a book.<sup>77</sup> Second, it suggests that part of the failure of academic books to adequately sell is due to illegal photocopying which diminishes their deserved market.<sup>78</sup>

Another significant contribution to the literature occurred in May 2005, when the Commonwealth of Learning (CoL) convened a group of copyright experts in Johannesburg to develop a guideline document on copyright limitations and exceptions.<sup>79</sup> Later, CoL also commissioned a 'copyright audit' document,<sup>80</sup> which provides an explanatory checklist for researchers seeking to examine their country's national copyright environments in terms of provisions that support education.

In January 2008, the Cape Town Open Education Declaration was launched.<sup>81</sup> The declaration (1) urges governments and publishers to make publicly funded educational materials available freely over the Internet and (2) encourages teachers and students around the world to use the Internet to share, remix and translate classroom materials to make education more accessible, effective and flexible.

Cape Town is also home to a pioneering open content initiative called Free High School Science Texts (FHSST), through which volunteers from around the

75 Draft Review (in possession of the authors of this report).

76 Available at [http://www.sabookcouncil.co.za/pdf/PICC\\_Cost%20of%20books%20studyFinal.pdf](http://www.sabookcouncil.co.za/pdf/PICC_Cost%20of%20books%20studyFinal.pdf) [Accessed 30 March 2009].

77 Ibid at 19.

78 Ibid at 71.

79 J. Hofman et al *Document for Commonwealth countries on copyright matters in education* (2005). Available at <http://www.col.org/SiteCollectionDocuments/Copyright%20Document.pdf> [Accessed 30 March 2009].

80 A. Prabhala and T. Schonwetter *Commonwealth of Learning copyright audit* (2006). Available at <http://www.col.org/resources/knownServices/copyright/Pages/lawEduc.aspx> [Accessed 30 March 2009].

81 Cape Town Open Education Declaration (2008). Available at <http://www.capetowndeclaration.org/read-the-declaration> [Accessed 30 March 2009].

world, working online, are developing a set of complete textbooks for Mathematics, Physics and Chemistry for Grades 10-12. The use of the GNU Free Documentation Licence will allow the materials to be both freely available and legally modifiable by anyone, ensuring that the information they contain is kept up to date and that the texts can be translated or modified according to the needs of particular groups of learners. The textbooks will also be available online for teachers and pupils who can download and print them.

Meanwhile, a 2009 book chapter paper by Andrew Rens of South Africa's Shuttleworth Foundation addresses the potential role of the WIPO Development Agenda in improving copyright exceptions and limitations for education. Rens argues that 'the [WIPO] Development Agenda presents the right opportunity to create globally applicable minimum exceptions to copyrights for educational purposes. Absent such harmonisation, educators and educational institutions around the world will face unnecessary hurdles to facilitating development'.<sup>82</sup>

A Haupt, in his recent book *Stealing empire*,<sup>83</sup> examines, among other things, Creative Commons and open source licences in South Africa. Haupt notes that on the one hand, '[t]he adoption of Creative Commons licences in South Africa could go a long way towards reducing the costs of publishing and distributing works as well as simplifying legal processes, provided that the digital divide is narrowed significantly over the next few years'.<sup>84</sup> On the other hand, however, he argues that the success of Creative Commons eventually depends on the ability of American advocates of Creative Commons to enter into partnerships with activists in the developing world: 'These partnerships would be most successful when some of the basic premises from which Creative Commons operates are interrogated in order to create room for alternative perspectives from poorer countries of the southern hemisphere'.<sup>85</sup>

Lastly, the findings of the PALM Africa project can be expected to be a valuable contribution to the literature on copyright in relation to access to learning materials. The PALM project, closely connected with ACA2K's research work, is examining how open content approaches employing flexible licensing can work in conjunction with local publishing in developing countries to improve access to learning materials.<sup>86</sup>

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82 A. Rens 'Implementing WIPO's Development Agenda: treaty provisions on minimum exceptions and limitations for education' (2009) in J. de Beer (ed) *Implementing the World Intellectual Property Organization's Development Agenda* IDRC, CIGI, WLU Press. Available at [http://www.idrc.ca/en/ev-141335-201-1-DO\\_TOPIC.html](http://www.idrc.ca/en/ev-141335-201-1-DO_TOPIC.html) [Accessed 7 April 2010].

83 A. Haupt *Stealing empire* (2008). Available at <http://www.hsrbpress.ac.za/product.php?productid=2219> [Accessed 30 March 2009].

84 Ibid at 122.

85 Ibid at 126.

86 PALM Africa blog, entry of 12 June 2008 by E. Gray. Available at <http://blogs.uct.ac.za/blog/palm-africa> [Accessed 30 March 2009].

### 8.3.2 *Impact assessment interviews*

Interviewees were selected from the following stakeholder groupings:

- government — represented by the Department of Arts and Culture (DAC) and the Department of Trade and Industry (dti);<sup>87</sup>
- education community — represented by employees of the University of Cape Town (UCT)<sup>88</sup> who are responsible for copyright-related matters; and
- copyright-holders — represented by the Publishers' Association of South Africa (PASA) and an authors' association (ANFASA).

In accordance with ACA2K's cognisance of diversity issues, efforts were made to select interviewees representing gender, racial and ethnic diversity. The interviewees all came from roughly the same socioeconomic background, however, as they were high-ranking university, government or publishing industry employees.

#### *Government*

The two government interviewees — one from the Department of Trade and Industry (dti), one from the Department of Arts and Culture (DAC) — both had legal training and a detailed understanding of copyright. The dti is the lead department on copyright law and policy, whilst the DAC plays a supportive role by providing feedback on particular issues when requested to do so by the dti and where appropriate to bring certain issues to the attention of the dti.

Both interviewees were appreciative of the link between the copyright environment and access to learning materials and stated that their departments also held this view.

The dti representative initially stressed the importance of copyright law for protecting the interests of creators and for incentivising creative activity. It emerged, however, that one of the dti's goals is also achieving a fair balance of interests (between rights-holders and users) in the area of copyright law — particularly in relation to learning materials. Further, the department acknowledges a possible connection between copyright law and high prices for learning materials in South Africa caused by the fact that copyright law awards a limited monopoly to the rights-holder. The dti representative also stressed the relevance of South Africa's developing country status when drafting new copyright legislation.

87 An interview with employees from the Department of Education (DoE) never materialised despite several attempts to arrange for such an interview.

88 UCT is not representative of South African universities generally, therefore case studies of a university with a different socioeconomic profile from UCT and a distance education university are included in the SA country report on the ACA2K website, <http://www.aca2k.org>. UCT was chosen for inclusion in this chapter because the examination of such a well-resourced and highly acclaimed African university provides additional and valuable insights regarding the actual effects of the copyright environment on access to learning materials.

The DAC is more attuned to cultural and artistic matters than the dti but even in that context the interviewee stated that the department was aware that the copyright environment had an impact on access to learning materials generally and specifically, from the DAC perspective, on artistic and cultural training institutions. Indeed, the interviewee stated that copyright is an important issue for museums, librarians and community artists.

It emerged in the interviews that the dti is in the process of commissioning research that will influence policy changes. In addition, the department engages in public and stakeholder consultation and closely follows and engages in, copyright-related discussions at WIPO in Geneva. The department is therefore familiar with the views of copyright stakeholders such as publishers, open source software representatives and learning institutions.

Both departments are aware of access to knowledge initiatives and hence both interviewees expressed genuine interest in ACA2K's research and findings.

In relation to gender and race-related issues, the dti representative expressed the opinion that the current copyright laws do not discriminate on the basis of gender and that (other) socioeconomic elements are predominantly the reason for dissimilar access potential between men and women or between people of different racial groups. The DAC interviewee suggested, however, that gender and race issues were closely related to socioeconomic factors. This is because certain racial groups, and women in general, have been historically disadvantaged due to the country's apartheid past. The interviewee went so far as to state that black women particularly appeared most disadvantaged because they are poorer and less educated and the copyright environment seems to affect them more adversely than other groups. Also, it seemed to this interviewee that white males are more prominent in the copyright landscape, for example as leading IP lawyers and academics.

With regard to ICTs, both government representatives were of the view that ICTs were an enabler and an empowering tool, rather than a hindrance. The dti interviewee further stated that while he generally supported the use of technological protection measures (TPMs), he was also aware of access problems caused by such measures.

### *Educational community*

Interviews were conducted with employees at the University of Cape Town (UCT) main library, the UCT Research Contracts and IP Services office, the UCT Research and Innovation office and the UCT Centre for Educational Technology.

The respective UCT interviewees approached the issue of copyright protection and access to learning materials from very different angles. Overall, this group of interviewees demonstrated an appreciation of the relationship between the

copyright environment and access to learning materials. But while the interviewee from the Centre for Educational Technology showed the greatest sympathy for enhancing access possibilities, the interest of the interviewees from UCT's Research Contracts and IP Services office were clearly focused on the financial exploitation of intellectual creations. The interviewee from UCT's main library was somewhat divided about the role of copyright, which does not come as a surprise, because university libraries usually represent both the interests of users (ie students and teachers) and creators (ie academics) of copyright-protected works.

Copyright plays a significant part in university curriculum development and learning support. This is evidenced by the care that needs to be taken with respect to the compilation of course-packs, so that they comply with the voluntarily negotiated blanket licence agreement UCT concluded with DALRO, South Africa's collecting society (reprographic rights organisation) for literary works. There are also concerns about the dissemination of learning materials electronically via the university's online course system, Vula.

Whether or not the blanket licence agreement with DALRO improves or hampers access to learning materials could not be answered by the interviewees. The reason for this is that although the DALRO licence factors in existing statutory copyright exceptions and limitations when setting the rates by containing a fair dealing component, it is impossible to say if and to what extent this fair dealing component is indeed fair because it is unclear what the law in South Africa really allows in terms of the reproduction of learning materials. As one interviewee put it:

If the university view that [the law] allows generous copying, and probably even course-pack creation, is valid, then the DALRO licence is a poor deal. If the publisher view that the copying allowed [...] is seriously constrained by the application of the Berne three-step test is right, then the allocation of the percentage for fair dealing copying may be fairer.

The same interviewee noted that the blanket licence agreement may, after all, be 'too expensive' for what it offers, given the amount of work it creates for universities to track copying for DALRO and in light of the fact that universities did not aggressively and in a united manner, engage in price negotiations with DALRO.

UCT has an Intellectual Property Policy that in part regulates copyright ownership in material produced by its staff (when done in the scope and course of their employment at the university). As a general rule, the university holds copyright in work produced by staff in the course of their employment. However, the copyright in a number of works is subsequently assigned to the authors of the works. The net income from copyright-protected works is shared between the university and the authors.



The university has also created wide structures for copyright administration, as shown by the selected interviewees who came from three different bodies in the university. However, it was evident from the three separate interviews that the coordination of the roles played by the various structures could perhaps be improved.

The university plays an active role in national IP policy and legislation formulation. The interviewees stated that should further opportunities arise, they were confident that there would be meaningful participation from the university.

It is also noteworthy that in 2008, UCT committed to building a repository of open educational resources (OER). The purpose of the project, funded by the Shuttleworth Foundation, is to create 'a new culture of sharing at UCT and the availability of high quality, open access learning materials organised on a UCT-branded OER website'.<sup>89</sup>

With regard to gender and race dimensions, the interviewees could not easily conceptualise the impact that gender and race would have on access to learning materials. Two interviewees stated that it was more likely a broader socioeconomic phenomenon, ie other socioeconomic factors, beyond gender and race, were responsible for differential access dynamics.

When asked about the importance of digital technology and ICTs, all interviewees stressed the growing significance of such tools. They pointed to UCT's Educational Technology Policy Document. This document refers to both staff and students at UCT and makes explicit UCT's position on educational technology within the institution. In addition, the document suggests how the expressed principles may be put into practice.<sup>90</sup>

### *Copyright-holders*

The views of the rights-holder community were obtained by interviewing a representative of the Publishers' Association of South Africa (PASA), as well as a representative from the Academic and Non-Fiction Authors' Association of South Africa (ANFASA).

The PASA interviewee described the financial situation of South African publishers as generally healthy, especially due to the implementation of a new curriculum some years ago. He pointed out that most school books are produced locally. In higher education, however, the vast majority of learning materials used in South Africa originate overseas. Although digital material is increasingly utilised, the interviewee stated that printed books are still the most accessible and readily available learning

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89 UCT Centre for Educational Technology website. Available at <http://www.cet.uct.ac.za/projects#OER> [Accessed 07 July 2009].

90 University of Cape Town Educational Technology Policy Document (n.d.). Available at <http://www.cet.uct.ac.za/policy> [Accessed 30 March 2009].

material in South Africa. The ANFASA interviewee linked the choice of learning materials to the materials prescribed by the Department of Education and indicated an increase in use of learning materials originating in South Africa.

The PASA interviewee noted that the publishing industry makes information available and ensures certain quality standards but can usually not provide information free since there are costs involved in producing and distributing the material. With regard to open access and the interests of authors, the ANFASA interviewee also raised the issue of the costs associated with the production of knowledge and tendered the suggestion that in promoting access to knowledge, these costs could be borne by the state, which could provide, for instance, subsidies to schools for the purchase of learning materials. The point that the ANFASA interviewee was making is that generation of open access content should still create a payment and revenue incentive for the producer of that content.

The PASA representative also stressed that PASA has numerous policy positions regarding copyright law but that it was difficult at times to identify people in government departments with whom these issues could be discussed. As a result, PASA often engages in direct negotiations with user associations, such as LIASA — the Library and Information Association of South Africa. These discussions have become much more open and less acrimonious in recent times.

The ANFASA interviewee has been active in highlighting authors' concerns during policy and legislative processes, including input on the Intellectual Property Rights from Publicly Financed Research and Development Act — where ANFASA promoted an exception for academic works, which was accepted.

While PASA is relatively satisfied with the current Copyright Act, it considers the Copyright Regulations too vague, making litigation in this field difficult and costly. Moreover, PASA criticises the fact that many court cases which have simply fizzled out because the judicial system appears not sufficiently prepared or informed enough to prosecute with vigour and energy. The ANFASA representative was pleased with the Copyright Act. ANFASA believes strongly in copyright, the protection of author's rights, educating authors about copyright and safeguarding copyright, especially in relationship with publishers.

The ANFASA interviewee was, however, displeased with the implementation of the Copyright Act. According to the ANFASA interviewee, when he was still practising law, his (previous) firm acted on behalf of DALRO and represented four academic publishers whose textbooks were being photocopied by a copyshop at a university campus. The case was based on the Counterfeit Goods Act and test purchases were made and used as evidence. The law firm approached the dti to undertake a search-and-seizure operation, whereby they would have confiscated the machinery in the copyshop because it was being used to produce counterfeit goods. The main objective was to get publicity for the whole operation. However,

according to the ANFASA interviewee, the dti's immediate reaction was that the matter was emotive because it had to do with education and the dti went on to say that it usually deals with trademark infringement where factories make fake goods and the warrant is to go and seize the fake products and machinery. In this case, however, the photocopying was happening on an ad hoc basis and they were not likely to find quantities of photocopied books in the copyshop. According to the ANFASA interviewee, it almost seemed as if the dti had reservations about taking up a case of copyright infringement regarding educational material.

The PASA interviewee expressed the view that, currently, the South African copyright law and regime, in fact, are more inclined to make access to copyright-protected material possible rather than not making it possible. He stated, in this context, that 'if one really wants to fundamentally challenge the current copyright regime in South Africa, you have to challenge that view of what IP is,' ie the view that IP is a very personal possession that belongs to the creator like any other kind of (tangible) property.

The PASA representative frequently emphasised the importance of a balanced approach to copyright, which takes into account both the rights of the owners of copyright-protected works and those of users. Among other things, copyright laws should therefore describe ways in which users can get access to copyright-protected material. If the industry followed this balanced approach, they could better run their own businesses 'because it might mean that they would constantly investigate better ways of providing access to the user while making money through this access'. However, the interviewee noted that this was not a universally held view among publishers and that others in the industry may well have a different view.

The ANFASA interviewee clarified that ANFASA's role as an organisation was to educate authors on copyright, though the choice of licence used eventually was the author's decision entirely. The ANFASA representative further submitted that authors are becoming increasingly aware of open access and Creative Commons licences, due to the discussions at industry events. According to him, some authors were willing to publish specific works under open content licences, but sought royalties where there was a strong belief that a work was commercially viable.

The PASA interviewee also expressed great interest in alternative licensing schemes, particularly Creative Commons licences.

The PASA interviewee further mentioned that PASA's contracts state, for example, that authors have to agree that their material will be provided free of charge to an institution that would transfer the material into Braille. Regarding formats of works, ANFASA cautioned authors against signing publishing contracts that allow publishing of a work in any format 'known or unknown'.

Regarding the language of a work, the ANFASA interviewee raised the point that there is a perception that only a small market exists for indigenous works: this means that those who write in an indigenous language are not likely to find a publisher.

The PASA representative expressed the opinion that the discussion about access to copyright-protected material often has an unrealistic ideological basis. In his view, the core access issue appears to be the cost of copyright material—and as far as (locally produced) school materials are concerned, no huge mismatch between costs and what people can afford exists, because most material is funded by government. In other words, he felt current prices for school textbooks did not prohibit people from accessing knowledge. In fact, he added, schools often choose very expensive textbooks although cheaper textbooks are also available. In addition, parts of textbooks can be photocopied freely or at least more cheaply, by applying to DALRO. The PASA interviewee acknowledged, however, that the situation may be different when it comes to tertiary educational material produced overseas. Such material is usually very expensive and thus there is a problem around costs.

The ANFASA representative also touched on the issue of photocopying learning materials and its effect on the publishing industry. He said that publishers' current print runs are very low because the publisher is aware that of all the books in a print run, only one quarter will be sold, because of the photocopying of such learning materials. This, he stated, raises the costs of books and limits the author's royalty payments.

The PASA interviewee stated that, in addition, there is a huge problem in South Africa regarding access to bookshops where ordinary people in the community can buy books or print material. He said: '[T]his whole issue of affordability of just general books in order to create a better informed reading public and parents that can help their children with school tasks or just for the love of reading it—I think for me that is it.' ANFASA runs a grant scheme to promote the production of knowledge. The grant covers the author's specific costs related to the book being written, such as funds which allow the author to take time off work to complete the book, conduct research or travel. This is done to promote knowledge creation and to encourage books that break new ground and generally, to promote a culture of reading and writing.

Furthermore, the PASA interviewee had interesting views on ICT and socioeconomic dimensions including race and gender. For example, he noted that around 90 per cent of publishing houses are run by men.

Meanwhile, the PASA interviewee said publishing houses appear to have been impacted differently by the advent of ICT dissemination channels and the possibility of the production of electronic learning materials. Some houses were able to include these easily in their business models while others are battling to do so. Generally, the PASA representative expressed his excitement about new access possibilities

brought about by digital technologies, especially by way of using cellphones. Finally, he also agreed with other interviewees from the educational community and government departments that race, gender and socioeconomic issues tend to be conflated in South Africa.

The ANFASA representative concurred that ICTs have indeed made knowledge more accessible, but regarding online publishing, the ANFASA interviewee expressed the reluctance of some authors concerned about copyright infringement of their works in the online environment.

### *Information and communication technology (ICT)*

South Africa has the largest Internet community on the African continent and it is laudable that all South African tertiary educational institutions (and a growing number of schools) have some form of ICT access. It is also important to acknowledge that South Africa has various ICT-related policies in place, such as the policy on e-education. The government appears determined to establish South Africa as an information society. The strategies and plans suggest that schools and other educational institutions in South Africa are set to improve ICT access and usage in the future, a fact which is going to positively influence access to learning material in the country.<sup>91</sup>

Having said this, it must not be overlooked that a large number, if not the majority, of South Africans still lack the resources to use ICTs. As a result, printed books are still the most accessible and readily available learning tool in South Africa.

During the interviews conducted for this project, the issue of ICTs was repeatedly raised by the interviewees, mostly in the context of digitised learning material. In summary, the response was the acknowledgment of the potential of ICTs as an enabler for increased access to knowledge, but suggestive of the need for more legal clarity on the application of copyright in this domain.

The enactment of the Electronic Communications and Transactions (ECT) Act 25 of 2002 affords electronic materials equal legal status as their printed-paper counterparts. The legal recognition and framework presented by this single piece of legislation have paved the way for a significant increase in the adoption of electronic commerce in South Africa. Notwithstanding these positive developments, issues such as the adaptation of pre-existing legislation, particularly the Copyright Act, to cope with digitisation needs, must be addressed.

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91 For a good and relatively recent overview of ICT-related initiatives in South Africa see S. Isaacs 'ICT in education in South Africa' (2007) *Survey of ICT and education in Africa: South Africa country report*. Available at <http://www.infodev.org/en/Document.429.aspx> [Accessed 30 March 2009].

To further the work of another positive development, the government Free and Open Source Software Policy, it is imperative that questions surrounding open access content are considered and a suitable legal framework is tabled (that is, to do to culture broadly what the FOSS Policy has done for software).

### *Gender*

Essentially, the researchers understand gender as referring to the sociocultural construction of roles and relationships between men and women.<sup>92</sup>

The South African research team, which consists of two female researchers and one male researcher, acknowledges the fact that even seemingly gender-neutral laws may in practice uphold existing gender discriminations. The research team also took note of the assertion made by some legal scholars that copyright laws contribute to sustaining inequalities between men and women since they were ultimately written and enforced to help men retain control over copyright-protected material.<sup>93</sup>

Apart from developing a general awareness with regard to the gender-related issues of the ACA2K project, the South African research team placed emphasis on identifying specific inequities based on gender. It was decided, however, that a deep analysis of identified inequities was beyond the scope of the current project.

