



Copyright & A2K in Africa: Research Findings on Limitations & Exceptions from an Eight-Country Study

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African Copyright and Access to Knowledge (ACA2K) Project
www.aca2k.org



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Executive Summary

A just and balanced copyright system can promote access to knowledge (A2K) and support critical public policies such as educational policies in Africa. It is in this context that the African Copyright and Access to Knowledge (ACA2K) network has been undertaking research in the continent aimed at furthering understanding of the relationship between national copyright environments and A2K, specifically access to learning materials. This research focuses on eight African countries: Egypt, Ghana, Kenya, Morocco, Mozambique, Senegal, South Africa and Uganda. In this briefing paper, we share some initial findings based on the analysis of draft reports from the eight study countries.

These findings are relevant not only to the study countries but also to the international copyright community and, most specifically, the World Intellectual Property Organisation (WIPO), whose Standing Committee on Copyright and Related Rights (SCCR) is involved in progressive development of copyright norms, policies and practices. ACA2K research is especially relevant to discussions on limitations and exceptions.

In general, ACA2K research indicates that creative works are strongly protected by national copyright laws in all the African countries studied. There is, however, little awareness and use of copyright flexibilities that could facilitate A2K. The connection between copyright law and knowledge production and consumption is, therefore, often ignored in policymaking.

While there are several aspects of national copyright law that are crucial to A2K, the role of limitations and exceptions is particularly noteworthy. In this respect, ACA2K research indicates that in all eight study countries, copyright limitations and exceptions are too narrowly and/or vaguely defined to facilitate access in a balanced and effective manner. Addressing the need for appropriate limitations and exceptions is urgent, because it is clear from the ACA2K research that in many cases the law is not reflecting the practical needs of the African countries studied.

It is notable that the ACA2K research findings also indicate that across the board there are several factors – not copyright law alone – that inhibit or restrict A2K; these include unaffordability, unavailability, and in some cases, the lack of a reading culture. ACA2K research also indicates that in all the study countries (with the exception of South Africa) the effects of copyright law on the ground – however restrictive the law may be – are minimal, due to weak enforcement.

In practical terms, this means that unpunished copyright infringement (with regard to learning materials) is the main channel for A2K in the ACA2K study countries. This situation is, however changing. Copyright-holders are systematically beginning to enforce sanctions against perceived copyright violation and infringement. It can be expected that national copyright laws as they are currently formulated, when increasingly enforced, will create significant barriers to learning materials in the ACA2K countries. ACA2K research suggests that if copyright laws were better aligned with practical realities in the study countries, the system could be more effective for all stakeholders.



1. The ACA2K Project – An Introduction

The African Copyright and Access to Knowledge (ACA2K) project was initiated in 2007 with support from Canada's International Development Research Centre (IDRC) and the Shuttleworth Foundation in South Africa. ACA2K is managed by the LINK Centre at the University of the Witwatersrand's Graduate School of Public & Development Management (P&DM) in Johannesburg.

The primary objective of the project is to probe the nexus between national copyright environments and access to knowledge, using learning materials as a proxy for knowledge. The project engages a network of over 30 experts from law, economics, information sciences and gender studies, based almost exclusively in Africa (see Annex). It has research nodes in eight African countries namely: Egypt, Ghana, Kenya, Morocco, Mozambique, Senegal, South Africa and Uganda. ACA2K study countries were selected to represent differences in legal, socioeconomic, political, cultural and linguistic contexts.

The Conceptual Framework

The fundamental conceptual premise underlying the ACA2K research project is that knowledge is essential to human development. Access to knowledge is thus an essential human right, as it is a component of economic progress, cultural growth and individual fulfilment. And thus, according to the ACA2K framework, a just copyright system will be one that enables access to knowledge (A2K).

A2K must be understood in the context of a country's prevailing socioeconomic conditions, physical infrastructure and information and communications technology (ICT) infrastructure. There is, also, a significant relationship between legal environments and access to knowledge, as has been noted by a range of scholars and commentators. The ACA2K network thus approaches A2K as a critical developmental and human rights issue, and an issue that requires a multi-disciplinary research methodology.

A2K is integrally linked to education and the availability of learning materials. Access to learning materials is not only a prerequisite for building knowledge. Access to learning materials can also serve as a useful proxy for gauging A2K in general in a society.

While different countries may exhibit different A2K problems, the ACA2K project assumes that it is generally evident across Africa that national education systems are failing to meet the needs of the vast majority of their constituents.

