



ACA2K

Country Report

JUNE 2009

**African Copyright and Access to
Knowledge (ACA2K) Project**

www.aca2k.org

KENYA

By Dr. Marisella Ouma and Dr. Ben Sihanya



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About the Authors

Dr. Marisella Ouma

Kenya Copyright Board
Nairobi, Kenya

mouma@ag.go.ke or mwarsie@justice.com

Marisella Ouma of the ACA2K Kenya team is the Executive Director of the Kenya Copyright Board and a part-time Lecturer at the Faculty of Law, University of Nairobi, where she teaches Intellectual Property Law. She has published several articles on copyright as well as presented papers on access to knowledge (A2K).

Dr. Ben Sihanya

Faculty of Law, University of Nairobi
Nairobi, Kenya

sihanya@innovativelawyering.com

Ben Sihanya of the ACA2K Kenya team is Dean of the Faculty of Law, University of Nairobi, where he teaches and carries out research on Intellectual Property Law, Education, Training and Research Law, ICT Law and Constitutionalism. He is a Director at Innovative Lawyering and Copyright Africa.

RESEARCH ASSISTANT:

Angela Waweru

Innovative Lawyering
Nairobi, Kenya

angelawaweru@gmail.com

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Executive Summary

The two main hypotheses tested by this research were: that the copyright environment in Kenya is not at present maximising access to learning materials; and that the copyright environment can be changed in order to optimise access. The copyright environment, for the purposes of the research, encompassed not only laws and policies, but also actual practices.

In Kenya, the variables of copyright protection, copyright promotion and enhancement of access to teaching and learning material tend to be discussed largely in polemical terms. On the one hand, some copyright-holders and supporters advocate for absolute protection, while on the other hand, some users or anti-copyright activists argue for no or limited copyright protection. The conflicting interests have necessitated this survey, with a view to establishing common ground on which the antagonistic standpoints converge through (the essential and intricate process of) consensus-building.

In as much as the need to protect copyright cannot be overstated, protection should not function to deny users or consumers access to works that are crucial to teaching and learning. If creativity is to be encouraged and rewarded, there must be a ready market for literary works and related educational material. Also, access to knowledge is essential for the functioning of a healthy and democratic society. Without a well-informed citizenry, enlightened public discussions on political, social, environmental or economic issues cannot take place. It is universally acknowledged that access to knowledge is fundamental to education, research and creation of the human capital upon which the development of society depends. This is especially true in the information society where economic progress depends on having a literate and educated population.

Copyright law in Kenya is governed by the Copyright Act 12 of 2001 and related laws on education, communication and archiving. It provides for exclusive rights, subject to limited exceptions and limitations. Kenya also currently has a draft Intellectual Property Policy and there are also specific government policies that enhance and facilitate access to teaching and learning materials. There are also policies to address gender disparities in access to education or information. However, the copyright law is seen to be gender-neutral. Women and girls in Kenya fare worse than men and boys in terms of learning materials access, because the social, economic, political and cultural environments favour males in terms of access to education and information.

Copyright law potentially impedes access to teaching and learning materials, particularly when exclusive rights are strictly enforced or when exceptions and limitations are not effectively utilised. However, in Kenya, enforcement of rights conferred by copyright has, in the past, not been effective; as a result, infringements largely went unpunished, especially in the education system. It is only recently that rights-holders have started to systematically enforce their rights through, for instance, collective management organisations (CMOs) and litigation.

Users of copyright-protected material, such as students, researchers, universities and libraries in Kenya, are now being asked to obtain a licence to reproduce works for educational purposes. This is due to the fact that access-enabling copyright exceptions and limitations (Sections 26-29) in the Copyright Act are very narrowly constructed, making it (in most cases) illegal to create copies of works without the authority of the copyright-holder. (Significantly, however, public libraries are allowed to reproduce copyright-protected material without obtaining permission from authors or rights-holders if it is deemed to be in the 'public interest' to do so and if it is for non-commercial purposes.)

Copyright-holders in Kenya tend to feel that the current copyright law allows access, rather than hampers access, as it protects rights-holders' rights; it thus gives rights-holders the incentive to produce material that can be used for advancing teaching and learning at various stages. Copyright-holders also argue that the existing exceptions and limitations, including those for educational use, are adequate.

Information and communication technology (ICT) has enhanced access to copyright-protected material in Kenya because ICT facilitates cheaper reproduction and dissemination, especially for students in open distance and electronic learning (ODEL) programmes in colleges and universities. The cost of the equipment, Internet connectivity and bandwidth are, however, some of the challenges faced in the transition to the digital platform. Another ICT-related challenge is that the Kenyan copyright law makes it illegal to circumvent technological protection measures (TPMs) and provides no exceptions to this provision, which in effect blocks access to certain electronic content which would otherwise have been accessible.

First, this report provides some background information about national indicators relevant to access to knowledge, access to learning materials and copyright in Kenya. Thereafter, the report carries out a doctrinal analysis as well as a qualitative analysis to test the project's aforementioned hypotheses. The analysis shows that, in Kenya, a difference exists between the provisions of the copyright law and the practice 'on the ground'. The law severely restricts access to copyright-protected materials, while the practice on the ground is one where users are securing a certain degree of access via activities such as unauthorised photocopying – activities which go against the law but are not punished because the law is generally not enforced.

As a result, few copyright-related cases have been determined by the courts in Kenya, especially those that would have a bearing on access to teaching and learning materials by educational institutions, libraries and other users.

Finally, the report concludes that increased enforcement of copyright is likely to have an impact on access to learning material in Kenya, especially where it strictly limits photocopying of copyright-protected material. However, paradoxically, it is also concluded that copyright, as applied today in Kenya, has little impact on teaching and learning materials, because it is not being fully enforced.

1. Background

Kenya, a country located in the Eastern part of Africa, has a population of approximately 34 million people. It is the 47th largest country in the world in terms of size, at 582,646 sq km. It borders Ethiopia, Sudan, Somalia, Tanzania, Uganda and the Indian Ocean. The capital city is Nairobi. Kenya is divided into eight administrative regions known as provinces. The country has 42 ethnic communities. English is the official language and Kiswahili is the national language. The adult literacy level is 73.6 per cent.¹ The country's economy relies largely on agriculture and tourism. Kenya obtained independence from British rule in 1963 and has a multi-party political system.

