



ACA2K

Executive Policy Brief

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

www.aca2k.org

SOUTH AFRICA

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1. Introduction: the ACA2K Project and the ACA2K Research

Access to knowledge generally, and to learning materials more particularly, is of crucial importance to developing nations because it is one of the keys to unlocking sustainable development. The African Copyright and Access to Knowledge (ACA2K) project is probing the relationship between national copyright environments and access to knowledge in African countries. The project is supported by Canada's IDRC and South Africa's Shuttleworth Foundation and managed by the LINK Centre at the Wits University Graduate School of Public and Development Management (P&DM) in Johannesburg. It currently has research nodes in eight African countries. These are Egypt, Ghana, Kenya, Morocco, Mozambique, Senegal, South Africa and Uganda.

In essence, the ACA2K project seeks to establish to what extent, if any, copyright is fulfilling the objective of facilitating access to knowledge in the eight study countries. It tests the two following hypotheses:

- The copyright environment does not maximise effective access to learning materials; and
- The copyright environment can be changed to maximise effective access to learning materials.

The South African research team is:

- **Tobias Schonwetter:** Postdoctoral Fellow at the University of Cape Town's Intellectual Property Research Unit; legal advisor for Chetty Law in Johannesburg; member of the Commonwealth of Learning (CoL) Copyright Expert Group; and legal lead of Creative Commons South Africa.
- **Caroline Ncube:** Lecturer at the University of Cape Town's Law Faculty and member of the UCT Intellectual Property Research Unit.
- **Pria Chetty:** an attorney and founder of technology and innovation law firm Chetty Law, Johannesburg.

In testing the project's hypotheses, the South African research team has produced a report which examines the South African copyright environment and its impact on access to learning materials. The copyright environment encompasses laws, policies and practices. The report includes a survey of relevant legislation, policies, secondary literature and reported case law. In addition, it contains the results of a qualitative analysis which included a review of relevant secondary literature in South Africa as well as impact assessment interviews with key stakeholders.

Unlike in most other study countries of the ACA2K project, access to knowledge issues in general, and the interrelation between copyright protection and access to knowledge in particular, are topics already being discussed in South Africa. However, few legal academics participate in the discussion and, as a result, in-depth analysis is lacking. This is where the ACA2K project steps in. It provides a thoroughly researched examination of the link between the copyright environment in South Africa and opportunities to access learning materials.

The ACA2K project identified the relevant government departments, copyright-holders and the educational community as the key stakeholders for the issues at hand. It became clear that some of these key stakeholders have contrasting perceptions of the impact of copyright protection on access to learning materials. Unsurprisingly, rights-holders generally argued for strict copyright protection regimes, regardless of the copyright material in question, while user groups and libraries called for less stringent copyright protection, particularly with regard to learning materials. Yet, despite the fact that rights-holder associations and user groups chiefly lobby for their own causes, the different stakeholders showed notable awareness and understanding of the conflicting interests of other stakeholders. An acrimonious debate between rights-holders and users could not be detected. Also, most stakeholders generally lamented, in one way or another, the outdated and often vague state of current South African copyright legislation. As a result, several interviewed stakeholders called for revisions to copyright legislation because it is simply not in touch with reality, especially since the advent of digital technologies. Of course, the reform proposals varied considerably from stricter protection regimes (rights-holders) to more access oriented copyright protection (user groups).

Interestingly, the educational community took a rather uncritical stance towards South Africa's copyright legislation. Their main concern was the implementation rather than the questioning of the legal framework. It therefore appears as if universities are generally caught in the middle of the discussion between copyright-holders and users of copyright protected material, because every university accommodates both rights-holders and users.

It appears from the interviews conducted with government officials that more prominence is likely to be given to access to knowledge in any future copyright policy or legislation amendment process. This is, however, not an easy task, since even the limited number of interviews conducted for this project provided ample proof of the diverse and often conflicting positions between different stakeholders. To complicate matters further, views differ even within the same stakeholder categories, particularly between different government departments and within the tertiary educational community.

On the basis of the research undertaken, the South African research team confirms the project's hypotheses by concluding that the copyright environment in South Africa does not maximise effective access to learning materials, and that it can be changed to maximise effective access to learning materials.

