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COPYRIGHT AND EDUCATION: LESSONS ON AFRICAN COPYRIGHT AND ACCESS TO KNOWLEDGE

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ABSTRACT: The African Copyright and Access to Knowledge (ACA2K) project is a pan-African research network of academics and researchers from law, economics and the information sciences, spanning Egypt, Ghana, Kenya, Morocco, Mozambique, Senegal, South Africa and Uganda. Research conducted by the project was designed to investigate the extent to which copyright is fulfilling its objective of facilitating access to knowledge, and learning materials in particular, in the study countries. The hypotheses tested during the course of research were that: (a) the copyright environments in study countries are not maximising access to learning materials, and (b) the copyright environments in study countries can be changed to increase access to learning materials. The hypotheses were tested through both doctrinal legal analysis and qualitative interview-based analysis of practices and perceptions among relevant stakeholders. This paper is a comparative review of some of the key findings across the eight countries.

An analysis of the legal research findings in the study countries indicates that national copyright laws in all eight ACA2K study countries provide strong protection, in many cases exceeding the terms of minimum protection demanded by international obligations. Copyright limitations and exceptions to facilitate access to learning materials are not utilised as effectively as they could be, particularly relating to the digital environment. Distance learning, the needs of disabled people, the needs of students, teachers, educational institutions, libraries and archives are inadequately addressed. To the extent that copyright laws address the Internet and other information and communication technologies (ICTs), they do so primarily in a manner that further restricts access to learning materials. In summary, national copyright frameworks in the study countries are not geared for maximal access to learning materials, and are in need of urgent attention.

An analysis of qualitative research findings, gathered from the field in stakeholder interviews, suggests that a substantial gap exists between copyright law and copyright practice in each country studied. Many users who are aware of the concept of copyright are unable or unwilling to comply with it or to work within the user rights it offers because of their socioeconomic circumstances. In everyday practice, with respect to learning materials, vast numbers of people act outside legal copyright structures altogether, engaging (knowingly or unknowingly) in infringing practices in order to gain the access they need to learning materials.

In conclusion, evidence from the ACA2K project suggests that the copyright environments in the study countries can and must be improved by reforms that will render the copyright regimes more suitable to local developing country realities. Without such reform, equitable and non-infringing access to learning materials will remain an elusive goal in these countries.

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Introduction

The African Copyright and Access to Knowledge (ACA2K) project, a pan-African research network of nearly 30 academics and researchers from law, economics and the information sciences, was launched in October 2007. In early 2008, researchers finalised a methodology to explore and analyse the intersection of copyright and learning materials in Egypt, Ghana, Kenya, Morocco, Mozambique, Senegal, South Africa and Uganda (ACA2K, 2008). The study countries represent Africa's geographic diversity, as well as its economic, linguistic, religious, cultural and legal differences. This article describes the research project, its results, and ensuing implications for copyright, education and development policies in Africa.

Underlying the ACA2K project is an incontestable fact: that education is essential to human development. Education indicators from the study countries, as below, demonstrate both the urgency of the need and the enormity of the task ahead.

Table 1: Education Rankings of ACA2K Study Countries (range 182 countries)

	UNDP Education Index Ranking (2009)
Egypt	123
South Africa	129
Morocco	130
Kenya	147
Ghana	152
Uganda	157
Senegal	166
Mozambique	172

Source: UNDP, 2009, Education Index: 171-174

The role of copyright in influencing education outcomes – by being a key determinant of access to knowledge, and access to learning materials in particular – has only begun to be studied (Rens et al, 2006; Consumers International, 2006; Chon, 2007) and applies across the educational system from primary to tertiary levels. There are convincing grounds to conceive of access to knowledge (A2K) as a right rather than as a privilege (Yu, 2007; Wong, 2008). It is on this basis that ACA2K researchers have examined national copyright environments.