Remarkably, one of the goals of the government at the time of independence was to eradicate illiteracy in the country.² The government recognised education as a basic tool to address ignorance and secure human resource development³ and it took several steps to provide education to all Kenyans. As a result, both primary and secondary education in Kenya are now free in public schools.⁴ Universal Primary Education (UPE) was introduced in January 2003, while Universal Secondary Education (USE) was introduced in January 2008.⁵ The provision of free basic education saw a sharp increase in public primary school enrolment.⁶ There was a gross enrolment rate of 99 per cent and a total of 1.2 million children were absorbed into schools.⁷ This influx heightened the demand for teaching and learning materials in schools.

The high number of students enrolled at these lower levels will cause more students to seek tertiary/ university education.⁸ There are 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) conditions and the government's policy changes, students were required to meet their own costs, including tuition, accommodation and the purchase of books and other learning materials.⁹ To ensure that university education was not completely out of 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 only available 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 the loan is earmarked for the student's personal expenses, including books, while the tuition loan is directed to universities for the purchase of academic materials.¹⁰ 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 students therefore photocopy entire books, book chapters and other reading materials.

¹UNDP 2007/2008 *Human development report* (2008) Available at http://hdrstats.undp.org/countries/country_fact_sheets/cty_fs_KEN.html [Accessed 30 June 2009].

²Ben 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.

³Ibid.

⁴Free Primary Education refers to the waiver of tuition fees and provision of textbooks and classroom material only.

⁵Universal Primary Education (UPE) was first introduced in 1979, but had to be abandoned with the implementation of the Structural Adjustment Programmes in the 1980s.

⁶Sihanya supra note 2 at 106.

⁷Republic 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.

⁸Ibid.

⁹Ibid.

¹⁰SO Odebero et al 'Equity in the distribution of HELB loans in Kenya in relation to student characteristics: an empirical analysis' (2007) *Educational Research and Review* 2 (8), at 209-219, August 2007. Available at <http://www.academicjournals.org/ERR/PDF/pdf%202007/Aug/Odebero%20et%20al.pdf> [Accessed 26 March 2009].

The government fully subsidises primary school books and other teaching materials that are sourced/procured using the set government procurement procedures. The government has had to enact policies that facilitate access to materials, including the National Text Book Policy on Publication, Procurement and Supply of June 1998.¹¹ The government's expenditure on education is equivalent to 7 per cent of the country's GDP.¹²

Despite the challenges that the country has faced, Kenya has one of the most diverse human resource pools within the region.¹³

In order to support academic and 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 Service Board Act.¹⁴ KNLS currently runs public libraries in all major towns in Kenya as well as mobile libraries for remote areas.¹⁵ In addition, local authorities, such as the Nairobi City Council, embassies or high commissions and foundations run libraries in Kenya. There are also 'departmental libraries', which are not professionally run and rarely used. A health library, for example, which was started about 17 years ago at Pumwani Hospital, is at present non-operational. Furthermore, there are other libraries within educational institutions such as universities, colleges and schools. University libraries, in particular, have remained central to the management of scholarly communication and have been a repository of the written record and a powerful symbol of human intellectual achievement.¹⁶ However, the introduction of IMF Structural Adjustment policies in Kenya resulted in limited funding for Kenya's public universities.¹⁷

This has had an impact on the development of library and information services in universities. Among other things, public university libraries are not equipped to deal with the rising student enrolment numbers. As a result, academics, and in particular senior faculty members, in Kenya have increasingly adopted strategies other than using the university library to obtain information. These strategies include: personal contacts in the First World to obtain reports and journal articles, asking for reprints, travel outside the country, development of personal libraries, the personal purchase of key texts and personal subscription to journals. Amongst the academics at Kenya's Kenyatta University (KU) and Moi University (MU), 50 per cent and 75 per cent respectively of the academic staff reportedly never enter the library.¹⁸ With undergraduate 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.

¹¹Daniel Rotich 'Textbook policy in Kenya under a new policy on school textbook procurement' (2000) *Publishing Research Quarterly* 16, 2 June 2000.

¹²Ministry of State for Planning, National Development and Vision 2030 *Kenya vision 2030; a globally competitive and prosperous Kenya* (2007).

¹³Republic of Kenya *Transformation of higher education and training in Kenya: securing Kenya's development in the knowledge economy* (2006) Report of The Public Universities Inspection Board, Government Printer, Nairobi, Kenya.

¹⁴Chapter 225, Laws of Kenya

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

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

¹⁷Sihanya supra note 2 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.

¹⁸Joseph 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].

2. Doctrinal Analysis¹⁹

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 1920.²⁰ 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 date²¹) and later 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 new 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, audio-visual works, sound recordings, broadcasts and for connected purposes.

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

¹⁹This section is adapted from Ben 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.

²⁰Ibid. 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 YP Ghai and JPW McAuslan, *Public law and political change in Kenya* (1970) Oxford University Press, Nairobi; JB Ojwang, *Constitutional development in Kenya: institutional adaptation and social change* (1990) ACTS Press, Nairobi at 29-34; HWO Okoth-Ogendo, *Tenants of the crown* (1990) ACTS Press, Nairobi.

²¹Section 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 op cit at 19-25; Ojwang op cit at 32-33. See especially R Seidman, 'The reception of English law in colonial Anglophone Africa revisited' (1968) *East Africa Law Review* at 1.

²²Local 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 also be attributed to the lack of 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.

The discussion of the sources of Kenya's copyright law must be seen in the context of Section 3 of the Judicature Act. Accordingly, there are five sources that need to be considered:

- The Constitution,²⁴ which is the first in the list, 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),²⁵ and freedom of expression and access to information (Section 79).²⁶
- 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,²⁷ the Evidence Act,²⁸ the Appellate Jurisdiction Act,²⁹ rules of court, as well as 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.³⁰ 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: '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 was first enacted in Kenya as Section 17 of the Copyright Act of 1966, the clause having been copied from the 1911 UK Copyright Act.³¹ The marginal note to the section reads, 'Abrogation of common law rights.'

²³Indeed, the development of the Kenyan Copyright Act, Chapter 130 compares to other states: Tanzania 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 (PNDC 110). See JO Asein *The Nigerian Copyright Act with introduction and notes* (1994) Sam 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.

²⁴Constitution of Kenya Act 5 of 1969.

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

²⁶The few contexts in which constitutional doctrines have been invoked in Kenya include Richard 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 124-134. Under the doctrine of materiality, only original works, which are expressed in tangible, fixed or material form, are protectable and promotable. See B Sihanya *Constructing copyright and creativity in Kenya*.

²⁷Chapter 21 of the Laws of Kenya.

²⁸Chapter 80 of the Laws of Kenya.

²⁹Chapter 9 of the Laws of Kenya.