Notably, most interviewees had difficulties detecting a correlation between the copyright environment and its impact on access to learning materials on the one hand and gender inequities on the other. This lack of awareness is an interesting observation in itself since it suggests that key stakeholders are, from the outset, not overly concerned about this issue. Upon further inquiry, however, some interviewees shared a number of general observations and views with the research team. These observations and views implied that:

- gender-related matters and problems form arguably part of a much broader socioeconomic discourse which in South Africa currently centres on race inequities;
- knowledge tends to centre on male-dominated subject matter;
- the whole area of intellectual knowledge is male-dominated;
- from a cultural point of view, the classic idea behind and the concept of, copyright protection is male;
- black women are particularly disadvantaged when it comes to receiving knowledge;

92 IDRC *Gender analysis as a development research tool* (1998) International Development Research Centre (IDRC) Gender and Sustainable Development Unit. Available at <http://archive.idrc.ca/gender/tool.html> [Accessed 30 March 2009].

93 See, for instance, A. Bartow 'Fair use and the fairer sex: gender, feminism, and copyright law' (2006) 14 *American University Journal of Gender, Social Policy and the Law* at 551-2.

- a race and gender stereotype exists according to which a publisher in South Africa is a white male;
- the vast majority of publishers in South Africa are male but most of the larger educational publishing houses in South Africa are run by women; and
- South African authors are perceived to be mostly male.

## 8.4 Conclusions and recommendations

It is evident that the issues of access to knowledge in general and access to learning materials in particular, have started to attract more attention in recent years in the South African copyright arena. And it is notable that most copyright stakeholders in South Africa appear to have a balanced view, in that they acknowledge the validity of positions of stakeholders with differing views. This surely is a promising point of departure for future discussions in this area.

There is a growing body of secondary literature on the topic. Notably, however, only a few legal academics have participated in the discussion so far. The majority of the (few) legal academics dealing with copyright law and the issue of access to knowledge and learning materials appear to favour a less stringent copyright protection regime in South Africa in order to facilitate access to learning materials and foster education.

This study found that the existing legislation is inadequate in a number of ways. The key pieces of legislation/regulation in the area of copyright law, the Copyright Act 98 of 1978 and its Regulations, do not make use of many of the flexibilities contained in TRIPs and other international copyright treaties and agreements, particularly in relation to copyright exceptions and limitations.

The Copyright Act does not properly address the digital environment and its challenges.

The ability to promote access to learning materials by, for instance, creating adaptations of copyright-protected works for the sensory-disabled, is hindered by the threat of copyright infringement.

Many existing copyright exceptions and limitations in the South African Act and Regulations — especially the provisions on fair dealing — are generally considered to be too vague by both rights-holders and users. The failure to provide clarity for fair dealing in digitised works, for instance, hinders the distribution of knowledge through the efficient distribution mechanisms of ICTs. In addition, despite progress in electronic communications access in South Africa, the ECT Act, through its protection of TPMs, may attach criminal liability to materials usage that is legitimated by the Copyright Act.

A positive observation from the legislative analysis is that there is legislative and policy activity to promote the access to and use of ICTs, as evidenced by the ECT Act and the FOSS Policy. Notwithstanding these notable developments to promote

access to ICTs, it was found that such legislation and policy is to some extent either in conflict with, or insufficiently supported by, the Copyright Act.

Meanwhile, the new Intellectual Property from Publicly Financed Research and Development Act intends to provide for more effective utilisation of intellectual property emanating from publicly funded research. A more conducive provision for access to knowledge would have been created, however, if works resulting from government-funded research were mandated to be in the public domain or, alternatively, publicly available at no charge within a reasonable time frame, perhaps subject to reasonable exceptions.

The provisions of the Constitution, particularly the right to education and the right to equality, are important and may be relied upon when proposing the need for legislative changes that cater for improved access to knowledge. The extent to which the Copyright Act is inconsistent with the provisions of the Constitution must be resolved.

It would appear, from the interviews conducted with government officials, that more prominence is likely to be given to access to learning materials in any future copyright policy or legislation amendment process.

Also, initiatives such as the Free High School Science Texts project show willingness by some sectors of society to take effective action to step outside traditional copyright structures to improve access to learning materials in South Africa.

The authors of this report observed a lack of directly relevant case law in the area of copyright law. It has been concluded that this is largely due to remedial inadequacies and legal costs and complexities. In addition, based on anecdotal evidence and personal experience, the interviewees opined that there is limited prosecution of offences in relation to copyright because the track record of the dti and the attitudes of police, customs officials and prosecutors together indicate that copyright infringement is not considered a serious offence. This means that rights-holders do not have meaningful support in pursuing cases of copyright infringement. Also, it was found that some educational institutions are unwilling to assist rights-holders to enforce their rights. Furthermore, fines imposed after convictions have historically been low and proving civil damages is a difficult task due to the lack of statistical data. The net effect of these factors has been that publishers are very reluctant to bring litigation or instigate criminal prosecutions and run the risk of substantial expense for an uncertain outcome.

It is suggested by the South African research team that the lack of debate on copyright and access to knowledge may be blamed on the currently unclear and incomplete legislative framework. A law cannot be subjected to substantial criticism if it is unclear as to what it allows and prohibits. Furthermore, such ambiguity often discourages people from reverting to the courts, since the outcome of costly court



proceedings is uncertain. The lack of case law, in turn, aggravates the current legal ambiguity. It appears that as a result, most people just do whatever they think is allowed under the current South African copyright regime — regardless of whether their assumptions are correct or not.

Thus, both of the ACA2K research project hypotheses tested are accurate in describing the current situation in South Africa: the copyright environment in South Africa does not maximise effective access to learning materials; and the environment can be changed in order to maximise effective access to learning materials. The South African ACA2K research team proposes the following legal and regulatory changes to maximise access to learning materials in South Africa.

South Africa has, for the most part, implemented the standard protection terms required by the Berne Convention and other relevant international treaties and agreements. Some countries, including some other ACA2K study countries, have extended the term of protection beyond international standard requirements. To preserve access to learning materials, South Africa should not extend the term of copyright protection.

The Copyright Act is silent in respect of orphan works. Our recommendation is for an amendment to the South African Copyright Act that permits use of orphan works on reasonable terms when copyright-owners cannot be identified or located to negotiate voluntary licences.

The government's FOSS Policy, if implemented successfully, may address and lower barriers to schools' and libraries' access to ICTs. It is recommended that, in order to fully realise the benefits of FOSS, legislative amendments promoting access to the learning materials carried via ICTs should be considered. The government will need to ensure that the FOSS Policy is compatible with the policies embedded in related legislation, such as the Copyright Act.

Currently, the South African Copyright Act does not permit the scanning, translation, adaptation or conversion of works for the sensory-disabled without permission from the copyright-holder. However, the Constitution of South Africa expressly provides for the right to education, which arguably places a duty on the state to facilitate access to learning materials required to exercise the right to education. The South African Copyright Act should be amended to remove barriers to access to learning materials faced by people with disabilities by, for instance, allowing the permission-free conversion of learning material into Braille or into audio format.

The ECT Act of 2002 arguably prohibits the circumvention of TPMs, even if such circumvention aims at enabling uses of copyright-protected materials that are expressly permitted under the Copyright Act (eg, fair dealing or accessing works in the public domain). It is recommended that this conflict between the Copyright Act

and the ECT Act is addressed, for instance, by declaring the copyright exceptions and limitations contained in the Copyright Act as valid defences to anti-circumvention claims based upon the ECT Act.

The current set of copyright exceptions and limitations, particularly in relation to educational uses of copyright-protected materials, are vague, fragmentary and in many instances outdated. The use of modern technologies for educational purposes, for example in distance education, remains largely unconsidered. Exceptions and limitations contained in the South African Copyright Act must be reformed to, among other things, address technological advancements that could facilitate access to knowledge. Detailed and clear provisions for uses by libraries, archives, educators and learners should be introduced. One particular issue that requires further clarification is if and to what extent the creation of course-packs for learners is and ought to be allowed, under South African law.

While for reasons of legal certainty it seems best to adopt a detailed list of specific copyright exceptions and limitations (for which the recently amended copyright laws of other countries such as Australia could serve as an example), it should also be considered by the South African lawmaker to introduce an additional and subordinate catch-all clause modelled after the 'fair use' doctrine in the United States. Such a provision would (in the future) prevent numerous unanticipated uses being deemed illegal simply because the law cannot keep up with the pace of technological change.

Of course, national copyright exceptions and limitations must fulfil the requirements for copyright exceptions and limitations as set out by the relevant international copyright treaties and agreements, particularly those contained in the 'three-step test'.

In light of South Africa's developmental needs, especially in the educational sphere, copyright protection in South Africa should not exceed the standard scope of copyright protection required under the relevant international copyright treaties and agreements. To the extent that the current law exceeds the standards set out in those treaties and agreements, legislative change is required.

For the educational communities, the existing policies and practices at the University of Cape Town may provide a starting point for developing appropriate copyright-related policies and practices. Of particular importance are UCT's blanket licence agreement with DALRO and UCT's institutional Intellectual Property Policy. However, the UCT-DALRO blanket licence agreement may not adequately reflect authorisation-free and often remuneration-free uses for educational purposes permitted under the Copyright Act. UCT, like most educational institutions in South Africa, currently does not have a copyright policy to guide its students and staff with regard to their entitlement to copying works for educational purposes beyond what is covered by the blanket licence

agreement. UCT's institutional Intellectual Property Policy does not address this issue. Arguably, UCT students and researchers are therefore photocopying much less than they are entitled to because they are unsure of the legal implications. It is thus recommended that a policy on what can be lawfully copied be drafted in simple and succinct terms and that it be effectively communicated to the university's educational community.

The South African government's FOSS Policy has positive implications for access to knowledge. By endorsing open source software and open standards, the intention of FOSS is to lower barriers for accessing information and communication technologies. Unfortunately, no policies exist for areas other than open source software and open standards. The South African ACA2K research team recommends that more far-reaching legislative guidelines on copyright and access to learning materials be adopted, with the aim to enable rather than hamper access. Such guidelines should be jointly drafted by the relevant government departments, ie the dti, DoE and DAC, in consultation with representatives from the educational community and rights-holders, to ensure a comprehensive and holistic approach. Every future piece of legislation with implications for education in South Africa should then be drafted under consideration of these copyright guidelines. More generally, there seems to be room for improvement towards facilitating a broader range of participation in copyright policymaking in South Africa.

Copyright-holders collectively, through fora such as PASA and ANFASA, would be well advised to formulate policies, or update their current policies, with regard to enhancing access to copyright-protected materials for learners in South Africa. The South African research team is well aware that many copyright-holders, especially publishers, have a business to run — which makes it impossible to give away their material free. As far as education in South Africa is concerned, however, this factor alone does not unburden copyright-holders from a responsibility towards society as a whole to enable access to the greatest extent possible rather than constantly trying to achieve stricter copyright-protection regimes. Even from a business perspective, it appears counterproductive to impede the development of a reading culture which in the long run will heighten the demand for their works. Moreover, before pushing for stronger and longer copyright protection, copyright-holders should consider that laws that are too removed from the needs and beliefs of the majority are often ignored and difficult to enforce. Eventually, such laws often become ineffective. Particular attention should be paid to the needs of learners who face additional barriers to access to learning materials such as the sensory-disabled.

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# Chapter 9

## Uganda

*Dick Kawooya, Ronald Kakungulu and Jeroline Akubu*

### 9.1 Background

Uganda is located in East Africa, to the northwest of Lake Victoria. The country achieved independence from the British in 1962, but the post-independence experience was marred by political upheavals and internal wars.<sup>1</sup> These conflicts exposed the contradictory relationships and tensions between the state and different ethnic groups that existed long before independence.<sup>2</sup>

For a long time following independence, state corporations produced essential commodities for sale through private businesses mainly owned by the Asian community. Uganda's free market economic reforms started in the early 1980s, ushering in neo-liberal policies that led to the dismantling of state corporations. Since 1986, Uganda has registered fast macroeconomic growth, except in the northern part of the country, which was engaged in civil war until 2008. Uganda has a vibrant information sector, relative to some other African countries, including a small but fast-growing publishing industry. Furthermore, Uganda has a liberalised telecommunications industry, which has contributed to the growth of the country's ICT sector.

In 2007-2008, Uganda was ranked 154<sup>th</sup> out of 177 countries on the Human Development Index.<sup>3</sup> Despite recent economic growth, 31 per cent of the population still lives below the poverty line. A significant proportion of poor Ugandans (34 per cent) live in rural areas. The country's goal is to eliminate poverty by 2035. In 2006, annual income per capita was a dismal US\$300 and it is unlikely to change significantly in the near future. Foreign support by the international donor community constitutes 45 per cent of Uganda's total budget, making the country highly reliant on foreign funds. Literacy remains relatively low with the figure at just

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1 S.R. Karugire *Roots of instability in Uganda* (1996) Fountain Publishers, Kampala.

2 H.B. Hansen and M. Twaddle (eds) *Uganda now: between decay and development* (1995) James Currey, London.

3 United Nations Development Programme (UNDP) *Human development report 2007/2008: fighting climate change: human solidarity in a divided world* (2008) UNDP, Nairobi, Kenya (as quoted in the UN Human Development Index).

69 per cent of the adult population. Computer literacy is even lower and only 0.2 per cent of all literate adults own a computer.<sup>4</sup>

Generally, the Ugandan government is emphasising vocational training and science and technology, with the goal of delivering job creation. It is also seeking to create an informed society by encouraging a 'reading culture' based on 'positive values and ethics'.<sup>5</sup> The government *White Paper on Education* prioritises basic education through the Universal Primary Education (UPE) programme and secondary education through Universal Secondary Education (USE). Both are government-funded and provide free and universal education to all children of school-going age in Uganda. It is reported that UPE led to a dramatic increase in enrolment of over 70 per cent, with the primary school enrolment figures rising from 3.4 million students in 1996 to 6.9 million in 2001.<sup>6</sup> Current primary school enrolment is estimated at close to 7.2 million pupils. While UPE still experiences challenges including low completion rates, the programme has afforded many poor families the opportunity to send children to school. Owing to the large number of students graduating from primary school, the government introduced USE in 2007.

Due to the costs associated with UPE and USE, the government has been left with few resources for the tertiary sector, beyond the 4 000 scholarships in place at public universities. There is an affirmative action initiative that encourages women to attend public universities, which has helped equalise the ratio of male to female students in public universities at almost 50:50. The government also set up the Uganda National Institute of Special Education (UNISE) at Kyambogo University, to accommodate individuals with special education needs. In addition to UNISE, all public institutions provide certain services to individuals with special needs, such as the visually impaired or hearing impaired.

The government's *Vision 2035* document recognises that Uganda must prepare for and take advantage of the Information Age, stating that:

No effort must be spared in the creation of an information-rich Ugandan society. Information and knowledge and their management, therefore, will be cornerstones of national development.<sup>7</sup>

The government identifies ICTs as 'central in the pursuit of productivity-driven growth'.<sup>8</sup> Uganda's vision of the knowledge economy is one that affords equal opportunities to all groups, especially marginalised groups and women.

4 Government of Uganda *Vision 2035: towards a transformed Ugandan society from a peasant to a modern and prosperous country within 30 years* (2008) unpublished draft document, National Planning Authority.

5 Ibid at 7.

6 Ibid at 4.

7 Ibid at 10.

8 Ibid at 12.

## 9.2 Doctrinal analysis<sup>9</sup>

### 9.2.1 *Uganda's copyright law*

Copyright is a relatively recent development in Uganda, first introduced by the British, during their colonial regime. Copyright in Uganda was initially designed to protect British authors and publishers within the Ugandan Protectorate.<sup>10</sup> Historically, Uganda's copyright protection is a product of the common law system, owing to the country's British colonial heritage. The Judicature Act (Cap. 13) recognises the application of common law principles by Ugandan courts.<sup>11</sup>

Until August 2007, Uganda operated under the Copyright Act (Cap. 215) of 1964 (the 1964 Copyright Act), which was replaced by the Copyright and Neighbouring Rights Act of 2006 (the 2006 Copyright Act). The 1964 Copyright Act was never revised up until it was repealed, even though the corresponding British law of 1911 from which it was derived had been revised.<sup>12</sup>

Uganda is not party to the Berne Convention, but owing to the fact that many provisions of the Berne Convention are incorporated into the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement), which Uganda is bound by, these Berne provisions nevertheless apply. The Appendix to the Berne Convention provides for statutory licences, primarily for translation and certain kinds of reproductions and while Uganda has not notified use of the Appendix, it has still enacted similar provisions within the 2006 Copyright Act. Section 17 of the 2006 Copyright Act provides for non-exclusive licensing for translation of a work under certain prescribed circumstances – if the work is unavailable in a local language one year after its initial publication or is unavailable in any form after a set period of years from first publication, depending on the nature of the work.

In April 1994, Uganda signed the Marrakech Agreement establishing the World Trade Organisation (WTO), requiring it to comply with, among other things, the

9 The authors gratefully acknowledge the research assistance provided by Mary Namono and Dan Ngabirano in support of the doctrinal analysis outlined in this section and the qualitative analysis outlined in the next section.

10 In colonial times, Uganda was a Protectorate rather than a colony—a system of indirect rule that granted Uganda some degree of autonomy from the British administration; see H.F. Morris 'Sir Philip and "protected rule" in Buganda' (1972) 13 *Journal of African History* 2 at 305-323.

11 Section 14 of the Judicature Act (Cap. 13).

12 J. Akubu 'Balancing features in Uganda's copyright law' in *Copyright and documentary film in the Commonwealth: legal scholar reports from six countries* (2009) Program on Information Justice and Intellectual Property and Center for Social Media, American University, Washington, DC at 65. Available at <http://www.wcl.american.edu/pijip/go/filmmakerpapers> [Accessed 1 April 2010].

TRIPs Agreement. Uganda has undertaken several legal reforms to comply with WTO rules, though significant work remains to be done. Uganda, being a least-developed country (LDC), was not obliged to comply with TRIPs until 2013 with respect to copyright. Yet, the 2006 Copyright Act largely implemented a number of the copyright provisions in TRIPs.

Uganda is not party to the 'WIPO Internet Treaties' (the WIPO Copyright Treaty [WCT] and the WIPO Performances and Phonograms Treaty [WPPT]) and is, therefore, not bound by these two instruments. But Uganda is a member of the East African Community (EAC) alongside Kenya, Tanzania, Rwanda and Burundi, which resolved to update intellectual property laws to protect creative industries in the region. And Uganda is a member of the African Regional Intellectual Property Organisation (ARIPO) and is therefore required to harmonise intellectual property laws with other ARIPO members.<sup>13</sup>

This environment of external pressure, coupled with some internal demands from recording and performing artists, created the particular copyright policymaking environment in Uganda that eventually led to the 2006 Copyright Act. Due to its scant attention to teaching and learning issues, the 2006 Copyright Act will have potentially serious consequences for education and research. In general, the 2006 Copyright Act places great emphasis on copyright protection, which has the potential to limit access to educational and research materials.<sup>14</sup>

### *Scope of copyright protection*

Section 5 of the Copyright Act of 2006 outlines the specific types of protected works in Uganda. These works include literary, scientific and artistic works (including computer programs, illustrations and traditional folklore and knowledge), as well as derivative works such as translations, transformations and collections. The works are defined in Section 2 of the Act. Section 6 of the Act makes it clear that ideas are not protected by copyright and Section 7 excludes from copyright protection 'public benefit works' such as laws and government reports.

Traditional knowledge and folklore are included as works eligible for copyright protection in Section 5(1)(j). However, the Act does not elaborate on how this knowledge and these resources are to be protected. Moreover, the Copyright and Neighbouring Rights Regulations of 2010 are silent on how traditional knowledge and folklore will be specifically protected. In any case, Section 3(1) of the Regulations sets stringent registration standards requiring proof of ownership of protected

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13 Ibid.

14 A. Mpeirwe 'Sellers of music and video CDs should mind the law' (22 March 2007) *The New Vision*; J. Wasula 'Is it time to rejoice over copyright?' (22 March 2007) *The New Vision*; J. Wasula 'A copyright law was passed in Uganda two years ago' (20 June 2008) *The New Vision* at 19.

materials.<sup>15</sup> Most traditional knowledge and folkloric resources are collectively owned and in some cases considered part of the public domain. Therefore, they cannot pass this standard.

The rights-holders' economic rights are outlined in Section 9 of the Act and include publication, distribution, broadcasting and communication to the public.

Furthermore, the law recognises and protects moral rights under Section 10. These moral rights are non-assignable<sup>16</sup> and include rights to:

- claim authorship of the work;
- have the author's name or pseudonym mentioned or acknowledged each time use is made of the work;
- object to and seek relief in, cases of unauthorised distortion, mutilation, modification or alteration of the work; and
- withdraw the work from circulation if the author so chooses.

Section 13(8) of the 2006 Copyright Act assigns moral rights in perpetuity, enforceable by the author or his or her successors after death.

