



ACA2K

Executive Policy Brief

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

www.aca2k.org

SENEGAL

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1. Introduction: the ACA2K Project and the ACA2K Research

Development can be a reality only if based on people's access to knowledge. In other words, social and economic progress largely depend on the existence of people who have access to knowledge, and who are, furthermore, skilled and able to gain maximum benefit from knowledge in the areas of technology, science, education and management. Knowledge works, or works of the mind – whatever the medium – are essential tools for information, leisure and promotion of culture, and they are essential learning materials for education, training and research.

But paradoxically, at the same time that we are seeing new techniques and technologies to disseminate learning materials, counter-measures are also being taken to control the use of this knowledge. Such measures, many of them put in place to protect copyright, have the potential to limit people's access to learning materials, and thus to knowledge.

The ACA2K research in Senegal is one of eight African ACA2K country studies looking at the relationship between copyright and access to learning materials. As with the other ACA2K country studies, the ACA2K Senegal Team followed the *ACA2K methodology guide* in conducting the research. The guide sets out two main research components for the country studies: a doctrinal review and qualitative impact assessment interviews with relevant stakeholders.

The doctrinal research in Senegal consisted of an examination of the provisions of the Senegalese copyright law and other legal instruments relevant to learning materials access. The qualitative component consisted of impact assessment interviews with Senegalese stakeholders connected to copyright and learning materials contexts.

The following people were interviewed:

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

The ACA2K project aims to understand the relationship that exists between a nation's copyright 'environment' and access to learning materials in that country. A country's copyright environment is conceptualised by ACA2K as being a function of not only the country's legal instruments but also the interpretations and practices 'on the ground' in that country in relation to the copyright legal framework. That is why both doctrinal and qualitative methodologies have been employed in the course of ACA2K data collection in the eight study countries, including Senegal.

The two main ACA2K hypotheses tested – and ultimately confirmed – by our research were that:

- the copyright environment in Senegal is at present not maximising access to learning materials; and
- the copyright environment can be changed in order to maximise access to learning materials.

The Senegal ACA2K research team is based at two public universities – the Université de Cheikh Anta Diop (UCAD) in Dakar and the Université de Bambey in Bambey. The three team members are:

- **Assane Faye:** the ACA2K Senegal team leader, Faye is a trained librarian with a degree in Library and Information Sciences and is Human Resources Manager at the Université de Bambey. Faye has served as the national expert on intellectual property for Electronic Information for Libraries (eIFL) and is a Member of the IFLA International Federation of Library Associations and Institutions (IFLA) Committee on Copyright and other Legal Matters (CLM). He has participated in several workshops on copyright in Senegal and internationally.
- **Nogaye Ndour:** a Lecturer in UCAD's Faculty of Legal Sciences, Ndour has participated in several workshops on copyright.
- **Dr. Mamadou Seye:** a Law Lecturer at the Université de Bambey. Seye is a specialist in intellectual property matters related to ICTs.

2. The Copyright Environment in Senegal

2.1 Evolution of the Law

During the colonial era in Senegal, copyright was governed by French legislation, particularly the 11 March 1957 French Copyright Law that was extended to the colonies, and by conventions signed by France, particularly the Berne Convention for the Protection of Literary and Artistic Works.

Thirteen years after its independence from France in 1960, Senegal adopted its first domestic Copyright Law, Law 73-52 of 4 December 1973, which, among other things, created a fee-based system for profit-making use of folklore in the public domain. The chief aim of this measure was to stop uncontrolled exploitation of national folklore, and to create a role for the state in managing, and collecting royalties for, profit-making uses of folklore.

The 1973 Law was amended by Law 86-05 of 24 January 1986, whose main objective was to provide stronger rights protection. The 1973 Law was then repealed and replaced by Law 2008-09 of 25 January 2008.

The 2008 Law kept many of the clauses from the 1973 Law but also made several significant changes, including:

- protecting the rights of performers and producers of copyright works (neighbouring rights);
- providing for the phasing out of the Bureau sénégalais du droit d'auteur (BSDA, the Copyright Office), which is currently the only collective society collecting royalties, and providing for the introduction of multiple collective societies;
- increasing the duration of copyright term for most works from 50 years to 70 years after the death of the author;
- broadening the scope of non-copyrighted works that require royalty payments for exploitation from folklore to any work in the public domain, and requiring royalty payments for seemingly any kind of exploitation; and
- providing strong protection for the technological protection measures (TPMs) that are used by rights-holders to control access to digital works.

2.2 Key Findings from the ACA2K Senegal Research

Through the ACA2K Senegal research, it was found that the copyright environment in Senegal is generally oriented towards creators and protection of their rights. It was found that artists, particularly musicians, were central in the push to improve protection of their rights through neighbouring rights to copyright, a push that led to the 2008 Copyright Law extending the term of protection, introducing neighbouring rights for performers and producers, and creating strict protection of TPMs. Senegal has a booming cultural sector, and thus the power of the artists' lobby is understandable, as is the state's desire to ensure that creation is encouraged and that the rights of creators are protected.