³⁰No case has actually addressed this 'controversy.' However, one of the author's (Sihanya's) former students, faced with a case in which Kenya's Copyright Act was not clear, called to refresh the arguments Sihanya had developed in class. In the discussion on the place of the common law, Sihanya analysed evidence of practices that indicate the matter is controversial, even if it has not been directly litigated. Indeed, limited copyright expertise in the Bar and the Bench has led to many assumptions.

³¹John 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.

³²DJ 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.

- The Judicature Act does not specifically mention international law, including treaties and conventions, as a source of law and, therefore, copyright law. 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.³² Thus, treaties 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(1)(2) 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 new Act of 1966 sought to abrogate the common law of copyright. This development may be regarded as an attempt to de-link Kenya 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 the 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 and re-defined existing definitions under the Copyright Act, partly as a result of technological changes. These amendments introduced traditional relief for copyright infringement, including judicial remedies such as injunctions and damages as well as delivery up; criminal sanctions were also reformed. After Kenya acceded to the Berne Convention in 1993, the Attorney-General exercised his rulemaking powers under Section 18 of the Copyright Act and extended the protection of the Act to literary and artistic works belonging to nationals of other Berne Member States.³³

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 1996.³⁴ It received presidential assent on 31 December 2001.

³²DJ 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.

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

³⁴The 'WIPO Internet Treaties' are the WIPO Copyright Treaty (WCT) of 1996 and the 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 study 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 into Berne under Article 21. See also Article 36 of the Berne Convention.

2.1 Statutes and Regulations

This section deals with the operative Kenyan copyright law. As mentioned, in 2001, following numerous consultations by the government with stakeholders and industry players, a new Copyright Act was passed by Parliament, and 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. Section 51 of the Act provides that copyright shall only subsist by virtue of the Copyright Act.

2.1.1 Works Protected by Copyright

Section 22(1) of the Copyright Act provides for works that are eligible for copyright protection. These are:

- literary works (including computer programmes);
- musical works;
- artistic works;
- audio-visual works;
- sound recordings;
- performances; and
- broadcasts.

2.1.2 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.³⁵

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. It is obvious that the protection of non-tangible forms of reproduction impacts access to digital teaching and learning materials.

The owner of literary, artistic, musical or audio-visual works has the exclusive right to control the reproduction, in any material form, of his 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 his works.³⁶ These exclusive rights are, however, subject to limitations and exceptions, which are discussed below.

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

³⁶Section 26(1) of the Copyright Act.

The rights-holder in a sound recording has the exclusive right to: 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.³⁷

Broadcasting organisations have the right to control the fixation, broadcast and communication to the public of the whole or part of their broadcast.³⁸

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.³⁹

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 claim authorship and the right to object to any mutilation or derogatory treatment that affects the honour or reputation of the author or performer.⁴⁰

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.

Furthermore, the Act stipulates that the term 'work' includes translations, adaptations, arrangements or other transformations of a work and public performance of the work.⁴¹

Lastly, the right of making available is not yet expressly provided for by the Act, but this is to be included in the forthcoming amendments to the law. This 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 more control of the work when it is distributed over the digital network.

³⁷Section 28 of the Copyright Act.

³⁸Section 29 of the Copyright Act.

³⁹Section 30 of the Copyright Act.

⁴⁰Compared to Article 66 of the Berne Convention on Literary and Artistic Works of 1886, Rome and Geneva, moral rights under the Copyright Act of Kenya are limited, as the Act only protects the right of paternity and integration.

⁴¹Section 2 of the Copyright Act.

2.1.3 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.⁴² In the case of audio-visual 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.⁴³ Sound recordings are protected for 50 years after the end of the year in which the recording was made.⁴⁴ Broadcasts are protected for 50 years after the end of the year in which the broadcast took place.⁴⁵ 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 minimum term of protection required by the most relevant international copyright treaties and agreements such as the Berne Convention and TRIPs.

2.1.4 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 and the interests of users, Section 26(1) of the Copyright Act provides, *inter alia*, that copyright in literary, musical, artistic works or audio-visual 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;⁴⁶
- 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;⁴⁷
- the broadcasting of a work, or reproduction of a broadcast, for educational purposes in an educational institution;⁴⁸ 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.⁴⁹

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 works to be used for instructional purposes. If enforced, this provision would have a great effect on 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 rights-holder.

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.

⁴²Section 23(2) of the Copyright Act.

⁴³*ibid.*

⁴⁴*ibid.*

⁴⁵*ibid.*

⁴⁶Section 26(1)(a) of the Copyright Act.

⁴⁷Section 26(1)(d) of the Copyright Act.

⁴⁸Section 26(1)(e) and (f) of the Copyright Act.

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

There are also no specific provisions for exceptions in relation to distance learning and e-learning.⁵⁰

Regarding the exception 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 persons with disabilities, eg, 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 may make a translation of 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.

It is important to note that 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 his 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 CMOs such as the reprographic rights organisations. Libraries and educational institutions are expected to take out licences in order to be able to reproduce copyright-protected works if the use is not covered by the exceptions and limitations. Some licences, however seek royalties and related payments for works already in the public domain or works in which copyright never subsisted in the first place.⁵¹ Other licences simply provide what is already permitted, especially through copyright exceptions and limitations, in the Act. KOPIKEN, a reprographic rights organisation, has been developing standard license templates for the relevant users.

The Copyright Act is currently 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 that is expected to be completed in 2009-10. By virtue of their academic work and work for the Kenya Copyright Board, ACA2K researchers Ben Sihanya and Marisella Ouma, the authors of this report, are already tied into this Copyright Act review process.

2.1.5 Parallel Importation

Parallel importation of any copyright work in Kenya remains under the control of the rights-holder. The law does not allow parallel importation without the authority 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 import copyright-protected works into Kenya which have been released in other countries legitimately. This, for instance, affects learning materials that are produced outside Kenya.⁵²

⁵⁰Ben Sihanya 'Intellectual property, quality assurance and ISO in Kenyan universities' (2008) *Law Society of Kenya Journal* 4(1) at 35.

⁵¹Sihanya *supra* note 19.

⁵²Section 26(1) of the Copyright Act.

2.1.6 Compulsory Licensing

There is no specific provision on compulsory licensing. However, Section 26(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 provision, it is clear that the government or public library may order the reproduction of a work in the case of the public interest being served. The Act does not define what constitutes public interest.

2.1.7 Digital Rights Management (DRM) and Technological Protection

Measures (TPMs)

Although the law nowadays recognises copyright in computer software, the law does not otherwise make specific provisions in relation to exploitation of copyright works in the digital environment. The provisions contained in the law are presumably seen to apply to the digital environment as well.⁵³ The relevant provisions include those covering communication to the public, rental and distribution of the copyright-protected works.

