

Chapter 10

Summary and conclusions

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

10.1 Introduction

As the preceding chapters of this book have demonstrated, copyright law alone does not constitute a national copyright environment. Legislation is only part of a system that includes regulations, policies, cases and judicial attitudes and more importantly, copyright-related practices, including perceptions and interpretations of these practices. The preceding chapters show the richness and complexity of the qualitative data that can emerge from studying systems of law and practice in a holistic way. The purpose of this final chapter is to look at the doctrinal and qualitative findings and the interconnections between these findings across the eight countries. The goal is to summarise findings, draw general conclusions, highlight lessons learned and point toward possible ways to build African copyright environments that better support education through access to learning materials and dissemination of knowledge.¹

10.2 Doctrinal research findings

Legal analysis in the eight study countries attempted to understand the nature and scope of copyright protection for learning materials and the extent to which policymakers in the study countries are cognisant of access-enabling flexibilities and have acted upon them. In this context, colonial influences on national law — and copyright law in particular — can be very significant when examining the scope and nature of copyright protection as well as the use of access-enabling flexibilities. A distinction is generally drawn between the common law tradition and the civil law system. The former generally reflects a utilitarian view of copyright, while the latter is generally rooted in authors' natural rights. The ACA2K study countries reflect both systems, sometimes combined.

1 The authors acknowledge Andrew Rens for his feedback during the development of the conclusions represented in this chapter.

Historical and contemporary international dimensions of copyright protection are also of great importance. International copyright treaties and agreements contain, on the one hand, binding minimum standards for copyright protection in member states. On the other, they leave significant leeway to national lawmakers to implement those minimum standards.

The most important multilateral copyright treaties and agreements are the Berne Convention for the Protection of Literary and Artistic Works of 1886 (Berne Convention) administered by the World Intellectual Property Organisation (WIPO) and the World Trade Organisation's (WTO's) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) of 1994. Today, most countries, including all ACA2K study countries, are members of the WTO. They must, therefore, adhere to TRIPs, which, among other things, incorporates important aspects of the Berne Convention (with the notable exception of Article *6bis* regarding moral rights). As a result, members of the WTO have to abide by these elements of the Berne Convention even if they are not party to the Berne Convention itself. Other international treaties and agreements that need to be considered include the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) of 1996, which are together commonly referred to as the 'WIPO Internet Treaties'. In addition, national intellectual property regimes may be affected by bilateral or regional free trade agreements (FTAs).

Research confirmed that all eight countries studied afford copyright protection that complies with and in many cases exceeds, the standards reflected in the applicable international treaties and agreements, including the Berne Convention and TRIPs. This is in spite of the fact that three of the study countries, Mozambique, Senegal and Uganda, are least-developed countries (LDCs)² which have longer grace periods to comply with, let alone exceed, TRIPs obligations.

10.2.1 Copyright scope

One example of national copyright protection exceeding international requirements in study countries is in relation to the scope of moral rights protection. Though the Berne Convention establishes some standards in this regard, TRIPs does not require countries to protect moral rights. Yet, even study countries that are not bound by the Berne Convention, such as Uganda and Mozambique, do protect moral rights of attribution (the right to claim authorship) and integrity (protection against unauthorised modification) and in Egypt moral rights also concern disclosure (the right to decide if and when to publish the work). Copyright protection for

2 WTO 'Least-developed countries.' Available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm [Accessed 20 December 2009].

authors in these African countries, therefore, appears to exceed that required by the relevant international instruments and that given in some other countries, notably the United States. It seems evident that strong protection is not merely an attempt to fulfil international obligations. There are likely local or regional forces that have contributed to protective legal frameworks in some of the ACA2K study countries, reflecting the fluid environments in which copyright in Africa is legislated and implemented.

Strong protection for authors' moral rights in Africa can help to alter the power imbalance that sometimes exists between creators and intermediaries, such as publishers, that often acquire ownership of authors' (economic) copyrights. This is especially true where moral rights cannot be waived or assigned. At the same time, however, this protection must be weighed against the possibility that an additional layer of rights might add to impediments facing prospective users of protected materials, especially if—as is sometimes the case with moral rights—such rights are granted in perpetuity. For instance, the right of attribution is unlikely to have any negative effects on access to learning materials. The right of integrity, while seemingly in the interests of authors, could potentially inhibit criticism, thus restricting the circulation of knowledge around the work. Similarly, the right of disclosure, without safeguards, could potentially lead to unreasonable barriers to accessing some works. Fortunately, few if any users of learning materials disrespect authors' moral rights of integrity and attribution, which are consistent with standard scholarly norms around, for example, plagiarism. Not surprisingly, therefore, flexibilities in some study countries that permit the use of protected materials in educational contexts often require proper citation or attribution as a precondition for immunity from liability.

Another finding in relation to the scope of copyright protection is that the copyright laws of most of the eight study countries contain express provisions for the protection of cultural expressions and folklore. South Africa, like many countries outside of Africa, does not yet have provisions protecting traditional knowledge, though it soon may. In some of the study countries, such as Ghana and Morocco, there is perpetual copyright protection for cultural expressions and in several cases this strong protection was established through outside technical assistance promoting model laws. In theory, such protection can help to preserve traditional knowledge and prevent its misappropriation. The trade-off, however, is that even local access to this knowledge is legally constrained by strong protection and opportunities for use of this knowledge in the country's own educational system are potentially stifled. This is the case in Ghana where ownership of folkloric resources is vested in the state and a 'folklore tax' may be levied for certain uses when appropriated by locals and foreigners alike.

Many of the study countries' laws are seemingly contradictory on the matter of government works and the public domain. The public domain in some study countries is not open to free and unfettered use by everyone, as it is normally understood in countries outside of Africa. Uganda's law, for example, on the one hand excludes 'public benefit works' from eligibility for copyright protection while on the other hand assigns trusteeship of such works with the government in a manner that connotes ownership. Similarly, in Senegal and Egypt, permissions and royalties are required from anyone generating profit from public domain works, which could potentially include tuition-charging educational institutions. In Egypt, permission and royalties are even required for 'professional' use of public domain work, which is difficult to interpret. In Senegal, the net is seemingly cast even wider, with any 'exploitation' of a public domain work potentially requiring permission and payment of royalties.³

Because Senegalese and Egyptian copyright laws require permissions and royalties for uses of the public domain access to and innovation based upon the public domain materials in these two countries is potentially stifled. Moreover, most of the study countries give the state control over folkloric works that should otherwise be in the public domain, and in some cases impose fees for exploitation of folklore. Such control over use of what should be public domain folkloric resources has been deemed necessary in order to control exploitation of national cultural resources. In fact, Senegal's system of fee payment to the state for potentially any 'exploitation' of any public domain work (folklore or otherwise), as introduced in its new 2008 Law, evolved out of a narrower provision in the previous 1973 Law, which had required permission and payment for profit-making uses only and only for uses of folklore.⁴

10.2.2 Copyright term

International agreements set the standard duration of copyright protection for most literary and artistic works at 50 years from the author's death. After this term, works fall into the public domain. The shorter the term of protection, the sooner works become accessible as part of the public domain.

In four ACA2K study countries – Ghana, Morocco, Mozambique and Senegal — the copyright term for literary and artistic works has been extended to 70 years after the death of the author, a term 20 years longer than the international standard. In Morocco, there was a legal obligation, via its free trade agreement (FTA) with the

3 Article 157 of Senegal's Copyright Law of 2008; Article 183 of Egypt's EIPRPA of 2002.

4 Article 9 of Senegal's Copyright Law of 1973: loi n° 73-52 du 04 décembre 1973 relative au droit d'auteur.

United States, to legislate such an extended term of protection.⁵ In Senegal, the move to a 70-year term was linked to the ‘TRIPs-plus’ orientation of the 1999 revised OAPI (Organisation africaine de la propriété intellectuelle) Bangui Agreement.⁶ In Ghana and Mozambique, the origins of the move towards a longer term of protection are more difficult to detect, though foreign technical assistance clearly plays a role.

10.2.3 *Copyright limitations and exceptions*

Statutory limitations and exceptions are among the most important tools for national lawmakers to achieve balanced copyright systems that suit the specific needs of their respective countries.

The relevant international copyright treaties and agreements such as the Berne Convention and TRIPs impose three requirements for national limitations and exceptions. According to ‘the three-step test’, limitations and exceptions must be: 1) applicable only in certain special cases; 2) not in conflict with the normal exploitation of the work; and 3) not unreasonably prejudicial to the legitimate interests of the author/rights-holder.⁷ In several study countries, some or all of these requirements are built directly into national law. Where that is the case, it is possible that legal jurisprudence interpreting the three-step test in the international context could be useful to make national laws based upon similar principles more predictable for stakeholders relying on national limitations and exceptions to enable access to learning materials.

