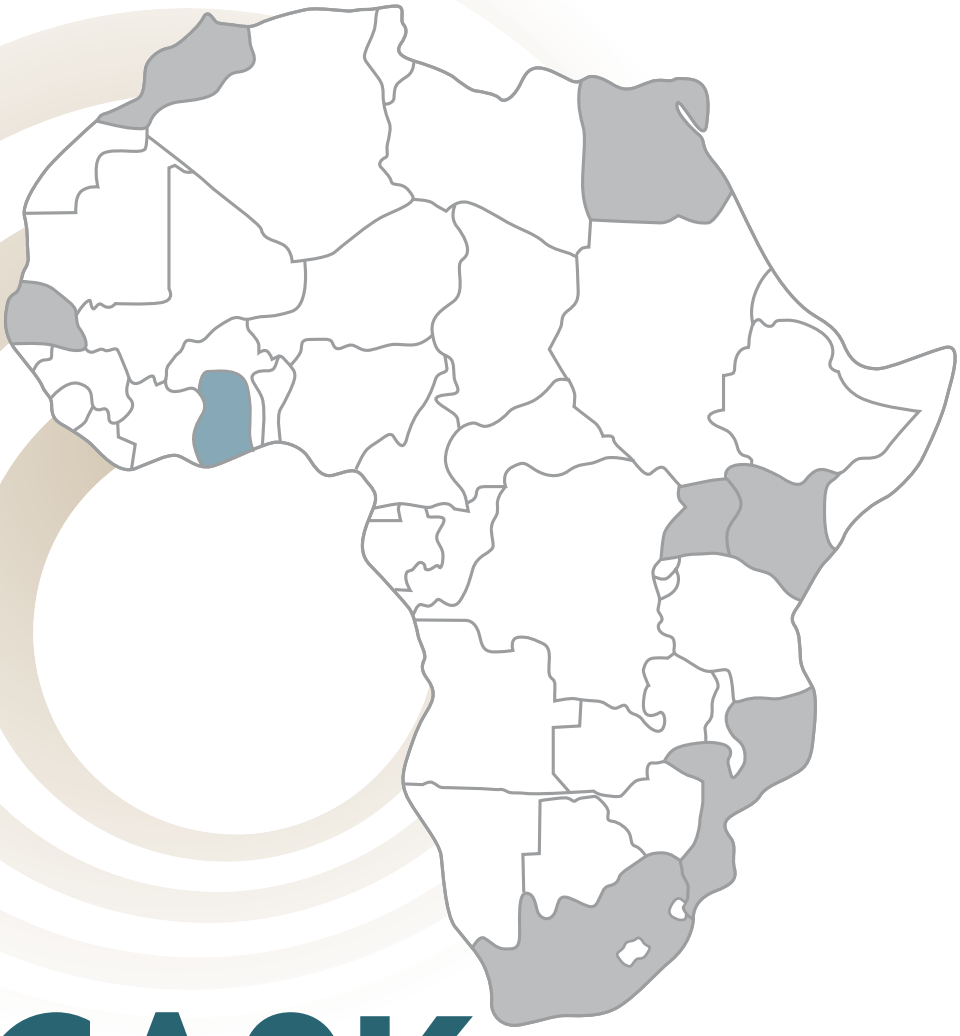

ACA2K

Country Report

MAY 2009

African Copyright and Access to Knowledge (ACA2K) Project

www.aca2k.org

GHANA

By Poku Adusei, Kwame Anyimadu-Antwi and Naana Halm

ACA2K
African Copyright and Access to Knowledge

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About the Authors

Poku Adusei
Faculty of Law, University of Ghana Legon, Accra, Ghana
aduseipoku@hotmail.com
LL.B., B.L. (Ghana); LL.M. (Alberta, Canada); Doctoral Candidate (McGill, Canada). Poku Adusei leads the Ghana team for the ACA2K research project. He is a Lecturer at the Faculty of Law, University of Ghana, Legon, where he teaches Intellectual Property Law, Land Law and Conflict of Laws.

Kwame Anyimadu-Antwi
Faculty of Law, Kwame Nkrumah University of Science and Technology (KNUST), Kumasi, Ghana
anyimaduantwi@yahoo.com
LL.B., B.L. (Ghana); LL.M. (Queen Mary, University of London). Kwame Anyimadu-Antwi, member of the ACA2K Ghana research team, teaches Intellectual Property Law and the Law of Contract at the Faculty of Law, KNUST, Kumasi. He is also a Member of Parliament.

Naana Halm
Fugar & Company Law Firm, Accra, Ghana
qwansima@hotmail.com
LL.B. (Kent, UK); LL.M. (Munich, Germany). Naana Halm, a member of the Ghana ACA2K research team, heads the IP Division of Fugar & Co Law Firm in Accra.

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Executive Summary

The global intellectual property (IP) system has forced developing countries to adopt far-reaching copyright standards, and Ghana is no exception. In 2005, Ghana passed new copyright legislation (the Copyright Act of 2005) in order to become compliant with the World Trade Organisation (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). The new law increased the scope of protectable subject matter and further extended the duration of protection even beyond the TRIPs standard requirement. Thus, instead of adopting the TRIPs standard duration for copyright protection of 50 years after the death of the author, Ghana's Copyright Act of 2005 protects works for a term of 70 years after the author's death. The justification, inter alia, is that longer protection is needed to encourage Ghanaian authors to be creative. There is, however, no evidence to support the claim that 'TRIPS-plus' standards spur creativity.