Having said this, Section 35(3) of the Copyright Act says copyright is infringed by anyone who:

- (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 TPMs and the legal protection of these measures, 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 (which Kenya has, however, not ratified).

⁵³Lawrence Lessig *Code and other laws of cyberspace* (1999) Basic Books, New York.

A case can be made to review the legal protection of TPMs because they jeopardise existing statutory limitations and exceptions. While the utilisation of TPMs enhances the enforcement of rights in the digital environment, this also has the potential to limit access to works that would, in the non-digital sphere, be available to users under exceptions and limitations.⁵⁴ 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.⁵⁵

However, this will only become a major issue once these exceptions and limitations accorded by the law in Kenya are expanded. At the moment the exceptions and limitations are very narrow, allowing the rights-holder to have firm control over the use of copyright-protected works. Yet, at the moment, even the narrow exceptions are further eroded by the TPMs and their legal protection.

2.1.8 Traditional Cultural Expressions (TCEs) and Others

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) of the Act. Section 49(d) provides that if one wishes to make use of TCEs for commercial purposes, then one has to seek authority from the Attorney General to do so at a fee. From a reading of the section, it is clear that the use of TCEs for educational purposes is not subject to any restrictions for as long as usage is not commercial.

Foreign works are granted the same protection as local works by extension of the provisions of the Copyright Act under Section 49 of the Act. These provisions are implemented through the Copyright Regulations of 2004/5. However, this extension of protection is restricted to copyright protected works from countries that are party to international conventions to which Kenya is a party.

Works that are created by employees of the government are deemed to be the copyright of the government.⁵⁶ They do not automatically fall into the public domain, except for statutes and judicial decisions.⁵⁷ Other works that belong to the public domain are:

- works in respect of which the terms of protection have expired;
- works in respect of which the authors have renounced their rights; and
- foreign works that do not enjoy copyright protection in Kenya.⁵⁸

Most government works are protected by copyright; yet most of them are accessible for the public over the Internet. Examples include policy documents. Some hard-copy government works protected by copyright, however, have to be purchased from the Government Printer, which publishes most official government documents.

⁵⁴Lawrence Lessig *Free culture: how big media uses technology and the law to lock down culture and control creativity* (2004) Penguin Press, New York; Margaret Jane Radin, John A Rothchild and Gregory M. Silverman *Internet commerce: emerging legal framework* (2004) Foundation Press, New York.

⁵⁵Debate in the United States led to the proposed 'Cohen Doctrine' (named after Prof. JE 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 (DMCA) should not criminalise measures that circumvent DRM or TPMs to facilitate non-copyright materials. See JE Cohen 'Some reflections on copyright management systems and laws designed to protect them'; Lawrence Lessig *The future of ideas: the fate of commons in a connected world* (2001) Random House, New York at 163-185; and Paul Goldstein *Copyright's highway: from Gutenberg to the celestial jukebox* (2003) Stanford University Press, Stanford, CA, esp. Chapter 6 'The answer to the machine is the machine.'

⁵⁶Section 31 of the Copyright Act of 2001.

⁵⁷Section 25 of the Copyright Act. Section 2, on definition of literary works.

⁵⁸Section 45 of the Copyright Act.

2.1.9 International Obligations

Kenya is party to several international treaties and conventions dealing with copyright and related rights. Most importantly, Kenya is party to:

- the Berne Convention for the Protection of Literary and Artistic Works of 1886 (Paris Act 1971); and
- the WTO TRIPs Agreement of 1994.

Kenya has not yet acceded to the WIPO Internet Treaties of 1996 (the WPPT and WCT), but has, as mentioned above, already incorporated some relevant provisions in the Copyright Act 12 of 2001.

2.1.9.1 Berne Convention of 1886 (Paris Act 1971)

Kenya is a member of the Berne Convention (Paris Act 1971) of 1886. The Copyright Act of 2001 incorporates provisions of the Berne Convention, which provide for a minimum standard of copyright protection in Berne Member States.

The Kenyan Copyright Act contains no specific provisions in relation to the Berne Appendix, however. The Berne Appendix provides for a compulsory licensing regime for translations and the reproduction of texts that are only available 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 is, arguably, that the medium of instruction in schools and other educational institutions in Kenya is English. The provisions of the Berne Appendix are only useful where the works are to be translated into a local language, ie, a language other than widely spoken languages such as English, Spanish and French.

2.1.9.2 TRIPs Agreement of 1994

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

2.1.9.3 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(1) already contains far-reaching anti-circumvention provisions, which are becoming a major barrier for accessing digitised educational material, as mentioned above.

2.1.10 Laws Outside Copyright

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

2.1.10.1 Education and Training Laws

Evidently, education laws that foster attainment of education should aim to facilitate access to knowledge. Kenya has several laws and policies that govern education and training in the country. Unfortunately, however, these laws do not have specific provisions on the development or promotion of access to knowledge or learning materials. These laws only affect access to knowledge indirectly in so far as they regulate access to education, which, by and large, reveals to individuals where, how and what knowledge to acquire. The relevant laws include, but are not limited to, the Education Act, University Act, Board of Adult Education Act and the Council of Legal Education Act.

2.1.10.2 Library and Archival Laws

A library has little meaning if it cannot impart knowledge. Libraries of all types are an essential building block in the information society and the starting point from which the citizenry has access to information, including learning materials, on a reasonably equal basis. Public libraries play a vital and unique role in assisting the independent learner. They are key deliverers of literacy from the earliest age. The legislation in Kenya that governs libraries includes: the Kenya National Library Service Board Act and the McMillan Memorial Library Act.

a. Kenya National Library Service Board Act, Chapter 225 of the Laws of Kenya

This legislation establishes the Kenya National Library Service Board, whose functions, amongst others, are to promote, establish, equip, maintain and develop libraries in Kenya as a national library service. It 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.

b. 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 in Nairobi of a reference library, a reading room and a lending library. Furthermore, it is mandated to establish, maintain and develop a circulating library for the circulation of books.