In general, the duration of copyright in Uganda keeps to the standard requirements laid out in the relevant international instruments such as the Berne Convention and TRIPs. The 2006 Copyright Act affords economic rights protection, in most cases, for 50 years after the death of the author.<sup>17</sup> For audiovisual works, sound recordings and broadcasts, the economic rights of the author are protected until the expiration of 50 years from the date of making the work or from the date the work was made available to the public with the consent of the author.<sup>18</sup> In the case of photographic works and computer programs, the economic rights of the author are protected for 50 years from the date of making the program available to the public.<sup>19</sup>

'Public benefit works' are not entitled to copyright protection.<sup>20</sup> Public benefit works include government works and legal proceedings. Specifically, Section 7 of the 2006 Copyright Act provides that enactments, decrees, orders or decisions by a court of law, as well as reports made by committees or commissions of inquiry appointed by government, are not subject to copyright protection. The works specifically provided for in Section 7 are usually publicly accessible. However,

15 Section 3(1) of the Copyright and Neighbouring Rights Regulations of 2010.

16 Section 10(3) of the Copyright and Neighbouring Rights Act of 2006.

17 Section 13 of the Copyright and Neighbouring Rights Act of 2006.

18 Section 13(5) of the Copyright and Neighbouring Rights Act of 2006.

19 Section 13(6) and (7) of the Copyright and Neighbouring Rights Act of 2006.

20 Section 7 of the Copyright and Neighbouring Rights Act of 2006.



when a person creates work under the direction or control of the government, unless otherwise agreed, the copyright in respect of that work vests with the government.<sup>21</sup>

Court judgments and transcripts of Parliamentary proceedings are freely available online. But government works that are printed by the Uganda Publishing and Printing Corporation (UPPC), such as the national Gazette, must be purchased. The government's view is that printed materials, as opposed to online materials, cost money to produce and thus cannot be free. Similarly, printed materials from the Uganda Law Reform Commission (ULRC) and Uganda National Examination Board (UNEB) are also available only on a fee-paying basis. And even the free online government material is relatively inaccessible in Uganda, due to poor ICT infrastructure and low levels of Internet penetration.

The 2006 Copyright Act makes no mention of digital rights management (DRM) systems or technological protection measures (TPMs).

Section 46 of the 2006 Copyright Act lays out how and whether parallel importation of copyright-protected works may constitute an infringement of copyright. Section 47 of the Act describes the related offences and penalties in more detail. As per Section 46(1):

Infringement of copyright or neighbouring right occurs where, without a valid transfer, licence, assignment or other authorisation under this Act a person deals with any work or performance contrary to the permitted free use and in particular where that person does or causes or permits another person to —

- (a) reproduce, fix, duplicate, extract, imitate or import into Uganda otherwise than for his or her own private use;...

Thus, parallel importation is not permitted without some form of agreement with the copyright-holder.

### *Copyright flexibilities*

#### **'Fair use'**

'Fair use,' outlined in Section 15 of the Act, exempts the user from seeking the rights-holder's consent for use of a work in the course of research, teaching, criticism and review, news reporting, public library reproduction, judicial proceedings or translation into Braille or sign language. The 2006 Copyright Act does not specify what portion of a work can be used under fair use, but Section 15(2) provides for consideration of 'the purpose and character of the use, including whether the

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21 Section 8(2) of the Copyright and Neighbouring Rights Act of 2006.

use is of a commercial nature or is for non-profit educational purposes', as well as consideration of the 'nature' of the work being used, 'the amount and substantiality of the portion used' and the effect on the 'potential market' for the work when it is decided whether a use falls in the realm of fair use. The discretion therefore lies with the courts in interpreting the provision. And although there is no express provision for protection of digital works, it can be argued that Section 15 applies equally to digital and non-digital works.

Notably, the earlier 1964 Copyright Act contained a 'fair dealing' provision<sup>22</sup> instead of fair use. The old fair dealing provision was concise and stringent; the new fair use provision is arguably more liberal and flexible. The shift from fair dealing to fair use potentially creates a window to widen access, provided that the courts (in case of a dispute) interpret fair use liberally. Much would depend on whether the listed categories are interpreted as illustrative or exhaustive of permitted activities.

### Provisions for teaching and learning

Section 15 of the Act subsumes fair use for teaching purposes in schools, colleges and other educational institutions if it is 'fair'. The Act is, however, silent on distance and e-learning, as well as on the number of copies of works or illustrations permitted to be used in terms of the teaching exception. Moreover, the fair use provision is quite broad, making it difficult to predict how the law regulates specific scenarios.

### Libraries and archives

Libraries and archives are important gateways to accessing knowledge. There is a brief mention, in the Section 15 fair use provision, of reproduction by public libraries and non-commercial documentation centres being allowed under fair use. Thus, in publicly accessible libraries and non-commercial documentation centres, copying of works and limits on the number of copies permitted, depend on interpretation of Section 15 on fair use.

In practice, regardless of the legal provisions in place, it is possible to copy and utilise substantial portions of works from both publicly accessible libraries and commercial libraries. Though the law seeks to limit what may be photocopied, its enforceability is very limited in Uganda. This aids access to knowledge generally, but in the long run, creators of such works might more vigorously enforce their rights, thus curtailing access.

<sup>22</sup> Section 7(2)(a) of the Copyright Act of 1964.

There is no express public lending rights (PLRs) provision under the Act, meaning that there is no provision for libraries to pay fees to rights-holders for the practice of lending out copyright works.

### Disabled people

There are no detailed provisions for people with a disability under the 2006 Copyright Act — only a single mention under Section 15 of the Act in terms of fair use, where reference is made to transcription of a work into Braille or sign language.<sup>23</sup> Thus, for visually impaired people, the fair use provision provides for translations of works into Braille, subject to the fairness test. This provision would mean that the entity doing the transcription would not need to apply for a licence to adapt into Braille, or to remunerate rights-holders for this adaptation. Further, there are no specific restrictions on the sharing of such material and export or import of such material; general copyright rules would apply to such activities.

### Quotation

Quotations are dealt with under fair use in Section 15(1)(b) of the Act, which specifies that as well as the quotation being fair in terms of the criteria outlined in Section 15(2), the quotation must be ‘compatible with fair practice’ and the extent of the quotation should ‘not exceed what is justified for the purpose of the work in which the quotation is used; ...’ In addition, acknowledgement must be given ‘to the work from which the quotation is made’.

### Compulsory and statutory licensing

The 2006 Copyright Act does not explicitly provide for compulsory licensing. However, Section 17 provides for the granting by the government of a non-exclusive licence (statutory licence) to reproduce a work or to translate and make reproductions of a work into English, Kiswahili or any other Ugandan language. Section 18(1)(c) specifies that such a licence must be for teaching, research or scholarship purposes and Sections 18(2) and 18(3) list conditions that must be satisfied before the government issues such a licence and the circumstances under which the licence terminates. The translation provisions enacted into the Act mirror those in the Appendix to the Berne Convention (as previously noted).

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23 Section 15(1)(k) of the Copyright and Neighbouring Rights Act of 2006 states that works ‘transcribed into [B]raille or sign language for [the] educational purpose of persons with disabilities’ can be covered by the fair use exception.

### **9.2.2 Other laws and policies connected to copyright**

#### *The 1995 Constitution of the Republic of Uganda*

The Constitution is the supreme law of the land and all other laws, including copyright law, must adhere to it. The Constitution guarantees several rights and freedoms that have significance for copyright, either by enhancing access to knowledge or by concretising the protection afforded to rights-holders. Some of the relevant provisions for the purpose of this study are:

- Article 30 guaranteeing the right to education;
- Article 41 on the right of access to information;
- Article 29 guaranteeing freedom of expression; and
- Article 26 on the right to property.

#### *The Access to Information Act of 2005*

Pursuant to Article 41 of the Constitution, Parliament enacted the Access to Information Act, which essentially provides for the public's right of access to information when such information is in possession of the state or any state agencies, so long as such information does not prejudice national security, the sovereignty of the state or the right of privacy of any other person.<sup>24</sup> The Act calls for accessibility of information to the public, prescribes forms of access and puts in place procedures, institutions and mechanisms to enable access to information.

The Act does, however, protect the rights of copyright-holders, in cases where the information record requested is not a copyright-free 'public benefit work' or when the copyright is not owned by the state or the public body from which the information record is being sought.<sup>25</sup> The Act states that when information is requested in a particular form, access in that form may be denied if it amounts to an infringement of copyright.<sup>26</sup> Similarly, when a record is made available to any person under the Act, that person may make copies of or transcribe the record using his or her equipment unless doing so amounts to an infringement of copyright.

#### *Copyright and Neighbouring Rights Regulations of 2010*

The 2010 Regulations for the 2006 Copyright Act primarily serve to provide a process for the registration of copyright and neighbouring rights, or any assignment, licensing or transfer of a copyright or neighbouring right. It is important to note that registration is optional under Section 43 of the 2006 Copyright Act. However, under Section 43(6) of the Act it is mandated that the Registrar must issue a certificate

<sup>24</sup> Section 5 of the Access to Information Act of 2005.

<sup>25</sup> Section 20(8)(c) of the Access to Information Act of 2005.

<sup>26</sup> Section 20(3) of the Access to Information Act of 2005.

as proof of registration. This certificate acts as an incentive to register copyright and neighbouring rights, since such a certificate can be taken as conclusive proof of ownership of the right. The Regulations also streamline the registration and regulation of collecting societies.

### 9.2.3 *Judicial and administrative decisions*

The law in Uganda obliges parties to a dispute to settle the matter out of court as the first option. Only after such efforts have failed may a hearing be fixed to try the matter in court. This has led to many copyright cases being settled out of court and in such cases there is no record of the negotiations and terms of settlement. The law responsible in this case is the Arbitration and Conciliation Act.<sup>27</sup>

Litigation in relation to cases involving copyright infringement has until recently been very limited. But the trend now is that the Commercial Court — a branch of the High Court of Uganda — is registering intellectual property cases. Several have been registered, a majority of which are still ongoing. There are three decided cases from the Commercial Court that are relevant to Uganda's copyright environment. Of these, the *John Murray* case has the most direct bearing on access to learning materials.

#### *Attorney General v Sanyu Television*<sup>28</sup>

The Attorney General, as a representative of Uganda Television, a public television station, filed a suit against the respondent/defendant for infringement of broadcasting rights. It was the plaintiff/applicant's case that by means of an agreement with the Union of National Radio and Television Organisations of Africa (URTNA) and Canal France International (CFI), Uganda Television was granted exclusive rights to broadcast live coverage of the 1998 World Cup football series and that the respondent had infringed these rights by screening the matches on its television station, Sanyu TV. The applicant made the present application for an injunction restraining the respondent from further broadcasting the matches pending disposal of the main suit. Counsel for the respondent challenged the application arguing that the suit and application had been made against the wrong party, which was a non-legal entity.

James Ogoola, J., held that the respondent infringed the plaintiff's copyright. The respondent admitted having infringed the copyright and apologised for the act. As a result, the application was allowed and an injunction granted.

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27 Arbitration and Conciliation Act of 2000 (Cap. 4).

28 High Court Civil Suit No. 614 of 1998, reported in *Uganda Commercial Law Reports 1997-2001* (2005) 184-190 at 185, Blackhall Publishing, Dublin, Ireland.

*Uganda Performing Rights Society Limited v Fred Mukubira*<sup>29</sup>

The applicant, Uganda Performing Rights Society, as the assignee of copyright in the musical works of various local artists in Uganda, filed a suit against the respondent for alleged copyright infringement. The applicant sought a permanent injunction and damages for infringement. Further to the suit, the applicant applied ex parte for a temporary injunction to restrain the respondent from further infringement of copyright. The applicant also sought orders to search the respondent's premises and seize all material relating to the copyright infringement. The main issues at the hearing of the application were whether the Court had authority to grant the temporary injunction, whether the applicant satisfied the conditions for grant of an order and whether the suit was properly brought under Section 13 of the 1964 Copyright Act.

Geoffrey Kiryabwire, J., held that:

- Section 13 of the Copyright Act provides a remedy of direct statutory prohibitory injunction in cases of copyright infringement;
- In the instant case, where the application was made ex parte for a temporary injunction, pending disposal of the main suit based on Sections 38 and 39(2) of the Judicature Act alone, the Court did not have sufficient legal authority to grant the order;
- The three conditions for grant of search and seizure orders are that: there must be an extremely strong prima facie case, the potential or actual damage to the applicant must be serious and there must be clear evidence that the respondents have in their possession incriminating materials which they may destroy before any application inter parties can be made; and
- The Application satisfied all the conditions for grant of the order.

As a result, the application was granted.

*John Murray (Publishers) Ltd and Others v George William Senkindu and Another*<sup>30</sup>

In 1997 the plaintiffs brought an action against the defendants for infringement of copyright in the book *Introduction to biology* alleging, among other things, that the first defendant was selling counterfeit copies of the book in his Kampala Newstyles bookshop, thus causing a decline in the plaintiff's sales.

29 Misc. Application 818 of 2003 (Arising from High Court Civil Suit 842 of 2003), reported in *Uganda Commercial Law Reports 2002-2004* (2005) at 476, Zebra Graphics Ltd, Kampala, Uganda.

30 HCCS 1018 of 1997 (unreported).

Ntagoba, J., found that the books sold by the first defendant were counterfeit. Relying on Section 2(a) of the 1964 Copyright Act, it was found that the plaintiffs had copyright protection in Uganda and the judge went to great length to explain the significance of the Universal Copyright Convention of 1952 (as amended). Further it was stated that under Section 11(1) of the Copyright Act, the plaintiff did not have to prove 'knowledge' of the infringement by the defendant and hence, under that Section, strict liability was imposed on the defendant with no burden on the plaintiff to prove the knowledge of infringement on the part of the defendant.

Accordingly, the plaintiffs were awarded UGX10 710 000 (Uganda shillings) in lieu of actual loss incurred by the plaintiffs, considering that each of the 765 copies sold had been sold at UGX14 000. In addition, they were awarded UGX6 000 000 as further damages. Finally, the court granted the plaintiffs a permanent injunction restraining the defendant, his/her agents or servants from committing further infringements against the plaintiff's copyright.

Kampala Newstyles, which was at the time one of the biggest bookshops in Uganda, collapsed as a result of this case. This demonstrates the significant, practical effect that copyright can have, if and when it is enforced.

#### **9.2.4 Summary of doctrinal analysis**

While the 2006 Copyright Act addresses many requirements of the relevant international instruments to which Uganda is a signatory, much can be done to improve access to learning materials. As it stands, the Act includes a fair use clause that does not define clearly what is permissible and what is not. While Uganda's fair use doctrine seems to be an improvement on the more restrictive fair dealing provisions in the 1964 Act, it alone is not reliable enough to guarantee adequate access to learning materials, given the vague nature of the four factors that must be considered when determining fairness.

Also, considering the increasing use of digital technologies and the Internet, it can be argued that there is a constraining lack of provisions in the 2006 Copyright Act to regulate the digital medium. The current law, for example, makes no attempt to enable distance learning. However, at the same time the absence of provisions protecting DRM in general and TPMs specifically, provides a window for accessing electronic resources under fair use, for example by those at tertiary institutions with good access to ICTs.

Meanwhile, from the available case law, it would seem that judges are strictly interpreting and enforcing the law in the limited numbers of disputes that have been litigated. In particular, the *John Murray* case has serious implications for access to learning materials. Not only did a key node in the book distribution chain disappear as a result of the case, the high damages awarded sent a strong message to infringers and non-infringers alike.

## 9.3 Qualitative analysis

### 9.3.1 *Secondary literature*

There is a small but growing body of literature on copyright in the Ugandan context. However, literature on the intersection of copyright and access to knowledge is thin. We attribute that to two factors. First, there is a lack of a copyright culture, given the short history of the copyright system in Uganda. Second, there is a general lack of awareness of copyright both in the academia and the Ugandan society at large.

A study of the Ugandan copyright law was undertaken in 2001 (eventually published in 2004) by the Uganda Law Reform Commission (ULRC). According to this study, the review of the Copyright Act of 1964 was to further constitutional and international laws that require regular reviews of national legislation. Among the major reasons for the review revealed by the study was the desire to improve access to materials created by educators.<sup>31</sup> Another compelling justification for reform was the changing technological scenario in Uganda and elsewhere in the world. The area of works that were to be protected by copyright had to be widened to cover other areas in light of international technological developments.<sup>32</sup> Thus, the educational possibilities that might have been opened by technological developments were weighed against an emphasis on other issues, including stopping Ugandan and foreign rights-holders from being ‘robbed’ of their property.<sup>33</sup>

ULRC drafted a Bill based on the assumption that the law would be used in accordance with Article 26 of the Constitution, which guarantees protection from deprivation of property, while also furthering access to information, legal recognition of traditional and group rights and development goals such as those in the Poverty Eradication Action Plan (PEAP).<sup>34</sup> Unfortunately, findings and recommendations of this ULRC study were not fully integrated into the Private Member’s Bill that led to the 2006 Copyright Act.

A study by Edgar Tabaro, which is, essentially, a critique of the first draft Bill released in 2004, is useful in analysing the form of the eventual 2006 Copyright Act.<sup>35</sup> Tabaro analyses the concepts and principles adopted by the Bill in the context of Uganda’s national development objectives and policy instruments. He argues that the Bill principally sought to update the 1964 Copyright Act and bring it to international standards at the expense of domestic objectives. According to Tabaro, comprehensive copyright legislation should be based on a more meaningful purpose

31 Uganda Law Reform Commission (ULRC) *A study report on copyright and neighbouring rights law* (2004) ULRC Publication 9, at 18-19.

32 Ibid at 14.

33 Ibid at xviii-xix.

34 Ibid at xx.

35 E. Tabaro ‘Copyright law reform in Uganda: addressing international standards at the expense of domestic objectives’ (2005) ACODE Policy Briefing Paper.



in the national development process. His primary objective is to show that copyright should primarily serve the instrumentalist function of satisfying social goals and values, namely the creation, spreading and sharing of knowledge and further, that it should facilitate public use and access.

Joseph Kakooza's study is an illuminating one on copyright law in Uganda prior to the enactment of the 2006 Copyright Act.<sup>36</sup> The study was aimed at analysing the state of copyright law in Uganda at the year 2000, from the perspectives of what ought to be and what was. One unique weakness with the copyright law at the time, according to Kakooza, was the failure of the law to protect the moral rights of the author. Studies like Kakooza's greatly influenced the amendment of copyright law in Uganda to eventually provide for the protection of moral rights.

Ronald Kakungulu-Mayambala's study<sup>37</sup> focuses on rights-holders, users and publishers, noting the world's changing technologies and the growing problem of piracy. New technologies, he concludes, present a great challenge to rights-holders, as digital technology permits the storage, transmission, manipulation of and access to an author's work in ways unforeseen. With new technologies, infringement of copyright is made easy and the usurping of the exclusive rights held by rights-holders is also made easy. He identifies a core area of conflict between the rights-holders and copyright users:

Intellectual property is based on the fundamental principle of balance—the balance between the interests and needs of the public and those of creators. This extrapolates to a balance between consumers versus innovators; public versus proprietary rights; *socialism versus capitalism*. When the legal systems that underpin intellectual property no longer maintain the correct balance or, even worse, neglect it, then respect for those systems and intellectual property erodes ... we should address this substitution of the foundations and principles of copyright by rules imposed by mere technical facts ... failing to give an adequate and balanced answer to it would be stealing copyright from the public and giving it to the industry. The public is becoming more and more contemptuous of copyright. This leads to an increasing tendency to infringe copyright....<sup>38</sup>

A study by Amir Bakidde-Mubiru examines Uganda's growing problem of copyright infringement.<sup>39</sup> The purpose of the study is to establish how Uganda is dealing with the problem of infringement, while noting that this is an African problem. He notes that following the introduction of copyright law in Uganda,

36 J. Kakooza 'Note on the "is" and the "ought" of the law of copyright in Uganda' (2001) 112 *Makerere Law Journal*.

37 R. Kakungulu-Mayambala *The impact of new technologies on the protection, exercise and enforcement of copyrights and related rights* (2006) unpublished LLM dissertation, Lund University.

38 Ibid at 11-12.

39 A. Bakidde-Mubiru *Copyright infringement, defenses and remedies: the case of Uganda* (1998) unpublished dissertation for the award of a Bachelor of Laws, Makerere University.

many changes have taken place in environments regulated by the law. He argues that Uganda's legal infrastructure is insufficient to address the growing problem of copyright infringement. He observes that the problem is not simply the lack of legal infrastructure, but also a lack of awareness of the law by both users and owners of copyrighted materials.<sup>40</sup> Bakidde-Mubiru finds that illegal photocopying is rampant, as is music copying. He also takes note of ICTs used in sharing copyrighted resources. Academic institutions such as Makerere University allow extensive access to email and the Internet. The author argues that infringement is possible in such a technologically enabled environment. Infringement is also common in newspapers where some lift other papers' articles without acknowledgement or attribution. Bakidde-Mubiru observes that it is common for drama groups in Uganda to stage plays that belong to other groups, attributing this to the weaknesses in the law.

A study by Moses Kamoga-Matovu focuses on counteracting copyright and patent infringement in Uganda.<sup>41</sup> Writing about the 1964 Copyright Act, Kamoga-Matovu asserts that Uganda's weak IPR enforcement mechanism was likely to dissuade foreign direct investment since most investors want an environment with a strong IP regime. Kamoga-Matovu fears that without legal reform, development in general will be affected. His primary objective is to establish the importance of copyright and patent law in Uganda. He examines the framework for technology transfer in the context of copyright and its suitability to Uganda's development. In his study, Kamoga-Matovu finds glaring evidence of copyright violation.