However, it was found that the state's objective of protecting creators and the copyright of creators is being pursued in a fashion that is not balanced by an appreciation of the need to ensure reasonable levels of free user access to works, particularly learning materials. Protection of creators needs to be balanced by protection of users.

The 2008 Copyright Law goes too far in the direction of protectionism in the following respects:

- The 70-year term of protection is excessive, given that the term required by the Berne Convention and the World Trade Organisation (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) is only 50 years. The longer the term of protection, the longer the period of time it takes for works to fall into the public domain;

- The provisions in the Law requiring payment of royalties for a seemingly wide range of acts of exploitation (not just exploitation for profit) of any public domain work (not just folklore) are unnecessary and are not required by international conventions;
- The scope of rental rights in the Law goes beyond TRIPs requirements, as it is not limited to certain types of work such as computer software and movies but covers all types of works;
- The Law lacks provisions for reproduction of works by libraries and archives;
- The Law lacks provisions for translation or adaptation for educational purposes;
- The Law lacks provisions for compulsory/statutory licences for educational purposes;
- Except within the Union Economique et Monétaire Ouest Africaine (UEMOA, West African Economic and Monetary Union) bloc of countries, the Law does not provide for parallel importation of works where works are being sold at higher prices in Senegal than in another country;
- The Law provides blanket protection for technological protection measures (TPMs), with no exceptions for acts such as TPM circumvention for personal private use, for teaching or for format conversion for use by the visually-impaired;
- The Law contains no specific provisions for visually-impaired people; and
- The Law contains no specific provisions for distance education or e-learning.

Meanwhile, in terms of practice, we found widespread lack of awareness of copyright law, and even where the law is understood or partially understood, there is widespread lack of adherence. For instance, university students routinely purchase photocopies of entire books which, because the reproductions are made for commercial purposes, are in violation of the copyright law. In other cases, university students have been found to engage in illegal 'page-tearing' from library books. The strongest explanations provided for student reliance on illegal commercial photocopies or page-tearing were poverty and the high prices of copyrighted materials. Other practices, such as student photocopying on a non-commercial basis of large portions of works, or entire works, for personal private use are not clearly illegal, but could be illegal if the exception for photocopying for private/personal use (in Article 40) were to be interpreted narrowly by the judiciary. In the meantime, in the absence of judicial interpretation of Article 40, the rights of users to photocopy for personal/private use remain unclear.

Our interviews also revealed that infringing activities in relation to copyright are not at present curtailed to any great extent by the authorities, due to lack of expertise in the judiciary and lack of respect for the notion of intellectual property among many Senegalese. However, it seems clear that if and when prosecutions for copyright violation are more aggressively pursued – and that is one of the goals of the 2008 Law – some of the existing learning materials access channels (both illegal and legal) will likely be narrowed or closed.

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

The Internet could, in the years to come, become an important means of knowledge access, particularly for the higher education sector. But very few Senegalese currently have an Internet connection at home, mainly due to cost. The Université de Cheikh Anta Diop (UCAD) in Dakar, through its EBAD unit, is making progress in offering distance education via ICTs, an important initiative given that UCAD has 70 000 students and, as the largest university in Francophone Africa, faces a shortage of lecture rooms. But successful implementation of ICT-based distance education/e-learning requires specific copyright exceptions and, as mentioned above, such exceptions are not present in the 2008 Law.

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

3. Recommendations

3.1 Legal Recommendations

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

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

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

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

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

In addition, the 2008 Law's extension of the copyright term from 50 years to 70 years, and the Law's provisions for payment of royalties for exploitation of any kind of public domain work (and not just folklore), should be reconsidered.

3.2 Policy Recommendations

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

We further recommend that Senegal develop a 'positive discrimination' IP policy that addresses not just protection of the interests of rights-holders but also the needs of users. We recommend that professionals from the educational and research sectors, as well as rights-holders, be part of the process of developing this policy and re-examining the 2008 Law.

3.3 Action Points for Stakeholders

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

The Association des musiciens du Sénégal (AMS, Senegalese Association of Musicians) is a very powerful organisation whose main mission is the defence of musicians' interests. The protection of copyright represents its major lobbying action to date. The AMS needs to be made aware of the different flexibilities for educational and research purposes, so that it can be encouraged to lobby the government for some reforms to facilitate better access to knowledge for certain categories of the population (learners, disabled persons, etc).

The Ministry of Justice and the Ministry of Culture (through the Bureau sénégalais du droit d'auteur (BSDA, the Copyright Office)) are the key policymakers and they should be called upon to work with their Cabinet colleagues to provide an IP policy, and related policies, that push for maximum access to teaching and learning materials in the country.

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