2.1.10.3 Communication Laws

The media play a very important role as a source of information, education and entertainment. The media are a mirror of the society, with a duty to inform, educate and entertain people and are sometimes regarded as accommodating the world in a single village, which is saturated with media information. The media affect peoples' perspectives, not only through television, but also through radio and newspapers and are considered particularly important these days, as they play an important role as an informative bridge between governing bodies and the general public. In the absence of the media, the general public will not know what bills and acts are passed in Parliament, nor about their positive and negative effects in society. The following acts are relevant in this context:

a. Kenya Communications Act 2 of 1998, as amended in 2008

The controversial Kenya Communications Act has been widely criticised because it generally limits access to knowledge. This Act gives the government the power to seize not only telecommunication equipment, but also to remove radio and television stations from the air at will. The law authorises the state-funded telecommunication regulator, the Communications 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 tranquility is threatened. Thus, this Act largely 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.

b. 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. It also promotes high professional standards among journalists. Despite this Act not expressly dealing with aspects of access to knowledge, its objectives of promoting freedom and independence of the media play a key role in ensuring access to knowledge. This is largely because the media play a key role in the dissemination of information.

c. Books and Newspapers Act, Chapter 111 of the Laws of Kenya

The statute 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. This legislation contains no provision on access to knowledge, dealing mainly with the regulation of books and newspapers. However, it requires authors to deposit their works with the Registrar, copies of which are sent to the National Archives and libraries.

2.1.10.4 Law Pertaining to 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 in all fields of scientific, cultural, technological and human interest may be undertaken; and to identify, protect, conserve and transmit the cultural and natural heritage of Kenya. It is quite clear from the foregoing that museums play a key role in the preservation and dissemination of knowledge. They act as repositories of natural and cultural heritage, preserving the past and enlightening society about its heritage. As institutional archives, they endeavour to document the past. This they do through acquiring and describing selected materials and providing access to these, thus acting as valuable information providers.

2.2 Judicial and Administrative Decisions

This section of the report highlights some of the major copyright court decisions taken in Kenya that are relevant to access to knowledge and learning materials. There are several copyright cases that have been decided by the Kenyan courts at the interim or final stages. 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.⁵⁹

2.2.1 *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. Safaricom operates a mobile phone network in Kenya, dispensing 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, upon oath, all infringing copies of the scratch cards. The court in this case addressed the issue of ownership of copyright and was of the opinion, as provided by the law, that the rights-holder has the exclusive right of reproduction in produced works. This underscores the legal provision that for one to use a copyright-protected work, one has to obtain the authority of the rights-holder. As Kenyan courts apply the rulings of previous cases in subsequent cases, it is arguable that the same principles would be applied in cases involving access to learning and teaching materials.

⁵⁹Most of the cases, many of which are unreported or not officially published, are reported and analysed in Ben Sihanya *Constructing copyright and creativity in Kenya: cultural politics and the political economy of transnational intellectual property* (2003) doctoral dissertation, Stanford Law School, Stanford, CA.

2.2.2 *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 Magazines* and *Go Places Restaurant Guide* by reproducing and authorising the reproduction of artistic works and text without obtaining authorisation 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.⁶⁰

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 therein 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 only be done if the course pack only contains material that was utilised in accordance with the aforementioned copyright exception, which allows two short passages of a 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.

⁶⁰Ibid.

2.2.3 *Paul Odalo Abuor v Colourprint Ltd & Text Book Centre Ltd (2002)* (unreported)⁶¹

In this case, the High Court in Nairobi issued an ex parte order restraining Colourprint Limited 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.

2.2.4 *Margaret Ogola & 3 Others v David Aduda and Another (unreported)*⁶²

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. The court refused to grant an injunction.

2.2.5 *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 Society was not the sole licensing body of copyright in all musical works in Kenya and, further, that MCSK could only enforce the rights of members who had assigned their rights to MCSK. The defendant also argued that they had continually paid Multi Choice 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.

⁶¹Ibid.

⁶²Ibid.

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 are narrowly crafted. Users usually have to 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 reprographic rights organisations (RROs). The existence of too many CMOs is detrimental to institutional practices and the ability to exploit licences. In certain circumstances, it defeats the purpose of having a one-stop centre for rights clearance if it is not clear who manages what rights.

2.2.6 Macmillan Kenya (Publishers) Ltd v Mount Kenya Sundries Ltd, Civil Case 2503 of 1995

The plaintiff brought a case against the defendant, seeking judgement 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 judgement 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 can thus not reproduce the whole or substantial parts of a work for use by students if they have not obtained a licence.

2.3 Summary of Doctrinal Analysis

The laws in Kenya in relation to protection, administration and enforcement of copyright are very clear. They grant exclusive rights to the rights-holder, subject to specific exceptions and limitations. In general, any third party who wishes to use the works has to obtain permission from the rights-holder, which would be in the form of a licence and 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;
- 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.

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; this because TPMs do not usually distinguish between uses that require authorisation and uses that fall under one of the statutory copyright exceptions and limitations.

Apart from the Copyright Act of 2001, there are several other laws that have an impact on access to teaching and learning materials in Kenya. These laws include education and training laws, library and archival laws, communication laws and laws pertaining to museums. These laws do not have specific provisions on the development or promotion of access to learning materials. As a result, these laws only indirectly affect access to knowledge. 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 the 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* where the plaintiff, an author, sued the defendant for copyright infringement of her novel, which had been included in the national secondary school curriculum as a set book. The court refused to grant the plaintiff's request for an injunction.

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 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.

3. Qualitative Analysis

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

3.1 Secondary Literature

Secondary literature gathered by the Kenyan research team provides an overview of copyright law and practice in Kenya that includes books, published scholarly articles, theses and newspaper articles. This literature 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*,⁶³ addresses book publishing in diverse works and fora, including the dependence of Kenya's book publishing industry on UK publishing houses. Chakava also 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. He states that copyright laws in Kenya and Africa are generally not administered equitably. He further argues that Africa has 'very little or nothing to sell to the outside world.'⁶⁴ 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 further 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.

He 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. 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 further states that compulsory licensing is regarded by some as a tool that can be used to protect Kenya's economic, educational and cultural interests in the context of inequitable and unbalanced international copyright doctrine and practice. Chakava, an author, leading publisher and chairman of East African Educational Publishers (EAEP), the successor to British Heinemann Educational Books, is of the opinion that compulsory licensing should be applied where foreign (especially British) publishers have declined to publish textbooks locally or to issue licenses for major textbooks.⁶⁵

⁶³Henry Chakava *Publishing in Africa: one man's perspective* (1996) East African Educational Publishers, Nairobi.

⁶⁴Ibid.

⁶⁵Chakava 'International copyright and Africa: the unequal exchange' in *Publishing in Africa* (1996) op cit at 75-94.