This is a complex problem with multiple causes. The ACA2K project hypothesised that one such cause is inadequate access to learning materials. The predominant legislative mechanism used to facilitate the creation and dissemination of learning materials is copyright. Paradoxically, copyright law may also be a constraint on access to learning materials. Thus, in a given country,



copyright has the capacity to both promote and hinder access to learning materials, and A2K in general.

Of course, legislation on its own does not determine the relationship between copyright and access to learning materials. Legislation must be viewed as part of an overall copyright environment consisting of, among other things:

- A country's copyright statutes and regulations in relation to digital and non-digital learning materials;
- A country's copyright case law (in common law countries) and judicial attitudes/decisions in relation to digital and non-digital learning materials;
- Perceptions of the copyright framework;
- Actual interpretations of, and practices in relation to, a country's legal copyright framework; and
- Norms, social conditions and market dynamics that affect how people access and use learning materials.

Research Questions & Hypotheses

Grounded in the conceptual framework outlined above, the ACA2K research in eight countries has focused on answering one overarching question:

- To what extent is copyright fulfilling the objective of facilitating A2K in the study countries?

Using access to learning materials as a proxy for A2K, the specific research questions include:

- What is the state of the country's copyright environment and its impact on access to learning materials?
- What are the processes; political, legal, social and/or technical, which could positively impact a country's copyright environment in terms of access to learning materials?
- What might the country's optimal copyright environment look like?

In order to establish the extent to which copyright is fulfilling the objective of facilitating access to knowledge (learning materials) in the eight study countries, the ACA2K research has tested two main hypotheses:

- Copyright environments in the study countries do not allow maximal access to learning materials; and
- Copyright environments in the study countries can be changed to maximise effective access to learning materials.



Research Methodology

Conceptually and methodologically, the ACA2K project has framed the notion of a national copyright environment as encompassing not only laws/regulations/policies but also practices. Consequently, ACA2K's methodology involved a two-pronged approach: 1) doctrinal analysis of the legal elements of the country's copyright and access framework; 2) qualitative investigation of the practical perceptions of, interpretations of, and/or interactions with the law.

Doctrinal Analysis

The doctrinal component of the research involved a critical legal analysis of the relevant statutes, regulations, and judicial and administrative decisions. It was concerned with understanding what the national copyright laws in the study countries stipulate in relation to access to learning materials. It also entailed the analysis of the judicial and administrative decisions related to copyright and learning materials, including the case law, where applicable.

Qualitative Research

This component of the methodology aimed at understanding the practical implications of the laws on various copyright stakeholders, and was divided into two parts: a review of any relevant secondary literature, and impact assessment interviews.

The impact assessment interviews were meant to reveal the 'intended and actual' consequences of the copyright law in the study countries. They enabled ACA2K researchers to get the views of not just experts and commentators but also ordinary users of the law and/or of learning materials. It should be noted that the doctrinal and the qualitative aspects of the methodology and analysis were inextricably linked.

Generally, interview participants were selected to represent a diversity of perspectives on the copyright and access situations in the study countries. The following were the main interviewee categories:

- The *government department(s)* responsible for setting national copyright policies and/or drafting copyright legislation.
- *Educational communities and users* (recognising that education communities can be creators and/or holders of copyright).
- *Copyright-holders* (including collective societies or industry associations).
- *Intermediaries* who distribute learning materials.
- *Copyright administrators, enforcement agencies or professionals.*



2. General Legal & Qualitative Findings from the ACA2K Research

The findings presented below are extracted from draft research reports recently completed by the eight ACA2K country research teams.