The scope of a country’s national copyright limitations and exceptions is influenced, among other things, by the philosophical justifications underlying the country’s system of copyright protection.⁸ Generally, limitations and exceptions in civil law systems tend to be narrower than those in common law systems. Against this background, it is convenient to distinguish three main approaches to copyright limitations and exceptions in national copyright laws:

- First, some countries, especially civil law countries, follow a detailed approach and incorporate rather long lists of narrowly phrased copyright limitations and exceptions into their copyright laws.

5 Article 15.5(5) of the Morocco-United States Free Trade Agreement of 2004, which entered into force on 1 January 2006. Available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/morocco-fta/final-text> [Accessed 20 December 2009].

6 See C. Deere *The implementation game: the TRIPS Agreement and the global politics of intellectual property reform in developing countries* (2009) Oxford University Press, Oxford.

7 Berne Convention Article 9(2); TRIPs Agreement Article 13.

8 S. Ricketson *Study on limitations and exceptions of copyright and related rights in the digital environment* (2003) WIPO, Geneva. Available at http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=16805 [Accessed 20 December 2009].

- Second, some countries—most notably the United States—have chosen to introduce into their copyright laws a broad and open-ended provision, the so-called ‘fair use’ provision, which encompasses a variety of uses. Fair use provisions might also be accompanied by several more specific copyright limitations and exceptions.
- Third, there are countries, especially common law countries, which have systems somewhere between the first two just outlined. While their copyright laws contain specific copyright limitations and exceptions—such as for educational institutions, libraries and archives or quotations as examples—they also employ so-called ‘fair dealing’ provisions, which in broader terms allow the permission-free use of copyright-protected material for purposes of research, private/personal study, private/personal use, criticism and review and news reporting.

The technicalities of fair use and fair dealing should not be conflated, but the concepts are remarkably similar. Both reflect the same fundamental principle of permitting uses that are considered fair. Pragmatically, a fair use provision tends to be, in general, more flexible because it is not confined to specific purposes or to specific categories of protected works. But ultimately, whether fair use or fair dealing applies more broadly in practice depends mostly on judicial and stakeholder interpretations (or the lack thereof) in the relevant jurisdiction.

The different approaches followed by the ACA2K project’s African study countries in relation to copyright limitations and exceptions complicate a comparison: while private use of copyright-protected material, for instance, may be allowed in one country by a specific private use limitation and exception, it may be covered by a somewhat more general but not completely open-ended fair dealing provision in another. In this context, a few general observations from ACA2K study countries are worth mentioning.

First, Kenya and South Africa both use the specific term ‘fair dealing.’⁹ While the precise scope of their fair dealing provisions varies slightly, they are both very similar and the result of inherited British colonial laws. Another commonality between the Kenyan and South African cases is that researchers in both countries worry that their countries’ fair dealing provisions are potentially too vaguely crafted to be a reliable access mechanism, particularly because there are few or no domestic cases interpreting that aspect of the law.

Uganda, another former British colony, has a distinct approach. At first glance, Uganda’s Copyright Act appears to include an American-style provision by adopting

9 Section 26(1)(a) of Kenya’s Copyright Act of 2001; Section 12(1) of South Africa’s Copyright Act of 1978.

the term ‘fair use’.¹⁰ Closer analysis, however, reveals important distinctions. Uganda’s fair use provision does not contain an open-ended, illustrative list of permissible uses, but instead lays out a list of a limited number of specific activities that might be permitted if considered fair in light of a number of listed considerations. The result is a hybrid approach, somewhere between fair use and fair dealing. Similarly, in Ghana, another former British colony, the statute uses the term ‘permitted use’ to describe what is essentially a standard fair dealing system, which remains from the country’s British colonial history. The lesson is that the conventional labels of fair use and fair dealing do not capture the nuances of limitations and exceptions throughout Africa.

The following sub-sections compare limitation and exception provisions in the study countries related to specific uses or specific categories of users.

Students, teachers and educational institutions

In the ACA2K study countries, educational limitations and exceptions generally allow some use of copyright-protected materials in educational settings without licences or royalties.

In six ACA2K study countries, students and teachers could arguably use entire works for educational purposes, subject to varying notions of fairness, under certain conditions. In Kenya and Mozambique, however, the existing set of copyright exceptions and limitations does not allow entire copyrighted works to be used by students, teachers and educational institutions. This restriction in Kenya and Mozambique potentially blocks the educational use of certain types of works, such as photographs, for example.

In South Africa, Kenya, Uganda and Ghana, general fair dealing/fair use provisions encompass use for both research and study purposes, though the amount of reproduction permitted for these purposes is bound by the notion of fairness.

Egyptian copyright law contains exemptions for education, such as the right to stage non-profit performances of entire works (a provision which extends even beyond the educational context) and the reproduction of short works or short extracts from works for use in teaching.¹¹ Egyptian law also permits compulsory licensing (that is, granting of a translation and/or publishing licence for a work to an entity other than the work’s rights-holder) for the purposes of education.¹²

10 Section 15 of Uganda’s Copyright and Neighbouring Rights Act of 2006.

11 Article 171 of the Egyptian Intellectual Property Rights Protection Act (EIPRPA) of 2002.

12 Article 170 of Egypt’s EIPRPA of 2002.

Libraries and archives

Other than for preservation and replacement purposes and with the exception of Egypt and Kenya, the copying of entire works by libraries and archives is not explicitly permitted in the study countries. Moreover, in all study countries, limitations and exceptions lack clarity regarding digitisation of library and archival collections. A public lending right (PLR) system, which compensates rights-holders for the availability of their works in libraries – making it more expensive for libraries to operate – does not exist in any of the study countries.

Nevertheless, the treatment of libraries and archives in the copyright laws of several study countries is worrying. Libraries and archives are among the most important institutions for enabling access to learning materials and creating a literate and well-educated population. They are often subject to severe resource shortages and other constraints, making it hard to fulfil their mandate. Though libraries and archives do not expect to be completely free from ordinary copyright rules and in fact appreciate the need to protect authors and their publishers, some additional freedoms could be created without unduly impacting upon copyright-owners' legitimate interests.

Private or personal use

Ghana, Egypt, Mozambique, Morocco and Senegal all have copyright limitations and exceptions that are specifically phrased to cater for private or personal use of copyright-protected materials without permission of the rights-holder or payment of a royalty. In South Africa, Kenya and Uganda, private or personal uses fall under fair dealing/use provisions, making the acceptable amount of private or personal use subject to the notion of 'fairness'. In Morocco, private use is liberally defined: Moroccan law expressly exempts some activities from the scope of the private use exception and limitation and thus, implicitly, other non-specified private uses may be permitted.¹³

As part of these limitations and exceptions for private or personal use, all study countries permit some degree of private copying of non-digital works. But the extent of personal or private copying allowed in the digital realm is not explicitly covered in the study countries, thus leaving it uncertain as to whether the rules laid out for non-digital works should also apply to digital ones. (This ambiguity in the digital realm affects other exceptions and limitations too.)

13 Article 12 of Morocco's Copyright Law of 2000 as amended in 2006: dahir n° 1-00-20 du 15 février 2000 portant promulgation de la loi n° 2-00 relative aux droits d'auteur et droits voisins; and dahir n° 1-05-192 du 14 février 2006 portant promulgation de la loi n° 34-05 modifiant et complétant la loi n° 2-00 relative aux droits d'auteur et droits voisins.

Quotation

Quoting, without rights-holder authorisation, from copyright-protected works is permitted in all eight study countries. Kenya and Mozambique appear to have the most far-reaching provisions for quotations among the study countries because there are no express, statutory restrictions, other than that (in Kenya, for instance) the quotation be for criticism, review or reporting current events. In Egypt, for instance, quotations are permitted only for the purposes of criticism, discussion or information. Ghana and South Africa also impose restrictions on the types of works that can be quoted. In South Africa, the quotation exception does not apply to, among other things, 'published editions'. Both the Ghanaian and the South African statutes expressly require that the quoted work must have been made public before being quoted. Additionally, the Ghanaian, South African, Ugandan and Moroccan statutes restrict the length of quotations to what is fair and justified by the purpose.¹⁴ Quotations may also require acknowledgment of the source.