In *Copyright law and publishing in Kenya*,⁶⁶ 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. The author argues that the country's copyright regime has prevented the rise of indigenous publishing due to foreign competition. He states that Kenya suffers from the 'illusory reciprocity' represented in the Berne and Geneva Conventions.⁶⁷ 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*,⁶⁸ Ruth Makotsi and Lily Nyariki expound on the difficulties experienced by Kenyan publishers in marketing, promoting and distributing books. According to the authors, 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 convert their manuscripts into their own publications. The authors contend that copyright law in Kenya does not safeguard the interests of such authors.

In comparison, Chege, writing before divestment by major British publishers, argued that the government should nationalise foreign publishers to facilitate the development of the local publishing industry.⁶⁹ His arguments are based on a dichotomy between foreigners and citizens, a discourse that is now complicated by the inequity among Kenyan peoples. He does not seem to have a problem with compulsory licensing.

Several articles and chapters have been published on copyright law in Kenya in different journals and books. Ben Sihanya, in his article 'Copyright law, teaching and research in Kenya',⁷⁰ 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. 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 as the role of protecting infringers is left to the copyright owners. Sihanya further argues that the penalties provided for copyright infringement are not sufficient to control infringement. According to his research, only the University of Nairobi and Moi University offer Intellectual Property Law in Kenya as a course. He urges African governments to pursue copyright issues with similar vigour as they do 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 also briefly analyses the impact of the, then, new law on rights-holders as well as on users.⁷¹ 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.⁷² The article mirrors another article that she published earlier on copyright protection and the music industry.⁷³

⁶⁶John Chege *Copyright law and publishing in Kenya* (1976) Kenya Literature Bureau, Nairobi.

⁶⁷See the Geneva Convention 1971.

⁶⁸Ruth Makotsi and Lily Nyariki *Publishing and book trade in Kenya* (1997) East African Educational Publishers, Nairobi and Kampala.

⁶⁹Chege *supra* note 66.

⁷⁰Ben Sihanya 'Copyright law, teaching and research in Kenya' (2005) *East African Law Journal* 2.

⁷¹Marisella Ouma 'The Copyright Act 2001: a new era for copyright protection in Kenya' (2004) *UNESCO Copyright Bulletin*, July-September 2004.

⁷²Marisella Ouma 'Optimal enforcement of music copyright in Sub-Saharan Africa, reality or myth' (2006) *Journal of World Intellectual Property Law* 9 (5) 592-627.

⁷³Marisella Ouma 'Copyright protection and the music industry in Africa' (2004) *Journal of World Intellectual Property Law* 7 919-932.

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.⁷⁴ In his research, the author states 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. Some of the recommendations made by the author are 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 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. The author also analyses literary creativity in pre-colonial, colonial and post-colonial Kenya.

Another dissertation focussing on copyright is JWR Muriithi's *The impact of piracy on the gospel music industry in Kenya*.⁷⁵ According to the author, in 2002, one in three CDs sold in Kenya was pirated. Piracy in Kenya is therefore rampant and has had a significant effect on the sale of gospel musicians. The victims are the people currently employed, directly or indirectly by the music industry, that is, performers, producers, distributors and legitimate traders. Piracy undermines investment in the development of local talent and culture. The author argues that in Kenya there is limited awareness among members of the public of the negative effects of piracy. Piracy of music is a low risk activity because the penalties are minimal. Further, technological innovations have made it easier for pirates to copy music.

The MCKS, which protects the copyright of member artists, has not developed a strategy for dealing with online downloading of music. Enforcement failures, from raids to protection in the courts as well as in regard to border procedures, make it impossible for rights-holders to protect their rights in Kenya. Police, customs and other enforcement agencies are reluctant to pursue raids against copyright violators. Police officers have also not received any training on copyright. According to the author, a special crime prevention unit was established and was mandated to deal with copyright cases. However, the officers in the unit are yet to receive training. Other issues facing enforcement of copyright in Kenya are slow, expensive and long legal proceedings caused by a lack of familiarity by the judiciary regarding copyright and a general backlog of commercial cases. There is also a lack of authority on the part of the Kenya Copyright Board in prosecuting copyright cases under the Copyright Act and lax custom laws and regulations that allow for the importation of pirated music. The author noted that the Copyright Act of 2001 is a step in the right direction in curbing music copyright infringement. However, what is lacking is the infrastructure for its implementation and enforcement - as has been observed by key stakeholders in the authorship industry.

⁷⁴Ben Sihanya *Constructing copyright and creativity in Kenya: cultural politics and the political economy of transnational intellectual property* (2003) op cit.

⁷⁵JWR Muriithi *The impact of piracy on the gospel music industry in Kenya* (2007) Dissertation submitted to the University of Nairobi, School of Journalism, for the award of a Master of Arts Degree in Communication Studies (supervised by Ben Sihanya).

Nancy Karimi, the chair of the Kenya Publishers Association (KPA), presented a paper at the 2008 International Publishers Association Congress.⁷⁶ In her paper she highlighted that the majority of people in Kenya are ignorant about the existence of copyright relating to books, music and films. Despite the existence of copyright legislation, enforcement mechanisms are still weak and administrative structures do not support effective copyright protection. The high level of piracy in Kenya has become a barrier to the publishing industry in Kenya. Karimi stressed 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 argued that copyright exceptions should serve the needs of both users and creators in a fairly balanced manner. According to the author, the Kenya Copyright Act was long overdue for review in line with changes at the international level.

The idea that copyright law affects access to knowledge was captured by Marisella Ouma in a paper presented at the 3rd Annual Access to Knowledge Conference in 2008.⁷⁷ 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 for facilitating access to knowledge, hamper access to knowledge.

According to the WIPO report, *On the beat – tapping the potential of Kenyan music*, the modern musical landscape in Kenya is one of the most diverse and vibrant of all African countries.⁷⁸ However, the industry has encountered many obstacles. These include a lack of proper networking in terms of distribution, linguistic diversity (which fragments the market) and a lack of investment in production. The most serious problem facing the industry, however, is piracy and ineffective management of intellectual property rights (IPRs). Piracy results in loss of profits for many musicians and makes it difficult for them to achieve social recognition of their status as artists.

As a result of the rampant piracy in the country, as well the unwillingness of the government to deal with the problem, Kenya was specially mentioned in the International Intellectual Property Alliance Report in 2006.⁷⁹ 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 cafes using unlicensed products or providing piracy services; introducing, passing and aggressively implementing a new Counterfeit Goods Act; and, finally, combining offences in criminal charges.

⁷⁶Nancy 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.