The objective of this study was to undertake an independent and comprehensive assessment of the impact of the copyright environment on access to learning materials in Ghana.

The study involved a critical overview of the copyright regulatory framework in relation to access to copyright protected materials for the purposes of teaching, learning and research in Ghana. Apart from a doctrinal analysis of the regulatory regime, which included an analysis of the relevant statute and case law, the researchers looked at the relevant secondary literature and interviewed key stakeholders to find answers to the research questions. The key stakeholders among government bodies were identified as the Ministry of Justice (Copyright Office, Legislative Drafting Section and the Law Reform Commission) and the Ghana Education Service. Stakeholders representing educational communities were identified as the University of Ghana (Balme Library, Faculty of Law Library, administrators and students) and the Kwame Nkrumah University of Science and Technology (KNUST) (university library, administrators, lecturers and students). Stakeholders identified in the rights-holder community were the Ghana Book Publishers Association, the Ghana Association of Writers, Copy Ghana and Ghana Universities Press. The empirical evidence obtained from field research interviews assisted in answering the central research question of the project: whether the current copyright environment in Ghana impedes or promotes access to learning materials.

The overall finding is that the current copyright environment in Ghana can be improved in order to increase access to learning materials.

The outcomes of this study will form the basis for awareness-raising in support of the institutionalisation of systems that facilitate access to learning materials in Ghana and other countries. In the context of Ghana in particular, this study can play a role in making a case for the re-conceptualisation of copyright administration to address rigidities and inadequacies existing under the current Copyright Act. This amelioration of deficiencies in the current Act can be done through copyright reforms and the passage of a subsidiary legislation – or legislative instrument (L.I.) as it is also called – that is currently, as this report is being written in mid-2009, being debated in Ghana. The subsidiary legislation is aimed at fleshing out the framework provisions contained in the parent Act.

The findings in this report are also designed to serve as a reference for the main stakeholders identified, and in some cases interviewed, in the course of the study. Thus, it is hoped that this study will contribute to the development of a legal, regulatory and practical environment that serves to increase the scope of access to teaching and learning materials in Ghana. Further, it is hoped that this study will assist in the development of an enabling environment for positive interactions between copyright-users, such as educational institutions, on the one hand, and private collective societies on the other hand.

In addition, it is hoped that this report will serve as a resource for international organisations on matters pertaining to the formulation of copyright policies that affect Ghana and other developing countries.

The report is divided into five sections. Section 1 gives a brief overview of the political, legal, economic and cultural situation in Ghana, and the history of Ghana. This section confirms that the high rate of poverty in Ghana makes the question of affordability/accessibility to copyright protected materials crucial for any meaningful research and teaching to take place in educational institutions.

Section 2 engages in the doctrinal analysis referred to above and includes a comprehensive examination of statutes, legislative instruments and case law. This section finds that, though Ghana is over 50 years old, copyright jurisprudence is still in its infancy. Judges are still grappling with the basic concepts of copyright; lawyers practice copyright law under the general rubric of traditional legal practice, rather than as a specialised field of law; and, academics have not completely positioned the development of academic literature on the subject as a key aspect of the promotion of copyright jurisprudence in Ghana.

Section 3 focuses mainly on a qualitative analysis of the evidence gathered during field interviews. The analysis finds that it would be misleading to assess the impact of the copyright law on access solely from the perspectives of formal law (statutes and case law) and academic writings. An appreciation of the practice on the ground is crucial to understanding the impact of the copyright regime on access. This is because, as the research demonstrates, practice on the ground is different from stipulations under formal law. Though the scope of permitted uses under Ghana's Copyright Act of 2005 is restrictive, people do not comply with the strict requirements of the law when photocopying or engaging in other access-enabling activities. In other words, there is no strict enforcement of copyright law in relation to the activities of students and researchers. As a result, people do not feel the impact of the strict copyright regime on their lives.

The study found that, in the universities, photocopying activities exceed the limits allowed under the formal copyright law, in part because there are inadequate and insufficient text books in the university libraries to support the large student population. Students, generally, cannot afford to buy the text books that are available for sale, especially those published by foreign companies. Therefore, strict enforcement of the copyright law against students and researchers would impede access to knowledge in Ghana.

It needs to be mentioned, however, that the situation is different in the primary and secondary schools, due to the government's policy of supplying books for free. The government contracts one or two private publishers (who win the bid) to publish the books needed for the basic and secondary schools. This free book policy has, however, put many local book publishers (who fail to win government contracts) and sellers out of business.

The study also found that contacts/ negotiations between universities and private collective societies are now developing. There is, however, a lack of confidence in some of the collective societies, due to a lack of clarity as to which collective society truly represents authors and book publishers. This distrust hampers the progress of negotiations regarding payments of royalties by students to publishers via collective societies.

The study also found that there is a general lack of copyright and access policies in the universities. This lack of access policies creates uncertainty among users as to the scope of permitted uses under formal law.