A study by Anthony Wabwire Musana addresses copyright and development.<sup>42</sup> The study is aimed at 'assessing the utility of intellectual property protection in LDCs and Uganda in particular, as a means of stimulating the development process.'<sup>43</sup> He finds that the consideration of IP 'assets' in the trade arena has engendered an impression of confrontation between developed and developing countries. Moreover, Uganda's copyright regime is inconsistent with the needs and aspirations of the people and the economy and the incentive to create is lost at the hands of lax protection systems.<sup>44</sup> Against that background, Musana argues that, for Uganda to attain 'meaningful development', it has to adopt an 'efficient, relevant and stricter IP protection system.'<sup>45</sup> He carries out qualitative interviews with individuals across

40 A point that was reiterated by interview participants for this study.

41 M. Kamoga-Matovu *Counteracting copyrights and patents infringement in Uganda* (2000) unpublished dissertation for the award of a Bachelor of Laws, Makerere University.

42 A.W. Musana *Intellectual property: the case for copyright law in the economic development process in Uganda* (1998) unpublished dissertation for the award of a Bachelor of Laws, Makerere University.

43 Ibid at 6.

44 Ibid at 10.

45 Ibid at 11.

the spectrum of the creative arts in Uganda but relies primarily on a critical legal analysis of Uganda's copyright law vis-à-vis protection of local content.

Musana's approach to education and copyright is one that focuses on creative individuals whose resources are used in the education process. He argues that the education system can thrive only if locally generated resources are protected in order to attract creative individuals into the development of local resources. Musana observes that 'in recent times, due to the vigorous efforts of publishers such as Femrite Publishers [a local organisation promoting female writers], there has been a slight incentive to Ugandan authors to publish locally'.<sup>46</sup> He further notes that 'the legal regime remains the most villainous constraint to authors' incentive to publish their works'.<sup>47</sup>

Agatha Ainebyona's study<sup>48</sup> on the impact of copyright law on the publishing industry in Uganda is a relatively recent report. It focuses on a defined target audience: publishers. The study takes note of Uganda's growing publishing industry and also decries the growing problem of piracy. The latter is attributed to a number of factors including lack of awareness of the law, weaknesses in the law and low literacy rates. The author further identifies the foreign nature of copyright as another dimension of the copyright problem in Uganda. She argues that:

It must be observed, therefore, that this law was ill-conceived from the onset because it did not account [for] Ugandan circumstances. It was not fitting in time and space.<sup>49</sup>

Quoting Henry Chakava, a prominent East African publisher,<sup>50</sup> she notes that copyright has been used by publishers in the North (multinational publishing entities) to deter their counterparts in Africa from meeting local demand. Consequently, African publishers remain heavily dependant on foreign publishers, with copyright acting as a stick.

Ainebyona's study seeks to examine copyright in the publishing industry and its relationship to the growth of the publishing market. She gathered evidence from publishers and authors in the Ugandan book sector through a quantitative survey that featured questions on awareness of the law, availability of information on copyright, copyright-related problems and utilisation or implementation of the law. Her study reveals that the vast majority of publishers are aware of the law, although many have never read the fine print. Consequently, ignorance of the law is as high among publishers as it is in the general public. Publishers also observed that there

46 Ibid at 161.

47 Ibid at 161-2.

48 A. Ainebyona *The impact of the copyright law on the publishing industry in Uganda: a case study of various publishing houses in Uganda* (2006) unpublished dissertation for the award of a Bachelor of Library and Information Science, Makerere University.

49 Ibid at 5.

50 Ibid.

is a lack of government machinery in charge of copyright. On the ever-present issue of piracy, publishers overwhelmingly agreed that piracy was an enigma seriously undercutting their profitability. Some respondents argued, however, that piracy provided low-income groups with affordable textbooks which would otherwise be priced out of range. This affirms the intuitive assertion that piracy fills a gap left by the formal industries.

A review of copyright law in Uganda by Ruth Nassolo<sup>51</sup> is not significantly different from the study by Ainebyona. Nassolo cites the lack of effective administration of the law, weak enforcement and lack of awareness among stakeholders (primarily referring to rights-holders) as a recipe for a problematic copyright environment.

Elizabeth Lumu's study<sup>52</sup> of piracy focuses on the *John Murray* case. Based on the facts of the case, she frames the piracy problem as stemming not just from the users' quest for cheap copies but also bookshops as their accomplices. Lumu's study is partly a critical analysis of the wider implications of the *John Murray* case as well as a survey of publishers and book distributors on issues relating to piracy.

Lumu notes that piracy is driven in part by the fact that school textbooks for primary and secondary schools dominate the book market. The market for textbooks is ever-growing, outstripping all other publishing segments. Additionally, foreign textbooks dominate the curriculum due to the British influence. Today, their dominant position remains but also creates a favourable environment for piracy, since the pirates do not feel the presence of the owner.<sup>53</sup> In the survey part of her study, Lumu interviews stakeholders (publishers, booksellers) about awareness, the impact of piracy, the availability of copyright information, challenges and problems faced by publishers and possible remedies. The responses are largely predictable: a majority are aware of the law and piracy and illiteracy are their main problems.

Lumu concludes that 'information hungry students, therefore, have no choice but to reproduce any material that will be of use to them for their studies. In any case there is nothing illegal about it.'<sup>54</sup>

Makerere University's Research and Intellectual Property Management (IPM) Policy was also reviewed in the context of relevant literature. Of the more than

51 R. Nassolo *A review of copyright law in Uganda* (2001) unpublished dissertation for the award of a Bachelor of Library and Information Science, Makerere University.

52 E. Lumu *The impact of piracy on Uganda's publishing industry: a case study of Kampala New Styles Bookshop Ltd versus John Murray* (1999) unpublished dissertation for the award of a Master of Science in Information Science, Makerere University.

53 The only presence for most is a local agency, mostly book distributors (bookshops), some unreliable as the *John Murray* case revealed.

54 Ibid.

20 universities in Uganda, it is only Makerere — the biggest and oldest public university in the country and even the region — that had an Intellectual Property Management Policy at the time of this study.<sup>55</sup> This policy is relatively new, having been passed in March 2008. The aim of the policy is to stimulate and support innovative thinking among students and staff and to enable ownership and efficient management of intellectual assets and innovations produced at Makerere University. In addition, implementation of the IPM Policy is designed to increase potential income from research activity.<sup>56</sup> The policy also provides for ways of sharing the benefits that accrue from intellectual property. The policy is a response to the call by the Inter-University Council for East Africa (IUCEA), which recommended that universities and research institutions in Eastern Africa should develop institutional policies and build capacity to manage IP. The IUCEA argues that without an institutional IP policy and the capacity required to implement such policies, it is impossible to manage IP, regardless of existing national IP laws.<sup>57</sup>

### **9.3.2 Impact assessment interviews**

Interviews were conducted with judges, IP/copyright lawyers, a musician, a librarian who deals with digital material, a representative of publishers and university students.

The largest number of interviews, four, were conducted with judges in the administrators, enforcement agencies or professionals category. The choice of judges as interviewees underscored the importance of the judicial system in Uganda's copyright environment. The few copyright-related cases in Uganda were handled by at least one of the judges interviewed, making their input invaluable to the understanding of the current thinking of the Commercial Court on a wide range of copyright and access issues. The judges represent a significant body of knowledge of copyright in Uganda. Two of the judges specialise in copyright in the digital environment, including copyright on the Internet and technological protection measures (TPMs). Another interviewee, a retired judge, has worked extensively with the World Intellectual Property Organisation (WIPO) and related international and regional organisations.

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55 The policy was approved by the University Council—the top governing body of the university—at its 112th meeting held on Thursday 13 March 2008.

56 Regulation 2.0 of the policy.

57 For a more detailed discussion of this topic see the East African Regional Programme and Research Network for Biotechnology, Biosafety and Biotechnology Policy Development (BIO-EARN), Policy Brief 1, of January 2008. Available at <http://www.bio-earn.org> [Accessed 25 November 2008].

Two interviews were conducted with copyright/intellectual property lawyers — one in the administration, enforcement and professional category and another in the government category. One of these lawyers has represented a number of parties in copyright cases. He is also a faculty member at Makerere University, teaching and researching in intellectual property. The second lawyer was instrumental in the drafting of the Bill leading to the 2006 Copyright Act.

Also in the enforcement category, an informal interview was conducted with an official from the Uganda Registration Services Bureau, an agency in the Ministry of Justice and Constitutional Affairs. The Bureau houses the Intellectual Property desk, which administers a wide range of intellectual property matters including copyright, trademark and patent registrations.

For the educational and user communities, interviews were conducted with students (one group interview and one individual interview), a digital librarian and a university official responsible for research. The group interview with students was conducted with three female students focusing primarily on the nexus of copyright, access and gender. The second student interview was conducted with a male law student specialising in intellectual property rights.

The rights-holders group was represented by an official of the National Book Trust of Uganda (NABOTU). NABOTU represents different actors in the book sector, including writers, publishers, distributors and printers. The second rights-holder interview was conducted with a prominent local musician and award-winning songwriter. This musician is one of the most vocal on copyright matters. He was part of the core group of musicians that lobbied government to amend the 1964 Act, leading to the 2006 Act.

### *Government perspectives*

The one formal interview in this category was conducted with a lawyer who was associated with the amendment of the 1964 Copyright Act. The bulk of findings in this category represent our interaction with this individual. We also share anecdotes from the informal interview with the official from the Uganda Registration Services Bureau.

The key interviewee is not formally part of the government now, but worked closely with the Member of Parliament (the Hon. Jacob Oulanyah) who authored the Private Member's Bill (Copyright Bill of 2004) that led to the 2006 Copyright Act. When asked why they embarked on the review of the 1964 Copyright Act, he cited major inadequacies and weaknesses in the old Act as the reason. He noted that:

It [the 1964 Act] had been overtaken by modern developments, which rendered the law hapless. The need to eradicate this problem became more urgent with new technologies.

This coupled with the fact that the Ministry of Justice was taking an inordinately long time to reform the law, challenged us to work hand in hand with Hon. Oulanyah to cause a reformation of the law.

While this interviewee did not elaborate as to what caused the delay, one can attribute it to institutional inadequacies. The Ministry of Justice and the Uganda Law Reform Commission (ULRC), had commissioned the study of the copyright environment early in 2001, but technical and administrative problems delayed the study and issuing of the report until 2004.

Asked whether access to learning materials was of particular concern, the interviewee said that they did not look at specifics but approached the law in general. (The provisions of the 2004 Bill and eventual 2006 Act show that clearly learning materials were a marginal or non-factor in consideration of amendments.)

When asked about the copyright environment in relation to access to learning materials, he described the relationship as 'dysfunctional' because users do not understand copyright and this has led to unabated copying with no regard to the law. He characterised the situation as dire because the practice of copying entire texts 'has come to be accepted and it is widely in use especially in our higher institutions of learning'. This has led to a situation where 'there are more pirated learning materials copies in the market as opposed to the actual copies'. This participant preferred the copyright environment to be stricter. Relying on the vaguely defined fair use doctrine, the interviewee argued that at the doctrinal level, the current law provides for the balance between 'protecting copyright and access to learning material'. This balance, he argued, would eventually lead to a profitable publishing industry, enticing more authors to write and eventually to a thriving learning materials environment.

According to this interviewee, the current law devoted a significant amount of time to collective rights management. The lawyer took note of these organisations as presenting major problems and unintended consequences, for the current law: 'the more established collecting societies are suppressing upcoming societies'. Notwithstanding the shortfalls identified in the doctrinal section, the participant insisted that the law should be 'implemented in totality'. that is, no amendment is necessary at the moment.

Another seemingly unintended consequence of the new Act is the dynamic created by bringing copyright matters into the ambit of the Uganda Registration Services Bureau, under the Ministry of Justice and Constitutional Affairs. The informal interview with the Uganda Registration Services Bureau representative revealed that copyright matters are competing with other IP areas, many of which are more lucrative to the agency. According to the official, the poorly staffed desk finds itself attending to registration of trademarks and patents more than copyright because these two areas bring in more revenue. Personnel are generally not keen to

handle copyright, which is the reason why the Bureau has not carried out sufficient awareness efforts beyond musicians and artists. The official was of the view that the Act should have created a separate entity to handle copyright matters. A copyright board or commission is needed in the fast-growing Ugandan environment. Due to the workload with other IP areas, the best the desk has done is draft Copyright Regulations. These have taken time to finalise due to shortage of manpower and competing interests.

This interviewee did not feel there was a gender dimension to copyright. Copyright law was perceived by the participant as gender-neutral. He suggested that there is insufficient evidence beyond anecdotes to suggest a gender bias.

### *Educational/user community*

Interviewees in this category stated that a significant section of the Ugandan educational population is ignorant of the law. Several participants in this and other categories identified lack of awareness as the cause of the rampant infringement. They strongly encouraged awareness campaigns as a mechanism for curbing infringement. For instance, Makerere's new Policy on Research and Intellectual Property Rights Management calls for sensitisation of the university community in intellectual property matters, including copyright. Makerere's initial efforts targeted Deans and Directors across campus with the hope that the message would filter through to students and other members of the university community. The librarian interviewed was cautious, pointing to lack of human resources to undertake such awareness and enforcement activities.

Students decried the worsening access situations due to rising costs of essential learning materials in specialised areas. The same students pointed to the increased ease of access to electronic resources. But the digital or online resources remain restricted to campus environments, making it difficult for off-campus students to access resources available to on-campus students. The librarian noted that: 'In terms of textbooks and other articles in the library, only students with valid IDs are allowed in. As for the work online, we restrict it geographically in that only students on campus can access the work. Long distance students cannot access the work unless they come to campus.'

The librarian informed us that these restrictions were contractual requirements from the database providers. Generally, there is more lax copyright enforcement with respect to print resources. Copyshops have sprung up, often creating businesses around campus. The university library even runs some. Asked whether copyright impacted access to learning materials, a student participant mentioned that it did, but only to the extent that the resources are local, notably dissertations and theses. Copying of dissertations and theses is generally prohibited or restricted to a few pages at a time. However, other options are available for copying of entire documents.



The student participant attributed that to a relaxed copyright environment, where the law is not followed to the letter. According to him, in countries where the law is followed, copyright indeed impacts on access to learning materials. In Uganda, however, copyright law is either not known or not followed. There is:

totally a different scenario ... there is no one who will outrightly refuse it [copying] as a wrong thing. I mean the photocopyist will receive me with wide arms, I am bringing him business, no one can limit access to learning materials.

According to the librarian interviewed, while the library has instituted restrictions on copying of dissertations, theses and entire books, students find a way of copying sections of the resource until they have the entire text. The library, wanting to operate within the law, strategically places notices: 'photocopying machines to partly aid in fair use incidents of reasonable copying'. However, 'sometimes the commercial motive [of photocopy operators] overrides fair use in copyright law'. A student participant attributed the situation to lack of awareness, noting that people were generally unaware of the law because they do not access official documents (like the Gazette) and national laws. Associating such activities with lack of awareness, while true, is a simplistic correlation that does not fully explain the situation. For instance, the student participant had earlier noted the prohibitive cost of law textbooks that rendered photocopying the only option for a student with modest means. He noted that:

Unlike in the United States where almost every student can afford, it is not the case here; for example to access the text book of Wade on Administrative Law, if you go to one of the prominent bookshop like Aristoc the cheapest it is running at in most bookshops is UGX130 000 [US\$75]. Tell me if you do not find that out of way for a student?

Poor students struggling to pay tuition fees are unlikely to be able to afford such textbooks.

An important dimension to access addressed by both the librarian and the university official is access to internally generated scholarship by faculty and staff at universities. At the moment, significant barriers hinder access to such scholarship. For institutions like Makerere, the biggest public institution currently implementing access initiatives like institutional repositories, copyright presents legal barriers to such initiatives. The librarian noted that 'most owners of copyright are not willing to release their work. They believe copyright belongs to them and hence restricting public access impacts on the Makerere access environment. Our repository has a problem'. Along these lines, we questioned the director of research about electronic open access to scholarly resources, internal or external. This is particularly important in light of the limited access to internally generated research output. He noted that open access, while debated by faculty, had little support due to the negative

perceptions of open access resources as not peer-reviewed. The official was keen to learn more about open access given the problems currently caused by traditional print avenues. Most of the print journals delay faculty publication and consequently promotions.

ICTs were cited as important for accessing content. The librarian indicated that ICTs had made access and use of electronic resources 'less cumbersome' and that attracted a significant student user base. More and more resources, observed the librarian, are used by the 'click' of the button. Electronic resources, just like the print resources, are affected by copyright to the extent that ICTs make it easier to 'effectively regulate this access to the work'. The library can effectively restrict access, fulfilling contractual obligations with database providers. Nevertheless, ICTs have had a positive impact on access for they have extended library services to those who prefer to access outside the physical walls of the library.

A key consideration for institutions highlighted by the university official is the likelihood of losing control of intellectual property that might be disseminated through research findings before institutions have had opportunities to formally register for protection with relevant government authorities. Although universities would wish to disseminate research findings, they want to do so with care 'because of our weaknesses like abuse of intellectual property by the public'. Makerere has just adopted a policy calling for publications with potential IP information to be made available only after five years, in order to avoid being cheated of IP.

Female students in particular were asked to address the gender dimensions of copyright and access to learning materials. Three law students at different stages of their programmes were interviewed. Save for the rising costs of photocopying, the three female students did not think copyright affected them simply because they are females. However, these students noted that parts of the university campus were insecure, making it difficult for them to use the library at night. And strict library regulations on copyright make it difficult for them to copy in the library and then make use of the materials away from the library. Such situations adversely affect one gender more than the other. Other anecdotal evidence came from the male student and librarian. Both admitted that females were less likely to engage in infringing activities than were males. In all cases, the participants made it a point to qualify their statements and assessments on gender as being unscientific with no firm basis besides casual observations and perceptions.

Other themes that emerged from interviews in this category include: institutional policy, innovation and enforcement. At the time of the interview with the university official, Makerere had just adopted its policy on research and IPR management. The policy heavily promotes patenting Makerere's research output with potential industrial application. The motives and justification for Makerere's policy were summed up by the university official:

Of course for long there had been a lot of members of staff particularly concerned by matters of intellectual property and this affected innovation. Some people had innovated certain things and felt that they were not protected and we believe that they were one of the obstacles to people to innovate, because you innovate and you are not assisted. If there is a protection mechanism, it encourages innovation like for music, drama and many other things.

Innovation and rewarding innovation are the overriding goals of the Makerere policy. It also takes note of the dwindling research funds. Tapping and commercialising the university's IP output are seen as generating income to support and further faculty research and motivate staff to do more research. However, Makerere's policy has implications for access. According to the university official and as mentioned above, the policy calls for delaying by up to five years the dissemination of certain research findings until formal registration with government is complete. Students interviewed were unaware of the policy, which is understandable because it was relatively new.

Students did not feel it was the university's responsibility to enforce copyright. Similar sentiments were shared by the librarian as far as the library was concerned and the university in general. Interviewees emphasised awareness as a factor that institutions should encourage in order to avoid litigation and liability. One student pointed out that the photocopying going on unabated was likely to attract a lawsuit because the university was seen as 'aiding abuse of copyright'.

### *Administrators, enforcement agencies or professionals*

The judges interviewed were asked to generally discuss cases, some of which have already been analysed in the doctrinal analysis of this chapter. For these cases, the interview focused on the rationale for the judgments. Also, the interviews touched on a few out-of-court settlements that were not discussed in the previous section. One such case, according to one of the participating judges, involved a local publishing company and some writers (primary school teachers). The publisher hired local writers to write books for primary schools. The publisher used the materials for a tender to supply primary school textbooks under a textbook project of the Ministry of Education and Sports. The project involved the review of titles approved as appropriate for the curriculum. Schools across the country were required to purchase these titles, with funding from the government. Publishers that manage to get their books on the curriculum stand to gain a lot, given the huge market across the country. The writers objected, insisting that mass circulation of their work under the project was not part of the agreement with the publisher. They accused the publisher of infringing on their copyright. The judge believed that as part of the out-of-court settlement, the publisher made additional payments for the books.

According to the judge, rights-owners, especially those in literary areas, take action only if they feel economic loss. According to him, this explains why despite the seemingly rampant infringement in Uganda via photocopying, only a handful of cases have appeared in courts. As an example, he cited a hypothetical instance where a publisher produces 1000 copies of a text. If the rights-holder recoups production fees and makes a profit on the sale of the 1000 copies, that individual or entity is unlikely to oppose infringing activities because they do not impact the market or undercut profits. That said, in reference to photocopying, another judge pointed out that ‘there is still a problem of copyright in light of learning materials.’ According to him, there were lots of actionable activities that did not make it to court due to ignorance, or the burden of prosecuting infringing individuals that falls squarely on the rights-owner. He anticipated that copyright-related problems affecting learning would increase as people become aware of the law and the book sector becomes more profitable.

When the judges interviewed commented on learning materials, invariably the perception was that photocopying of protected materials was out of control. Often calling it piracy, the judges suggested that something had to be done at all levels. They suggested remedial actions ranging from raising awareness to strict interpretation of the law. One judge was of the view that infringing activities involving learning materials need not receive special treatment simply because they are learning materials. One judge spoke about a case he handled relating to textbooks, the *John Murray* case. The judge awarded heavy damages in order to send out a clear signal to all sectors that copyright was alive in Uganda. Another judge argued that ‘unless we [the courts] stopped it [piracy], there was a risk of wider pirating; yes it needed to be put to an end’.