- 2.1 Contrary to the often casual observations and general perceptions of weak copyright laws in Africa, it was established that all ACA2K study countries afforded copyright protection that exceeds minimum standards imposed by the relevant international treaties and agreements by which these countries are bound, such as the Berne Convention, the WTO's TRIPS Agreement and the WIPO 'Internet Treaties' (WCT and WPPT). A case in point is the term of copyright protection: according to Berne (and TRIPS), for most creative works, the minimum term of protection is 50 years after the lifetime of the creator. Yet countries like Ghana, Mozambique and Morocco all afford a term of protection for creative works that significantly exceeds this minimum term.
- 2.2 The advent of the Internet and information and communications technologies (ICTs) in general has created a significant opportunity for greater access to knowledge. Regulation of copyright in the digital environment, therefore, bears a special responsibility – applied judiciously, it has the potential to further learning through ICTs, and applied over-zealously, it has the potential to restrict access to knowledge. Of particular concern are anti-circumvention provisions in the laws of some ACA2K study countries: that is, clauses in the law that make it illegal to circumvent technological protection mechanisms (TPMs) – even while, for instance, a user is taking advantage of copyright limitations and exceptions, including 'fair dealing' with a work.
- 2.3 While copyright law is significant to accessing knowledge, there are also a number of positive policy provisions that may be implemented – across different sectors – to populate and promote the public domain. In South Africa, for instance, a recently implemented policy endorses open source software and open standards, thereby lowering barriers for accessing ICTs. In Ghana, universities have resorted to a 'pro-access' policy of pooling resources together to procure electronic materials and subsequently share these materials among themselves to bring down costs.
- 2.4 It is important for policymakers, at all relevant levels of government, to be aware of the impact of copyright on access to knowledge. ACA2K research indicates that this level of awareness differs significantly across government departments and across countries. In Morocco, for instance, no government department outside that which directly deals with copyright has an awareness of what the relationship between copyright and knowledge is. In Kenya, however, there is a greater and more widespread understanding of copyright within government, which is caused – and evidenced – by the fact that the government fully subsidises a range of books and teaching materials.



2.5 Copyright-holders are a crucial stakeholder group in deciding how copyright is designed and applied. In South Africa, rights-holders in general have been at the forefront of lobbying for increased copyright protection, sometimes to the detriment of access to knowledge. In Uganda, it is the musicians' lobby that has primarily represented rights-holders' interests. In this case too, some of the lobbying points are protectionist, at the cost of accessing published material.

2.6 The educational community at large – librarians, teachers, researchers, students – is perhaps the most affected copyright stakeholder group when it comes to access to knowledge. In Mozambique, for example, national and university libraries are implementing new forms of digital access to learning materials and in one case, pioneering distance learning. In Egypt, however, academic users perceive copyright as a threat to their access to knowledge and to learning and research. In Senegal, infrastructural difficulties and a shortfall of institutional budgets for learning materials have meant that the academic community resorts to copyright infringement through reprography to facilitate access.

3. ACA2K Research Findings on Specific Limitations & Exceptions

Copyright limitations and exceptions are a major vehicle for permitting personal and public consumption of copyright-protected works for legitimate purposes. While they cover a broad scope of potential uses and applications, below we discuss four ways in which they are construed in ACA2K study countries and the extent to which they facilitate, or fail to facilitate, access to learning materials for learners.

3.1 Disability & Special Needs

Limitations and exceptions for individuals with disabilities and special needs are particularly important since learning materials are often not available in formats accessible to these individuals, and access for these individuals often requires adaptation of a copyrighted work. A number of ACA2K study countries have taken steps to cater for individuals with disabilities and special needs. Several of the study countries have national laws and programmes that aim to afford equal opportunities for individuals with disabilities and special needs, including special training institutions and facilities in Mozambique, Kenya, South Africa and Uganda. South Africa, for instance, has established a library for the blind through the South African Library for the Blind Act 91 of 1998. Uganda has a public institution for individuals with special needs as well as limited facilities and services for those individuals in most public and private institutions like libraries. Makerere University, Uganda's largest public university, provides guides for students with disabilities as well as the Braille technology to support the learning needs of such students. In South Africa, the University of South Africa (UNISA), one of the largest distance learning institutions in the world, provides Braille and audiotapes for over 1000 students with visual and/or hearing disabilities. In Egypt, Alexandria University makes available human readers for students with visual disabilities, a programme that has proven popular with these students.



Likewise, the world-renowned Bibliotheca Alexandrina provides training courses on how to use such facilities for the disabled.

Yet none of the ACA2K study countries has meaningful provisions in its copyright laws for people with disabilities. This means that certain activities permitted by other national laws relating to individuals with disabilities like the conversion of content to formats accessible to these individuals (*e.g.*, Braille or audio formats) can only be done with express permission of the rights-holder. This points to inconsistencies in national legislative frameworks, where certain laws in a country aim to provide for disabled people while the copyright statute does not. The lack of provision for disabled users in ACA2K-country copyright laws potentially perpetuates an access gulf between individuals with disabilities and other users of the same services and facilities.

3.2 Teaching & Learning

Increasingly, distance learning is the best and/or the only option for many Africans to access tertiary education or practical training. Distance learning is making education affordable and accessible even for the economically disadvantaged sections of societies in Africa. ACA2K findings in Mozambique, for example, indicate that the University of Eduardo Mondlane (UEM), through its Centre for Distance Learning, is piloting online learning using digitised modules, e-learning platforms, online-tutoring and online fora, chats and conferencing.