Furthermore, although universities are primary users of copyright-protected works, they are not included in the formulation of national copyright policies/laws/regulations that impact on access; hence their reluctance, to some extent, to help the collective societies collect royalties from students.

Section 4 highlights the research findings on both law and practice pertaining to ICT-related issues.

Section 5 concludes the report and draws conclusions as to what can be done to promote communication, collaboration and trust among copyright stakeholders in Ghana. Through such collaboration, communication and trust-building, copyright administration and access to teaching and learning materials, could both be greatly improved in Ghana.

1. Background

1.1 Country History, Economics and Politics

Ghana (formerly the Gold Coast) is a West African country. It is bounded on the North by Burkina Faso, on the East by Togo and on the West by Ivory Coast (Cote d'Ivoire). The South boundary is the Gulf of Guinea. Ghana has a territorial landscape of about 240,000km^2 and an estimated population of 22 million. Men constitute 49.5 per cent of the population, whereas women constitute 50.5 per cent. A sizeable proportion of the population (42.1 per cent of persons above 15) is illiterate and the average life expectancy is 58.5 years.[1] In terms of gender, the literacy rate among women is 49.8 per cent and that of men 66.4 per cent.[2] Ghana consists of several tribal groups distinguished largely by native languages, but the official language is English. As of 2007, the proportion of the population living below the poverty line stood at 28.5 per cent.[3] Recent statistics have confirmed that about half the population lives on less than US$1 a day and the annual per capita income is estimated at US$600.[4] The current GDP (purchasing power parity) is estimated at US$31.33 billion and the GDP growth rate for the 2007 fiscal year stood at 6.3 per cent.[5]

Ghana gained independence from Britain on 6 March 1957; it was the first overthrow of colonial power in a black African country south of the Sahara. Ghana became a Republic on 1 July 1960. During the colonial period, Britain exercised control over the then Gold Coast territory and the laws of the coloniser (Britain) prevailed. Since independence, English common law has remained part of the laws of Ghana, unless otherwise modified by statute. Ghana has experienced five military regimes and five civilian regimes. Presently, Ghana has a functioning democracy based on constitutional rule. After turbulent years of military intervention, constitutional rule has been in force since 1993.

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[1]Ghana Statistical Service 'Population data analysis report Vol.1 August 2005' in *Women and men in Ghana: a statistical compendium* (2006). Estimated total population figure in 2005 was 21,134,501. This consisted of 10,670,817 women and 10,463,684 men.

[2]From the Encyclopedia of Earth. Available at http://www.eoearth.org/article/Ghana [Accessed 31 May 2009].

[3]From the Encyclopedia of Earth. Available at http://www.eoearth.org/article/Ghana [Accessed 31 May 2009]; http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=152940 [Accessed 31 May 2009].

[4]*Ghanaian Chronicle*. Available at http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=87871 [Accessed 31 May 2009].

[5]Institute of Economic Affairs *2007 economic review and outlook report*. Available at http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=152940 [Accessed 31 May 2009]; http://www.eoearth.org/article/Ghana'[Accessed 31 May 2009]; *2008 Ghana budget highlights*. Available at http://www.ghana.gov.gh/ghana/budget_highlights_year_2008.jsp [Accessed 31 May 2009].

1.2 Education

Roughly, Ghana's educational system can be divided into five sectors. First is the basic level, which encompasses primary and Junior High School (JHS) education. Normally, pupils spend 9 years at the basic level, excluding kindergarten. The basic level is free and compulsory. Second, there is the Senior High School (SHS), where students spend 4 years and receive general education, vocational, technical or agricultural training. As mentioned above, at the junior and secondary school levels, the government of Ghana has a policy of providing free text books to students. This policy does not apply to the tertiary level. Third, Ghana has 38 Teacher Training Colleges where qualified SHS graduates may receive three years of formal training to become teachers at the basic schools (upon completion of their training). Fourth is the polytechnic institutions. These institutions run various programmes, spanning between one and three years. There are nine polytechnics in Ghana. Fifth and finally, there are the Universities. Ghana has six public universities and thirteen private universities.[6] The universities run diploma programmes (usually for two years) and degree programmes (for four years).

Ghana has a 10-year strategic education plan. The total funding requirement for this plan is estimated at over US$12 billion.[7] The government, however, falls short of this financial estimate annually. In 2009, the government's budget allocation to education was about US$1 billion.[8] The gap in financing education is exacerbated by the fact that not all financial allocations toward education are released by the end of each fiscal year.

Although there are more women (50.5 per cent) than men (49.5 per cent) in Ghana, a 2005 report on enrollment in the above institutions of learning indicates an average of 36.5 per cent female enrollment, compared to an average 63.5 per cent male enrollment. At the primary level, male enrollment is 52.3 per cent and female enrollment is 47.7 per cent. At the Secondary or High School level, males constitute 55.8 per cent of the enrollment and females make up 44.2 per cent. At the Vocational/Technical level, males dominate with 86.1 per cent while females constitute 13.9 per cent. At the Teacher Training schools, males constitute 57.3 per cent and females constitute 42.7 per cent of enrollment.