People with disabilities

Only one out of the eight study countries, Uganda, makes specific mention in its copyright law of the needs of the disabled. Ugandan copyright law stipulates that it is not an infringement of copyright when a copyright-protected work is adapted into Braille or sign language for print-disabled people for 'educational purpose',¹⁵ subject to the test of fairness implied by the country's fair use clause. No other study country seems to consider that disabled people require specific enabling copyright provisions to meet their distinct educational needs. Even Uganda's provision, which subjects permission-free development of adapted resources for disabled people to a fairness test, is potentially restrictive. The lack of accommodation for people with perceptual or other disabilities is troubling from a development perspective. The legal reality in almost all ACA2K countries is feeding the growing international attention to the needs of this segment of the population. Some form of international harmonising instrument or declaration is not out of the realm of possibilities, but whether and how that would have a concrete impact on national laws in the study countries remains to be seen.

Media

The copyright laws in all the study countries contain specific provisions in support of media usage of copyrighted material. The review of copyright-protected works by

14 Section 19 of the Ghana's Copyright Act, 2005; Section 12(3) of South Africa's Copyright Act of 1978; Article 15(1)(b) of Uganda's Copyright and Neighbouring Rights Act of 2006; Article 14 of Morocco's Copyright Law of 2000 as amended in 2006.

15 Section 15(1)(k) of Uganda's Copyright and Neighbouring Rights Act of 2006.

the media is freely permitted in all eight study countries and so is the use of excerpts of such works in news reporting. The reproduction by the media of entire political speeches and public lectures/speeches is allowed in all the study countries.

Government works and legal proceedings

Morocco, Mozambique Egypt, Senegal and South Africa place official texts of a legislative, administrative or judicial nature in the public domain. And all of those study countries, except Egypt, place official translations of such texts in the public domain. Ghana, South Africa and Mozambique ACA2K researchers reported that legal proceedings, which may or may not fall within the interpretation of what constitutes an official text of a judicial nature, are also in the public domain. In South Africa and Mozambique, government and government-funded works are not automatically available in the public domain. Kenya's copyright law puts government works into the public domain but not government-funded works created by non-government people or entities.

10.2.4 Compulsory licensing

There are other provisions in national copyright laws which are not usually classified as 'limitations and exceptions' but rather, could be termed as 'flexibilities'. Like limitations and exceptions, these flexibilities aim to encourage beneficial access to and uses of, works as long as such access and uses do not unfairly undermine the legitimate interests of rights-holders.

One such flexibility is compulsory licensing. Compulsory licensing can be used to correct market failures or anomalies. When a copyright-protected work is not being made available in a country — or it is available but not at an affordable price or in an accessible language — a compulsory licence, typically issued by the state, permits an entity other than the rights-holder to exploit certain rights in that country.

In the copyright laws of Ghana, Kenya, Mozambique, Morocco and Senegal, there are no provisions for compulsory licensing. In South Africa, the Copyright Tribunal is permitted to issue compulsory licences in instances where a rights-holder's refusal to license a copyrighted work to another party is unreasonable.¹⁶ Egypt's law expressly allows for compulsory licensing a) for the purposes of education in all forms and at all levels; b) against payment of fair compensation to the author or his successors; and c) subject to the licence passing the Berne three-step test.

Countries interested in facilitating translations of copyright-protected works into local languages other than English, French or Spanish can use the Appendix to the Berne Convention for compulsory licensing. But to do so, they must formally notify

16 Section 33 of South Africa's Copyright Act of 1978.

WIPO of their intention to avail themselves of the Appendix and must comply with numerous procedural requirements. Of the study countries, only Egypt has provided such notice, though its notification has since expired. Egypt then incorporated into domestic law provisions enabling issuance of a compulsory licence for translation of a work into Arabic, after three years from the date of first publication, if the rights-holder has not already made such a translation within those three years.¹⁷

Uganda has not formally availed itself of the Berne Appendix, but has nevertheless incorporated compulsory licensing provisions into its national law for translations and reproductions.¹⁸ Subject to several conditions, one can apply to the state for a non-exclusive licence for translation of a work into English, Swahili or a vernacular Ugandan language—for teaching, scholarship or research purposes—after one year has passed since the publication of the work.

10.2.5 Parallel importation

Parallel importation is another copyright flexibility, involving the practice of legitimately importing, usually at a lower price, copyright-protected works from one country into another without permission from the copyright-holder in the country of import. The practice has significant potential to reduce prices for and increase access to learning materials, such as textbooks. Nevertheless, Egypt is the only study country that expressly permits parallel importation of copyright-protected works from any other country.¹⁹ Senegal permits parallel importation only regionally, within the West African Economic and Monetary Union (Union économique et monétaire ouest africaine, UEMOA).²⁰ South Africa specifically allows the rights-holder to prohibit parallel importation of copyright materials.²¹

10.2.6 Digital rights management (DRM), including TPMs and RMI

Digital rights management (DRM) systems are, as the name suggests, systems for managing intellectual property rights in a digital environment. DRM systems can include one or more of the following: technological protection measures (TPMs), rights management information (RMI) or end user licensing agreements (EULAs). Provisions related to TPMs and RMI are typically introduced into a national copyright law after a country has signed the WIPO Internet Treaties, which

17 Article 148 of Egypt's EIPRPA of 2002.

18 Sections 17 and 18 of Uganda's Copyright and Neighbouring Rights Act of 2006.

19 Article 147 of Egypt's EIPRPA of 2002.

20 Article 36(2) of Senegal's Copyright Law of 2008.

21 Section 28 of South Africa's Copyright Act of 1978.

require signatories to, among other things, prohibit circumventing of TPMs and/or tampering with RMI.

National laws prohibiting circumvention of TPMs are controversial because they may jeopardise the existing copyright balance safeguarded by copyright exceptions and limitations. TPMs allow for the lock-up of copyright-protected materials, regardless of established copyright-balancing tools that strive to reconcile rights-holders' interests and public interests. This is because TPMs are unable to distinguish between infringing and non-infringing access to and uses of, a copyright-protected work. As a result, exceptions and limitations in the law (such as fair dealing exceptions or exceptions for personal, educational or library/archive use, or access to public domain works) can be undermined by technology used to lock down learning materials. TPMs are then further reinforced by anti-circumvention provisions.

All study countries except Mozambique and Uganda have enacted TPM anti-circumvention provisions. This is not surprising in Ghana and Senegal, both of which have signed and ratified the WIPO Internet Treaties and are, therefore, obliged by international law to have such provisions.²² Ghana and Senegal, however, did not make use of flexibilities within the Internet Treaties to include reasonable exceptions to the circumvention prohibitions.

South Africa has signed the WIPO Internet Treaties but not yet officially ratified or implemented them. Nevertheless, South Africa has enacted TPM anti-circumvention provisions, not in its copyright law but in its Electronic Communications and Transactions (ECT) Act 25 of 2002.²³

Morocco is in the process of ratifying the WIPO Internet Treaties, as required pursuant to its free trade agreement (FTA) with the United States. Also pursuant to that agreement, Morocco implemented anti-circumvention provisions in a considerably more precise manner than contemplated by the Treaties.²⁴ Moroccan law exempts certain non-profit entities (non-profit libraries, archives, educational institutions and public broadcasters) from the prohibitions on circumvention,²⁵ utilising the small amount of flexibility left open in the Morocco-US FTA.

In Kenya and Egypt, though neither country has ratified the WIPO Internet Treaties, strict anti-circumvention provisions, without exceptions and limitations, have been enacted.²⁶ Neither country was legally compelled to introduce these access-inhibiting provisions, but they did so anyway. This demonstrates the

22 Section 42 of Ghana's Copyright Act of 2005; Article 125 of Senegal's Copyright Law of 2008.

23 Section 86 of South Africa's Electronic Communications and Transactions Act of 2002.

24 Article 65 of Morocco's Copyright Law of 2000 as amended in 2006..

25 Article 65.1 of Morocco's Copyright Law of 2000 as amended in 2006.

26 Section 35(3) of Kenya's Copyright Act of 2001; Article 181 of Egypt's EIPRPA of 2002.

significant influence that technical assistance and implicit or explicit pressure from outside forces can have on copyright laws in Africa.

10.2.7 Judicial decisions

In most study countries, case law with respect to copyright in general and access to learning materials in particular, is sparse. Copyright litigation is uncommon. In Mozambique and Egypt, for example, there is reportedly little or no copyright case law related to learning materials. Meanwhile, research in Morocco, Ghana and Uganda suggests that alternative dispute resolution mechanisms, involving arbitration, negotiation and other out-of-court dealings, are sometimes used to settle copyright disputes. Kenya and South Africa, in contrast, have a relatively rich body of copyright-related case law. However, even in these countries, there is little case law specifically related to learning materials.