Copyright law alone does not constitute a national copyright environment. Legislation is only one 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. Researchers engaged in the ACA2K project recognise the need to study systems of law and practice in a holistic way. Of course, taking a holistic view, there are many legal and practical issues affecting access to knowledge, of which copyright is merely one. Yet, copyright is especially important in the context of access to learning materials, the focus of this research.

The overarching question was: To what extent is copyright fulfilling its objective of facilitating access to knowledge in selected African study countries?

Two hypotheses were established in respect of this research question: (a) copyright environments in ACA2K study countries are not maximising access to learning materials,

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and (b) copyright environments in ACA2K study countries can be changed to increase access to learning materials.

Research undertaken to empirically test these hypotheses was classified under two frameworks: doctrinal and qualitative investigation. Doctrinal research consisted of analysis of each country's copyright laws (including related regulations, policies and case law). Qualitative research consisted of impact assessment interviews with key stakeholders in, and a social analysis of, each country's copyright environment. This paper outlines the results of a comparative analysis of research findings across the eight study countries.

Findings from research on legal doctrines

The legal analysis attempted to understand the nature and scope of copyright protection regarding learning materials, and the extent to which policy-makers in the study countries are cognisant of access-enabling flexibilities and/or have acted upon them.

In this context, the international dimension of copyright protection is 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) and the World Trade Organisation (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement) of 1994. Today most countries, including all ACA2K study countries, are members of the WTO. They must therefore adhere to the TRIPs Agreement. Among other things, TRIPs incorporates important aspects of the Berne Convention (with the notable exception of Article 6bis regarding moral rights) and 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 World Intellectual Property Organisation (WIPO) Copyright Treaty (WCT) and the 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).

Colonial influences on national law – and copyright law in particular – can also be significant when examining the scope and nature of copyright protection as well as the utilisation of access-enabling flexibilities. A distinction is generally drawn between the English common law tradition and the continental (Franco-German) civil law system. The former generally adopts a utilitarian view of copyright, while the latter is generally rooted in authors' natural rights. ACA2K study countries reflect both systems, sometimes combined.

A. Copyright scope

All eight study countries afford copyright protection that complies with, and in many cases exceeds, the standards reflected in the relevant international treaties and agreements, including the Berne Convention and TRIPs. This is in spite of the fact that three study countries, Mozambique, Senegal and Uganda, are least-developed countries (LDCs),[2] which technically need not comply with TRIPs until 2013.

2 WTO Classification of Least Developed Countries, Following UN Guidelines, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm

One example of national copyright protection exceeding international requirements concerns the issue of moral rights protection. Though the Berne Convention establishes some standards in this regard, TRIPs does not require countries to protect moral rights. Study countries such as Mozambique, Senegal, Egypt and Uganda nonetheless protect moral rights of attribution (the right to claim authorship), integrity (protection against unauthorised modification) and – in some cases – disclosure (the right to decide if and when to publish the work).

Another finding in relation to the scope of copyright protection is that the copyright laws of six of the eight study countries contain express provisions for the protection of traditional knowledge and folklore, with South Africa being the only country with no such provisions.[3] Many countries outside Africa offer no such protection.

B. 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. A shorter term of protection expedites the entry of works into the public domain and, therefore, limits the role of copyright term as a potential barrier to access to knowledge. However, in four ACA2K study countries – Morocco, Mozambique, Ghana and Senegal – the copyright term for literary and artistic works has been extended to 70 years from the death of the author (and in the case of Morocco, 70 years from the year following the year of the author's death), a term at least 20 years in excess of the international standard. Only in Morocco was there a legal obligation, via its FTA with the United States, to legislate such an extended term of protection.[4]

C. Copyright limitations and exceptions

Statutory limitations and exceptions are arguably the most important tools for national lawmakers to achieve a balanced copyright system that suits the specific needs of their respective countries. Notably, however, the relevant international copyright treaties and agreements such as the Berne Convention, TRIPs and the WCT all contain a set of requirements against which national limitations and exceptions have to be tested; this set of requirements is commonly referred to as the 'three-step test'. 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.[5] The limitations and exceptions found in the copyright laws of ACA2K study countries have never been alleged to violate the three-step test.