Enrollment in the universities and polytechnics is no different: males form 66.2 per cent, compared to 33.8 per cent enrollment by females.[9] These statistical data only shed light on the male-female school enrollment ratio in Ghana. The data, however, do not show the proportion of the population that falls within the school-going age but fails to enroll in schools in Ghana. Although the enrollment data was published in 2005, the gap in the male-female enrollment ratio has probably not changed significantly in 2009.

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[6]Information for this paragraph was obtained from the official website of the Ministry of Education, Science and Sports: http://www.moess.gov.gh [Accessed 31 May 2009]

[7]Ministry of Education, Science and Sports *Report on the education sector annual review* (ESAR) (2006), Government of Ghana.

[8]See 2009 'Budget statement' for Ghana.

[9]Ghana Statistical Service 'Enrolment in institutions of learning 2005' in *Women and men in Ghana: a statistical compendium* (2006).

Efforts are being made to improve the literacy rate and bridge the gap between male and female enrollment in schools. At the JHS level, the government has adopted a free compulsory universal basic education (FCUBE) programme in pursuance of the constitutional mandate to make basic education free and accessible to all.[10] The government is also taking progressive steps to comply with its constitutional obligation to introduce free high school education.[11] As an added incentive, the government has introduced free school feeding programmes for pupils at junior high schools. Additionally, an affirmative action campaign in support of girl child education is being vigorously pursued to bridge the male-female enrollment gap. The reason for the gap is cultural: historically, girls were stereotyped as best suited for household chores and marriage and not for professional careers. Such erroneous and offensive attitudes are, of course, now changing.

1.3 Laws of Ghana

The laws of Ghana consist of the 1992 Constitution, statutes enacted by Parliament, rules and regulations, the 'existing law' and the common law, including rules of equity and customary law. The existing law comprises all the laws that existed before 7 January 1993 when the Constitution came into force. The common law and rules of equity are 'received laws' based on judicial decisions of the courts in England and other common law jurisdictions. The common law rules serve as persuasive precedents for adjudication in Ghana. It is, however, important to indicate that the validity of all the laws is traced to the Constitution. This means that any law, action or omission can be challenged in court if considered unconstitutional. Important judicial decisions from the High Court, the Court of Appeal and the Supreme Court of Ghana shape the dynamics of the copyright regime in Ghana.

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[10]Articles 25 and 38 of the Constitution of 1992.

[11]Article 25 and 38 of the Constitution of 1992.

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2. Doctrinal Analysis

2.1 Statutes and Regulations

2.1.1 Copyright History

The history of copyright protection in Ghana can be traced to at least one of the sources of law identified in the previous section of this report. On attaining independence, Ghana inherited a copyright system based on the British Copyright Act of 1911. This use of the British law was reflected in Ghana's Copyright Ordinance of 1914 (CAP 126) with its enabling Copyright Regulation of 1918. The Ordinance applied the British Copyright Act of 1911 within the colony of the Gold Coast (now Ghana). Protection under the Ordinance focused on literary, dramatic, musical and artistic works. The law made it an offence to sell, make for sale, hire, exhibit, or distribute copyright infringing works in the then colony. Under the Ordinance, no express mention was made of public exceptions or free uses, but the British Act, from which the Ordinance derived its authority, permitted fair dealing with any work for the purpose of private study, research, criticism, review, or newspaper summary. In addition, no civil remedies were expressly provided for under the Ordinance, but since it implemented the British law in the colony, remedies such as injunctions, damages and accounts were available. There were also provisions that criminalised acts of making hard copies of protected works with the aid of industrial printing machines.[12] The term of protection, as based on the British Copyright Act, was for the life of the author plus 50 years after the author's death.

2.1.2 Copyright Act 85 of 1961

The Ordinance and its subsidiary legislation were replaced with the Copyright Act 85 of 1961 and the Copyright (Fee) Regulation of 1969 (L.I. 174) respectively. Act 85 and its L.I. 174 were the first post-independence pieces of copyright legislation in Ghana. The new 1961 Act added more materials as protectable subject matter of copyright. These additional protectable materials included cinematograph films, gramophone recordings and broadcasts.[13] The works were protected if sufficient effort had been expended on the work to give them an original character.[14] For some works, the Copyright Act of 1961 contained relatively shorter terms of protection. In the case of published literary works, copyright protection lasted only until the end of the year in which the author died or 25 years (instead of 50 years under the Ordinance) after the end of the year in which the work was first published, whichever was later in time.[15] For unpublished literary works, the 1961 Act offered a term of protection of 25 years (instead of 50 years under the Ordinance) after the end of the year in which the author died.[16] This made the protection granted to unpublished literary works longer than published ones.

Civil remedies, in the form of damages and injunctions, were also provided for in the 1961 Act, in addition to possible criminal sanctions under the law. However, the focus on criminal consequences (as prevailed under the Ordinance) was reduced.

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[12]Section 3(1).

[13]Section 1(1).

[14]Section 1(2).

[14]Section 14.

[16]Section 14.