On related matters, the IP lawyer was of the view that photocopying, especially in education settings, is rampant not because students and faculty cannot afford the materials, but because purchasing personal copies is not a priority. According to him, many students prefer spending money on luxury items or entertainment rather than academic resources. He feared that someone will likely bring a lawsuit against one of the institutions if only to send a signal that current photocopying practices and levels in that environment are not permissible.

Other issues discussed by the judges and the lawyer included access, awareness, ICT and gender. All four are interrelated. One judge noted that the poor reporting systems make it difficult for law students and practising lawyers to keep up with rulings on relevant cases. Obviously, if the legal fraternity has problems accessing such crucial information, it is likely to be even more problematic for the rest of the population.

One judge spoke of the tension caused by technology between access and protection of content. He noted that the computer ‘can let loose all the copyrighted

work, hence creating a big loss to the authors of the work'. Another judge expressed the same concern for ICTs, noting that the 'Internet is like an international notice board'. This judge feared that the Internet was killing aspects of copyright. However, the same judge expressed concerns about TPMs. He noted that the technology that permits access has been used to limit access.

According to another judge, the main problem at the moment is a lack of awareness. He observed that small businesses using different types of technologies for copying music and literary works always plead ignorance. He genuinely believes that some individuals are indeed unaware of the law. Even many artists whose works had been copied for many years were unaware of the law. Interestingly, this judge added that 'in our traditional law we had no copyright, everything was shared. Awareness has to be brought about by law. I think the awareness is minimal, but that is our society'.

The research team also wanted to know whether judges and the lawyer encountered more cases involving one gender group than another and we wanted to know whether the interviewees felt the law was gender-biased in any way. On the latter, the unanimous response was that copyright law is not gender-biased.

One judge was very surprised by the insertion of gender issues into a copyright discussion and said he had never given thought to the idea of the impact of copyright on gender groups. On further probing, however, he offered what he clearly indicated to be anecdotes, but anecdotes that hinted at a gender dimension to copyright in Uganda. He mentioned that there were more women plaintiffs in copyright cases he had handled than men and more men as alleged offenders. He cited two cases, one of a female musician (Chance Nalubega) whose songs had been misappropriated by a recording studio and another (ongoing) where a female fine artist (Annabel Kiruta) brought a lawsuit against a male artist for appropriation of her designs. The second case had been ongoing for one and a half years, demonstrating the problem of lengthy copyright-related litigations for poor institutions without resources to fight prolonged legal battles. That said, this judge dismissed the gender dimension to access to learning materials, arguing that 'I think it is neutral so I do not even expect such a question to ever arise. I don't think copyright affects women or men in any special way'. Another judge concurred with his colleague, but added that: 'you cannot deny the fact that men are more vigilant [business minded] in many activities and as a result, therefore, [men] are found ... in most violations ... . Most ladies have exhibited signs of compliance with the law'.

Consistent with the judges, the IP lawyer was reluctant to make a case for a gender dimension to copyright. But like the judges, he cited anecdotal evidence that men are more risk-taking than women and more inclined to break the law in order to make money. Most of the cases he has handled involved men. He noted that: 'Even at the selling end of CDs there are more men than women. For instance, at

the petrol stations there are always some people selling CDs and I have never seen a woman do that.’

Finally, for this group of interviewees, amending the laws was not generally felt to be urgent or necessary, especially not in order to facilitate access. There was a sense that as it stands now, access is well facilitated through the fair use provisions. Moreover, evidence of massive photocopying means that access is not a problem at the moment. The judges were of the view that the current law should be tested, otherwise one ends up with frequent amendments with no impact on realities.

### *Copyright-holders*

Among copyright-holders, the musician was the most sceptical. He offered a bleak assessment of the industry. According to the musician:

Based on research carried out, pirates make UGX280 million [Uganda shillings] per month [US\$147 500] on pirated music. Duplication has made music so hard to sell. An empty CD is now selling at only UGX500. With the easy computer access everyone almost owns a computer and it is no doubt that someone can duplicate over a hundred songs in a day. We need discipline to end such behaviour.... Stealing music has become a culture; nobody feels guilty that they are stealing music.... What happens here, I mean in Uganda, the only way artists can raise money is through stage performances. That is why you keep seeing musicians soliciting for cheap popularity in order to keep surviving. If I told you that in my latest album of ‘Olunaku Luno’ I wasn’t paid a penny... believe me because you’re getting it from the horse’s mouth.

What is notable about the above assessment is that it is made by one of the more established, respected and legally informed musicians. His sense of helplessness goes to show the extent of illegal copying of music. This assessment is striking in light of the musician’s personal efforts in the lobbying for and the passing of, the 2006 Act which ‘makes it more criminal [to engage in illegal activities]’. Two years after the new Act came into existence, the musician was describing a situation far different from what was expected of the new strong piece of legislation. According to the musician, some artists:

encourage pirates to sell around their music so that they can acquire cheap popularity, all this is done so as to attract fans to their [concerts]. It takes, or will rather take, a lot of training for the artists to appreciate the need to respect copyright law.

The publishers’ representative, on the other hand, offered a sober yet access-sensitive assessment. When asked about the copyright environment in relation to access, he blamed monopoly rights as responsible for failing to stem illiteracy and failing to improve the poor reading culture in Uganda:

Most of the reading materials are available under exclusive rights making it impossible for wider distribution of works and my organisation cannot easily achieve its goal of

universal reading culture without this. Secondly, the prices of books, especially for secondary schools and general readers, are high. Most students and parents cannot afford these books. The price could be lowered if, say, the IP cost was lowered. NABOTU would like many people to read books but this has not been possible.

As a representative of publishers, it is significant that the NABOTU official considers copyright a stumbling block to access and distribution of copyrighted works. It is also interesting that he makes an explicit connection between book prices and intellectual property, noting that lowering IP-related costs will likely lead to lower prices. Of course that connection is more anecdotal than empirical. However, by explaining the hurdles in terms of NABOTU's work, it means that these are based on real organisational experiences rather than personal views. Indeed, his additional comments reflect that position in the context of school textbooks:

The exclusivity of rights generally means that each school can only use the books that they are able to buy. Given the high enrolment rate and the high pupil-to-book ratio, even the state is limited in terms of interventions to reproduce the materials for learners without paying for IP.

It is appropriate to end our impact assessment interview findings with the NABOTU official's thoughts on the state of learning materials in Uganda. Consistent with studies in the literature reviewed, he observes that textbooks dominate the book industry:

There has been tremendous growth in this publishing segment following the adoption of policies that facilitate fair competition amongst publishers. One of the policy provisions being that for each subject, government allows ... five titles to compete in the schools. Also it is the responsibility of the schools to make selections of textbooks to use in their schools. As a result of the open policies in textbook procurements, there has been a number of new publishers entering and extending their market shares in a market, which traditionally was dominated by multinational publishers.

### **9.3.3 *Summary and conclusions: secondary literature and impact assessment interviews***

In the literature reviewed, studies conducted prior to the amendment of the 1964 Copyright Act consistently blame the massive infringements on weaknesses in the old law. Today the blame seems to be shifting to users' ignorance. However, some studies rightly focus on poverty and people's inability to afford certain learning materials because they are priced out of their range.

While the interviews, conducted to investigate the practices, generally confirmed the sentiments expressed in the literature, they also further revealed the motives behind infringing activities. We learnt that students simply cannot afford to purchase

their own learning materials and from the publishers' representative, that to some extent copyright is responsible for the high cost of learning materials in Uganda.

### *Information and Communication Technology (ICT)-specific findings*

Whilst one of the ACA2K study research questions raised the role of ICTs in furthering or hindering access in the copyright environments of study countries, in the Ugandan context ICTs were not found to play a significant role as far as copyright and access are concerned. This was attributed to the high cost of digital technologies and resources in environments where poverty is very high. ICTs play only a marginal role in terms of learning materials access. Typically, students and faculty find print as the preferred means of access. However, ICTs are increasingly part of the access infrastructure, as evidenced in Uganda's small but thriving ICT industry.

Additionally, ICTs are increasingly used in certain contexts such as libraries of major public institutions like Makerere University. The study revealed that the increasing use of ICTs is slowly shaping copyright discourse. For instance, one participant noted that recent advances in technology motivated the desire to amend the 1964 Act. It was also noted that database restrictions have been instituted in recognition of the increasing use of ICTs and electronic resources, rendering such resources inaccessible to distance education students; yet they are available to their on-campus counterparts.

### *Gender-specific findings*

A direct link between gender, copyright and access to learning materials was difficult to establish, but potentially significant anecdotal evidence emerged. For instance, institutional restrictions on amounts of copying mean that female students who cannot use libraries at night find it difficult to enjoy the same level of access as their male counterparts.

Meanwhile, outside academic or scholarly settings, it appears that men commit more copyright-related offences than women, a fact attributed by one interviewee to the risk-taking nature of men. However, beyond these anecdotes, we were unable to establish concrete evidence to make informed conclusions on the intersection of gender, access to knowledge and copyright. This was after taking significant steps to ensure equitable representation of interviewees and a balanced research team in Uganda, which had two male and two female members.

## **9.4 Conclusions and recommendations**

Findings from the Ugandan study clearly indicate that Uganda's copyright tradition is fairly recent, leading to an environment where copyright is hardly a concern



for most Ugandans, save for a handful of scholars, policymakers, artists and administrators.

Findings also point to stark contrasts between the law and practice. For a long time the law was considered weak and outdated. Most scholars attributed piracy and the rampant infringements to that weak law. In 2006, however, Uganda repealed the 1964 Copyright Act, paving the way for the 2006 Copyright Act, which moved the country closer to meeting international obligations and standards and included measures aimed at stricter enforcement. However, even under the new law, infringing activities appear to be continuing unabated, much to the consternation of rights-holders.

This study has found that poverty and the high price of learning materials in both electronic and print forms, are to a large degree responsible for the practices that disregard the law. This sentiment was shared by interviewees from the educational community (ie students and the librarian), as well as the publishing rights-holder representative interviewed. Some of the literature reviewed also seemed to suggest that there is sufficient evidence to directly link piracy and other infringing activities to poverty and high prices.

It was also found that infringing practices are not the sole preserve of users. The users have found accomplices in distributors as evidenced by the *John Murray* case and the Lumu study. Increasingly, distributors find a very high demand for reasonably priced learning materials, thereby finding it tempting to work with unscrupulous printers. It is clear that photocopy operators are also doing good business through provision of cheap and, in some cases, infringing materials.

Rights-holders interviewed called for more crackdowns on illegal activities, as did the judges who participated in the study. And while the judges showed awareness of the needs of learning environments, they felt the main priority ought to be enforcement — in order to send clear signals that copyright in Uganda is working.

The quest by some stakeholders to show, via stricter enforcement, that copyright is functional, has the potential to undermine some of the current primary modes of learning materials access in the country — because, as has already been pointed out, many of the current access practices are illegal.

In addition to the sharp disparities between the law and practice, we also found important gaps in the law itself that could hinder learning materials access. For instance, the law is silent on access for distance learners. The copyright law must not be seen to discriminate based on the remoteness of the learner from the primary learning site. The Copyright Act is also silent on digital technologies, which are critical to access in tertiary environments. Meanwhile, the vagueness of Uganda's fair use provision creates uncertainty as to how reliable this defence is for libraries, archives and teaching and learning purposes.

Thus, this study has confirmed the two hypotheses it tested: that the copyright environment in Uganda does not allow maximal access to learning materials; and that the copyright environment in Uganda can be changed to maximise effective access to learning materials.

While the current practices in Uganda allow a fair amount of learning materials access, many of the practices are illegal and thus the copyright environment — as broadly defined in this study to include laws, regulations, policies and practices — remains fragile and unfavourable to access to learning materials.

It is our opinion that there is room in the Ugandan copyright environment, specifically the law, to further access. The law can do more to advance access for certain interest groups, to accommodate distance learning and to enable use of digital formats for lending and archiving. Additionally, the fair use provision can be clarified, particularly for users in the education and research contexts.

Based on the findings of the study, the Ugandan ACA2K team makes the following legal recommendations:

- specific provisions for certain user groups and institutions should be included in the law, notably people with disabilities and distance learning;
- broadly, any provisions for these groups must take into account digital formats of knowledge material;
- the provision on fair use should be clarified to ease access to knowledge in the environments of education, research and the media. Fair use should be sensitive and accommodative of a wide range of on-campus copying aimed at furthering knowledge consumption and production; and
- the law should allow parallel importation of learning materials. Allowing parallel importation could open up access to reasonably priced learning materials produced outside the country.

Based on the findings of the study, the Ugandan team makes the following policy recommendations:

- Makerere University recently adopted an Intellectual Property Management Policy. We recommend that specific guidelines be established to facilitate the implementation of Makerere's policy. We further recommend that other universities in Uganda, public and private, adopt institutional IPR policies. Such policies should be sensitive to the access needs of students, faculty and researchers.
- We further recommend that Uganda puts in place a comprehensive IP policy and strategy that addresses, not just protection of the interests of rights-holders, but also the needs of users of copyright-protected resources. The process for

devising such policy and strategy should include input from all stakeholders, including the affected public, especially learners and their facilitators.

NABOTU represents a wide range of stakeholders including rights-holders. We recommend that:

- NABOTU be mandated to sensitise publishers and other stakeholders in the book chain to promote flexible mechanisms for access to learning materials in order to increase consumption of books by students in Uganda.

ULRC is the government agency responsible for legal reform. Part of ULRC's mandate is the development of legislative proposals for the relevant government ministry to introduce in Parliament. We recommend that:

- ULRC facilitates the development of a legislative proposal for the review of Uganda's 2006 Copyright Law to address some of the recommendations highlighted above.

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## Chapter 10

# Summary and conclusions

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and Tobias Schonwetter*

### 10.1 Introduction

As the preceding chapters of this book have demonstrated, copyright law alone does not constitute a national copyright environment. Legislation is only part of a system that includes regulations, policies, cases and judicial attitudes and more importantly, copyright-related practices, including perceptions and interpretations of these practices. The preceding chapters show the richness and complexity of the qualitative data that can emerge from studying systems of law and practice in a holistic way. The purpose of this final chapter is to look at the doctrinal and qualitative findings and the interconnections between these findings across the eight countries. The goal is to summarise findings, draw general conclusions, highlight lessons learned and point toward possible ways to build African copyright environments that better support education through access to learning materials and dissemination of knowledge.<sup>1</sup>

### 10.2 Doctrinal research findings

Legal analysis in the eight study countries attempted to understand the nature and scope of copyright protection for learning materials and the extent to which policymakers in the study countries are cognisant of access-enabling flexibilities and have acted upon them. In this context, colonial influences on national law — and copyright law in particular — can be very significant when examining the scope and nature of copyright protection as well as the use of access-enabling flexibilities. A distinction is generally drawn between the common law tradition and the civil law system. The former generally reflects a utilitarian view of copyright, while the latter is generally rooted in authors' natural rights. The ACA2K study countries reflect both systems, sometimes combined.

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1 The authors acknowledge Andrew Rens for his feedback during the development of the conclusions represented in this chapter.



Historical and contemporary international dimensions of copyright protection are also of great importance. International copyright treaties and agreements contain, on the one hand, binding minimum standards for copyright protection in member states. On the other, they leave significant leeway to national lawmakers to implement those minimum standards.

The most important multilateral copyright treaties and agreements are the Berne Convention for the Protection of Literary and Artistic Works of 1886 (Berne Convention) administered by the World Intellectual Property Organisation (WIPO) and the World Trade Organisation's (WTO's) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) of 1994. Today, most countries, including all ACA2K study countries, are members of the WTO. They must, therefore, adhere to TRIPs, which, among other things, incorporates important aspects of the Berne Convention (with the notable exception of Article 6*bis* regarding moral rights). As a result, members of the WTO have to abide by these elements of the Berne Convention even if they are not party to the Berne Convention itself. Other international treaties and agreements that need to be considered include the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) of 1996, which are together commonly referred to as the 'WIPO Internet Treaties'. In addition, national intellectual property regimes may be affected by bilateral or regional free trade agreements (FTAs).

Research confirmed that all eight countries studied afford copyright protection that complies with and in many cases exceeds, the standards reflected in the applicable international treaties and agreements, including the Berne Convention and TRIPs. This is in spite of the fact that three of the study countries, Mozambique, Senegal and Uganda, are least-developed countries (LDCs)<sup>2</sup> which have longer grace periods to comply with, let alone exceed, TRIPs obligations.

### **10.2.1 Copyright scope**

One example of national copyright protection exceeding international requirements in study countries is in relation to the scope of moral rights protection. Though the Berne Convention establishes some standards in this regard, TRIPs does not require countries to protect moral rights. Yet, even study countries that are not bound by the Berne Convention, such as Uganda and Mozambique, do protect moral rights of attribution (the right to claim authorship) and integrity (protection against unauthorised modification) and in Egypt moral rights also concern disclosure (the right to decide if and when to publish the work). Copyright protection for

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2 WTO 'Least-developed countries.' Available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org7\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm) [Accessed 20 December 2009].

authors in these African countries, therefore, appears to exceed that required by the relevant international instruments and that given in some other countries, notably the United States. It seems evident that strong protection is not merely an attempt to fulfil international obligations. There are likely local or regional forces that have contributed to protective legal frameworks in some of the ACA2K study countries, reflecting the fluid environments in which copyright in Africa is legislated and implemented.

Strong protection for authors' moral rights in Africa can help to alter the power imbalance that sometimes exists between creators and intermediaries, such as publishers, that often acquire ownership of authors' (economic) copyrights. This is especially true where moral rights cannot be waived or assigned. At the same time, however, this protection must be weighed against the possibility that an additional layer of rights might add to impediments facing prospective users of protected materials, especially if—as is sometimes the case with moral rights—such rights are granted in perpetuity. For instance, the right of attribution is unlikely to have any negative effects on access to learning materials. The right of integrity, while seemingly in the interests of authors, could potentially inhibit criticism, thus restricting the circulation of knowledge around the work. Similarly, the right of disclosure, without safeguards, could potentially lead to unreasonable barriers to accessing some works. Fortunately, few if any users of learning materials disrespect authors' moral rights of integrity and attribution, which are consistent with standard scholarly norms around, for example, plagiarism. Not surprisingly, therefore, flexibilities in some study countries that permit the use of protected materials in educational contexts often require proper citation or attribution as a precondition for immunity from liability.

Another finding in relation to the scope of copyright protection is that the copyright laws of most of the eight study countries contain express provisions for the protection of cultural expressions and folklore. South Africa, like many countries outside of Africa, does not yet have provisions protecting traditional knowledge, though it soon may. In some of the study countries, such as Ghana and Morocco, there is perpetual copyright protection for cultural expressions and in several cases this strong protection was established through outside technical assistance promoting model laws. In theory, such protection can help to preserve traditional knowledge and prevent its misappropriation. The trade-off, however, is that even local access to this knowledge is legally constrained by strong protection and opportunities for use of this knowledge in the country's own educational system are potentially stifled. This is the case in Ghana where ownership of folkloric resources is vested in the state and a 'folklore tax' may be levied for certain uses when appropriated by locals and foreigners alike.

Many of the study countries' laws are seemingly contradictory on the matter of government works and the public domain. The public domain in some study countries is not open to free and unfettered use by everyone, as it is normally understood in countries outside of Africa. Uganda's law, for example, on the one hand excludes 'public benefit works' from eligibility for copyright protection while on the other hand assigns trusteeship of such works with the government in a manner that connotes ownership. Similarly, in Senegal and Egypt, permissions and royalties are required from anyone generating profit from public domain works, which could potentially include tuition-charging educational institutions. In Egypt, permission and royalties are even required for 'professional' use of public domain work, which is difficult to interpret. In Senegal, the net is seemingly cast even wider, with any 'exploitation' of a public domain work potentially requiring permission and payment of royalties.<sup>3</sup>

Because Senegalese and Egyptian copyright laws require permissions and royalties for uses of the public domain access to and innovation based upon the public domain materials in these two countries is potentially stifled. Moreover, most of the study countries give the state control over folkloric works that should otherwise be in the public domain, and in some cases impose fees for exploitation of folklore. Such control over use of what should be public domain folkloric resources has been deemed necessary in order to control exploitation of national cultural resources. In fact, Senegal's system of fee payment to the state for potentially any 'exploitation' of any public domain work (folklore or otherwise), as introduced in its new 2008 Law, evolved out of a narrower provision in the previous 1973 Law, which had required permission and payment for profit-making uses only and only for uses of folklore.<sup>4</sup>

### **10.2.2 Copyright term**

International agreements set the standard duration of copyright protection for most literary and artistic works at 50 years from the author's death. After this term, works fall into the public domain. The shorter the term of protection, the sooner works become accessible as part of the public domain.

In four ACA2K study countries – Ghana, Morocco, Mozambique and Senegal – the copyright term for literary and artistic works has been extended to 70 years after the death of the author, a term 20 years longer than the international standard. In Morocco, there was a legal obligation, via its free trade agreement (FTA) with the

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3 Article 157 of Senegal's Copyright Law of 2008; Article 183 of Egypt's EIPRPA of 2002.

4 Article 9 of Senegal's Copyright Law of 1973: loi n° 73-52 du 04 décembre 1973 relative au droit d'auteur.

United States, to legislate such an extended term of protection.<sup>5</sup> In Senegal, the move to a 70-year term was linked to the ‘TRIPs-plus’ orientation of the 1999 revised OAPI (Organisation africaine de la propriété intellectuelle) Bangui Agreement.<sup>6</sup> In Ghana and Mozambique, the origins of the move towards a longer term of protection are more difficult to detect, though foreign technical assistance clearly plays a role.