In all the study countries except South Africa, there are problems with the publishing and reporting of judicial decisions, making it difficult to draw firm conclusions about judicial interpretation of the law. The implication is that greater reliance has to be placed in these countries on statutory provisions in the abstract, without the aid of interpretative guidelines from courts.

Some of the earlier chapters in this book highlighted legal ambiguities in a negative light, characterising ambiguities as imperilling access to learning materials. However, depending on the context, such constructive ambiguities in the legal framework, caused by a lack of judicial interpretation, could in some cases facilitate access to learning materials. Informal interpretation and application of the law by institutions such as libraries and enforcement agencies have enormous relevance for access to learning materials. Access-enabling interpretations of the law could be reasonable in the absence of precedents adopting the opposite position. But it is of course also true that, given the discourse dominating the copyright environment internationally and in many countries, an ambiguity in a country's national copyright legal framework could often lead to an informal interpretation that is access-restricting rather than access-enabling. Moreover, most public-interest institutions like libraries and universities generally stay clear of activities that might bring about litigation, hence their understandably strict interpretation of the law.

Another important issue related to the lack of judicial interpretation of access-related provisions in ACA2K country copyright laws is the issue of the three-step test contained in the Berne Convention, the TRIPs Agreement and other international instruments. If and when courts in ACA2K countries do start to interpret limitations, exceptions and flexibilities, they will probably consider this test. This test could also be relevant to administrative interpretations of provisions in the law by, for instance, enforcement agencies, or by collective management organisations negotiating licensing arrangements with universities. Finally and centrally for this research, the three-step

test binds legislators considering the kinds of access-enabling amendments to national laws that are recommended in the country chapters of this book. To summarise, a country's obligations pursuant to the Berne Convention and TRIPs Agreement apply not only to its statutory provisions but also to other 'measures' including, arguably, judicial and administrative interpretations and applications of the law.

The difficulty in speculating as to whether a particular provision (or interpretation or application of the provision) passes, or does not pass, the three-step test, arises from the fact that there is considerable disagreement, even among experts in the field, as to the nature and interpretation of the three-step test. There are divergent schools of thought on whether the three-step test is access-friendly or protection-friendly. Some might argue that the three-step test, in its vagueness, allows latitude for both access-enabling and protectionist interpretations. Others might argue that the three-step test is strongly biased towards rights-holders and that no copyright limitation, exception or flexibility can survive a strict interpretation of the three-step test.

10.2.8 Relevant non-copyright laws and policies

There are laws and instruments other than copyright statutes and regulations that affect access to learning materials. The most important of these are constitutional protections for fundamental rights such as the right to education, information, freedom of expression/communication and language rights. Such constitutional provisions could potentially be used to challenge elements of a country's copyright law that conflict with constitutionally protected rights. For instance, in countries where property rights or intellectual property rights are not constitutionally entrenched, constitutional framing of education as a fundamental right could provide important interpretative guidance in determining the scope of copyright protection.

In some countries, there are non-copyright laws, regulations or policies that govern aspects of the intersection between copyright and knowledge. For instance, Uganda and South Africa have specific laws dealing with access to government-held information. South Africa also has legislation designed to encourage public institutions and universities to exploit intellectual property rights from publicly financed research.²⁷ Unfortunately, the focus of that legislation is on potential commercial gain rather than on access and consequently, the legislation fails to safeguard the public domain. For instance, it does not mandate that the outputs of publicly financed research be accessible to the public. Similarly, the much-lauded Free and Open Source Software (FOSS) Policy adopted by the South African government²⁸ promotes the use of FOSS

27 South Africa's Intellectual Property Rights from Publicly Financed Research and Development Act 51 of 2008.

28 Policy on Free and Open Source Software Use for South African Government, 2006. Department of Public Service and Administration. Available at <http://www.info.gov.za/view/DownloadFileAction?id=94490> [Accessed 20 December 2009].

in government information technology systems, but fails to set out ways to build public access to the actual content residing on such systems.

10.2.9 Conclusions from the doctrinal research

The doctrinal studies in the eight ACA2K countries have found that national laws in all the countries provide strong copyright protection and in several cases the protection exceeds international legal standards and requirements as well as levels of protection offered in many countries outside Africa.

It was found that all of the study countries, with the exception of South Africa, have made substantial changes to their copyright laws within the past 10 years and in all cases the overwhelming emphasis of the changes has been on rights-holder protection rather than on user access. The starkest example of the emphasis on rights-holder protection is the extension of the standard term of protection from 50 years to 70 years in four of the countries: Ghana, Morocco, Mozambique and Senegal.

And the copyright limitations and exceptions related to learning materials in the study countries are, in various ways, problematic. No study country takes advantage of all, or even most, of the flexibilities that exist in (and outside of) relevant international agreements such as TRIPs. Provisions to enable access in the digital environment are mostly absent from the laws of the study countries. Limitations and exceptions for students and teachers, educational institutions and libraries and archives fail to adequately address the needs of disabled persons. Distance learning and e-learning are not specifically catered for in any of the countries' copyright laws. To the extent that copyright laws in ACA2K study countries address the Internet and other ICTs, they do so primarily to restrict access to learning materials by supporting the use of TPMs and prohibiting TPM circumvention, even for non-infringing purposes. Such restrictions may deny opportunities for learning offered by digital technologies in general and ICTs in particular.

Meanwhile, because there is little or no case law interpreting copyright legislation in respect of learning materials in the study countries, there is considerable ambiguity in most countries' laws. This ambiguity could hinder or facilitate access to learning materials, depending on the context.

10.3 Qualitative research findings

10.3.1 Scholarly and other literature

An extensive literature review conducted throughout all the study countries demonstrates that there is a generally sparse (but growing) body of African scholarship addressing copyright issues. Several conclusions can be drawn from a synthesis and analysis of this literature.

Practising lawyers in the study countries are generally not active writers on copyright and/or education. Furthermore, the scholarship on copyright being produced by African scholars generally reflects African universities' primary orientation towards teaching as opposed to research. The small body of literature that does exist addresses copyright from various perspectives, including an access-oriented perspective. And more recently, there has been some significant research output generated by undergraduate and graduate students in law, information sciences, communications and other disciplines. This is an encouraging development.

There have been relatively few government-commissioned or government-authored reports on copyright and education in the study countries. One notable exception to this pattern is a 2004 study commissioned by the Ugandan Law Reform Commission (ULRC) to examine Uganda's 1964 legislation in light of changing technologies and their potential impacts.²⁹

In general, South Africa has more copyright scholarship, particularly in relation to access to knowledge, than any other study country.³⁰ In part, this can be traced to civil society interest³¹ and projects around access to learning materials. The lesson here, for those who would seek to generate greater understanding of and influence on, copyright laws, practices and policies, is that short-term research and advocacy projects can cumulatively have significant and lasting impact.

A final observation concerning published resources on copyright and education (and copyright generally) in Africa is that there is a considerable amount of information available in the form of cursory media coverage, opinion commentaries and rights-holder publicity materials. ACA2K research suggests that such publications typically lack depth of analysis and present only a partial picture by focusing on copyright protections rather than access-oriented flexibilities in copyright law. There is a distinct need, therefore, for innovative, evidence-based public and scholarly discourse that presents balanced perspectives on copyright issues.

10.3.2 Impact assessment interviews

As seen in the preceding chapters, in each study country researchers engaged a variety of key actors and stakeholders, including representatives from policymaking, government and enforcement entities, tertiary educational communities and

29 Uganda Law Reform Commission (ULRC) *Study report on copyright and neighbouring rights law* (2004) ULRC Publication 9.

30 See, for instance, A. Rens, A. Prabhala and D. Kawooya *Intellectual property, education and access to knowledge in Southern Africa* (2006) TRALAC Working Paper 13, ICTSD, UNCTAD and TRALAC. Available at <http://www.iprsonline.org/unctadictsd/docs/06%2005%2031%20tralac%20amend-ed-pdf.pdf> [Accessed 1 June 2010].

31 See, for instance, The African Commons Project (TACP), <http://www.africancommons.org/> [Accessed 20 May 2010].

copyright-holders. The interview process addressed several thematic areas and revealed the following insights into copyright and education.