Fair dealing provisions were also articulated in the 1961 Act. There was provision for fair dealing for purposes of review or criticism or for compiling a collection of portions of literary or musical works for use in educational institutions, if the author was acknowledged in any public use of the work.[17]

One problem with the 1961 Act was that it made the requirement of writing a sine qua non for protection of works such as musical works and this militated against the interests of illiterate Ghanaian composers.[18] This requirement of writing was changed by the copyright law of 1985.

2.1.3 Copyright Law of 1985 (PNDCL 110)

In 1985, a new copyright law, the Provisional National Defence Council Law (PNDCL) 110, was passed to replace the 1961 Act. Under this law, protection for works was extended to cover foreign-made works, in compliance with the Berne Convention. The 1985 law contained, in comparison with the 1961 Act, extended terms of protection: the general duration of protection for most works became the life of the author plus 50 years. In the case of other kinds of works owned by a body corporate, protection lasted for 50 years from the date on which the work was made public.

This 1985 law (PNDCL 110) also changed the strict requirement of writing that had existed under the 1961 Act and adopted a more flexible requirement – fixation – which has continued to date.

The PNDCL 110 of 1985 also added new materials to the category of protectable subject matter. The newly added protectable materials included works such as sound recordings, choreographic works, derivative works and programme-carrying signals. In addition to the continued protection of economic rights of rights-holders, PNDCL 110 introduced moral rights protection (right of authorship and the right of integrity) in the works to last in perpetuity.[19] To some degree, the 1985 law allowed free use for purposes of private research, teaching and inclusion in other works.[20] PNDCL 110 was, however, repealed and replaced in 2005 by a new Copyright Act, which is analysed below. Under the 1985 PNDCL 110, a new Legislative Instrument (L.I. 1527) was passed, which served to create the Copyright Society of Ghana (COSGA) as an umbrella collective society for copyright-holders. This situation has, however, changed since the 2005 Act entered into force; COSGA has lost its status as the umbrella collective society in Ghana.

2.1.4 Copyright Act of 2005 (Act 690)

The current substantive copyright legislation in Ghana is the Copyright Act of 2005. It came into force on 17 May 2005. The Act seeks to bring Ghana's copyright regime into line with its assumed international obligations under the TRIPs Agreement. Indeed, the Act introduced a globally oriented system, which incorporates universal copyright standards like those that exist under the statutes of most developed countries. The Act provides protection to works such as computer programmes and folklore that were, until then, not expressly protected under PNDCL 110 of 1985. The new Act extends the general term of protection from the life of the author plus 50 years after the author's death to life plus 70 years after death. In the case of anonymous or pseudonymous works, economic rights (as opposed to moral rights) are protected for 70 years from the date on which the work was made public or published, whichever date is later. If the copyright in a work is vested in a corporate body, protection is, in general, offered for 70 years. For works of folklore, protection is vested in the state and the term of protection is perpetual. The terms of protection for works in Ghana thus exceed the standard duration of copyright protection required under the TRIPs Agreement. These provisions are, therefore, examples of what are known as TRIPs-plus provisions.

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[17]Section 1(2).

[18]CFAO v *Archibold* [1964] GLR 718; *Archibold v CFAO* [1966] GLR 79.

2.1.4.1 Requirements and Scope of Protection

In Ghana, for a work to be eligible for copyright protection it must be original, in the sense of the work being the independent creation of the author. Under the 2005 Copyright Act, protection is granted to original literary works, artistic works, musical works, sound recording, audio-visual works, choreographic works, derivative works, folklore and computer software or programmes. The Act also protects the rights of performers and broadcasting organisations in their programme-carrying signals by granting the 'exclusive' rights to reproduce, translate, adapt, transform, rent, distribute or perform the work in public. It also grants authors perpetual protection to moral rights. In following the global copyright regime, the Act increased penalties for copyright infringement by adding to the civil remedies provided for under the Act. In addition to civil remedies such as damages, injunction, seizure and destruction of infringing materials, accounting and Anton Piller relief, the infringer could face a fine or imprisonment of up to three years, or both fines and imprisonment.[21] This is different than the PNDCL 110 0f 1985, under which the term of imprisonment could not exceed two years.

2.1.4.2 Copyright Exceptions and Limitations

The 2005 Copyright Act also contains provisions respecting exceptions and/or permitted uses of copyright works. These provisions include, but are not limited to, Section 19 (permitted use for personal purposes), Section 20 (reproduction of a single copy of computer programmes as back-up) and Section 21 (permitted use of copyright materials by a library or archive). The full texts of both Sections 19 and 21 are attached to this report as Appendix A.

Section 19 makes it a non-infringing act to translate, reproduce, adapt or transform the work for exclusive personal use, if the user is an individual and the work is made public. Copying for private use does not, however, permit the reproduction of a whole or a substantial part of a book. The restrictions provided under Section 19 apply to the copying of all literary and artistic works, which includes text books, articles, dictionaries, paintings, photographs, sculptures, maps and virtually all other learning materials used in educational institutions. No formula has as yet been developed to serve as a guide on what constitutes substantial copying. It is likely that what constitutes substantial copying will be determined on a case-by-case basis, depending on both the quantity and the quality of the copying in question.