### 10.2.3 Copyright limitations and exceptions

Statutory limitations and exceptions are among the most important tools for national lawmakers to achieve balanced copyright systems that suit the specific needs of their respective countries.

The relevant international copyright treaties and agreements such as the Berne Convention and TRIPs impose three requirements for national limitations and exceptions. According to ‘the three-step test’, limitations and exceptions must be: 1) applicable only in certain special cases; 2) not in conflict with the normal exploitation of the work; and 3) not unreasonably prejudicial to the legitimate interests of the author/rights-holder.<sup>7</sup> In several study countries, some or all of these requirements are built directly into national law. Where that is the case, it is possible that legal jurisprudence interpreting the three-step test in the international context could be useful to make national laws based upon similar principles more predictable for stakeholders relying on national limitations and exceptions to enable access to learning materials.

The scope of a country’s national copyright limitations and exceptions is influenced, among other things, by the philosophical justifications underlying the country’s system of copyright protection.<sup>8</sup> Generally, limitations and exceptions in civil law systems tend to be narrower than those in common law systems. Against this background, it is convenient to distinguish three main approaches to copyright limitations and exceptions in national copyright laws:

- First, some countries, especially civil law countries, follow a detailed approach and incorporate rather long lists of narrowly phrased copyright limitations and exceptions into their copyright laws.

5 Article 15.5(5) of the Morocco-United States Free Trade Agreement of 2004, which entered into force on 1 January 2006. Available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/morocco-fta/final-text> [Accessed 20 December 2009].

6 See C. Deere *The implementation game: the TRIPS Agreement and the global politics of intellectual property reform in developing countries* (2009) Oxford University Press, Oxford.

7 Berne Convention Article 9(2); TRIPs Agreement Article 13.

8 S. Ricketson *Study on limitations and exceptions of copyright and related rights in the digital environment* (2003) WIPO, Geneva. Available at [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=16805](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=16805) [Accessed 20 December 2009].

- Second, some countries — most notably the United States — have chosen to introduce into their copyright laws a broad and open-ended provision, the so-called ‘fair use’ provision, which encompasses a variety of uses. Fair use provisions might also be accompanied by several more specific copyright limitations and exceptions.
- Third, there are countries, especially common law countries, which have systems somewhere between the first two just outlined. While their copyright laws contain specific copyright limitations and exceptions — such as for educational institutions, libraries and archives or quotations as examples — they also employ so-called ‘fair dealing’ provisions, which in broader terms allow the permission-free use of copyright-protected material for purposes of research, private/personal study, private/personal use, criticism and review and news reporting.

The technicalities of fair use and fair dealing should not be conflated, but the concepts are remarkably similar. Both reflect the same fundamental principle of permitting uses that are considered fair. Pragmatically, a fair use provision tends to be, in general, more flexible because it is not confined to specific purposes or to specific categories of protected works. But ultimately, whether fair use or fair dealing applies more broadly in practice depends mostly on judicial and stakeholder interpretations (or the lack thereof) in the relevant jurisdiction.

The different approaches followed by the ACA2K project’s African study countries in relation to copyright limitations and exceptions complicate a comparison: while private use of copyright-protected material, for instance, may be allowed in one country by a specific private use limitation and exception, it may be covered by a somewhat more general but not completely open-ended fair dealing provision in another. In this context, a few general observations from ACA2K study countries are worth mentioning.

First, Kenya and South Africa both use the specific term ‘fair dealing.’<sup>9</sup> While the precise scope of their fair dealing provisions varies slightly, they are both very similar and the result of inherited British colonial laws. Another commonality between the Kenyan and South African cases is that researchers in both countries worry that their countries’ fair dealing provisions are potentially too vaguely crafted to be a reliable access mechanism, particularly because there are few or no domestic cases interpreting that aspect of the law.

Uganda, another former British colony, has a distinct approach. At first glance, Uganda’s Copyright Act appears to include an American-style provision by adopting

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9 Section 26(1)(a) of Kenya’s Copyright Act of 2001; Section 12(1) of South Africa’s Copyright Act of 1978.

the term ‘fair use’.<sup>10</sup> Closer analysis, however, reveals important distinctions. Uganda’s fair use provision does not contain an open-ended, illustrative list of permissible uses, but instead lays out a list of a limited number of specific activities that might be permitted if considered fair in light of a number of listed considerations. The result is a hybrid approach, somewhere between fair use and fair dealing. Similarly, in Ghana, another former British colony, the statute uses the term ‘permitted use’ to describe what is essentially a standard fair dealing system, which remains from the country’s British colonial history. The lesson is that the conventional labels of fair use and fair dealing do not capture the nuances of limitations and exceptions throughout Africa.

The following sub-sections compare limitation and exception provisions in the study countries related to specific uses or specific categories of users.

### *Students, teachers and educational institutions*

In the ACA2K study countries, educational limitations and exceptions generally allow some use of copyright-protected materials in educational settings without licences or royalties.

In six ACA2K study countries, students and teachers could arguably use entire works for educational purposes, subject to varying notions of fairness, under certain conditions. In Kenya and Mozambique, however, the existing set of copyright exceptions and limitations does not allow entire copyrighted works to be used by students, teachers and educational institutions. This restriction in Kenya and Mozambique potentially blocks the educational use of certain types of works, such as photographs, for example.

In South Africa, Kenya, Uganda and Ghana, general fair dealing/fair use provisions encompass use for both research and study purposes, though the amount of reproduction permitted for these purposes is bound by the notion of fairness.

Egyptian copyright law contains exemptions for education, such as the right to stage non-profit performances of entire works (a provision which extends even beyond the educational context) and the reproduction of short works or short extracts from works for use in teaching.<sup>11</sup> Egyptian law also permits compulsory licensing (that is, granting of a translation and/or publishing licence for a work to an entity other than the work’s rights-holder) for the purposes of education.<sup>12</sup>

10 Section 15 of Uganda’s Copyright and Neighbouring Rights Act of 2006.

11 Article 171 of the Egyptian Intellectual Property Rights Protection Act (EIPRPA) of 2002.

12 Article 170 of Egypt’s EIPRPA of 2002.

### *Libraries and archives*

Other than for preservation and replacement purposes and with the exception of Egypt and Kenya, the copying of entire works by libraries and archives is not explicitly permitted in the study countries. Moreover, in all study countries, limitations and exceptions lack clarity regarding digitisation of library and archival collections. A public lending right (PLR) system, which compensates rights-holders for the availability of their works in libraries – making it more expensive for libraries to operate – does not exist in any of the study countries.

Nevertheless, the treatment of libraries and archives in the copyright laws of several study countries is worrying. Libraries and archives are among the most important institutions for enabling access to learning materials and creating a literate and well-educated population. They are often subject to severe resource shortages and other constraints, making it hard to fulfil their mandate. Though libraries and archives do not expect to be completely free from ordinary copyright rules and in fact appreciate the need to protect authors and their publishers, some additional freedoms could be created without unduly impacting upon copyright-owners' legitimate interests.

### *Private or personal use*

Ghana, Egypt, Mozambique, Morocco and Senegal all have copyright limitations and exceptions that are specifically phrased to cater for private or personal use of copyright-protected materials without permission of the rights-holder or payment of a royalty. In South Africa, Kenya and Uganda, private or personal uses fall under fair dealing/use provisions, making the acceptable amount of private or personal use subject to the notion of 'fairness'. In Morocco, private use is liberally defined: Moroccan law expressly exempts some activities from the scope of the private use exception and limitation and thus, implicitly, other non-specified private uses may be permitted.<sup>13</sup>

As part of these limitations and exceptions for private or personal use, all study countries permit some degree of private copying of non-digital works. But the extent of personal or private copying allowed in the digital realm is not explicitly covered in the study countries, thus leaving it uncertain as to whether the rules laid out for non-digital works should also apply to digital ones. (This ambiguity in the digital realm affects other exceptions and limitations too.)

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13 Article 12 of Morocco's Copyright Law of 2000 as amended in 2006: dahir n° 1-00-20 du 15 février 2000 portant promulgation de la loi n° 2-00 relative aux droits d'auteur et droits voisins; and dahir n° 1-05-192 du 14 février 2006 portant promulgation de la loi n° 34-05 modifiant et complétant la loi n° 2-00 relative aux droits d'auteur et droits voisins.

### *Quotation*

Quoting, without rights-holder authorisation, from copyright-protected works is permitted in all eight study countries. Kenya and Mozambique appear to have the most far-reaching provisions for quotations among the study countries because there are no express, statutory restrictions, other than that (in Kenya, for instance) the quotation be for criticism, review or reporting current events. In Egypt, for instance, quotations are permitted only for the purposes of criticism, discussion or information. Ghana and South Africa also impose restrictions on the types of works that can be quoted. In South Africa, the quotation exception does not apply to, among other things, 'published editions'. Both the Ghanaian and the South African statutes expressly require that the quoted work must have been made public before being quoted. Additionally, the Ghanaian, South African, Ugandan and Moroccan statutes restrict the length of quotations to what is fair and justified by the purpose.<sup>14</sup> Quotations may also require acknowledgment of the source.

### *People with disabilities*

Only one out of the eight study countries, Uganda, makes specific mention in its copyright law of the needs of the disabled. Ugandan copyright law stipulates that it is not an infringement of copyright when a copyright-protected work is adapted into Braille or sign language for print-disabled people for 'educational purpose',<sup>15</sup> subject to the test of fairness implied by the country's fair use clause. No other study country seems to consider that disabled people require specific enabling copyright provisions to meet their distinct educational needs. Even Uganda's provision, which subjects permission-free development of adapted resources for disabled people to a fairness test, is potentially restrictive. The lack of accommodation for people with perceptual or other disabilities is troubling from a development perspective. The legal reality in almost all ACA2K countries is feeding the growing international attention to the needs of this segment of the population. Some form of international harmonising instrument or declaration is not out of the realm of possibilities, but whether and how that would have a concrete impact on national laws in the study countries remains to be seen.

### *Media*

The copyright laws in all the study countries contain specific provisions in support of media usage of copyrighted material. The review of copyright-protected works by

14 Section 19 of the Ghana's Copyright Act, 2005; Section 12(3) of South Africa's Copyright Act of 1978; Article 15(1)(b) of Uganda's Copyright and Neighbouring Rights Act of 2006; Article 14 of Morocco's Copyright Law of 2000 as amended in 2006.

15 Section 15(1)(k) of Uganda's Copyright and Neighbouring Rights Act of 2006.



the media is freely permitted in all eight study countries and so is the use of excerpts of such works in news reporting. The reproduction by the media of entire political speeches and public lectures/speeches is allowed in all the study countries.

### *Government works and legal proceedings*

Morocco, Mozambique, Egypt, Senegal and South Africa place official texts of a legislative, administrative or judicial nature in the public domain. And all of those study countries, except Egypt, place official translations of such texts in the public domain. Ghana, South Africa and Mozambique ACA2K researchers reported that legal proceedings, which may or may not fall within the interpretation of what constitutes an official text of a judicial nature, are also in the public domain. In South Africa and Mozambique, government and government-funded works are not automatically available in the public domain. Kenya's copyright law puts government works into the public domain but not government-funded works created by non-government people or entities.

### **10.2.4 Compulsory licensing**

There are other provisions in national copyright laws which are not usually classified as 'limitations and exceptions' but rather, could be termed as 'flexibilities'. Like limitations and exceptions, these flexibilities aim to encourage beneficial access to and uses of, works as long as such access and uses do not unfairly undermine the legitimate interests of rights-holders.

One such flexibility is compulsory licensing. Compulsory licensing can be used to correct market failures or anomalies. When a copyright-protected work is not being made available in a country — or it is available but not at an affordable price or in an accessible language — a compulsory licence, typically issued by the state, permits an entity other than the rights-holder to exploit certain rights in that country.

In the copyright laws of Ghana, Kenya, Mozambique, Morocco and Senegal, there are no provisions for compulsory licensing. In South Africa, the Copyright Tribunal is permitted to issue compulsory licences in instances where a rights-holder's refusal to license a copyrighted work to another party is unreasonable.<sup>16</sup> Egypt's law expressly allows for compulsory licensing a) for the purposes of education in all forms and at all levels; b) against payment of fair compensation to the author or his successors; and c) subject to the licence passing the Berne three-step test.

Countries interested in facilitating translations of copyright-protected works into local languages other than English, French or Spanish can use the Appendix to the Berne Convention for compulsory licensing. But to do so, they must formally notify

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16 Section 33 of South Africa's Copyright Act of 1978.

WIPO of their intention to avail themselves of the Appendix and must comply with numerous procedural requirements. Of the study countries, only Egypt has provided such notice, though its notification has since expired. Egypt then incorporated into domestic law provisions enabling issuance of a compulsory licence for translation of a work into Arabic, after three years from the date of first publication, if the rights-holder has not already made such a translation within those three years.<sup>17</sup>

Uganda has not formally availed itself of the Berne Appendix, but has nevertheless incorporated compulsory licensing provisions into its national law for translations and reproductions.<sup>18</sup> Subject to several conditions, one can apply to the state for a non-exclusive licence for translation of a work into English, Swahili or a vernacular Ugandan language—for teaching, scholarship or research purposes—after one year has passed since the publication of the work.

### **10.2.5 Parallel importation**

Parallel importation is another copyright flexibility, involving the practice of legitimately importing, usually at a lower price, copyright-protected works from one country into another without permission from the copyright-holder in the country of import. The practice has significant potential to reduce prices for and increase access to learning materials, such as textbooks. Nevertheless, Egypt is the only study country that expressly permits parallel importation of copyright-protected works from any other country.<sup>19</sup> Senegal permits parallel importation only regionally, within the West African Economic and Monetary Union (Union économique et monétaire ouest africaine, UEMOA).<sup>20</sup> South Africa specifically allows the rights-holder to prohibit parallel importation of copyright materials.<sup>21</sup>

### **10.2.6 Digital rights management (DRM), including TPMs and RMI**

Digital rights management (DRM) systems are, as the name suggests, systems for managing intellectual property rights in a digital environment. DRM systems can include one or more of the following: technological protection measures (TPMs), rights management information (RMI) or end user licensing agreements (EULAs). Provisions related to TPMs and RMI are typically introduced into a national copyright law after a country has signed the WIPO Internet Treaties, which

17 Article 148 of Egypt's EIPRPA of 2002.

18 Sections 17 and 18 of Uganda's Copyright and Neighbouring Rights Act of 2006.

19 Article 147 of Egypt's EIPRPA of 2002.

20 Article 36(2) of Senegal's Copyright Law of 2008.

21 Section 28 of South Africa's Copyright Act of 1978.

require signatories to, among other things, prohibit circumventing of TPMs and/or tampering with RMI.

National laws prohibiting circumvention of TPMs are controversial because they may jeopardise the existing copyright balance safeguarded by copyright exceptions and limitations. TPMs allow for the lock-up of copyright-protected materials, regardless of established copyright-balancing tools that strive to reconcile rights-holders' interests and public interests. This is because TPMs are unable to distinguish between infringing and non-infringing access to and uses of, a copyright-protected work. As a result, exceptions and limitations in the law (such as fair dealing exceptions or exceptions for personal, educational or library/archive use, or access to public domain works) can be undermined by technology used to lock down learning materials. TPMs are then further reinforced by anti-circumvention provisions.

All study countries except Mozambique and Uganda have enacted TPM anti-circumvention provisions. This is not surprising in Ghana and Senegal, both of which have signed and ratified the WIPO Internet Treaties and are, therefore, obliged by international law to have such provisions.<sup>22</sup> Ghana and Senegal, however, did not make use of flexibilities within the Internet Treaties to include reasonable exceptions to the circumvention prohibitions.

South Africa has signed the WIPO Internet Treaties but not yet officially ratified or implemented them. Nevertheless, South Africa has enacted TPM anti-circumvention provisions, not in its copyright law but in its Electronic Communications and Transactions (ECT) Act 25 of 2002.<sup>23</sup>

Morocco is in the process of ratifying the WIPO Internet Treaties, as required pursuant to its free trade agreement (FTA) with the United States. Also pursuant to that agreement, Morocco implemented anti-circumvention provisions in a considerably more precise manner than contemplated by the Treaties.<sup>24</sup> Moroccan law exempts certain non-profit entities (non-profit libraries, archives, educational institutions and public broadcasters) from the prohibitions on circumvention,<sup>25</sup> utilising the small amount of flexibility left open in the Morocco-US FTA.

In Kenya and Egypt, though neither country has ratified the WIPO Internet Treaties, strict anti-circumvention provisions, without exceptions and limitations, have been enacted.<sup>26</sup> Neither country was legally compelled to introduce these access-inhibiting provisions, but they did so anyway. This demonstrates the

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22 Section 42 of Ghana's Copyright Act of 2005; Article 125 of Senegal's Copyright Law of 2008.

23 Section 86 of South Africa's Electronic Communications and Transactions Act of 2002.

24 Article 65 of Morocco's Copyright Law of 2000 as amended in 2006..

25 Article 65.1 of Morocco's Copyright Law of 2000 as amended in 2006.

26 Section 35(3) of Kenya's Copyright Act of 2001; Article 181 of Egypt's EIPRPA of 2002.

significant influence that technical assistance and implicit or explicit pressure from outside forces can have on copyright laws in Africa.

### **10.2.7 Judicial decisions**

In most study countries, case law with respect to copyright in general and access to learning materials in particular, is sparse. Copyright litigation is uncommon. In Mozambique and Egypt, for example, there is reportedly little or no copyright case law related to learning materials. Meanwhile, research in Morocco, Ghana and Uganda suggests that alternative dispute resolution mechanisms, involving arbitration, negotiation and other out-of-court dealings, are sometimes used to settle copyright disputes. Kenya and South Africa, in contrast, have a relatively rich body of copyright-related case law. However, even in these countries, there is little case law specifically related to learning materials.

In all the study countries except South Africa, there are problems with the publishing and reporting of judicial decisions, making it difficult to draw firm conclusions about judicial interpretation of the law. The implication is that greater reliance has to be placed in these countries on statutory provisions in the abstract, without the aid of interpretative guidelines from courts.

Some of the earlier chapters in this book highlighted legal ambiguities in a negative light, characterising ambiguities as imperilling access to learning materials. However, depending on the context, such constructive ambiguities in the legal framework, caused by a lack of judicial interpretation, could in some cases facilitate access to learning materials. Informal interpretation and application of the law by institutions such as libraries and enforcement agencies have enormous relevance for access to learning materials. Access-enabling interpretations of the law could be reasonable in the absence of precedents adopting the opposite position. But it is of course also true that, given the discourse dominating the copyright environment internationally and in many countries, an ambiguity in a country's national copyright legal framework could often lead to an informal interpretation that is access-restricting rather than access-enabling. Moreover, most public-interest institutions like libraries and universities generally stay clear of activities that might bring about litigation, hence their understandably strict interpretation of the law.

Another important issue related to the lack of judicial interpretation of access-related provisions in ACA2K country copyright laws is the issue of the three-step test contained in the Berne Convention, the TRIPs Agreement and other international instruments. If and when courts in ACA2K countries do start to interpret limitations, exceptions and flexibilities, they will probably consider this test. This test could also be relevant to administrative interpretations of provisions in the law by, for instance, enforcement agencies, or by collective management organisations negotiating licensing arrangements with universities. Finally and centrally for this research, the three-step

test binds legislators considering the kinds of access-enabling amendments to national laws that are recommended in the country chapters of this book. To summarise, a country's obligations pursuant to the Berne Convention and TRIPs Agreement apply not only to its statutory provisions but also to other 'measures' including, arguably, judicial and administrative interpretations and applications of the law.

The difficulty in speculating as to whether a particular provision (or interpretation or application of the provision) passes, or does not pass, the three-step test, arises from the fact that there is considerable disagreement, even among experts in the field, as to the nature and interpretation of the three-step test. There are divergent schools of thought on whether the three-step test is access-friendly or protection-friendly. Some might argue that the three-step test, in its vagueness, allows latitude for both access-enabling and protectionist interpretations. Others might argue that the three-step test is strongly biased towards rights-holders and that no copyright limitation, exception or flexibility can survive a strict interpretation of the three-step test.

### ***10.2.8 Relevant non-copyright laws and policies***

There are laws and instruments other than copyright statutes and regulations that affect access to learning materials. The most important of these are constitutional protections for fundamental rights such as the right to education, information, freedom of expression/communication and language rights. Such constitutional provisions could potentially be used to challenge elements of a country's copyright law that conflict with constitutionally protected rights. For instance, in countries where property rights or intellectual property rights are not constitutionally entrenched, constitutional framing of education as a fundamental right could provide important interpretative guidance in determining the scope of copyright protection.

In some countries, there are non-copyright laws, regulations or policies that govern aspects of the intersection between copyright and knowledge. For instance, Uganda and South Africa have specific laws dealing with access to government-held information. South Africa also has legislation designed to encourage public institutions and universities to exploit intellectual property rights from publicly financed research.<sup>27</sup> Unfortunately, the focus of that legislation is on potential commercial gain rather than on access and consequently, the legislation fails to safeguard the public domain. For instance, it does not mandate that the outputs of publicly financed research be accessible to the public. Similarly, the much-lauded Free and Open Source Software (FOSS) Policy adopted by the South African government<sup>28</sup> promotes the use of FOSS

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27 South Africa's Intellectual Property Rights from Publicly Financed Research and Development Act 51 of 2008.

28 Policy on Free and Open Source Software Use for South African Government, 2006. Department of Public Service and Administration. Available at <http://www.info.gov.za/view/DownloadFileAction?id=94490> [Accessed 20 December 2009].

in government information technology systems, but fails to set out ways to build public access to the actual content residing on such systems.