Legitimacy of the law

Many, but not all, interviewees perceived copyright as one of several barriers to accessing learning materials. Most people who did not perceive copyright as a barrier to access were unfamiliar with the law and when informed about applicable rules in their country, acknowledged that their modes of access are probably illegal. These interviews revealed that learning materials access is often achieved through behaviours adopted in spite of, or in ignorance of, the law. Infringing access to learning materials enabled primarily by lack of copyright enforcement may be a viable, albeit less than ideal, bandage for the access problems facing African tertiary education systems in the short-term. But when enforcement and copyright compliance inevitably increase in the future, this unfettered mode of access will cease to be available.

Infringement conducted in order to access learning materials was found to be rampant among users within the tertiary education communities from which interviewees were drawn. Government efforts in the study countries to enhance access to learning materials—by, for instance, commissioning materials or subsidising textbook purchases—are mainly directed at primary and secondary education sectors. Learning materials at the tertiary level are often sourced internationally and are rarely subsidised by governments. These tertiary-level materials are expensive and the lack of affordability was cited across all study countries as the primary reason for large-scale (often illegal) photocopying by learners and the commercial photocopying operations serving them.

Such widespread infringing behaviour is problematic not only because it means present access channels are precarious. More broadly, the lack of compliance with the legal framework undermines the legitimacy of copyright principles and even the rule of law. As long as copyright law is enforced only selectively or not at all, citizens receive mixed messages about the importance of respecting law and the principles it embodies. At the same time, however, strict compliance with copyright is not feasible. Copyright laws on the books in the study countries lack necessary flexibilities and are so far removed from the day-to-day realities facing education systems in these countries that enforcement is practically impossible if the existing moderate levels of learning materials access are to be preserved. The resulting illegitimacy is not in anyone's interests. It facilitates extremism, which undermines movement towards a balanced, legitimate national copyright system.

Administration and enforcement

In all study countries there are government agencies tasked with aspects of copyright administration or enforcement. These agencies' duties typically consist of some

or all of the following: licensing collective societies; setting royalty tariff rates for particular activities; public engagement and raising awareness of copyright issues; and operating enforcement programmes.

Across the spectrum of interviewees working for these administrative or enforcement agencies, or interviewees working in government departments responsible for the agencies, there was a wide variety of views about the relationship between copyright and learning materials. Some interviewees recognised a need for a balanced system to ensure access while at the same time protecting the interests of rights-holders. Others saw copyright chiefly in terms of enforced protection for rights-holders.

Based on data obtained through impact assessment interviews, the agencies can be classified according to their relative institutional strength.

Study countries with relatively less strong administrative institutions are Uganda, Senegal and Mozambique. These countries' administrative or enforcement agencies have only recently been established by statutes, or operate without sufficient financial, human and other resources, or are facing increased competition and possible irrelevance due to the creation of new entities. Countries such as Kenya, Ghana and Egypt have emerging institutions that are in the midst of building strength and capacity. Institutions that administer copyright in these countries have either existed for a considerable period of time or, if they are newly established, have strong leadership and substantial government support. In South Africa and Morocco, administrative institutions can be characterised as relatively strong. They are well established, well resourced and generally influential in the national or even international copyright environment.

Classifying a country's administrative institutions in this way is a useful frame for understanding the kinds of programmes operated and the copyright perspectives promoted. Evidence suggests that the weaker the institutional framework, the more dependent the administrative agency is on external financial, technical and other kinds of support. This dependency renders weak institutions more susceptible to undue influence from particular constituencies of stakeholders. Because of information asymmetry and skewed economic incentives for participation, the supporting stakeholders have tended to represent large groups of industrial rights-holders, such as record companies or book publishers, rather than representatives of education sectors. For example, the push for greater protection and enforcement in Senegal and Uganda is led by musicians supported by the music industry. In Ghana and Mozambique, reprographic rights organisations (representing literary publishers) are especially influential.

The problem of rights-holder lobbying power is also evidenced in countries with emerging institutions, such as Egypt and with strong institutional frameworks, such as Morocco and South Africa. However, with a strong institutional framework,

it appears that processes tend to be more participatory and programming more reflective of a diversity of interests impacted by copyright policy and practice. For instance, copyright administrators in South Africa have demonstrated greater willingness to engage concerns around access to knowledge than their counterparts in some other ACA2K study countries. Whether this will eventually yield dividends for the South African education system through better access to learning materials remains to be seen, however.

There is also some evidence to suggest that stronger institutions may correlate with (though not necessarily cause) increased awareness and enforcement of copyright. Throughout all the study countries, systemic copyright infringement is widespread. But infringement appears to be least rampant in the country with the strongest institutional framework, South Africa. In every other study country, there is evidence of complete ignorance of or disregard for copyright law, in the context of photocopying entire books, for example. The reasons for such infringements are complex, but essentially reflect people's determination to pursue the most cost-effective access channels available. It can be argued that countries with stronger copyright institutional frameworks (not necessarily stronger copyright laws — an important distinction) may be better able to grapple with the daily realities facing their citizens and to calibrate copyright laws, regulations, policies and practices accordingly.

Educational institutions/libraries

Photocopying learning materials at and near tertiary educational institutions was found to be commonplace in most of the study countries. Some copying activities, such as selling photocopies of entire copyright-protected books that are still in print, are clearly illegal. Other activities, such as students or teachers copying parts of books, however, are less clearly an infringement of copyright, because in most of the study countries, what constitutes 'fair' copying is an open question due to vagueness in the law and an absence of interpretation mechanisms such as judicial decisions, regulations, government policies or licensing agreements between rights-holders and collective management organisations.

It was found that the reliance on photocopying in tertiary-level education communities was a result not just of users' inability to purchase high-cost materials, but also the poor state of resources in many university libraries. Educational institutions in Senegal (which is among the least economically developed of the study countries) face some of the most significant access challenges. For example, the law library at the Université de Cheikh Anta Diop (UCAD) in Dakar has book stacks full of photocopies rather than printed textbooks because students vandalise the originals through 'page-tearing' in order to secure access to portions of the books. Signs posted next to photocopiers at a UCAD library instruct students to photocopy rather than tear pages out of books, while at the same time informing

students that photocopying could be an infringing activity. Libraries in most other study countries are somewhat better resourced, although Senegal's university libraries are not alone in facing vandalism issues. Page-tearing from books and widespread, infringing photocopying by students or the copyshops they buy from are issues in all study countries.

Libraries in several of the study countries have taken some steps to develop institutional policies on copyright and/or access. Whether those policies are access-enabling is sometimes debatable. The libraries interviewed in Egypt, for instance, do not allow users to check any books out, meaning their entire collections are for viewing only on the library premises. The justification offered by the interviewees at these libraries was that such measures are required to prevent theft and vandalism.

Meanwhile, some well-resourced and well-intentioned institutions are not yet able to fully capitalise on access-enabling opportunities. The Bibliotheca Alexandrina (BA) in Egypt has acquired state-of-the-art technology to print books on demand, but Egyptian researchers found that the BA's print-on-demand service was, so far, not widely used. Apparently copyright negotiations with publishers were one of the factors delaying deployment. And a quirk of the Egyptian copyright law, which requires government permission and payment of a fee before copying a public domain work for professional or commercial use, may complicate BA's ability to print/distribute works for which copyright has expired. When it is able to fully capitalise on the potential of access-enabling technologies such as print-on-demand, the BA can become not only a continental but worldwide leader in this kind of materials distribution.

*Gender*³²

As outlined in the introductory chapter of this book, the ACA2K project sought to build network members' awareness and capacity to investigate gender issues in their impact assessment interviews. Achieving full gender equity is a fundamental component of development and is therefore a necessary part of any development-oriented research project. All members of the ACA2K research network attempted to engage gender issues and there were also attempts by some project members

32 The authors acknowledge the work of M. Ouma of the ACA2K Kenya research team and ACA2K Gender Consultant S. Omamo of Own & Associates in Nairobi, both of whom improved the investigation of gender in Kenya and both of whom gave inputs on the gender elements contained in the Introduction chapter of this book as well as Chapter 4 and this concluding chapter. The authors also acknowledge the inputs on ACA2K's gender findings from K. Diga and K. Fourati of the IDRC South Africa office. For Diga's reflections on ACA2K and gender, see K. Diga 'Reaction to the gender findings from Africa's access to knowledge research' (2010) GenderIT.org, 22 February. Available at <http://www.genderit.org/en/index.shtml?apc=---e--1&x=96381> [Accessed 1 March 2010].

to document the gender-related progress of the network and of research subjects, through the project's monitoring framework.³³

The ACA2K gender strategy for raising awareness among network members seems to have been largely successful. Almost all teams investigated gender as part of their research and most reported on gender-related findings. At the project monitoring level (using the outcome mapping [OM] framework described in Chapter 1), positive behaviour changes, including growth in awareness among network members of the need to interrogate gender, were documented. However, the country teams, in monitoring the outcomes of their research and initial dissemination work, were mostly unable to document significant gender-related behaviour change among the stakeholders in their national copyright environments. The difficulty in raising awareness of the possible intersections among copyright, access to learning materials and gender *outside of* the research network demonstrates the need for further work in this area using innovative, purpose-specific methodologies.