At present, no special mention is made of copyright exceptions for persons with disabilities. But the practice, as impact assessment interviews uncovered, is that the universities convert some of their learning materials into brail form for the visually impaired. In addition, no specific exceptions exist for distance learning. Access for purposes of distance learning is covered by the general exceptions under the Copyright Act. In other words, there are no special provisions made specifically to allow for access to materials for purposes of distance learning.

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[21] Section 43.

Fair use for purposes of review and criticism, which was explicit under the 1961 Act, is not mentioned in Act 690; save that a researcher may include another's work provided the first author is acknowledged. According to Section 19, it is not an infringement to include portions of another's work in one's own work, provided the individual user acknowledges the source and the quotations are in accordance with 'fair practice'. The use of a copyright protected literary or artistic work is also permitted without authorisation where it is used for teaching or broadcast in educational institutions. Besides acknowledging the source, this must be in line with fair practice. But the issue of what constitutes fair practice remains undefined. In making such determination, the practices of a particular industry will be a key factor. For instance, academic rules against plagiarism and the rules on incorporation of another person's work into one's own for purposes of scholarship will aid in interpreting the meaning of 'fair practice'. Section 19 also allows for reproduction in the media or communication to the public of political speeches, legal proceedings and lectures for purposes of reporting fresh events. This must also be consistent with fair practice in the media and the source must be acknowledged.

Under Section 21, libraries and archives are permitted to make a single copy of a published article or short extract for an individual, as long as they ensure that the individual uses the copy for purposes of study, research or scholarship. How such a supervisory role could be exercised remains unclear. Also, a library or archive may make a single copy of a copyright protected work to replace or preserve a book that may be lost or destroyed. When the reproduction is not an isolated instance, however, then a licence for that purpose is required from the copyright owner or collective society of owners.

2.1.5 The Constitution and Other Statutes

The Constitution of Ghana includes provisions that may concern access to learning materials. Articles 25 and 38 oblige the government to make basic education free and compulsory. The provisions also mandate the government to take progressive steps to make high school education free and accessible. Higher education must also be as accessible as possible. There is also provision for the passing of a right to information law in order to promote access to information. This law, which is to promote access to public information and documents, has not yet been passed, even though discussions on the need for such a law have taken place at several fora. Recently, the Attorney General invited memoranda from the public about the passing of the Right to Information Bill into law. The Bill is now before Parliament and it is expected to be passed soon.

The Constitution also makes provision for the protection of academic freedom.[22] It is, however, not known whether a defendant may use a constitutionally guaranteed right to information or academic freedom as a defense in a copyright suit in Ghana. What is called 'parody of defence'[23] is occasionally invoked in places such as the United States (US), but not in jurisdictions that follow the British copyright tradition.

Interestingly, statutes in Ghana that establish educational institutions do not explicitly talk about policies relating to copyright and access. It is left to the universities as knowledge-producing and knowledge-consuming institutions to take such steps to develop their own copyright policies and research guidelines. The crucial role of the universities as knowledge consumers and producers also brings to the fore the need for them to be heard when copyright policies are being discussed.

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[22]See Articles 21(1)(b)(f), 25 and 38 of the Constitution of 1992.

[23]'Parody of defence' involves invoking constitutionally guaranteed rights, especially free speech and press freedom, as defence for copyright infringement actions. This is common in the US, but rare in the UK.

2.1.6 International Obligations

Ghana is a member of the Berne Convention, the Universal Copyright Convention and the TRIPs Agreement. Ghana has also signed the World Intellectual Property Organisation (WIPO) Copyright Treaty (WCT) of 1996 and the WIPO Performances and Phonograms Treaty (WPPT) of 1996. Among other things, both WCT and WPPT deal with the protection of digital works by requiring member states to outlaw the circumvention of technological protection measures (TPMs), which are employed by rights-holders to prevent copyright infringement. Despite Ghana's accession to the two treaties, no express domestic legislation has been enacted to fully implement these. And there is no current reform debate regarding implementation of both treaties. It is, however, important to stress that the Copyright Act of 2005 contains some provisions that are called for by the WCT and WPPT. Most importantly, Section 42 contains an anti-circumvention provision, making it an offence to alter any electronic rights management information or to circumvent any technological measure applied by the rights-holder to protect his/her work. Also, devices to facilitate circumvention are prohibited. Upon conviction, a circumventer or facilitator could face a term of imprisonment of up to three years or a fine, or both as per Section 43. These provisions on anti-circumvention measures do not allow for any exceptions. The implications of anti-circumvention provisions are discussed under Section 4 below.

2.2 Judicial or Administrative Decisions

There is a dearth of relevant judicial decisions on the subject of copyright vis-à-vis access to teaching and learning materials in Ghana. A reading of reported cases in the Ghana Law Reports (1959 to 2000) does not reveal any significant judicial pronouncements on the development of the law of copyright and access. In fact, it may be of interest to note that there have been no more than seven reported copyright cases in the Law Reports since independence. The reported cases between 1959 and 2000 are: *CFAO v Archibold*;[24] *Archibold v CFAO*;[25] *Ransome-Kuti v Phonogram Ltd*; [26] *Ransome-Kuti v Phonogram Ltd*;[27] *Musicians Union of Ghana v Abraham & Another*;[28] *Ellis v Donkor & Another*;[29] and *Copyright Society of Ghana v Afreh*.[30] All of these cases concerned musical works. Therefore, their significance here is minimal. Moreover, some of the principles established in cases such as that of the *Archibold* case (dealing with the strict requirement of writing as a prior condition for protection) have been changed by subsequent legislation. Since law reporting is running almost a decade behind in Ghana, the research team also searched for unreported cases from the courts for further analysis. One such unreported case is: *The Republic v Ministry of Education & Sports & Others; Ex parte Ghana Book Publishers Association*.[31]

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[24][1964] GLR 718.