The scope of national copyright limitations and exceptions is influenced, among other things, by the philosophical justifications underlying a country's system of copyright protection (Ricketson, 2003). 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

3 Legislative drafting is currently in progress.

4 Morocco-United States Free Trade Agreement of 2004, Article 15.5(5), http://www.ustr.gov/trade-agreements/free-trade-agreements/morocco-fta/final-text

5 Berne Convention Article 9(2); TRIPs Article 13

countries, follow a detailed approach and incorporate rather long lists of specifically and narrowly phrased copyright limitations and exceptions into their copyright laws. 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 that encompasses a large variety of uses. Fair use provisions are usually accompanied by only a few more specific copyright limitations and exceptions. Thirdly, there are countries, especially those in the common law tradition, that have opted for a compromise. While their copyright laws contain specific copyright limitations and exceptions – for example, educational uses or quotations – they also employ so-called 'fair dealing' provisions, which in broader terms generally allow the permission-free use of copyright protected material for certain purposes, in particular for the purposes of research, (private) study, private use, criticism and review, and news reporting. The concepts of fair use and fair dealing must not be confused. Both concepts share the same fundamental idea of permitting uses which are considered fair. However, the concept of fair use is, in general, much broader than the concept of fair dealing because it is not confined to specific purposes. Furthermore, unlike fair use, some of the uses permitted under the concept of fair dealing only pertain to certain categories of protected works. Therefore, fair use and fair dealing are analogous rather than synonymous.

The different approaches followed by countries in relation to copyright limitations and exceptions complicates a comparison: while the 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 fair dealing in another country or fall under a broad fair use provision in a third country.

In this context, a few general observations from ACA2K study countries are worth mentioning. Firstly, only Kenya and South Africa specifically employ fair dealing provisions. While the precise scope of their fair dealing provisions varies slightly, ACA2K researchers in both these countries have concluded that their countries' fair dealing provisions are potentially too vaguely crafted to be a reliable access mechanism. This is particularly so because clarifying case law is rare in both countries. Secondly, at first glance Uganda's Copyright Act appears to follow the US-style fair use approach by employing the term 'fair use'. A closer look at Uganda's fair use provision reveals, however, that this country's fair use provisions should not be confused with fair use as utilised in the United States, Israel, and Singapore. Fair use in these countries entails open-ended categories of permissible uses, subject to a fairness analysis. Uganda's fair use provisions instead contain what looks like a closed list of permissible uses which are additionally subjected to a fairness test. Therefore, Uganda's fair use approach represents some sort of hybrid between the US-style fair use doctrine and the civil law-based approach of incorporating rather long lists of specifically phrased copyright limitations and exceptions. This is a noteworthy observation because, despite the widespread belief about the clear-cut differences between fair use and fair dealing, one must look beyond mere semantics. Moreover, fair use in Ugandan law is actually more restrictive than fair use in the US Copyright Act. Consequently, one should not judge a legal regime simply by the language used; it is necessary to analyse what that language implies.

Limitations and exceptions for the benefit of students, teachers and educational institutions

In the study countries, educational limitations and exceptions generally allow the use of copyright-protected materials in educational settings without the authorisation of the rights-holder or payment of a royalty fee. However, in Kenya and Mozambique entire copyrighted

works may not be utilised for educational purposes. In the other six ACA2K study countries, entire works may be used, subject to varying notions of fairness, under certain conditions. Egyptian copyright law provides for certain automatic exemptions for education, such as the right to hold non-profit performances (which extends beyond the educational context) and the reproduction of short extracts from a work/articles for use in teaching. Egyptian law requires that a compulsory licence be issued in order to use an entire copyrighted work for the purposes of education. In South Africa, Kenya and Uganda, fair dealing/fair use provisions encompass use for both research and study purposes.