Unfortunately, because of the lack of awareness of, or prioritisation of, gender issues among the stakeholders interviewed by the country teams, gathering qualitative research data for analysis, via the impact assessment interviews, was a substantial challenge. Very little gender-related data emerged from the interviews and the data that did emerge was largely anecdotal findings. At the same time, however, the fact that very little data emerged despite substantial research efforts is in itself interesting. Researchers' inability to uncover significant data does not necessarily demonstrate that there are no linkages between copyright, access and gender. Instead, the lesson could be that there is a need for different, more appropriate research methodologies. Another possible lesson is that building issue awareness is a prerequisite to research investigating the underlying causes of the problem. The project's findings do, therefore, provide insights into potentially valuable future directions in terms of research questions and methodologies.

The strongest gender-related research data came from Uganda, South Africa and Kenya, the last of which benefited from additional resources and attention directed at follow-up research around this sub-issue. The research experiences in all three of these countries and other countries to a lesser extent, provide valuable insights into the research problem, as well as lessons for the future.

In the Ugandan study, there were anecdotal findings suggesting that men are more likely to infringe copyright than women and that plaintiffs in copyright court cases seem, anecdotally, more often to be women. As well, students interviewed at Kampala's

33 S. Earl, F. Carden and T. Smutylo *Outcome mapping: building learning and reflection into development programs* (2001) International Development Research Centre (IDRC), Ottawa. Available at http://www.idrc.ca/en/ev-9330-201-1-DO_TOPIC.html [Accessed 1 November 2009]. The authors of this chapter acknowledge the work of ACA2K Outcome Mapping Consultant Chris Morris of Results and Outcomes Consulting, Pretoria, South Africa.

Makerere University spoke of how library photocopy restrictions (aimed at copyright law compliance), when coupled with women's safety concerns at night, made learning materials access less reliable for female than for male students. It was said that female students do not typically stay at libraries at night, because of safety issues and thus the copyright restrictions on photocopying have more impact on women than men.

The anecdotal finding that plaintiffs in Ugandan copyright cases are often women raises some possible questions for future research. And the observations at the Makerere library beg the question: if the Ugandan copyright law explicitly permitted more photocopying, or the university library policies enabled more lending, or education systems and copyright limitations were more focused on enabling distance education and e-learning, could the gender bias around access to library materials be ameliorated?

The South African research also uncovered some potentially meaningful findings. For instance, it was pointed out by an interviewee that most general publishing companies in South Africa are controlled by men, but women run some of the key educational publishers. This finding would seem to warrant further investigation. For instance, might female publishers, potentially more keenly aware than men of access difficulties faced disproportionately by women (particularly black women in the South African context), be more open than male publishers to non-traditional approaches to copyright licensing, such as Creative Commons licensing?

In Kenya, interviewees spoke of educational access biases favouring men over women and pointed to the fact that the Kenyan government, in its affirmative action policies, is clearly anxious to build gender equality in the country's education systems. Thus, the question arises: how does the copyright environment in Kenya interface with the recognised links between gender and educational access? For instance, many tertiary-level texts in Kenya are published by foreign firms and there are no provisions in the Kenyan law for compulsory licensing of local editions or for parallel importing from other jurisdictions of foreign texts. If compulsory licensing or parallel importing were allowed, the result could be lower-priced books. And thus, future research could ask: to what extent does the (partially copyright-induced) absence of affordable texts impact on female learners more than male learners, given that males tend to have better access to resources than females? And to what extent is the (partially copyright-induced) absence of affordable learning materials undermining the Kenyan government's efforts to increase gender equality in education access?

In Mozambique, it was found that operators of the Eduardo Mondlane University (UEM) online distance education programme were to some degree uncertain as to the correct approaches to take regarding copyright in the materials being developed and used. It would thus seem that an investigation into the effect on UEM of the absence of distance learning and e-learning provisions in the Mozambican Copyright

Law could yield useful findings. Also, if it were found via future research that females are more likely to benefit from distance education than men in Mozambique (it was said by the Mozambique researchers that women have a greater need to remain near their homes, often remote from tertiary educational institutions), then an intersection between copyright, access and gender might be demonstrated.

A key lesson learned from the Kenyan gender-focused follow-up research process described in Chapter 4 of this book concerns the importance of adopting flexible, participative qualitative interviewing methods for research of this nature. Interviewers, moreover, should be specifically trained and experienced using the chosen methodologies. Asking interviewees to reflect on a possible intersection between copyright, learning materials access and gender is asking people to talk about something they may never have talked about before and thus an element of back-and-forth between interviewer and interviewee — a kind of participatory, action research — is required, with the interviewer drawing the interviewee out and helping the interviewee to try to identify subtle, perhaps hidden (even from the interviewee) perceptions, experiences and understandings. This kind of research work requires many specialised skills.

Other gender-related methodological insights from the project, gleaned with the assistance of an expert consultant, include:

- gender issues could be addressed separately, segregated methodologically (but not conceptually) from the other aspects of the research, while at the same time not putting the issue in a ‘gender ghetto’ within the broader research project;
- focus groups could be included within the range of participative interview methodologies employed;
- the interviewing process could be made continuous and not a one-time event, with a relationship built between interviewer and interviewee; and
- future research could be more specific, focused and clear about the gender issues being examined.

Information and communication technologies (ICTs)

All the study countries except South Africa reported that ICT infrastructure remains weak in the tertiary education sector. In South Africa ICT infrastructure is relatively strong at some universities, but at the same time there are many historically disadvantaged tertiary institutions with severe resource constraints of all kinds, including limited ICT capacity. At the University of Cape Town (UCT), which was investigated by the ACA2K South African research team, it was found that there was a robust ICT infrastructure, combined with digital resources that fully support the research needs of the academic community.

Senegal's Université de Cheikh Anta Diop was found to have a very small number of computers from which to access an intranet (not the Internet or World Wide Web) and was still relying primarily on card catalogues. Institutions such as Makerere University in Uganda, the Eduardo Mondlane University (UEM) in Mozambique and the University of Ghana Legon, have reasonable ICT infrastructure and are technologically (though perhaps not legally) able to provide their communities with access to a wide range of electronic resources.

In Ghana, sharing of electronic resources among public universities is occurring through the Consortium of Academic and Research Libraries (CARLIGH). In Mozambique, UEM's new online distance learning programme is an ambitious and fairly well-resourced ICT-based access programme, illustrating that innovative institutional use of new media is entirely possible even within a least-developed country. It was found, however, that there are still uncertainties at UEM about the copyright rules and practices that apply to such distance education initiatives.

Conclusions from the qualitative research

Qualitative impact assessment interviews confirmed that an enormous gap exists in the study countries between copyright law and practices pertaining to access to learning materials. In the typical situation, tertiary users, who may or may not be aware of copyright law, rely heavily on illegal photocopying to access books or other learning materials. In everyday practice, with respect to learning materials, vast numbers of people act outside of legal copyright structures altogether. Among all of the countries and institutions studied, only in South Africa and even there only at advantaged institutions such as UCT, can it be said from the research that tertiary students have the practical opportunity to legally obtain sufficient access to learning materials. Such findings suggest that copyright laws, regulations, policies and practices in the study countries are problematic and should be reformed.

10.4 Copyright and education in Africa: the road ahead

Empirical evidence gathered during almost three years of work by more than 30 researchers investigating copyright laws, policies and practices in eight African countries has provided a valuable opportunity to assess how copyright environments really impact access to learning materials on the continent.

Perhaps the most important revelation from this research is that copyright laws in all study countries comply with international copyright standards. In many cases, the African countries studied provide even greater protection than international laws require. Thus, the countries studied do not need advice or assistance in drafting legislation to bring levels of legal protection up to par. Simply put, Africa does not need stronger copyright laws. This in itself is a very important finding, which

urgently needs to inform African national copyright policymaking at a time when many countries — including the ACA2K study countries Kenya, Ghana and South Africa — are in the midst of revising, or planning revisions to, their copyright laws.