[25][1966] GLR 79.

[26][1976] 1 GLR 220.

[27][1978] GLR 316.

[28][1982-83] GLR 337.

[29][1993-94] 2 GLR 17.

[30][1999-2000] 1 GLR 135.

[31][Suit No. AP11/2006] (the *Book Publishers Association* case).

In the Book Publishers Association case, the applicants filed an ex parte application with the High Court to challenge the decision of the Education Ministry and the Procurement Board to award a contract for the printing of basic school books to MacMillan on the grounds of unfairness of opportunity and the lack of open procedure. The High Court accepted the applicant's position that Macmillan had been given an unfair advantage over local producers and therefore revoked the said contract. As at the time of writing this report, the case was pending an appeal at the Court of Appeal. The appeal notwithstanding, the *Book Publishers Association* case exemplifies the concerns voiced by local book publishers during the field research carried out for this report that their industry is collapsing due to unfair practices by giant international publishers such as MacMillan.

2.2.1 Judicial Appreciation of Copyright Concepts

Because of the complexity of copyright principles and the lack of litigation activity or judicial training in this area, some judges unfortunately are not equipped to appreciate the basic concepts of Ghana's copyright jurisprudence. One judicial decision that will be discussed here is the *Ellis* case, since it seeks to establish the requirement of originality under the copyright law of Ghana. A detailed analysis of this case is important as it elaborates on the requirement of originality, which is the sine qua non of copyright protection.

In *Ellis v Donkor*, the plaintiff, who claimed to have created piano music by substituting the vocals in five existing songs and personally adding one song ('Aketesia'), sued the defendants for, inter alia, damages for copyright infringement and a permanent injunction. The plaintiff's claim against the defendants was that the latter had reproduced the piano music for commercial purposes without authorisation. In dismissing the plaintiff's action, the judge had to determine whether the work in question was original and thus eligible for copyright protection. The judge held that merely taking someone else's original music and substituting the vocals with one instrument (such as the piano), did not sufficiently amount to an independent creation that was original in character. The judge stated that '[i]n order for a musical work to constitute derivative work under PNDCL 110, it should on analysis and comparison be conspicuously different from the original work and should reveal originality or innovation by the musician in adapting the original work.'[32]

It is arguable that the judge erred by equating *originality* in copyright with *innovation*. Innovation is a standard used in patent law and not in copyright laws. Independently created work also does not need to be conspicuously different from the earlier work. Perhaps the American 'creative spark' standard of originality, as enunciated in the case of *Feist Publications Inc v Rural Telephone Service Co.*,[33] influenced the judge's reasoning. This subjected the plaintiff in the Ellis case to a higher standard than that required under the Copyright Law of Ghana. Indeed, Section 2(4) of the then Copyright Law (PNDCL 110 of 1985), which corresponds with Section 1(4) of the current Copyright Act, defines a work as original 'if it is the product of the independent effort of the author'. This definition in Ghana's Act appears to resonate more with the British standard of originality enunciated in the famous case of *University of London Press Ltd v University Tutorial Press Ltd.*[34] The British standard is that the work must originate from the author. It must not have been copied. The American standard of creativity (which the judge followed in violation of the express definition of originality under the then PNDCL 110) is a result of their constitutional history and doctrine, which is obviously inapplicable in the Ghanaian context.

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[32][1993-94] 2 GLR 17.

[33](1991) 499 US 340.

[34](1916) 2 Ch 601.

Under the current Act of 2005, the Ghanaian legislature decided to retain the definition that resonates with the British requirement of originality. Under Section 1(4) a work is considered original 'if it is the product of the independent effort of the author.' Thus, the work should be independently created, not copied. And the eligibility of a work of copyright is not affected by its artistic quality; the purpose of the author in creating the work or the manner or form of its expression will not affect the eligibility of the work.[35]

2.2.2 Explaining the 'Lack' of Copyright Cases

The near paucity of judicial authorities on the subject of copyright is partly due to the preoccupation of most Ghanaians to litigate to protect their tangible property rights, rather than their intangible property rights through the courts.[36] Moreover, inordinate delays in the judicial system make it unattractive to spend time over a seemingly less important intangible property right matter.

Another factor that contributed to the dearth of copyright cases was the existence of an arbitration provision under the copyright law of 1985, to which most people resorted in preference to litigation. Thus, once parties involved in a copyright dispute agree to submit their disagreement to arbitration, the matter is taken over by the Copyright Administrator and the award binds the parties. This arbitration arrangement has, however, been discontinued under the Copyright Act of 2005. During the course of field research conducted by the researchers, no calls were made by the copyright stakeholders for re-introduction of the arbitration system. It is apparently believed that the court system can better resolve copyright disputes, despite the delays and even though the Copyright Office believes that the arbitration processes previously used were effective in resolving disputes.