⁷⁷Marisella Ouma 'Law, technology and access to educational material' (2008) paper presented at the 3rd Annual Access to Knowledge Conference, September 10-12, 2008, Geneva, Switzerland. Available at <http://a2k3.org/2008/09/access-to-knowledge-and-human-rights-panel/>

⁷⁸World Intellectual Property Organisation *On the beat – tapping the potential of Kenya's music industry* (2007).

⁷⁹International Intellectual Property Alliance '2006 Special 301: Kenya' issued 13 February 2006, at 467-468.

Lastly, newspaper articles mainly concentrate on the music industry or pieces that are more appealing to the media houses than learning materials. Mwenda Micheni, a journalist, wrote an article on licensing by CMOs – including KOPIKEN – that collect and distribute royalties from users such as libraries and, generally, educational institutions.⁸⁰ In his article, Mark Okuttah highlights the anti-piracy actions against cyber cafés in Kenya.⁸¹ Okuttah notes that most cyber cafés in Kenya use Microsoft software without a valid licence. 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 and counterfeiting of its products in Kenya has been widespread but discreet. A Nairobi business lady mentioned in the article attributed the use of pirated software to ignorance.⁸²

3.2 Impact Assessment Interviews

This phase of the research collected and collated the views of stakeholders from the following categories: policymaking/government/enforcement, educational communities and copyright-holders. There were, however, various challenges that the Kenyan research team faced in carrying out this field study. Some of the respondents, for example, who are experts in research, found some of the interview questions unnecessarily repetitive and vague. Also, the timeframe was very restrictive for conducting the appointment-based interviews.

Representatives of the following categories and organisations/institutions were interviewed:

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)
- The Reproduction Rights Society of Kenya (KOPIKEN)
- National Book Development Council (NBDC)

⁸⁰Mwenda wa Micheni 'Copyright board appoints team to collect royalties' (2008) *Business Daily*, Nairobi, 8 October. Available at http://www.bdafrica.com/index.php?option=com_content&task=view&id=10709&Itemid=5822 [Accessed 30 June 2009].

⁸¹Mark Okuttah 'Copyright Board takes piracy war to cyber cafes' (2007) *Business Daily*, Nairobi, 26 November 2007. Available at http://www.bdafrica.com/index.php?option=com_content&task=view&id=4522 [Accessed 30 June 2009].

⁸²Ibid.

3.2.1 Policymaking/Government/Enforcement Entities

As mentioned, the interviewees representing policymaking/government/enforcement came from the Kenya Copyright Board and the Ministry of Higher Education, Science and Technology.

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 who have specialised in copyright and related rights. One respondent was the Executive Director of the Board (and also one of the authors of this study), while the other was the head of the enforcement unit within the Board. (It 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 has an oversight role regarding education within institutions of higher learning, such as the University of Nairobi. The Ministry is responsible for formulating education policies that have an impact on access to teaching and learning material. The respondent from the Ministry 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 has to date not been carried out effectively in Kenya, but the Board believes 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 material 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. The Board is currently reviewing the law and amongst the proposed amendments is the expansion of exceptions and limitations, especially for educational and library use.

From the interviews in this policymaking/government/enforcement category, it was clear that 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. As the Board is the focal point of the creative industries, it has to take a lead in formulating copyright policy. Meanwhile, the Ministry of Basic Education and the Ministry of Higher Education, Science and Technology are the two main government organisations involved in the formulation of education policies, which are expected to cover issues relating to access to teaching and learning materials. The Directorate of Policy and Planning within the two Ministries plays a significant role in educational policy formulation. The National Text Book Policy on Publication, Procurement and Supply of June 1998 and the Gender Policy (which compels the development of gender-sensitive materials) are two of the tools regulating access to teaching and learning materials. Other policy statements are expressed in circulars at the departmental level.

The respondents in this category averred that there is no copyright policy but there is a draft Intellectual Property Policy awaiting adoption. The policy seeks to provide guidelines for optimum utilisation of 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 establishes the procedures for effective facilitation of intellectual creation, protection, commercialisation and enforcement of IPRs thereto in Kenya in the best interest of the public, the creator and the research sponsor, in order to meet the following objectives:

- improve public awareness;
- enhance dissemination of information;
- facilitate capacity building;
- promote competition and ensure fair treatment;
- promote integrity and fairness on issues of ownership, royalty and disposal;
- increase transparency and accountability of the established benefit sharing;
- empower creation, protection, exploitation and enforcement;
- increase public confidence in creation, protection and enforcement; and
- facilitate the promotion of local industry and economic development.

The Board is in the process of amending the current Copyright Act to increase the exceptions and limitations in order to allow for easier access to teaching and learning materials.

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 prevailing copyright environment and access to teaching and learning materials. The respondent noted that copyright laws and policies are the main factors that affect access to teaching and learning materials especially in institutions of higher learning. The respondent explained that the right to reproduce for teaching and learning purposes is limited under the Act. Furthermore, the respondent pointed out that there are no incentives provided for users of educational materials to use authorised works.

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: (a) wider and better-defined provisions within the Copyright Act on limitations and exceptions, (b) more efficient licensing schemes, and (c) 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 were apparently unaware of the licensing provisions in the Act. Universities even admitted to photocopying material without consideration of the amount of photocopying that might be allowed by law and providing the same 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 only be felt 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 copyright and 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.

3.2.2 Educational Communities

The educational communities were represented by interviewees from the University of Nairobi, Strathmore University and the KNLS.

The University of Nairobi is a public university that offers various degree and diploma courses; it is also a state corporation that is expected to raise its revenue from the courses offered. Strathmore University is a private university that specialises in business studies, but has recently introduced other courses. The University of Nairobi produces some of the materials used by its students and lecturers. However, students rely heavily on foreign literature, especially in specialised courses such as engineering, law and business studies, among others. Strathmore University, on the other hand, mainly uses publications from outside the university and prepares course packs for students. The research was conducted in both private and public universities in order to ensure a more diverse group of respondents, as the facilities vary. Both universities have libraries in various faculties.

The KNLS is a state corporation that offers library services to Kenya. KNLS has libraries in various parts of the country and also provides mobile libraries in remote areas that do not have permanent library facilities. The libraries provide reference materials for educational purposes as well as recreational reading materials.