Limitations and exceptions for the benefit of 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 (in general) lack clarity regarding digitisation of library and archival collections. An additional point to be noted is that the public lending right (PLR) system which exists in some jurisdictions – a system whereby rights-holders are compensated for the availability of their works in libraries, thus making it more expensive for libraries to operate – is not in evidence in any of the study countries.

Private or personal use

Ghana, Egypt, Mozambique, Morocco and Senegal all have copyright limitations and exceptions that are specifically phrased to cater for private use of copyright-protected materials without permission of the rights-holder or payment of a royalty. In South Africa, Kenya and Uganda, personal and private uses fall under fair dealing/fair use provisions. In Morocco, private use is liberally defined: Moroccan law expressly exempts some activities from the scope of the private use exception and limitation, and consequently, other personal uses not specified are permitted. As part of these limitations and exceptions for private use, all study countries permit some degree of private copying of non-digital works.

Quotations

Quoting, without rights-holder authorisation, from copyright-protected work is permitted in all eight study countries. Uganda, Kenya and Mozambique appear to have the most far-reaching provisions for quotations because there are no express, statutory restrictions. In Morocco and Egypt there are some restrictions around quotation. In Egypt, for instance, quotations are only permitted 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, both South African and Moroccan statutes restrict the length of quotations. They stipulate that quotations must be compatible with fair practice, and that the extent of the quotation must not exceed the extent justified by the purpose.

Limitations and exceptions for the benefit of disabled persons

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. Thus, no study country, with the exception of Uganda, seems to

consider that disabled persons require enabling copyright provisions to cater to their particular educational needs.

Limitations and exceptions for the benefit of media and the press

Copyright laws in all study countries contain specific provisions for media freedom. The review of copyright-protected works is, for instance, permitted in all eight study countries. So is the use of excerpts of such works in news reportage. With the exception of Senegal, the reproduction of entire political speeches and public lectures/speeches is allowed.

Government works and legal proceedings

Morocco, Egypt, Senegal and South Africa place all official texts of a legislative, administrative or judicial nature in the public domain. With the exception of Egypt, these countries furthermore place the official translations of such texts in the public domain. Legal proceedings are in the public domain in Ghana, South Africa and Mozambique.

In Ghana, 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. Ugandan law is contradictory: on the one hand, it excludes 'public benefit works' from eligibility for copyright protection; on the other hand, it assigns trusteeship of such works with the government in a manner that connotes ownership.

D. Compulsory licensing

Compulsory licensing can be a tool to correct market failures or anomalies. When copyright-protected works are not being made available, compulsory licensing may permit an entity other than the rights-holder to exploit the rights. A compulsory licence, typically issued by the state, may be justified if a work is unavailable (including in the desired form, for example, an adequate translation), or unaffordable, or has an owner who cannot be located.

In the copyright laws of Ghana, Kenya, Mozambique, Morocco and Senegal, there is no mention of compulsory licensing. In South Africa, the Copyright Tribunal is permitted to issue compulsory licences in instances where the refusal to license a copyrighted work is unreasonable. Egypt expressly allows for compulsory licensing, limited only (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 passing the Berne three-step test.

Countries interested in facilitating the translation of copyright-protected works into languages other than English, French or Spanish can utilise provisions in the Appendix to the Berne Convention (the Berne Appendix). To do so, countries must formally notify WIPO of their intention to avail themselves of the Appendix, and comply with a number of procedural requirements.

Of the ACA2K study countries, only Egypt has provided such notice to WIPO. Egypt, moreover, not only provided notice of its intention to use the Berne Appendix (a notification that has since expired), it also incorporated into domestic law provisions for statutory licensing, to enable the translation of works into Arabic after a certain period of time (three years of the date of first publication). Uganda has not formally exploited the Berne Appendix, but has nevertheless incorporated provisions into national law that mirror the allowances for translation outlined therein. In South Africa, translations pursuant to compulsory licences are permitted only for specific purposes, such as for educational use.