### **10.2.9 Conclusions from the doctrinal research**

The doctrinal studies in the eight ACA2K countries have found that national laws in all the countries provide strong copyright protection and in several cases the protection exceeds international legal standards and requirements as well as levels of protection offered in many countries outside Africa.

It was found that all of the study countries, with the exception of South Africa, have made substantial changes to their copyright laws within the past 10 years and in all cases the overwhelming emphasis of the changes has been on rights-holder protection rather than on user access. The starkest example of the emphasis on rights-holder protection is the extension of the standard term of protection from 50 years to 70 years in four of the countries: Ghana, Morocco, Mozambique and Senegal.

And the copyright limitations and exceptions related to learning materials in the study countries are, in various ways, problematic. No study country takes advantage of all, or even most, of the flexibilities that exist in (and outside of) relevant international agreements such as TRIPs. Provisions to enable access in the digital environment are mostly absent from the laws of the study countries. Limitations and exceptions for students and teachers, educational institutions and libraries and archives fail to adequately address the needs of disabled persons. Distance learning and e-learning are not specifically catered for in any of the countries' copyright laws. To the extent that copyright laws in ACA2K study countries address the Internet and other ICTs, they do so primarily to restrict access to learning materials by supporting the use of TPMs and prohibiting TPM circumvention, even for non-infringing purposes. Such restrictions may deny opportunities for learning offered by digital technologies in general and ICTs in particular.

Meanwhile, because there is little or no case law interpreting copyright legislation in respect of learning materials in the study countries, there is considerable ambiguity in most countries' laws. This ambiguity could hinder or facilitate access to learning materials, depending on the context.

## **10.3 Qualitative research findings**

### **10.3.1 Scholarly and other literature**

An extensive literature review conducted throughout all the study countries demonstrates that there is a generally sparse (but growing) body of African scholarship addressing copyright issues. Several conclusions can be drawn from a synthesis and analysis of this literature.

Practising lawyers in the study countries are generally not active writers on copyright and/or education. Furthermore, the scholarship on copyright being produced by African scholars generally reflects African universities' primary orientation towards teaching as opposed to research. The small body of literature that does exist addresses copyright from various perspectives, including an access-oriented perspective. And more recently, there has been some significant research output generated by undergraduate and graduate students in law, information sciences, communications and other disciplines. This is an encouraging development.

There have been relatively few government-commissioned or government-authored reports on copyright and education in the study countries. One notable exception to this pattern is a 2004 study commissioned by the Ugandan Law Reform Commission (ULRC) to examine Uganda's 1964 legislation in light of changing technologies and their potential impacts.<sup>29</sup>

In general, South Africa has more copyright scholarship, particularly in relation to access to knowledge, than any other study country.<sup>30</sup> In part, this can be traced to civil society interest<sup>31</sup> and projects around access to learning materials. The lesson here, for those who would seek to generate greater understanding of and influence on, copyright laws, practices and policies, is that short-term research and advocacy projects can cumulatively have significant and lasting impact.

A final observation concerning published resources on copyright and education (and copyright generally) in Africa is that there is a considerable amount of information available in the form of cursory media coverage, opinion commentaries and rights-holder publicity materials. ACA2K research suggests that such publications typically lack depth of analysis and present only a partial picture by focusing on copyright protections rather than access-oriented flexibilities in copyright law. There is a distinct need, therefore, for innovative, evidence-based public and scholarly discourse that presents balanced perspectives on copyright issues.

### **10.3.2 Impact assessment interviews**

As seen in the preceding chapters, in each study country researchers engaged a variety of key actors and stakeholders, including representatives from policymaking, government and enforcement entities, tertiary educational communities and

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29 Uganda Law Reform Commission (ULRC) *Study report on copyright and neighbouring rights law* (2004) ULRC Publication 9.

30 See, for instance, A. Rens, A. Prabhala and D. Kawooya *Intellectual property, education and access to knowledge in Southern Africa* (2006) TRALAC Working Paper 13, ICTSD, UNCTAD and TRALAC. Available at <http://www.iprsonline.org/unctadictsd/docs/06%2005%2031%20tralac%20amend-ed-pdf.pdf> [Accessed 1 June 2010].

31 See, for instance, The African Commons Project (TACP), <http://www.africancommons.org/> [Accessed 20 May 2010].

copyright-holders. The interview process addressed several thematic areas and revealed the following insights into copyright and education.

### *Legitimacy of the law*

Many, but not all, interviewees perceived copyright as one of several barriers to accessing learning materials. Most people who did not perceive copyright as a barrier to access were unfamiliar with the law and when informed about applicable rules in their country, acknowledged that their modes of access are probably illegal. These interviews revealed that learning materials access is often achieved through behaviours adopted in spite of, or in ignorance of, the law. Infringing access to learning materials enabled primarily by lack of copyright enforcement may be a viable, albeit less than ideal, bandage for the access problems facing African tertiary education systems in the short-term. But when enforcement and copyright compliance inevitably increase in the future, this unfettered mode of access will cease to be available.

Infringement conducted in order to access learning materials was found to be rampant among users within the tertiary education communities from which interviewees were drawn. Government efforts in the study countries to enhance access to learning materials—by, for instance, commissioning materials or subsidising textbook purchases—are mainly directed at primary and secondary education sectors. Learning materials at the tertiary level are often sourced internationally and are rarely subsidised by governments. These tertiary-level materials are expensive and the lack of affordability was cited across all study countries as the primary reason for large-scale (often illegal) photocopying by learners and the commercial photocopying operations serving them.

Such widespread infringing behaviour is problematic not only because it means present access channels are precarious. More broadly, the lack of compliance with the legal framework undermines the legitimacy of copyright principles and even the rule of law. As long as copyright law is enforced only selectively or not at all, citizens receive mixed messages about the importance of respecting law and the principles it embodies. At the same time, however, strict compliance with copyright is not feasible. Copyright laws on the books in the study countries lack necessary flexibilities and are so far removed from the day-to-day realities facing education systems in these countries that enforcement is practically impossible if the existing moderate levels of learning materials access are to be preserved. The resulting illegitimacy is not in anyone's interests. It facilitates extremism, which undermines movement towards a balanced, legitimate national copyright system.

### *Administration and enforcement*

In all study countries there are government agencies tasked with aspects of copyright administration or enforcement. These agencies' duties typically consist of some



or all of the following: licensing collective societies; setting royalty tariff rates for particular activities; public engagement and raising awareness of copyright issues; and operating enforcement programmes.

Across the spectrum of interviewees working for these administrative or enforcement agencies, or interviewees working in government departments responsible for the agencies, there was a wide variety of views about the relationship between copyright and learning materials. Some interviewees recognised a need for a balanced system to ensure access while at the same time protecting the interests of rights-holders. Others saw copyright chiefly in terms of enforced protection for rights-holders.

Based on data obtained through impact assessment interviews, the agencies can be classified according to their relative institutional strength.

Study countries with relatively less strong administrative institutions are Uganda, Senegal and Mozambique. These countries' administrative or enforcement agencies have only recently been established by statutes, or operate without sufficient financial, human and other resources, or are facing increased competition and possible irrelevance due to the creation of new entities. Countries such as Kenya, Ghana and Egypt have emerging institutions that are in the midst of building strength and capacity. Institutions that administer copyright in these countries have either existed for a considerable period of time or, if they are newly established, have strong leadership and substantial government support. In South Africa and Morocco, administrative institutions can be characterised as relatively strong. They are well established, well resourced and generally influential in the national or even international copyright environment.

Classifying a country's administrative institutions in this way is a useful frame for understanding the kinds of programmes operated and the copyright perspectives promoted. Evidence suggests that the weaker the institutional framework, the more dependent the administrative agency is on external financial, technical and other kinds of support. This dependency renders weak institutions more susceptible to undue influence from particular constituencies of stakeholders. Because of information asymmetry and skewed economic incentives for participation, the supporting stakeholders have tended to represent large groups of industrial rights-holders, such as record companies or book publishers, rather than representatives of education sectors. For example, the push for greater protection and enforcement in Senegal and Uganda is led by musicians supported by the music industry. In Ghana and Mozambique, reprographic rights organisations (representing literary publishers) are especially influential.

The problem of rights-holder lobbying power is also evidenced in countries with emerging institutions, such as Egypt and with strong institutional frameworks, such as Morocco and South Africa. However, with a strong institutional framework,

it appears that processes tend to be more participatory and programming more reflective of a diversity of interests impacted by copyright policy and practice. For instance, copyright administrators in South Africa have demonstrated greater willingness to engage concerns around access to knowledge than their counterparts in some other ACA2K study countries. Whether this will eventually yield dividends for the South African education system through better access to learning materials remains to be seen, however.

There is also some evidence to suggest that stronger institutions may correlate with (though not necessarily cause) increased awareness and enforcement of copyright. Throughout all the study countries, systemic copyright infringement is widespread. But infringement appears to be least rampant in the country with the strongest institutional framework, South Africa. In every other study country, there is evidence of complete ignorance of or disregard for copyright law, in the context of photocopying entire books, for example. The reasons for such infringements are complex, but essentially reflect people's determination to pursue the most cost-effective access channels available. It can be argued that countries with stronger copyright institutional frameworks (not necessarily stronger copyright laws — an important distinction) may be better able to grapple with the daily realities facing their citizens and to calibrate copyright laws, regulations, policies and practices accordingly.

### *Educational institutions/libraries*

Photocopying learning materials at and near tertiary educational institutions was found to be commonplace in most of the study countries. Some copying activities, such as selling photocopies of entire copyright-protected books that are still in print, are clearly illegal. Other activities, such as students or teachers copying parts of books, however, are less clearly an infringement of copyright, because in most of the study countries, what constitutes 'fair' copying is an open question due to vagueness in the law and an absence of interpretation mechanisms such as judicial decisions, regulations, government policies or licensing agreements between rights-holders and collective management organisations.

It was found that the reliance on photocopying in tertiary-level education communities was a result not just of users' inability to purchase high-cost materials, but also the poor state of resources in many university libraries. Educational institutions in Senegal (which is among the least economically developed of the study countries) face some of the most significant access challenges. For example, the law library at the Université de Cheikh Anta Diop (UCAD) in Dakar has book stacks full of photocopies rather than printed textbooks because students vandalise the originals through 'page-tearing' in order to secure access to portions of the books. Signs posted next to photocopiers at a UCAD library instruct students to photocopy rather than tear pages out of books, while at the same time informing

students that photocopying could be an infringing activity. Libraries in most other study countries are somewhat better resourced, although Senegal's university libraries are not alone in facing vandalism issues. Page-tearing from books and widespread, infringing photocopying by students or the copyshops they buy from are issues in all study countries.

Libraries in several of the study countries have taken some steps to develop institutional policies on copyright and/or access. Whether those policies are access-enabling is sometimes debatable. The libraries interviewed in Egypt, for instance, do not allow users to check any books out, meaning their entire collections are for viewing only on the library premises. The justification offered by the interviewees at these libraries was that such measures are required to prevent theft and vandalism.

Meanwhile, some well-resourced and well-intentioned institutions are not yet able to fully capitalise on access-enabling opportunities. The Bibliotheca Alexandrina (BA) in Egypt has acquired state-of-the-art technology to print books on demand, but Egyptian researchers found that the BA's print-on-demand service was, so far, not widely used. Apparently copyright negotiations with publishers were one of the factors delaying deployment. And a quirk of the Egyptian copyright law, which requires government permission and payment of a fee before copying a public domain work for professional or commercial use, may complicate BA's ability to print/distribute works for which copyright has expired. When it is able to fully capitalise on the potential of access-enabling technologies such as print-on-demand, the BA can become not only a continental but worldwide leader in this kind of materials distribution.

### *Gender*<sup>32</sup>

As outlined in the introductory chapter of this book, the ACA2K project sought to build network members' awareness and capacity to investigate gender issues in their impact assessment interviews. Achieving full gender equity is a fundamental component of development and is therefore a necessary part of any development-oriented research project. All members of the ACA2K research network attempted to engage gender issues and there were also attempts by some project members

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32 The authors acknowledge the work of M. Ouma of the ACA2K Kenya research team and ACA2K Gender Consultant S. Omamo of Own & Associates in Nairobi, both of whom improved the investigation of gender in Kenya and both of whom gave inputs on the gender elements contained in the Introduction chapter of this book as well as Chapter 4 and this concluding chapter. The authors also acknowledge the inputs on ACA2K's gender findings from K. Diga and K. Fourati of the IDRC South Africa office. For Diga's reflections on ACA2K and gender, see K. Diga 'Reaction to the gender findings from Africa's access to knowledge research' (2010) GenderIT.org, 22 February. Available at <http://www.genderit.org/en/index.shtml?apc=---e-1&x=96381> [Accessed 1 March 2010].

to document the gender-related progress of the network and of research subjects, through the project's monitoring framework.<sup>33</sup>

The ACA2K gender strategy for raising awareness among network members seems to have been largely successful. Almost all teams investigated gender as part of their research and most reported on gender-related findings. At the project monitoring level (using the outcome mapping [OM] framework described in Chapter 1), positive behaviour changes, including growth in awareness among network members of the need to interrogate gender, were documented. However, the country teams, in monitoring the outcomes of their research and initial dissemination work, were mostly unable to document significant gender-related behaviour change among the stakeholders in their national copyright environments. The difficulty in raising awareness of the possible intersections among copyright, access to learning materials and gender *outside of* the research network demonstrates the need for further work in this area using innovative, purpose-specific methodologies.

Unfortunately, because of the lack of awareness of, or prioritisation of, gender issues among the stakeholders interviewed by the country teams, gathering qualitative research data for analysis, via the impact assessment interviews, was a substantial challenge. Very little gender-related data emerged from the interviews and the data that did emerge was largely anecdotal findings. At the same time, however, the fact that very little data emerged despite substantial research efforts is in itself interesting. Researchers' inability to uncover significant data does not necessarily demonstrate that there are no linkages between copyright, access and gender. Instead, the lesson could be that there is a need for different, more appropriate research methodologies. Another possible lesson is that building issue awareness is a prerequisite to research investigating the underlying causes of the problem. The project's findings do, therefore, provide insights into potentially valuable future directions in terms of research questions and methodologies.

The strongest gender-related research data came from Uganda, South Africa and Kenya, the last of which benefited from additional resources and attention directed at follow-up research around this sub-issue. The research experiences in all three of these countries and other countries to a lesser extent, provide valuable insights into the research problem, as well as lessons for the future.

In the Ugandan study, there were anecdotal findings suggesting that men are more likely to infringe copyright than women and that plaintiffs in copyright court cases seem, anecdotally, more often to be women. As well, students interviewed at Kampala's

33 S. Earl, F. Carden and T. Smutylo *Outcome mapping: building learning and reflection into development programs* (2001) International Development Research Centre (IDRC), Ottawa. Available at [http://www.idrc.ca/en/ev-9330-201-1-DO\\_TOPIC.html](http://www.idrc.ca/en/ev-9330-201-1-DO_TOPIC.html) [Accessed 1 November 2009]. The authors of this chapter acknowledge the work of ACA2K Outcome Mapping Consultant Chris Morris of Results and Outcomes Consulting, Pretoria, South Africa.

Makerere University spoke of how library photocopy restrictions (aimed at copyright law compliance), when coupled with women's safety concerns at night, made learning materials access less reliable for female than for male students. It was said that female students do not typically stay at libraries at night, because of safety issues and thus the copyright restrictions on photocopying have more impact on women than men.

The anecdotal finding that plaintiffs in Ugandan copyright cases are often women raises some possible questions for future research. And the observations at the Makerere library beg the question: if the Ugandan copyright law explicitly permitted more photocopying, or the university library policies enabled more lending, or education systems and copyright limitations were more focused on enabling distance education and e-learning, could the gender bias around access to library materials be ameliorated?

The South African research also uncovered some potentially meaningful findings. For instance, it was pointed out by an interviewee that most general publishing companies in South Africa are controlled by men, but women run some of the key educational publishers. This finding would seem to warrant further investigation. For instance, might female publishers, potentially more keenly aware than men of access difficulties faced disproportionately by women (particularly black women in the South African context), be more open than male publishers to non-traditional approaches to copyright licensing, such as Creative Commons licensing?

In Kenya, interviewees spoke of educational access biases favouring men over women and pointed to the fact that the Kenyan government, in its affirmative action policies, is clearly anxious to build gender equality in the country's education systems. Thus, the question arises: how does the copyright environment in Kenya interface with the recognised links between gender and educational access? For instance, many tertiary-level texts in Kenya are published by foreign firms and there are no provisions in the Kenyan law for compulsory licensing of local editions or for parallel importing from other jurisdictions of foreign texts. If compulsory licensing or parallel importing were allowed, the result could be lower-priced books. And thus, future research could ask: to what extent does the (partially copyright-induced) absence of affordable texts impact on female learners more than male learners, given that males tend to have better access to resources than females? And to what extent is the (partially copyright-induced) absence of affordable learning materials undermining the Kenyan government's efforts to increase gender equality in education access?

In Mozambique, it was found that operators of the Eduardo Mondlane University (UEM) online distance education programme were to some degree uncertain as to the correct approaches to take regarding copyright in the materials being developed and used. It would thus seem that an investigation into the effect on UEM of the absence of distance learning and e-learning provisions in the Mozambican Copyright

Law could yield useful findings. Also, if it were found via future research that females are more likely to benefit from distance education than men in Mozambique (it was said by the Mozambique researchers that women have a greater need to remain near their homes, often remote from tertiary educational institutions), then an intersection between copyright, access and gender might be demonstrated.

A key lesson learned from the Kenyan gender-focused follow-up research process described in Chapter 4 of this book concerns the importance of adopting flexible, participative qualitative interviewing methods for research of this nature. Interviewers, moreover, should be specifically trained and experienced using the chosen methodologies. Asking interviewees to reflect on a possible intersection between copyright, learning materials access and gender is asking people to talk about something they may never have talked about before and thus an element of back-and-forth between interviewer and interviewee — a kind of participatory, action research — is required, with the interviewer drawing the interviewee out and helping the interviewee to try to identify subtle, perhaps hidden (even from the interviewee) perceptions, experiences and understandings. This kind of research work requires many specialised skills.

Other gender-related methodological insights from the project, gleaned with the assistance of an expert consultant, include:

- gender issues could be addressed separately, segregated methodologically (but not conceptually) from the other aspects of the research, while at the same time not putting the issue in a ‘gender ghetto’ within the broader research project;
- focus groups could be included within the range of participative interview methodologies employed;
- the interviewing process could be made continuous and not a one-time event, with a relationship built between interviewer and interviewee; and
- future research could be more specific, focused and clear about the gender issues being examined.

### *Information and communication technologies (ICTs)*

All the study countries except South Africa reported that ICT infrastructure remains weak in the tertiary education sector. In South Africa ICT infrastructure is relatively strong at some universities, but at the same time there are many historically disadvantaged tertiary institutions with severe resource constraints of all kinds, including limited ICT capacity. At the University of Cape Town (UCT), which was investigated by the ACA2K South African research team, it was found that there was a robust ICT infrastructure, combined with digital resources that fully support the research needs of the academic community.

Senegal's Université de Cheikh Anta Diop was found to have a very small number of computers from which to access an intranet (not the Internet or World Wide Web) and was still relying primarily on card catalogues. Institutions such as Makerere University in Uganda, the Eduardo Mondlane University (UEM) in Mozambique and the University of Ghana Legon, have reasonable ICT infrastructure and are technologically (though perhaps not legally) able to provide their communities with access to a wide range of electronic resources.

In Ghana, sharing of electronic resources among public universities is occurring through the Consortium of Academic and Research Libraries (CARLIGH). In Mozambique, UEM's new online distance learning programme is an ambitious and fairly well-resourced ICT-based access programme, illustrating that innovative institutional use of new media is entirely possible even within a least-developed country. It was found, however, that there are still uncertainties at UEM about the copyright rules and practices that apply to such distance education initiatives.

### *Conclusions from the qualitative research*

Qualitative impact assessment interviews confirmed that an enormous gap exists in the study countries between copyright law and practices pertaining to access to learning materials. In the typical situation, tertiary users, who may or may not be aware of copyright law, rely heavily on illegal photocopying to access books or other learning materials. In everyday practice, with respect to learning materials, vast numbers of people act outside of legal copyright structures altogether. Among all of the countries and institutions studied, only in South Africa and even there only at advantaged institutions such as UCT, can it be said from the research that tertiary students have the practical opportunity to legally obtain sufficient access to learning materials. Such findings suggest that copyright laws, regulations, policies and practices in the study countries are problematic and should be reformed.

## **10.4 Copyright and education in Africa: the road ahead**

Empirical evidence gathered during almost three years of work by more than 30 researchers investigating copyright laws, policies and practices in eight African countries has provided a valuable opportunity to assess how copyright environments really impact access to learning materials on the continent.

Perhaps the most important revelation from this research is that copyright laws in all study countries comply with international copyright standards. In many cases, the African countries studied provide even greater protection than international laws require. Thus, the countries studied do not need advice or assistance in drafting legislation to bring levels of legal protection up to par. Simply put, Africa does not need stronger copyright laws. This in itself is a very important finding, which

urgently needs to inform African national copyright policymaking at a time when many countries — including the ACA2K study countries Kenya, Ghana and South Africa — are in the midst of revising, or planning revisions to, their copyright laws.