The interviewees from the University of Nairobi and Strathmore University – students, lecturers and librarians – were drawn from:

- University of Nairobi College of Humanities, Social Sciences, Department of Literature
- University of Nairobi College of Biological and Physical Sciences, Chiromo Campus
- University of Nairobi School of Business
- University of Nairobi School of Law, Commercial Law Department
- University of Nairobi ICT Centre
- University of Nairobi Business School
- University of Nairobi Business School Library
- Strathmore University School of Accountancy
- Strathmore University Library Department

The respondents in this category noted that the institutions now offer teaching and learning materials in both hard and softcopies, which may be accessed both on and off campus. The universities have introduced e-learning to accommodate patrons or 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 (IP) policies, although both Nairobi and Strathmore Universities have such policies. None of the interviewees were involved in the process of formulating the policies and only heard about them on campus. The policies seek to protect and promote the interests of the respective creators, as well as the relevant universities.

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.

Respondents from the educational community 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.

3.2.3 Copyright-Holders

Rights-holders were represented by interviewees from the KPA, Mountain Top Publishers, the Jomo Kenyatta Foundation, the WAK, the NBDC and KOPIKEN.

The KPA is the umbrella organisation for book publishers in Kenya and tries to achieve the widest possible spread of printed books in Kenya and beyond.

Mountain Top Publishers is a private publishing company and a member of the KPA. As a publisher, Mountain Top Publishers interacts with educational institutions through book displays, exhibitions and other promotional efforts in order to supply these institutions with books that they publish.

The Jomo Kenyatta Foundation publishes materials targeting educational institutions such as secondary schools. The institution owns copyright in some of the materials that it publishes because it commissions the authors to write the books. As with Mountain Top Publishers, the Foundation is a member of the KPA. The Foundation's respondent was the Managing Director of the Foundation as well as Chairperson of the KPA.

The NBDC of Kenya is a non-profit organisation that was established to encourage a book-reading culture and to facilitate access to books and other reading material in Kenya. The Council seeks to further the welfare of non-fiction writers.⁸³ The Book Development Council works with the KNLS and the KPA to prepare books for schools.

Creative authors who generate reading materials locally for schools and institutions of higher education have an association known as the WAK. The Association, among other things, advocates for strong protection of the rights of its members through copyright law.

KOPIKEN is a CMO that collects and distributes royalties on behalf of its members. It licenses users such as educational institutions, photocopy shops and other users.

⁸³Chakava supra note 63.

From the interviews in this copyright-holders category, it was clear that rights-holders expect users of their material to pay for the use of their works. Consequently, KOPIKEN is currently negotiating licences with various universities and other institutions of higher learning to enable these institutions to use the works 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 decried the lenient penalties for copyright infringement and said copyright law in Kenya does not confer adequate protection to rights-holders.

Furthermore, rights-holders are of the opinion that the current copyright law is primarily designed to protect copyright-holders and that the present copyright environment is not favourable to rights-holders. This is evidenced, they say, by high levels of unauthorised use of their work. Most importantly, rights-holders interviewed stated that they feel copyright does not impede access to teaching and learning materials.

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

Lack of knowledge of copyright was clear from the absence of copyright litigation initiated by the interviewees' entities. Only one interviewee mentioned that his organisation had been involved in such litigation and this only in relation to HIV drugs – meaning that the interviewee was ostensibly confusing copyright with patent.

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 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 allowing them to photocopy in return for royalties;
- various forms of incentives – for example, awards – to encourage the creation of learning materials; and
- review of the Copyright Act to better provide for digital works.

3.3 Summary of Qualitative Analysis

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

The interviews conducted by the Kenyan research team have shown that, in the eyes of some stakeholders, copyright in Kenya, because of its narrow educational limitations and exceptions, is an impediment to access to teaching and learning materials. Meanwhile, others do not see copyright as an impediment to access to teaching and learning materials because, they say, it provides for access without infringement through exceptions and limitations as well as through licensing schemes.

Copyright infringement is considered a major problem that rights-holders have to deal with. This affects rights-holders who publish books for the local market and has an impact on creativity to a certain extent, as authors may not be motivated to produce relevant materials. Infringement can thus be seen as both an access mechanism (in the short-term) and as a force against access (in the longer-term).

Generally, however, it was observed that knowledge of copyright and its impact on teaching and learning materials is limited. In particular, several interviewees were not familiar with copyright law and what flexibilities it offers in relation to access.

It also became clear that there are other factors besides copyright that are regarded as limiting access to teaching and learning materials in Kenya, including the cost of material, a poor reading culture and attendant socioeconomic factors. It is argued that these factors are exacerbated by the limited access to ICT. 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 (even local books) for schools. This makes access to teaching and learning materials a luxury for many in Kenya.

4. Information and Communication Technology (ICT)-Specific Findings

From the interviews, it was evident that ICT has a major impact on access to teaching and learning materials, as it can enhance access. Universities employ e-learning to reach out to those who do not have direct access to teaching and learning materials and the Internet and other electronic resources are used for research and teaching.

Lecturers in both public and private universities use electronic resources such as the Internet to access electronic journals. Unfortunately, this 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 would improve access further, lowering the cost of teaching and learning materials and widening the scope - making materials accessible to more students within and outside the institutions of higher learning. However, as mentioned earlier, 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.

5. Gender-Specific Findings

The term gender can be defined or understood differently. There were those who understood gender to mean biological differences between men and women, while others defined it as the differences between men and women in terms of the social construct of roles assigned to men and women based on their sex.

To some extent, it can be said that income disparities between men and women have an impact not only on creativity, but also on access to learning materials in Kenya. However, it must be pointed out that income disparities tend to only affect access to teaching and learning materials in well-served localities. In such areas, parents are able to provide extra materials above and beyond what the relevant ministry or institution does and this means that children from such areas could have better access to educational materials.

The ratio of men to women in most public institutions was between 1:1 and 3:1. In most cases, not much attention had been given to gender disparities.

With respect to copyright, respondents felt that there were no gender issues to be addressed in framing legislation, because copyright is seen to be gender neutral. However, gender issues have been central in the formulation of education policy. For instance, admission to certain courses at the universities allows 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 overall Gender Policy, whereby authors are proscribed from entrenching gender stereotyping 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 steps have been taken 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; the Affirmative Action in Arid and Semi-Arid Regions programme to promote the welfare of the girl-child. These policies ensure enrolment, retention and the completion of studies and the proliferation of the principle of equality. In addition, these affirmative action approaches are undertaken in a manner that is in harmony with cultural sensitivity to pre-empt a clash between modernity and culture.

6. Conclusions

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 information communication technology (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. As well, 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, up until now, not been strictly enforced, allowing users a reasonable degree of access through activities such as 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 collective management organisations (CMOs), educational institutions and libraries are starting to have to obtain licences to reproduce work for educational purposes – an indication of increased rights-holder enforcement. The ongoing legal reforms provide a window for redefining statutory exceptions and limitations in favour of access to learning materials.

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