E. Parallel importation

Parallel importation is the practice of importing legitimately-acquired, copyright-protected works from one country into another, without the consent of the copyright-holder in the country of import, typically to address situations where the work is being sold at a lower price in another country. It is neither piracy (the large-scale infringement of intellectual property rights) nor counterfeiting (trademark infringement and fraud). Nevertheless, Egypt is the only study country that expressly permits parallel importation of copyright-protected works. Senegal permits parallel importation only regionally, within the West African Economic and Monetary Union, or Union Économique et Monétaire Ouest-Africaine (UEMOA). South Africa specifically prohibits parallel import of copyright materials.

F. Digital rights management

Digital rights management (DRM) systems are, as the name suggests, systems for managing intellectual property rights in a digital environment. DRM systems can utilise 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 require member states to prohibit circumventing TPMs and/or tampering with RMI.

South Africa, Ghana and Senegal have all signed the WIPO Internet Treaties, but South Africa has not yet officially ratified or implemented these treaties. Having said this, South Africa has enacted anti-circumvention provisions in the Electronic Communications and Transactions (ECT) Act 25 of 2002. Morocco is in the process of ratification of the Internet Treaties, as required pursuant to its FTA with the United States. Also pursuant to that agreement, Morocco was required to implement anti-circumvention provisions in a considerably more precise manner than provided for by the Internet Treaties themselves. It is interesting, therefore, that as these provisions have been implemented in Morocco, libraries, archives, educational institutions and public broadcasters are not subject to prohibitions on circumvention. Morocco, it seems, has availed itself of the small amount of flexibility available from a combination of the Internet Treaties and its FTA with the US.

At this point, among study countries, only Mozambique and Uganda have not enacted anti-circumvention provisions.

G. Judicial decisions

In most study countries, case law with respect to copyright in general, and access to learning materials in particular, is rare. Copyright litigation is uncommon. In Mozambique and Egypt, for example, there is reportedly little or no case law related to learning materials. Research in Morocco, Ghana and Uganda suggests, however, that alternative dispute resolution mechanisms, involving arbitration, negotiation and other out-of-court dealings, are used more regularly. 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 countries, with the exception of South Africa, there are problems with publication and reporting of judicial decisions, making it difficult to draw firm conclusions about the true state of the case law. The implication is that greater reliance would be placed on statutory provisions in the abstract, without the aid of interpretative guidelines from courts. Depending

on context, constructive ambiguities in the law could either hinder or facilitate access to learning materials.

H. Relevant non-copyright laws and policies

In most study countries, there are laws and instruments other than copyright statutes that affect access to learning materials. These include, most importantly, constitutional protections for fundamental rights to education and/or development. In countries where property rights or intellectual property rights are not constitutionally entrenched, framing education or development as a fundamental right provides important interpretative guidance in determining the scope of copyright protection.

In some countries, there are policies governing 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.[6] Unfortunately, the focus of that legislation is on potential commercial gain rather than access, and consequently, the legislation is lax on safeguarding 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[7] adopted by the South African Government promotes the use of FOSS in government information technology systems, but fails to guarantee public access to content residing on such systems.

I. Conclusions from the research on legal doctrines

National laws in all ACA2K study countries provide strong copyright protection, in many cases exceeding international legal standards and levels of protection offered in some countries outside of Africa. Limitations and exceptions to facilitate access to learning materials are not utilised as effectively as they could be, and exceptions and limitations catering for access to learning materials in the digital environment are mostly absent. Limitations and exceptions for students and teachers, educational institutions, and libraries and archives inadequately address digital technologies, distance learning and the needs of disabled persons. 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 the laws of most countries. This ambiguity could hinder or facilitate access to learning materials, depending on the context.