Online learning programmes like the one at UEM are made possible by the ever-expanding ICT infrastructure of some universities. Among other things, UNISA in South Africa is experimenting with digital content in the form of kiosks that allow students to download content relevant to their course onto CDs, DVDs, and flash drives.

Notwithstanding the demonstrated potential of, and the high demand for, distance and online learning, copyright laws in the ACA2K study countries generally do not accommodate this mode of delivery and instruction through specific limitations and exceptions. Consequently, institutions offering distance and online learning exist in a state of uncertainty as to what is or is not permitted.

Another type of copyright limitation and exception linked to learning is the incorporation in some copyright statutes of a fairness provision: either fair dealing (*e.g.*, Kenya and South Africa) or fair use (*e.g.*, Uganda). These provisions allow limited copying or use of copyright materials without the permission of the rights-holder, for purposes such as private research/study or criticism/quotation.

The ACA2K research has found that, where such a fairness provision is present in a country's copyright statute (*e.g.*, Kenya, South Africa, Uganda), it tends to be too vaguely crafted to be a reliable access mechanism. For instance, it is far from clear in many ACA2K countries as to what the law regards as the 'fair' portion of a copyright work that can be copied for private research use.



Another factor potentially undermining fairness provisions in the copyright statutes of some ACA2K countries is the existence of provisions -- either in the copyright statute (*e.g.*, Kenya) or in another act (*e.g.*, the Electronic Communications and Transactions Act in South Africa) -- which prohibit the circumvention of TPMs. The effect of such provisions is that users seeking to exercise their fair dealing right to access a copyright work for private study could be prevented from exercising this right where the learning item in question is protected by a TPM.

3.3 Libraries & Archives

Libraries, particularly public libraries, are extremely important in Africa where the majority of people cannot afford to purchase personal copies of learning materials. The ACA2K research found that public access was widely regarded as an important access mechanism, particularly in academic and research settings. However in all study countries, except South Africa, most libraries and archives were reported to be heavily under-resourced. Even some parts of South Africa have poorly resourced libraries.

In spite of this clear need for better support for libraries and archives, it was found that the provisions for libraries and archives in the copyright laws in most ACA2K study countries were generally inadequate. ACA2K established that in some cases there was a lack of clarity around the nature of reproduction that libraries and archives are permitted to carry out for preservation of their collections, public lending purposes, or digitisation of their collections.

3.4 Government Works & Legal Proceedings

Another important category of limitation and exception for the cause of learning materials access is that category of provision which seeks to ensure that public interest works are not copyright-protected and immediately enter the public domain.

In general, it was found that ACA2K study countries tend to exclude from copyright protection most government works and enactments, decrees, orders or decisions by a court of law as well as reports made by committees or commissions of inquiry appointed by government. However, in some instances, such as in Uganda, there are contradictions to this principle of public access to government/judicial works. In Uganda, ownership of such works is vested in the government, potentially undermining the purpose of issuing state/judicial works as free of any copyright encumbrances. For purposes of transparency, accountability and public access public interest works should be in the public domain.

Meanwhile, South Africa's Intellectual Property Rights from Publicly Financed Research and Development Act 51 of 2008 provides for, in certain circumstances, intellectual property emanating from publicly financed research to be owned by a new National Intellectual Property Management Office (NIPMO). ACA2K research suggests that South Africa's approach, while useful in addressing cases where such work could be appropriated by private entities, does not address the broad question of whether a system that allowed such intellectual property to fall directly into the public domain would not be better for South Africans.



4. Conclusion

In general, ACA2K research indicates that the state of access to knowledge (and learning materials in particular) in Africa is precarious. In all cases, a pro-access copyright law, with appropriate and clear exceptions and limitations in support of learning materials access, would go a long way in facilitating access to knowledge. In some cases, however, the effects of a pro-access copyright law might be most visible not in the present time, but in the near future. Given the enormous opportunity that ICTs and the Internet provide to learning in Africa, it is imperative that national copyright laws duly and speedily reflect this opportunity, and act to promote learning through these new and effective means.

The international copyright and A2K communities, and the WIPO SCCR in particular, need to pay close attention to both law and practice as they move forward with discussions on copyright limitations and exceptions. Limitations and exceptions in Africa should be grounded in practical realities. Likewise, WIPO's technical assistance to these countries should be based on cognisance of the gaps that exist in the implementation of the copyright flexibilities highlighted in this briefing paper and others permitted by international instruments. ACA2K research suggests that if copyright laws were better aligned with practical realities in the study countries, the system could be more effective for all stakeholders.



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