2. The Copyright Environment in South Africa

Research was conducted between May and October 2008 using a methodology comprising three distinct phases. The first phase was a desktop review of relevant national and international legislation, tertiary institution and state policies, and academic literature. The second was a series of interviews with various stakeholders and the third was a series of case studies addressing issues that did not emerge fully from the interviews.

Interviews were conducted with employees of the Department of Arts and Culture (DAC) and the Department of Trade and Industry (DTI) – which are two of the primary departments tasked with legislative and policymaking powers in the field of copyright law – to obtain an impression of the intended effects of the copyright environment. To ascertain the actual effects of the copyright environment, several employees of the University of Cape Town (UCT) who are responsible for copyright-related matters were interviewed. In particular, these employees were drawn from the IP and research department, the library and the educational technology section of the institution. Rights-holders' views were also sought by interviewing representatives of both the Publishers' Association of South Africa (PASA) and an association of non-fiction authors (ANFASA).

In summary, the key findings of the research are:

- There is a lack of directly relevant case law in the area of copyright, largely due to difficulties rights-holders encounter in pursuing remedies for infringement, and the complexity of copyright and evidentiary law (which makes it difficult for rights-holders to secure any evidence on which to mount litigation).
- The Copyright Act does not make use of most flexibilities contained in TRIPs and other international copyright treaties and agreements, particularly regarding the use of copyright exceptions and limitations. The Act also does not properly address the digital environment and its challenges, nor adequately provide for enhancing access to learning materials for the sensory-disabled. Further, many of the existing copyright exceptions and limitations, and especially the provisions on fair dealing, are generally considered to be too vague by both rights-holders and users.
- The Electronic Communications and Transactions Act may override the important access-enabling provisions of the Copyright Act by attaching criminal liability for some uses of a work that are allowed under the Copyright Act.
- The Electronic Communications and Transactions Act and the Free and Open Source Software Policy are notable developments to promote access to ICTs; however, they are either in conflict with, or insufficiently supported by, the Copyright Act, and thus do not enhance access to learning materials.
- The new Intellectual Property from Publicly Financed Research and Development Act also fails to provide adequately for access to learning materials.
- There are initiatives such as the Free High School Science Texts project which show willingness by some sectors of society to take effective action to improve access to learning materials in South Africa.
- Some higher education institutions have implemented various IP- and ICT-related policies in order to comply with the current legislative requirements. These policies may serve as samples for other institutions which have not yet developed such policies.
- The gender dimensions in relation to copyright and access to learning materials are highly complex and under-explored.

3. Legal and Regulatory Recommendations

The South African ACA2K research team proposes the following legal and regulatory changes to maximise access to learning materials in South Africa.

3.1 Retain the Current Standard Term of Copyright Protection

South Africa has, for the most part, implemented the standard protection terms required by the Berne Convention and other relevant international treaties and agreements. Some countries, including some other ACA2K study countries, have extended the term of protection beyond international standard requirements. To preserve access to learning materials, South Africa should not extend the term of copyright protection.

3.2 Address Orphan Works

'Orphan works' are works that are still copyright-protected but for which the copyright-owner is not identifiable or locatable. Whilst the copyright-owner of an orphan work is entitled to the benefits of copyright, the fact that the owner is unknown prevents any transaction to secure the rights to use the work. The Copyright Act is silent in respect of orphan works. Our recommendation is for an amendment to the South African Copyright Act that permits use of orphan works on reasonable terms when copyright-owners cannot be identified or located to negotiate voluntary licences.

3.3 Align Promotion of Access to Learning Materials to Promotion of Access to ICTs

The government Free and Open Source Software (FOSS) Policy, if implemented successfully, may address and lower barriers to schools' and libraries' access to information and communication technologies. It is recommended that in order to fully realise the benefits of FOSS, legislative amendments promoting access to the learning materials carried via ICTs should be considered. The government will need to ensure that the FOSS Policy is compatible with the policies embedded in related legislation, such as the Copyright Act.

3.4 Provide for Promotion of Access to Knowledge for the Disabled

Currently, the South African Copyright Act does not permit the scanning, translation, adaptation or conversion of works for the sensory-disabled without permission from the copyright-holder. However, the Constitution of South Africa expressly provides for the right to education, which arguably places a duty on the state to facilitate access to learning materials required to exercise the right to education. What is needed is an amendment of the South African Copyright Act to remove barriers to access to learning materials faced by people with disabilities by, for instance, allowing the permission-free conversion of learning material into Braille or into audio format.