To the extent that copyright laws address the Internet and other ICTs, they do so primarily to restrict access to learning materials by encouraging the use of TPMs and prohibiting TPM circumvention, even for non-infringing purposes. From the doctrinal research, therefore, it can be concluded that national copyright frameworks in the study countries are not maximising access to learning materials, and could be improved to increase access.

Qualitative research findings

J. 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 scholarship addressing copyright issues (see, for example, Adusei, 2007; Nicholson, 2006; Rens et al, 2006; Ouma, 2004).

6 The Intellectual Property Rights from Publicly Financed Research and Development Act 51 of 2008

7 Policy on Free and Open Source Software Use for South African Government, 2006

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, unlike their counterparts in developed countries. Furthermore, the scholarship on copyright being produced by African scholars generally reflects African universities' primary orientation toward teaching as opposed to research. More recently, however, there has been some significant research output in the field of copyright being generated by undergraduate and graduate students in law, information sciences, communications and other disciplines, which is encouraging.

There have been relatively few government-commissioned or government-authored reports on copyright and education in the listed study countries. A notable exception to this pattern is, for example, 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 (ULRC, 2004).

In general, South Africa has more copyright scholarship, particularly in relation to access to knowledge/learning materials, than any other study country. In part, this can be traced to civil society interest and projects around access to learning materials (Rens et al, 2006). 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 projects can 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-generated publicity. 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, mass-based communication that presents a balanced perspective on copyright issues.

K. Impact assessment interviews

In order to assess the true impact of copyright laws on day-to-day practices, a series of impact assessment interviews were conducted to gather qualitative empirical data. In each study country, researchers engaged a variety of key actors and stakeholders, including representatives from government, the education sector, and rights-holder groups. Feedback reported through the interview process addressed several thematic areas and revealed the following insights into copyright and education.

General access issues

Some, but not all, groups of interviewees perceive copyright as one of several barriers to accessing learning materials. Most people who said they did not perceive copyright as a barrier were unfamiliar with copyright law, and when informed about applicable rules in their country, acknowledged that their modes of access are often illegal. In general it was found that in cases where copyright does not act as a barrier to access to learning materials, it seems largely to be due to ignorance of, or disregard for, the law.

Government strategies to enhance access to learning materials, by, for example, commissioning materials or subsidising textbook purchases, are mainly directed at primary and secondary education sectors. This is the case in Kenya, Uganda, Egypt, Ghana and Mozambique. In most study countries, learning materials at tertiary level are sourced

internationally and/or locally photocopied, and rarely subsidised by governments. The lack of affordability of tertiary-level learning materials was cited across all study countries as the primary reason for large-scale (often illegal) photocopying by students and the commercial photocopying operations serving them. In markets such as Uganda, the lack of distribution networks for learning materials also contributes to inaccessibility.

Administration and enforcement

In all study countries there are government agencies tasked with some aspects of copyright administration or enforcement. Some copyright agencies' primary duties include licensing collective societies and setting royalty tariff rates for particular activities. Other countries' agencies are tasked with public engagement and raising awareness of copyright issues. Yet others are in charge of organised copyright enforcement programmes. Across this spectrum of copyright administration and enforcement agencies, there are a wide variety of views about the relationship between copyright and education. Generally, evidence suggests that public and expert views on this topic correlate to the relative sophistication and experience of agencies administering and enforcing copyright in a particular country. Based on data obtained through impact assessment interviews, these agencies can be classified as weak, emerging or strong.

Study countries with relatively weak 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. Countries such as Kenya, Ghana and Egypt have emerging institutions that are 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 received substantial government support. In South Africa and Morocco, administrative institutions can be characterised as relatively strong. Agencies in these countries have existed longer than agencies in most other study countries. Strong economies in both these countries enable the relevant administrative institutions to be sufficiently resourced.

Classifying a country's administrative institutions as 'weak' or 'emerging' or 'strong' 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.

Similar problems are evidenced in countries with emerging institutions, like Egypt, and with strong institutional frameworks, such as Morocco. However, with a strong institutional framework, 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 other ACA2K study countries.

