

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

*Tobias Schonwetter*¹

Post-Doctoral Fellow, Intellectual Property Research Unit, Faculty of Law, University of Cape Town, South Africa

Jeremy de Beer

Associate Professor, Faculty of Law, University of Ottawa, Canada

Dick Kawooya

Senior Lecturer, School of Information Studies, University of Wisconsin, Milwaukee, USA

Achal Prabhala

Researcher and writer, Bangalore, India

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.

¹ The authors are with the African Copyright and Access to Knowledge (ACA2K) project. Tobias Schonwetter (tobiasschonwetter@gmail.com), Jeremy de Beer (jeremydebeer@uottawa.ca) and Achal Prabhala (aprabhala@gmail.com) are principal investigators and Dick Kawooya (dkawooya@gmail.com) is the lead researcher. The comparative findings presented in this paper are drawn from the eight ACA2K study countries (Egypt, Ghana, Kenya, Morocco, Mozambique, Senegal, South Africa and Uganda) and are based on the eight ACA2K Country Reports which are listed, along with their authors, in the References section of this paper. The authors thank Andrew Rens of the Shuttleworth Foundation, South Africa, for his valuable suggestions.

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