3.5 Address the Conflict between the Copyright Act and the ECT Act

Intellectual property experts are concerned that the Electronic Communications and Transactions (ECT) Act of 2002 may override copyright exceptions and limitations contained in the Copyright Act. This is because the ECT Act arguably prohibits the circumvention of technological protection measures, even to enable uses of copyright-protected materials that are expressly permitted under the Copyright Act (eg, fair dealing, or accessing works in the public domain). It is recommended that this conflict between the Copyright Act and the ECT Act is addressed, for instance, by declaring the copyright exceptions and limitations contained in the Copyright Act as valid defences to any claims based upon the ECT Act.

3.6 Review, Amend and Expand Copyright Exceptions and Limitations

The current set of copyright exceptions and limitations, particularly in relation to educational uses of copyright-protected materials, are vague, fragmentary and in many instances outdated. The use of modern technologies for educational purposes, for example in distance education, remains largely unconsidered. Exceptions and limitations contained in the South African Copyright Act must be reformed to, among other things, address technological advancements that could facilitate access to knowledge. Detailed and clear provisions for uses by libraries, archives, educators and learners should be introduced. One particular issue that requires further clarification is if and to what extent the creation of so-called course packs for learners is, and ought to be, allowed under South African law.

While for reasons of legal certainty it seems best to adopt a detailed list of specific copyright exceptions and limitations (for which the recently amended copyright laws of other countries such as Australia could serve as an example), it should also be considered by the South African lawmaker to introduce an additional and subordinate catch-all clause modelled after the 'fair use' doctrine in the United States. Such a provision would (in the future) prevent numerous unanticipated uses being deemed illegal simply because the law cannot keep up with the pace of technological change.

Of course, national copyright exceptions and limitations must fulfil the requirements for copyright exceptions and limitations as set out by the relevant international copyright treaties and agreements, particularly those contained in the Berne 'three-step test'.

3.7 Examine Scope of Copyright Protection to Promote Public Domain

In light of South Africa's developmental needs, especially in the educational sphere, copyright protection in South Africa should not exceed the standard scope of copyright protection required under the relevant international copyright treaties and agreements. To the extent that the current law exceeds the standards set out in those treaties and agreements, legislative change is required.

4. Policy and Practical Recommendations

Existing policies and practices should be examined to determine whether they promote access to learning materials. Additional policies and practices should be considered by all relevant stakeholders in order to facilitate access to teaching and learning materials. The following stakeholder group-specific recommendations are intended to promote access to learning materials in South Africa.

4.1 Educational Communities

For the educational communities, the existing policies and practices at the University of Cape Town may provide a starting point for developing appropriate copyright-related policies and practices. Of particular importance are UCT's blanket licence agreement with South Africa's Dramatic, Artistic and Literary Rights Organisation (DALRO) and UCT's institutional intellectual property policy. However, the UCT-DALRO blanket licence agreement may not adequately reflect authorisation-free and often remuneration-free uses for educational purposes permitted under the Copyright Act. For instance, the blanket license limits photocopying sections of books to 10 per cent whilst copyright law permits copying to a 'reasonable' extent. The meaning of 'reasonable' is debatable but it arguably exceeds 10 per cent. In addition, the Copyright Act generally allows any fair dealing with literary and musical works for the purposes of research and private study. Again, while the precise scope of fair dealing is unclear, it is obvious that such copying could very well exceed the 10 per cent threshold contained in the blanket licence. Consequently, the university licence and royalty rates could be renegotiated to sufficiently reflect the flexibilities inherent in national copyright law.

UCT, like most educational institutions in South Africa, currently does not have a copyright policy to guide its students and staff with regard to their entitlement to copying works for educational purposes beyond what is covered by the blanket licence agreement. UCT's institutional intellectual property policy does not address this issue. Arguably, UCT students and researchers are therefore photocopying much less than they are entitled to because they are unsure of the legal implications. It is thus recommended that a policy on what can be lawfully copied be drafted in simple and succinct terms, and that it be effectively communicated to the university's educational community.