There is also evidence that stronger institutions correlate with (though may not 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. Elsewhere, 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 most people's fundamental inability – not unwillingness – to comply with legal rules that bear little relation to their behaviour, circumstances or needs. It can be argued that countries with stronger copyright institutional frameworks (not stronger copyright laws) will be better able to grapple with the daily realities facing their citizens, and to calibrate copyright policies and practices accordingly. It may also be that countries with strong copyright institutions are likely to be those with stronger publishing and distribution infrastructure for learning materials.

Educational institutions/libraries

Photocopying of learning materials at and near tertiary educational institutions is commonplace in most study countries. Some copying activities – such as selling photocopies of entire copyright-protected books that are still in print, for example – are clearly illegal. Other activities, such as students or teachers copying parts of books, however, are less clearly an infringement of copyright.

There are significant differences in the resources available to tertiary students and educational institutions in ACA2K study countries. 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 Cheikh Anta Diop in Dakar has book stacks full of photocopies rather than printed textbooks, because students vandalise the originals. Signs posted next to photocopiers contradictorily instruct students to photocopy pages rather than tear them, while noting that photocopying could be an infringing activity. Libraries in most other study countries are somewhat better resourced, although it is still common that pages are ripped out of library books and that infringing photocopies are made. Libraries in several of the study countries have taken some steps to develop institutional policies on copyright and/or access. Whether those policies are rational or realistic is, of course, another matter altogether.

Some well-resourced and well-intentioned institutions are failing to fully capitalise on access-enabling opportunities. The Bibliotheca Alexandrina (BA) in Egypt is an example. As a UNESCO world heritage site with significant funding, the Bibliotheca has acquired state-of-the-art technology to print books on demand. Its institutional policy concerning use of this potentially revolutionary technology is, however, problematic. Essentially, the service has only been demonstrated for distinguished visitors, such as heads of state. Copyright negotiations with publishers are holding back the technology's potential, while a quirk of Egyptian copyright law requires government permission to copy public domain works for commercial use, which means that even works for which copyright has expired are not being printed/distributed as they could be. The situation is all the more ironic given that certain staff members at the Bibliotheca are renowned for being among the continent's leading experts advocating greater access to knowledge.

There is a startling disparity, in resources and expertise available to address copyright issues, between the Bibliotheca Alexandrina and other educational institutions in Egypt, such as the University of Alexandria's law library. Such disparities are seen in other study countries, including South Africa, where institutions such as the University of Cape Town have excellent

library infrastructure and resources while others like the University of Limpopo struggle to keep their libraries updated.

Gender-specific issues

Undeniably, gender has an impact on knowledge, to the extent that gender imbalances exist in society at large. While the ACA2K research explicitly investigated the hypothesis that gender has a distinct impact on the relationship between copyright and access to knowledge, the evidence produced was inconclusive, suggesting that further, purpose-specific work needs to be conducted in this area.

ICT Issues

All study countries reported that the ICT infrastructure remained weak in most institutions. Senegal's Université Cheikh Anta Diop has a very small number of computers from which to access an Intranet (not Internet), and still relies primarily on card catalogues. The University of Cape Town in South Africa was reported to have robust institutional ICT infrastructure, combined with digital resources that fully support the research needs of the academic community. Institutions like Makerere University in Uganda, Universidade Eduardo Mondlane (UEM) in Mozambique, and the University of Ghana Legon, have reasonable ICT infrastructure and are able to provide their communities with access to a wide range of electronic resources. In Ghana, sharing of electronic resources among some 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. There are, however, still deep uncertainties and misunderstandings about the copyright rules and practices that apply to such distance education initiatives.