Throughout the continent, however, there is a lack of awareness, enforcement and exploitation of copyright. A gap exists, to varying degrees, between copyright law and on-the-ground practices in all countries studied. Empirical evidence has confirmed the intuition and impression that copyright law in Africa is widely ignored, if even known about. And many of those who are aware of the concept of copyright are apparently unable to comply with it because of their socioeconomic circumstances.

Access to learning materials in the study countries is obtained mainly through copyright infringement. When copyright enforcement begins in earnest (as research indicates it will), then, without mechanisms in place to secure non-infringing channels of access to knowledge, many learners, particularly at the tertiary level, will be in a precarious position. Entire systems of education will be vulnerable. Thus, maintaining the status quo is not a sustainable policy option. Also, representing an unreliable and unsustainable access mechanism, learners' systemic infringement of copyright in order to obtain necessary access to educational materials has a detrimental effect on the integrity of the entire copyright system. Copyright laws that cannot be followed by the vast majority of society serve only to generate resentment of their underlying principles and ultimately undermine respect for copyright and the rule of law generally.

The consequences of maintaining unrealistic copyright systems are serious. Though the ACA2K research acknowledges that there are many other barriers to access to learning materials — such as the high prices of books and student poverty — the ACA2K project has revealed that copyright is an important and under-researched barrier. The research suggests that an appropriate and sustainable copyright environment, combined with other measures to make access to materials more affordable, could be one of the key components of a holistically well-functioning tertiary education system. Though all the countries studied have other urgent public policy matters to address, from health crises to security and political or economic stability concerns, the importance of education in addressing these and related development challenges should not be understated.

For these reasons, the project's overarching recommendation is that all stakeholders throughout and beyond Africa work towards solutions that can help to bridge the gulf in the continent between national copyright laws and the prevailing practices used for accessing learning materials. There are essentially two ways to narrow this divide: modify behaviour and/or reform laws. Expanding copyright protection even further beyond international norms is almost certain to aggravate the existing compliance challenges. It is already impractical for most members of

tertiary educational communities in the ACA2K study countries to adhere to existing legal requirements; compliance with even stronger laws is clearly unattainable. Evidence from the study countries strongly suggests that the copyright environment can be improved by legal reforms that make copyright more flexible and suitable to local realities. Paradoxically, less restrictive laws could provide more effective protection. Less restrictive laws would enable entire segments of the population currently operating outside of the copyright system altogether to comply with reasonably limited, realistic rules. This could, in turn, increase awareness of and respect for, the concept of copyright, compounding in the longer term to bolster the effectiveness of the system for all stakeholders.

Research results from the study countries contain several specific examples of best practices, as well as areas for improvement, for lawmakers, rights-holders and the tertiary education sector. Probably the best place to start is with the supreme laws of the countries where access to learning materials is a concern — their constitutions. Constitutions in several of the study countries recognise a right to education, which arguably includes a right to adequate access to learning materials, as well as other important rights such as freedom of expression and freedom of access to information. The Mozambican Constitution even goes so far as to specifically mention copyright as having a role in cultural development — a provision which presumably should be interpreted as protecting both the rights of creators and the rights of users. African national copyright policymakers should be encouraged to make use of constitutional provisions as the foundations for user-friendly amendments to copyright laws. And in countries where property rights in general are constitutionally protected, care should be taken to remain aware of the crucial distinctions between physical and intellectual property.

Among the most important provisions related to access to learning materials are countries' limitations and exceptions. Uganda's provision for Braille and sign language adaptations for educational purposes is something other countries might wish to note. And Uganda's hybrid approach to development of its fairness clause is worthy of closer examination by African lawmakers. Ghana's statutory references to 'permitted use' (in some cases subject to the notion of 'fair practice') — which is applied to a broader set of uses than is the case in British-style fair dealing clauses — and the subsequent work that has been done by stakeholders in Ghana to develop interpretive practices, is a promising example of attempts by African copyright lawmakers and policymakers to be innovative and proactive.

Another area where African lawmakers could try to chart their own course is in provisions regarding TPMs. Countries that do not yet have TPM anti-circumvention provisions should resist pressure to enact protections for TPMs prematurely, when doing so may not be in the best interests of local stakeholders. And countries that do already have anti-circumvention provisions should consider whether flexibilities

exist in their TPM provisions to ensure the access to learning materials allowed by others parts of their copyright laws (for example, in copyright exceptions and limitations) and to allow the exercise of other fundamental rights and freedoms. Where such flexibilities in TPM provisions do not exist, amendments should be considered. Even in Morocco, where an FTA with the United States requires Moroccan law to prohibit circumvention of TPMs, the Moroccan legislators have managed to incorporate an exception to the TPM anti-circumvention provision for certain non-profit entities.

Parallel importation of copyright-protected goods from one country to another is also a potentially promising strategy for ensuring access to the lowest-cost learning materials available. Egypt is an example to follow in this respect, because its copyright law contains a provision permitting parallel imports from any country. And Senegal's legislation is to some extent laudable for permitting parallel imports from its seven neighbours in the eight-member UEMOA bloc of countries. In contrast, South Africa's provision explicitly outlining steps rights-holders can take to block parallel imports could pose a serious problem if used by rights-holders to block access to lower-cost learning materials from neighbouring countries.

African legislators can also show a commitment to learning materials access (and, in turn, to national educational development), by resisting pressure from local creative industry groups and certain developed world entities — pressure that is sometimes reinforced by African bodies such as the Francophone African intellectual property body OAPI — to extend the copyright term in their national laws beyond the international standard of the life of the author plus 50 years. While it is perhaps unrealistic to expect countries like Morocco, Senegal, Ghana and Mozambique to wind back the term of protection from their current length of life plus 70 years, other African countries that have not extended their term — including the ACA2K countries South Africa, Uganda, Kenya and Egypt — could work together with other developing nations to maintain the status quo. Several ACA2K study countries are influential developing world member states at WIPO, giving them a platform to promote, among other things, maintenance of the standard 50-year term of protection in African nations. Indeed, the difficulty of recalibrating copyright terms to anything shorter than what is currently granted illustrates the importance of very carefully considering the economic, social and cultural impacts of any upward extension.

Some ACA2K countries have embraced the potential of compulsory licensing, which could be an example for other study countries to consider. Egypt's provisions permitting compulsory licences for educational purposes and for certain kinds of translations and Uganda's provision for compulsory licensing of certain translations and reproductions for purposes of teaching, scholarship or research, are important

examples of how African nations can seek to realise educational/developmental goals through copyright law.

African lawmakers should also consider the potential developmental role that copyright tribunals can play. The ACA2K research in South Africa and Ghana suggested that the provision for a Copyright Tribunal in each of those two countries could potentially be central to mediation of the tension between protection for and access to, copyright-protected learning materials. In Ghana, a key intended function for the Tribunal, which has not yet been established, is intervention in disputes over royalty rates and licensing frameworks.

Development of an access-friendly blanket licence agreement between a collection society and a user body (such as a university) is an example of a practice that can be pursued by stakeholders regardless of the state of, or lack of, legislative reform. A blanket agreement seeks to standardise and systematise permissions to users, in return for standardised remuneration to rights-holders. This eliminates some uncertainty for both users and rights-holders, strikes a balance between the education rights of users and the economic rights of rights-holders and encourages compliance with and respect for the law.

At the University of Ghana, Legon, it was found that the blanket licensing systems being established potentially do not go beyond what is already allowed by the law and have little connection to the everyday realities of life on campus, where widespread photocopying of entire textbooks regularly occurs. However, the South African research found that the blanket licence agreement between the DALRO collection society and the University of Cape Town (UCT), while not perfect in terms of clarity, is reasonably well understood and complied with at UCT. Stakeholders in other African countries could benefit from scrutiny of the blanket agreements negotiated in Ghana, South Africa and elsewhere, so as to determine which, if any, elements could be relevant to development of blanket licences in their countries. It should be cautioned, however, that standard-form contracts modelled on South African (or, worse, European) precedents may not be appropriate for other countries. Context-specific solutions are needed.

As well as the provisions and practices just outlined, copyright policy stakeholders in African countries would do well to give consideration to entirely new types of provisions and practices. There are several innovative new approaches to copyright that study countries could be at the forefront of piloting. Indeed, some of the study countries would be ideal places to test new attitudes and approaches — not least because existing laws are not at present being enforced to any great extent in the study countries. In that context, being open-minded about alternative solutions could put Africa ahead of the curve in developing model copyright laws for the 21st century.