4.2 Government

The South African government's FOSS Policy has positive implications for access to knowledge. By endorsing open source software and open standards, the intention of FOSS is to lower barriers for accessing information and communication technologies. Unfortunately, no policies exist for areas other than open source software and open standards. The South African ACA2K research team recommends that more far-reaching legislative guidelines on copyright and access to learning materials be adopted, with the aim to enable rather than hamper access. Such guidelines should be jointly drafted by the relevant government departments, ie, the DTI, DoE and DAC, in consultation with representatives from the educational community and rights-holders, to ensure a comprehensive and holistic approach. Every future piece of legislation with implications for education in South Africa should then be drafted under consideration of these copyright guidelines. It may be useful also to address potential gender dimensions of copyright and access to learning materials in the guidelines proposed; but before doing so, the relationship between gender dynamics on the one hand and copyright and access to knowledge on the other needs to be investigated more carefully. More generally, there seems to be room for improvement towards facilitating a broader range of participation in copyright policymaking in South Africa.

4.3 Copyright-holders

Copyright-holders collectively, through fora such as PASA and ANFASA, would be well-advised to formulate policies, or update their current policies, with regard to enhancing access to copyright-protected materials for learners in South Africa. The South African research team is well aware that many copyright-holders, especially publishers, have a business to run – which makes it impossible to give away their material for free. As far as education in South Africa is concerned, however, this factor alone does not unburden copyright-holders from a responsibility towards society as a whole to enable access to the greatest extent possible rather than constantly trying to achieve stricter copyright-protection regimes. Even from a business perspective, it appears counterproductive to impede the development of a reading culture which in the long run will heighten the demand for their works. Moreover, before pushing for stronger and longer copyright protection, copyright-holders should consider that laws that are too removed from the needs and beliefs of the majority are often ignored and difficult to enforce. Eventually, such laws often become ineffective. Thus, even from a copyright-holders perspective, a more lenient protection model is preferable since such a model is more likely to increase enforceability and respect in order to sustain the system in the long run. Particular attention should be paid to the needs of learners who face additional barriers to access to learning materials such as the sensory-disabled. Better access to copyright-protected works for these groups could be achieved, for instance, by voluntarily permitting reproduction into Braille, audio or electronic format.

5. Action Points for Stakeholders: the Way Forward

South African ACA2K research has demonstrated that there is a correlation between a country's copyright environment on the one hand and access to learning materials in that country on the other. The current copyright environment in South Africa does not maximise effective access to learning materials, and should be changed to do so. The copyright law and policy environment in South Africa has been highly contested recently, with two attempts at copyright law reform meeting with significant opposition and being subsequently abandoned. The status of copyright law reform is currently uncertain but the South African Department of Trade and Industry (DTI) has said it is embarking on a five-year copyright reform process. The South African ACA2K research team's findings and recommendations suggest the following action points for stakeholders:

Educational institutions, government departments and copyright-holders should:

- Participate in ACA2K's 2009 National Policy Dialogue Seminars;
- Facilitate internal/inter-departmental workshops on copyright and access to learning materials in order to raise awareness of the potentially hampering effect of the current copyright environment on access to learning materials; and
- Establish a copyright task team.

In addition:

Educational institutions should:

- Review existing institutional policies, including blanket licence agreements with DALRO, to ensure that these policies sufficiently reflect a fair balance between the interests of both copyright-holders and users of copyright-protected materials;
- Draft sound institutional guidelines for teachers and learners that clearly outline the extent to which authorisation-free copying is permitted under South African copyright law; and
- Provide substantiated input to the relevant government departments, particularly the DTI, during the ongoing Copyright Act amendment process, which expresses the needs and concerns of the educational community.

Relevant government departments should:

- Draft departmental policies to ensure that they sufficiently reflect a fair balance between the interests of both copyright-holders and users of copyright-protected materials;
- Consult with relevant stakeholders from the educational community and copyright-holders during the ongoing Copyright Act amendment process; and
- Analyse recently amended copyright legislation from other jurisdictions, such as Australia, during the ongoing Copyright Act amendment process.

Copyright-holders should:

- Review existing policies, including blanket licence agreements with educational institutions, to ensure that these policies sufficiently reflect a balance between the interests of both copyright-holders and users of copyright-protected materials; and
- Provide substantiated input to the relevant government departments, particularly the DTI, during the ongoing Copyright Act amendment process – input which expresses the needs and concerns of copyright-holders.

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