L. Conclusions from the qualitative analysis

A significant gap exists in each of the study countries between copyright law and copyright practice. Many consumers who are aware of the concept of copyright are unable to comply with it or to exploit the protections it offers because of their socioeconomic circumstances and/or the circumstances at tertiary institutions from which they operate. Others users are ignorant of the concept of copyright, but tend to pursue learning materials access in the same manner, and driven by the same socioeconomic constraints, as those who know about copyright. In everyday practice, with respect to learning materials, vast numbers of people act outside of legal copyright structures altogether.

Copyright and education in Africa: the road ahead

Empirical evidence gathered during more than two years of work by nearly thirty 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.

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 legal norms 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. Realising this point is urgent, as some of the study countries – Kenya, Ghana, 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 substantial gap exists between copyright law and copyright practice in all countries studied. Empirical evidence has confirmed the intuition and impression that copyright law in Africa is widely ignored. The disconnection between law and practice manifests in various ways. Many people do not know that copyright law exists. Those who are aware of the concept of copyright are unable to comply with it or exploit the protection it offers because they cannot afford to. Vast numbers of people act outside of the formal copyright system altogether.

Access to learning materials is obtained primarily through activities that infringe copyright. When – and if – the enforcement of sanctions against copyright violation becomes a greater reality in the study countries, then, without mechanisms in place to promote and ensure non-infringing access to knowledge, many learners, particularly at the tertiary level, will be in a precarious position and entire systems of education will be vulnerable. Thus, maintaining the status quo is not a sustainable policy option. Openly expecting learners to infringe copyright in order to obtain access to educational materials has a detrimental effect on the integrity of the copyright system. Copyright laws that cannot possibly be followed by the vast majority of society only serve to generate resentment for their underlying principles, and ultimately undermine respect for the law.

The consequences of maintaining unrealistic copyright systems are serious. Though there are many additional barriers to access to learning materials, the ACA2K research project has revealed that copyright is an important and under-researched barrier. The research suggests that an appropriate and sustainable copyright environment is a key component of a well-functioning education system. Though all countries studied have other urgent public policy matters to address, from health crises to security and political stability concerns, the importance of education in addressing these and related development challenges should not be understated.

For these reasons, the recommendation is that all stakeholders throughout and beyond Africa work toward solutions that help to bridge the gulf between copyright law and practice. There are essentially two ways to narrow this divide: modify behaviours and/or reform laws.

Expanding copyright protection even further beyond international norms is almost certain to aggravate compliance challenges. It is already impossible for most people in Africa to adhere to existing legal requirements; compliance with even stronger laws is clearly unattainable. In addition, the lack of enforcement of existing copyright rules is primarily attributable to widespread inability, not unwillingness, to comply with the law. Copyright infringement to obtain learning materials in Africa is thus the consequence of a lack of appropriate exceptions such as those found in the laws of many developed and developing countries.

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, because they would enable entire segments of the population currently operating outside the copyright system altogether to comply with 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.

Reports from ACA2K study countries contain several specific examples of best practices, as well as areas for improvement, for lawmakers, rights-holders, and the education sector. Blanket collective licensing works well at institutions such as the University of Cape Town, where students typically comply with the terms of these licences with regard to hard-copy course materials. At the University of Ghana, Legon, however, the blanket licensing systems being established have little connection to the everyday realities of life on campus, where widespread photocopying of entire textbooks regularly occurs. In such a context, standard-form contracts modelled on South African (or, worse, European) precedents are inappropriate. At the Université Cheik Anta Diop in Dakar, Senegal, where practices align more with the Ghanaian than South African experience, a similarly geared context-specific solution is warranted.

Locally-produced objective policy research has also proved to have a positive impact on access to learning materials. Countries with more local copyright expertise have a demonstrably richer policy debate, which, in some cases, has led to desirable law or policy reform initiatives. South Africa, for instance, is home to the continent's largest collection of copyright scholars who are advocating for access to knowledge, and this has created a policy environment that is favourable to all stakeholders in the debate. In sum, governments throughout Africa, and their national and international supporters, would do well to increase investment in local policy research, and grow the community of intellectual property researchers based in Africa. ❑

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