For instance, African nations could consider pioneering a system of compulsory periodic renewal of copyright, following an initial term of automatically granted copyright protection. Such a system would not go against the internationally mandated life-plus-50-years term of protection, but it would require a copyright-holder to renew copyright in a work several times during that 50-year period in order to keep the copyrights. Such a system has been proposed as a way to ensure that works that are not actively commercially exploited by their rights-holders enter the public domain much more quickly.³⁴ As well, African legislators could consider introducing provisions whereby use of ‘orphan works’ under reasonable conditions could be allowed if the copyright-holder cannot be identified for negotiation of a voluntary licence.

Another idea, which does not require any legislative changes, is for stakeholders to establish registries of public domain works in order to assist users in knowing which works they can use, adapt or copy freely without rights-holder permission. Libraries or administrative agencies could be at the cutting edge of establishing these registries, building upon their pre-existing responsibilities towards protection of local knowledge and cultural expression. Exploiting print-on-demand technology is another extremely promising area that does not require legislative intervention and where at least one institution in Africa, the BA, is poised to become a global leader.

Support for locally produced, objective policy research also has the potential to energise national copyright policymaking environments, potentially opening up space for policy narratives, positions and models that improve access to learning materials. The ACA2K network has already documented, through its project monitoring framework, what appear to be the seeds of behaviour change in national policymaking environments in countries such as Ghana and Kenya. In both of these countries, members of the local ACA2K research teams have managed to make their research findings and recommendations known within high-level policy processes.

The ACA2K research suggests that countries with more local copyright expertise have a richer policy debate and therefore, the potential for a more access-friendly copyright environment. South Africa, for instance, is home to the continent’s largest collection of copyright scholars and this is likely to have helped generate a policy environment that is, as discovered from this research, somewhat favourable to consideration of multiple viewpoints within the policymaking space. South Africa is home to several research centres and projects focusing on issues related to the intersections between intellectual property and knowledge access, including work

34 See, for instance, A. Rens and L. Lessig ‘Forever minus a day: a consideration of copyright term extension in South Africa’ (2006) 7 *Southern African Journal of Information and Communication* 22. Available at <http://link.wits.ac.za/journal/journal-07.html> [Accessed 1 April 2010].

at both UCT and the University of the Witwatersrand, two institutions connected to the ACA2K project. Egypt is also emerging as an anchor for African research in this field, with leadership from BA and American University in Cairo (AUC). AUC launched its Access to Knowledge for Development Center (A2K4D) in early 2010.³⁵

It is essential to engage multi-disciplinary teams to tackle various facets of the issue of access to learning materials. There is an important role for academics from law, economics, information sciences and other disciplines, as well as practitioners such as librarians, lawyers, politicians, administrators, judges and more. Governments throughout Africa and their national and international supporters, would do well to increase investment in local policy research and grow the epistemic community of intellectual property researchers based in Africa.

Momentum for change towards more access-friendly national copyright environments can also come from institutions that are willing to challenge the boundaries of copyright law in order to enable access in clearly reasonable but perhaps technically illegal ways. For instance, the Egypt ACA2K research found evidence of Egyptian libraries providing access to materials to disabled users, regardless of the fact that Egyptian copyright law does not specifically provide exceptions for such access. And a Moroccan library official interviewed by the ACA2K Morocco team said he would be willing to convert copyright-protected material into Braille for use by visually impaired users, in spite of the fact that the Moroccan law does not provide for permission-free adaptation of works. The Moroccan library official said he would be willing to take such a step because he did not anticipate any author objecting to adaptation of a work for the visually impaired.

Libraries and other institutions on the frontline of access provision could be given greater support to execute their mandates without fear of liability. This support could come in many different forms, from scholarly opinions to government statements to rights-holder endorsement. Judges, administrators and enforcement officials could also assist by taking account of reasonable practices in defining the boundaries of otherwise ambiguous legal concepts such as fair dealing, fair use and fair practice.

All stakeholders need to work together to continue to develop best practices within the context of the law as it presently exists in a given country, because access-enabling legal changes — as desirable as they may be — are unlikely in the immediate future in most African countries. And even if and when desired legal changes do occur, such changes alone will not change the environment. The ACA2K research

35 See AUC Access to Knowledge for Development Center (A2K4D). Available at <http://www.aucegypt.edu/academics/schools/BUS/A2K4D/Pages/Home.aspx> [Accessed 20 May 2010].

has shown that the practices and behaviour that prevail in a copyright environment are often even more important than the laws themselves. Ultimately, the ACA2K research has found that copyright laws are, at best, unreliable access-enablers, regardless of the fact that copyright law is founded on the notion of the need to balance the economic interests of rights-holders with the access rights of users.

A valuable access-building practice for Africa is the promotion and utilisation of flexible approaches to the licensing and distribution of locally produced works. The Publishing and Alternative Licensing Model of Africa (PALM Africa) project has successfully supported publishing of three open access books, under Creative Commons (CC) open licences, by Fountain Publishers, a traditional publisher in Uganda.³⁶ In Egypt, the CC flexible copyright licences are also starting to gain exposure. In South Africa, the use of these licences has been ongoing since they were 'ported' into that country in 2005. Also, South Africa is home to the pioneering Free High School Science Texts open content curriculum project that uses the GNU Free Documentation Licence for all its works.³⁷ This book itself is published by one of Africa's leading publishers, UCT Press, under a Creative Commons licence agreement. Adopting such models is not a rejection of the importance of copyright; on the contrary, open licensing is fundamentally premised on copyright protection, without which there would be no basis for a licence.

The ACA2K research has found that reforming copyright laws and practices should not be seen as a magic solution to the learning materials access problem. Multiple strategies are required and any strategy or practice that can directly reduce the cost of legal access must be tried. Educators can, for instance, offer free open access to their own research outputs through institutional repositories. And universities can form consortia to share the costs of subscriptions to electronic journals. One example of such a consortium is CARLIGH in Ghana, which was highlighted in the Ghana ACA2K research. South Africa also has a similar entity, the South African National Library and Information Consortium (SANLiC). Also, it is clear that African policymakers could increase support for local publishers, through, for instance, measures to decrease the costs of publishing inputs such as paper and printing machinery. And increased efforts can be made to promote girl-child and women's education materials access. And more resources could be invested in ICT infrastructure, training and exploitation. These are just a handful of examples of ideas which themselves are deserving of entire books.

This particular project has directed attention towards copyright's role in enabling or restricting access to learning materials. The project's principal contribution to the

36 See the PALM Africa blog at <http://blogs.uct.ac.za/blog/palm-africa> [Accessed 20 May 2010].

37 See the Free High School Science Texts website at <http://www.fhsst.org/> [Accessed 20 May 2010].

state of knowledge in this field is the rich empirical evidence generated by actually assessing the impact of copyright 'on the ground' rather than merely 'on the books'. To our knowledge, such a pan-continental, multi-disciplinary endeavour had never previously been undertaken.

Preliminary observation of the outcomes that this new evidence has contributed to at national, regional and international levels suggest that this book should be only part of the beginning, not the end, of engagement with the issues at the intersection between copyright and access to learning materials in Africa. Already, this empirical research has found its way into the high-level proceedings of WIPO committees on copyright and development issues in Geneva, as well into African fora examining intellectual property issues in the development context. Collaborative relationships have been formed between ACA2K and stakeholders on all sides of the copyright debate, including rights-holder and user groups, not to mention research centres, independent think tanks and non-governmental organisations (NGOs). The methods and findings of this project are already being taught in at least one university curriculum as a model for others to follow. National seminars have been held in every ACA2K study country, leading to meaningful engagement with lawmakers, policymakers and the stakeholders most directly impacted by tertiary educational access issues. The media have shown interest, with coverage of ACA2K finding its way into national and international outlets, including television, radio, print and online.

This project has succeeded in achieving its objectives of increasing research capacity in Africa on matters of copyright and learning materials access, refining methodological practices for this kind of research, growing the body of published evidence in this area and building researchers' awareness of the need to interrogate copyright in relation to educational development objectives and outcomes.

And perhaps most importantly, it is apparent that the team that has been involved in executing this project has cross-fertilised to create a solid and sustainable human network of people who are passionate about these issues. The mission to create a network of African researchers empowered not only to study the impact of copyright environments on access to learning materials, but also to use the evidence generated to assist copyright stakeholders to participate in evidence-based copyright policymaking aimed at increasing access to knowledge, has apparently succeeded. Some progress has thus been made towards the ultimate vision of people in Africa maximising access to knowledge by influencing positive changes in copyright environments nationally and across the continent.

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