Throughout the continent, however, there is a lack of awareness, enforcement and exploitation of copyright. A gap exists, to varying degrees, between copyright law and on-the-ground practices in all countries studied. Empirical evidence has confirmed the intuition and impression that copyright law in Africa is widely ignored, if even known about. And many of those who are aware of the concept of copyright are apparently unable to comply with it because of their socioeconomic circumstances.

Access to learning materials in the study countries is obtained mainly through copyright infringement. When copyright enforcement begins in earnest (as research indicates it will), then, without mechanisms in place to secure non-infringing channels of access to knowledge, many learners, particularly at the tertiary level, will be in a precarious position. Entire systems of education will be vulnerable. Thus, maintaining the status quo is not a sustainable policy option. Also, representing an unreliable and unsustainable access mechanism, learners' systemic infringement of copyright in order to obtain necessary access to educational materials has a detrimental effect on the integrity of the entire copyright system. Copyright laws that cannot be followed by the vast majority of society serve only to generate resentment of their underlying principles and ultimately undermine respect for copyright and the rule of law generally.

The consequences of maintaining unrealistic copyright systems are serious. Though the ACA2K research acknowledges that there are many other barriers to access to learning materials — such as the high prices of books and student poverty — the ACA2K project has revealed that copyright is an important and under-researched barrier. The research suggests that an appropriate and sustainable copyright environment, combined with other measures to make access to materials more affordable, could be one of the key components of a holistically well-functioning tertiary education system. Though all the countries studied have other urgent public policy matters to address, from health crises to security and political or economic stability concerns, the importance of education in addressing these and related development challenges should not be understated.

For these reasons, the project's overarching recommendation is that all stakeholders throughout and beyond Africa work towards solutions that can help to bridge the gulf in the continent between national copyright laws and the prevailing practices used for accessing learning materials. There are essentially two ways to narrow this divide: modify behaviour and/or reform laws. Expanding copyright protection even further beyond international norms is almost certain to aggravate the existing compliance challenges. It is already impractical for most members of



tertiary educational communities in the ACA2K study countries to adhere to existing legal requirements; compliance with even stronger laws is clearly unattainable. Evidence from the study countries strongly suggests that the copyright environment can be improved by legal reforms that make copyright more flexible and suitable to local realities. Paradoxically, less restrictive laws could provide more effective protection. Less restrictive laws would enable entire segments of the population currently operating outside of the copyright system altogether to comply with reasonably limited, realistic rules. This could, in turn, increase awareness of and respect for, the concept of copyright, compounding in the longer term to bolster the effectiveness of the system for all stakeholders.

Research results from the study countries contain several specific examples of best practices, as well as areas for improvement, for lawmakers, rights-holders and the tertiary education sector. Probably the best place to start is with the supreme laws of the countries where access to learning materials is a concern — their constitutions. Constitutions in several of the study countries recognise a right to education, which arguably includes a right to adequate access to learning materials, as well as other important rights such as freedom of expression and freedom of access to information. The Mozambican Constitution even goes so far as to specifically mention copyright as having a role in cultural development — a provision which presumably should be interpreted as protecting both the rights of creators and the rights of users. African national copyright policymakers should be encouraged to make use of constitutional provisions as the foundations for user-friendly amendments to copyright laws. And in countries where property rights in general are constitutionally protected, care should be taken to remain aware of the crucial distinctions between physical and intellectual property.

Among the most important provisions related to access to learning materials are countries' limitations and exceptions. Uganda's provision for Braille and sign language adaptations for educational purposes is something other countries might wish to note. And Uganda's hybrid approach to development of its fairness clause is worthy of closer examination by African lawmakers. Ghana's statutory references to 'permitted use' (in some cases subject to the notion of 'fair practice') — which is applied to a broader set of uses than is the case in British-style fair dealing clauses — and the subsequent work that has been done by stakeholders in Ghana to develop interpretive practices, is a promising example of attempts by African copyright lawmakers and policymakers to be innovative and proactive.

Another area where African lawmakers could try to chart their own course is in provisions regarding TPMs. Countries that do not yet have TPM anti-circumvention provisions should resist pressure to enact protections for TPMs prematurely, when doing so may not be in the best interests of local stakeholders. And countries that do already have anti-circumvention provisions should consider whether flexibilities

exist in their TPM provisions to ensure the access to learning materials allowed by others parts of their copyright laws (for example, in copyright exceptions and limitations) and to allow the exercise of other fundamental rights and freedoms. Where such flexibilities in TPM provisions do not exist, amendments should be considered. Even in Morocco, where an FTA with the United States requires Moroccan law to prohibit circumvention of TPMs, the Moroccan legislators have managed to incorporate an exception to the TPM anti-circumvention provision for certain non-profit entities.

Parallel importation of copyright-protected goods from one country to another is also a potentially promising strategy for ensuring access to the lowest-cost learning materials available. Egypt is an example to follow in this respect, because its copyright law contains a provision permitting parallel imports from any country. And Senegal's legislation is to some extent laudable for permitting parallel imports from its seven neighbours in the eight-member UEMOA bloc of countries. In contrast, South Africa's provision explicitly outlining steps rights-holders can take to block parallel imports could pose a serious problem if used by rights-holders to block access to lower-cost learning materials from neighbouring countries.

African legislators can also show a commitment to learning materials access (and, in turn, to national educational development), by resisting pressure from local creative industry groups and certain developed world entities—pressure that is sometimes reinforced by African bodies such as the Francophone African intellectual property body OAPI—to extend the copyright term in their national laws beyond the international standard of the life of the author plus 50 years. While it is perhaps unrealistic to expect countries like Morocco, Senegal, Ghana and Mozambique to wind back the term of protection from their current length of life plus 70 years, other African countries that have not extended their term—including the ACA2K countries South Africa, Uganda, Kenya and Egypt—could work together with other developing nations to maintain the status quo. Several ACA2K study countries are influential developing world member states at WIPO, giving them a platform to promote, among other things, maintenance of the standard 50-year term of protection in African nations. Indeed, the difficulty of recalibrating copyright terms to anything shorter than what is currently granted illustrates the importance of very carefully considering the economic, social and cultural impacts of any upward extension.

Some ACA2K countries have embraced the potential of compulsory licensing, which could be an example for other study countries to consider. Egypt's provisions permitting compulsory licences for educational purposes and for certain kinds of translations and Uganda's provision for compulsory licensing of certain translations and reproductions for purposes of teaching, scholarship or research, are important

examples of how African nations can seek to realise educational/developmental goals through copyright law.

African lawmakers should also consider the potential developmental role that copyright tribunals can play. The ACA2K research in South Africa and Ghana suggested that the provision for a Copyright Tribunal in each of those two countries could potentially be central to mediation of the tension between protection for and access to, copyright-protected learning materials. In Ghana, a key intended function for the Tribunal, which has not yet been established, is intervention in disputes over royalty rates and licensing frameworks.

Development of an access-friendly blanket licence agreement between a collection society and a user body (such as a university) is an example of a practice that can be pursued by stakeholders regardless of the state of, or lack of, legislative reform. A blanket agreement seeks to standardise and systematise permissions to users, in return for standardised remuneration to rights-holders. This eliminates some uncertainty for both users and rights-holders, strikes a balance between the education rights of users and the economic rights of rights-holders and encourages compliance with and respect for the law.

At the University of Ghana, Legon, it was found that the blanket licensing systems being established potentially do not go beyond what is already allowed by the law and have little connection to the everyday realities of life on campus, where widespread photocopying of entire textbooks regularly occurs. However, the South African research found that the blanket licence agreement between the DALRO collection society and the University of Cape Town (UCT), while not perfect in terms of clarity, is reasonably well understood and complied with at UCT. Stakeholders in other African countries could benefit from scrutiny of the blanket agreements negotiated in Ghana, South Africa and elsewhere, so as to determine which, if any, elements could be relevant to development of blanket licences in their countries. It should be cautioned, however, that standard-form contracts modelled on South African (or, worse, European) precedents may not be appropriate for other countries. Context-specific solutions are needed.

As well as the provisions and practices just outlined, copyright policy stakeholders in African countries would do well to give consideration to entirely new types of provisions and practices. There are several innovative new approaches to copyright that study countries could be at the forefront of piloting. Indeed, some of the study countries would be ideal places to test new attitudes and approaches — not least because existing laws are not at present being enforced to any great extent in the study countries. In that context, being open-minded about alternative solutions could put Africa ahead of the curve in developing model copyright laws for the 21<sup>st</sup> century.

For instance, African nations could consider pioneering a system of compulsory periodic renewal of copyright, following an initial term of automatically granted copyright protection. Such a system would not go against the internationally mandated life-plus-50-years term of protection, but it would require a copyright-holder to renew copyright in a work several times during that 50-year period in order to keep the copyrights. Such a system has been proposed as a way to ensure that works that are not actively commercially exploited by their rights-holders enter the public domain much more quickly.<sup>34</sup> As well, African legislators could consider introducing provisions whereby use of 'orphan works' under reasonable conditions could be allowed if the copyright-holder cannot be identified for negotiation of a voluntary licence.

Another idea, which does not require any legislative changes, is for stakeholders to establish registries of public domain works in order to assist users in knowing which works they can use, adapt or copy freely without rights-holder permission. Libraries or administrative agencies could be at the cutting edge of establishing these registries, building upon their pre-existing responsibilities towards protection of local knowledge and cultural expression. Exploiting print-on-demand technology is another extremely promising area that does not require legislative intervention and where at least one institution in Africa, the BA, is poised to become a global leader.

Support for locally produced, objective policy research also has the potential to energise national copyright policymaking environments, potentially opening up space for policy narratives, positions and models that improve access to learning materials. The ACA2K network has already documented, through its project monitoring framework, what appear to be the seeds of behaviour change in national policymaking environments in countries such as Ghana and Kenya. In both of these countries, members of the local ACA2K research teams have managed to make their research findings and recommendations known within high-level policy processes.

The ACA2K research suggests that countries with more local copyright expertise have a richer policy debate and therefore, the potential for a more access-friendly copyright environment. South Africa, for instance, is home to the continent's largest collection of copyright scholars and this is likely to have helped generate a policy environment that is, as discovered from this research, somewhat favourable to consideration of multiple viewpoints within the policymaking space. South Africa is home to several research centres and projects focusing on issues related to the intersections between intellectual property and knowledge access, including work

34 See, for instance, A. Rens and L. Lessig 'Forever minus a day: a consideration of copyright term extension in South Africa' (2006) 7 *Southern African Journal of Information and Communication* 22. Available at <http://link.wits.ac.za/journal/journal-07.html> [Accessed 1 April 2010].

at both UCT and the University of the Witwatersrand, two institutions connected to the ACA2K project. Egypt is also emerging as an anchor for African research in this field, with leadership from BA and American University in Cairo (AUC). AUC launched its Access to Knowledge for Development Center (A2K4D) in early 2010.<sup>35</sup>

It is essential to engage multi-disciplinary teams to tackle various facets of the issue of access to learning materials. There is an important role for academics from law, economics, information sciences and other disciplines, as well as practitioners such as librarians, lawyers, politicians, administrators, judges and more. Governments throughout Africa and their national and international supporters, would do well to increase investment in local policy research and grow the epistemic community of intellectual property researchers based in Africa.

Momentum for change towards more access-friendly national copyright environments can also come from institutions that are willing to challenge the boundaries of copyright law in order to enable access in clearly reasonable but perhaps technically illegal ways. For instance, the Egypt ACA2K research found evidence of Egyptian libraries providing access to materials to disabled users, regardless of the fact that Egyptian copyright law does not specifically provide exceptions for such access. And a Moroccan library official interviewed by the ACA2K Morocco team said he would be willing to convert copyright-protected material into Braille for use by visually impaired users, in spite of the fact that the Moroccan law does not provide for permission-free adaptation of works. The Moroccan library official said he would be willing to take such a step because he did not anticipate any author objecting to adaptation of a work for the visually impaired.

Libraries and other institutions on the frontline of access provision could be given greater support to execute their mandates without fear of liability. This support could come in many different forms, from scholarly opinions to government statements to rights-holder endorsement. Judges, administrators and enforcement officials could also assist by taking account of reasonable practices in defining the boundaries of otherwise ambiguous legal concepts such as fair dealing, fair use and fair practice.

All stakeholders need to work together to continue to develop best practices within the context of the law as it presently exists in a given country, because access-enabling legal changes — as desirable as they may be — are unlikely in the immediate future in most African countries. And even if and when desired legal changes do occur, such changes alone will not change the environment. The ACA2K research

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35 See AUC Access to Knowledge for Development Center (A2K4D). Available at <http://www.aucegypt.edu/academics/schools/BUS/A2K4D/Pages/Home.aspx> [Accessed 20 May 2010].

has shown that the practices and behaviour that prevail in a copyright environment are often even more important than the laws themselves. Ultimately, the ACA2K research has found that copyright laws are, at best, unreliable access-enablers, regardless of the fact that copyright law is founded on the notion of the need to balance the economic interests of rights-holders with the access rights of users.

A valuable access-building practice for Africa is the promotion and utilisation of flexible approaches to the licensing and distribution of locally produced works. The Publishing and Alternative Licensing Model of Africa (PALM Africa) project has successfully supported publishing of three open access books, under Creative Commons (CC) open licences, by Fountain Publishers, a traditional publisher in Uganda.<sup>36</sup> In Egypt, the CC flexible copyright licences are also starting to gain exposure. In South Africa, the use of these licences has been ongoing since they were 'ported' into that country in 2005. Also, South Africa is home to the pioneering Free High School Science Texts open content curriculum project that uses the GNU Free Documentation Licence for all its works.<sup>37</sup> This book itself is published by one of Africa's leading publishers, UCT Press, under a Creative Commons licence agreement. Adopting such models is not a rejection of the importance of copyright; on the contrary, open licensing is fundamentally premised on copyright protection, without which there would be no basis for a licence.

The ACA2K research has found that reforming copyright laws and practices should not be seen as a magic solution to the learning materials access problem. Multiple strategies are required and any strategy or practice that can directly reduce the cost of legal access must be tried. Educators can, for instance, offer free open access to their own research outputs through institutional repositories. And universities can form consortia to share the costs of subscriptions to electronic journals. One example of such a consortium is CARLIGH in Ghana, which was highlighted in the Ghana ACA2K research. South Africa also has a similar entity, the South African National Library and Information Consortium (SANLiC). Also, it is clear that African policymakers could increase support for local publishers, through, for instance, measures to decrease the costs of publishing inputs such as paper and printing machinery. And increased efforts can be made to promote girl-child and women's education materials access. And more resources could be invested in ICT infrastructure, training and exploitation. These are just a handful of examples of ideas which themselves are deserving of entire books.

This particular project has directed attention towards copyright's role in enabling or restricting access to learning materials. The project's principal contribution to the

36 See the PALM Africa blog at <http://blogs.uct.ac.za/blog/palm-africa> [Accessed 20 May 2010].

37 See the Free High School Science Texts website at <http://www.fhsst.org/> [Accessed 20 May 2010].

state of knowledge in this field is the rich empirical evidence generated by actually assessing the impact of copyright 'on the ground' rather than merely 'on the books'. To our knowledge, such a pan-continental, multi-disciplinary endeavour had never previously been undertaken.

Preliminary observation of the outcomes that this new evidence has contributed to at national, regional and international levels suggest that this book should be only part of the beginning, not the end, of engagement with the issues at the intersection between copyright and access to learning materials in Africa. Already, this empirical research has found its way into the high-level proceedings of WIPO committees on copyright and development issues in Geneva, as well into African fora examining intellectual property issues in the development context. Collaborative relationships have been formed between ACA2K and stakeholders on all sides of the copyright debate, including rights-holder and user groups, not to mention research centres, independent think tanks and non-governmental organisations (NGOs). The methods and findings of this project are already being taught in at least one university curriculum as a model for others to follow. National seminars have been held in every ACA2K study country, leading to meaningful engagement with lawmakers, policymakers and the stakeholders most directly impacted by tertiary educational access issues. The media have shown interest, with coverage of ACA2K finding its way into national and international outlets, including television, radio, print and online.

This project has succeeded in achieving its objectives of increasing research capacity in Africa on matters of copyright and learning materials access, refining methodological practices for this kind of research, growing the body of published evidence in this area and building researchers' awareness of the need to interrogate copyright in relation to educational development objectives and outcomes.

And perhaps most importantly, it is apparent that the team that has been involved in executing this project has cross-fertilised to create a solid and sustainable human network of people who are passionate about these issues. The mission to create a network of African researchers empowered not only to study the impact of copyright environments on access to learning materials, but also to use the evidence generated to assist copyright stakeholders to participate in evidence-based copyright policymaking aimed at increasing access to knowledge, has apparently succeeded. Some progress has thus been made towards the ultimate vision of people in Africa maximising access to knowledge by influencing positive changes in copyright environments nationally and across the continent.

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## Afterword

As you explore these last pages, one hopes that your experience with this book has not only informed your understanding of Africa's access to knowledge challenges, but that it has also triggered your curiosity to learn more and question.

Nearly three years ago, the ACA2K project, a network of scholars and stakeholders from Africa and elsewhere, embarked on a journey to understand how the copyright environment is affecting access to learning materials in Africa. This book is a contribution to this field of investigation and to the body of knowledge. Perhaps the greatest contribution of the ACA2K network has been its testing of hypotheses using innovative research methodologies – in an effort to probe the complex, positive and negative elements of the African copyright environment. There are very few studies championed by Africans, out of Africa, in this area of work. ACA2K has thus pushed the bar a bit higher and other scholars will benefit from this empirical work.

If, after reviewing the evidence presented, you disagree with the interpretation and opinions expressed in this book, then here is an opportunity to contribute, debate and take this work further. This book, taken on its own, can tell only part of the story. For those of us who work in development, our final aim is not to produce books, briefs and papers. Our aim is to see change and to influence policymaking in our respective countries so that we can benefit from better policies that can drive social and economic development and support poverty reduction.

Coming from that perspective, the research methods used by the ACA2K network aimed to probe the intersection between copyright laws, policies and practice in the identified study countries. The network also designed a multifaceted strategy of policy engagement at the national, regional and international levels in order to raise awareness of the challenges Africa faces when it comes to accessing learning materials.

The network's research findings address how the copyright environment could be enhanced to support improved higher education delivery. These findings clearly indicate that African countries do not necessarily need stronger copyright laws. As a matter of fact and in many cases, African copyright laws provide greater protection than international instruments do. Rather, what is needed is a set of flexible policies from government and other copyright stakeholders, as suggested in this book, which can reduce the gap between law and practice and ensure that learners access the education materials they need.

It is rather disturbing to see a polarisation within the international intellectual property (IP) debate and the emergence of strong forces actively lobbying for a focus on further enforcement and extension of IP protection. One would have hoped to see

a debate focusing on the promotion of innovative approaches that could strike the correct balance between the access needs of users on the one hand and the interests of rights-holders on the other. We hope that the balanced approach expressed and stressed throughout the pages of this book will help all those who seek evidence-based arguments in their efforts to inform debates taking place through the WIPO development agenda process and in other international and local IP policy forums.

Education is the cornerstone of Africa's development. Higher education in particular has been marginalised for a long time and it is only recently that policymakers in Africa have embarked on a revitalisation process. Programmes are being implemented to reduce skills shortages and to ensure that higher education institutions play their necessary role in supporting the development of a skilled work force and training researchers and scientists who can enable African creativity and innovation. The focus of ACA2K on access questions from a higher education perspective is an important contribution to the debate on the role of educational institutions in Africa. Policymakers want to see research in higher education institutions that addresses the development needs of the continent. They argue for more research that can inform community development rather than serving an elite of actors who consult specific publications. One cannot help but question whether current IP regimes are best suited to these developmental objectives.

When it comes to knowledge production and dissemination, Africa is marginalised. Until very recently, African scholars suffered from complete isolation. They faced enormous challenges in accessing cheap and reliable Internet bandwidth in a context where the Internet is becoming an important tool for knowledge production, and for knowledge dissemination, research collaboration and teaching in general. On average, an African university used to pay 100 times more for bandwidth than a university in North America or Europe. But this situation is changing, as investment in bandwidth infrastructure on the continent is slowly enabling cheaper connectivity. African universities are increasingly collaborating with their counterparts in the North, and promoting the emergence of national research and education networks dedicated to supporting research and education.

The digital era is thus changing the nature of the debate in Africa from a focus on access to a focus on broader fundamental policy choices and mechanisms that can nurture collaboration, networking, creativity and innovation. In this new environment, how can the IP regime support the creativity and innovation that will address Africa's development challenges? Are the current IP metrics best suited to understanding African bottom-of-the-pyramid creativity and innovation?

As indicated in the last chapter of this book, new models for supporting knowledge production and dissemination need to be explored. In this digital era, the IP regime is challenged and more research is needed to inform possible models that can promote what a networked society has to offer. These new models should

be tested in various sectors, from publishing to music to scholarly communication among others, so that we can come to understand their effectiveness in different settings and conditions. These are some of the areas that the ACA2K network could explore in the future. These issues bring forward important policy questions and fundamental choices that could affect all those who wish to be effective participants in a networked society. Forward-thinking, new, innovative research methods are needed for these challenging lines of enquiry. The ACA2K network has demonstrated its ability to integrate complex concepts and methods to produce solid, evidence-based policy recommendations. Thus, it is clear that constant engagement with policymakers is also fundamental to future processes of enquiry in this area. These are the possible avenues for taking this work further.

We hope that you will also find your own way to contribute to this new, fascinating line of enquiry that questions the intersection between law, practice, creativity and innovation for better developmental outcomes in Africa.

**Khaled Fourati**

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