Recently judicial procedures have improved. The coming into force of the new High Court Rules (C.I. 47) on 3 January 2005[37] and the establishment of the Commercial Division of the High Court under its Order 58, with specialised rules of enforcement of IP rights, ensures a speedy trial and/or disposal of cases.[38] The Commercial High Courts are now manned by judges who have considerable insight into the dynamics of IP law and the judges are occasionally trained by the Judicial Training Institute. Barring any hitches, most IP related cases can now be disposed of within a year of initiation. This position is in sharp contrast to what prevailed prior to 2005, when IP disputes could drag on for several years in the 'regular' high courts in Ghana. A major drawback here is that the Commercial High Court is only found in the Ghanaian capital, Accra. The other nine regional capitals do not have a Commercial High Court. However, progressive steps are being taken to establish a Commercial High Court in the other regional capitals. Further, although the Commercial High Court now deals with copyright cases more speedily, the long-standing issue of delay in case reporting is another major concern. As stated earlier, Ghana lags almost a decade behind in reporting cases in the official Law Reports. This makes it difficult to do any meaningful assessment of the trends, if any, from the courts. This meant that, for purposes of this study, a certain amount of roaming around the court registry was required in order to uncover copyright decisions.

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[35]Section 1(3).

[36]Reported cases prove that land-related cases constitute the bulk of litigation in Ghana. On this point see Poku Adusei 'Burden of proof in land cases: an analysis of some recent decisions of the Court of Appeal and the Supreme Court of Ghana' (2000-2002) 22 *University of Ghana Law Journal* 223.

[37]The High Court (Civil Procedure) Rules 2004 (C.I. 47) entered into force on 3 January 2005.

[38]Order 63 of C.I. 47.

2.2.3 Judicial Reliance on Foreign Cases

Ghanaian courts also attach great importance to the operations of the doctrine of *stare decisis*. Cases from other jurisdictions, such as the United States, Canada and the United Kingdom, can have a persuasive effect on judges in Ghana. The Canadian case of *CCH Canadian Ltd v Law Society of Upper Canada*,[39] for example, deals with photocopying activities in a library, and by analogy, an educational institution. Besides its relevance to this study, we had also, on a previous occasion, advised the University of Ghana about photocopying activities, relying on this case in providing the advisory opinion.

In the *CCH* case, the defendant (a professional law society) maintained and operated a request-based photocopy service for its members and the judiciary at the Great Library in Toronto, Canada. In 1993, the plaintiffs, publishers of legal materials, commenced a copyright infringement action, claiming that the Law Society had infringed its copyright in terms of the law reports and other legal materials that it had published. The Supreme Court of Canada had to decide, inter alia, whether copyright was infringed when a single copy of a case report, statute, book or other work was copied for purposes of research. In holding that the defendant did not infringe copyright, the court took account of the library's 'access policy,' which had been displayed at the place where the photocopying was done. Indeed, that access policy described the limits of the reproduction that a person may undertake at one time. The access policy proved critical when the Supreme Court of Canada held that the Law Society was not even contributorily liable for the violations of other persons who exceed the prescribed limit. If the CCH case were cited in a Ghanaian court in a dispute involving photocopying activities on a university campus, it may weigh heavily on the judge's mind. Therefore, the lesson for Ghanaian universities is that having access guidelines, which disclaim university liability in respect of unauthorised photocopying, could save an educational institution from copyright liability.

2.3 Summary of Doctrinal Analysis

Ghana's copyright regime has gone through several incremental changes since independence from Britain. The copyright system now complies with or exceeds the TRIPs Agreement standards by granting protection to literary, artistic, musical works, computer programmes and folklore. Between 1961 and 1985, copyright protection lasted for 25 years; protection increased to at least 50 years in 1985. Since 2005, Ghana has adopted a TRIPs-plus approach, granting protection for the life of the author and for seventy years after the author's death. In our view, this protection period is too long. In addition, the provisions on permitted use have too many restrictions. The net effect is that the scope of the public domain and access to learning materials have been restricted.

Ghana has also signed the WCT and the WPPT treaties, but has yet to implement both treaties fully in domestic legislation, with the notable exception of the key anti-circumvention provisions.

The few judicial decisions on copyright concern musical works. These cases do not articulate the copyright law of Ghana very well. The *Ellis* case indicates that some judges are not fully aware of the basic principles that underpin Ghana's copyright law. The establishment of the Commercial High Court, staffed by judges with insight into IP law, and regular training of these judges by the Judicial Training Institute should ameliorate the situation.

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[39][2004] 1 SCR 339 (*CCH Case*).

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3. Qualitative Analysis

3.1 Secondary Literature

In Ghana, the subject of copyright has received relatively little attention in academia. Academics have not completely positioned the development of literature on the subject as a key aspect of the promotion of copyright jurisprudence in Ghana. A primer on the Ghana law of copyright is a commentary by Andrew Ofoe Amegatcher entitled *Ghanaian law of copyright* (1993). This publication is based on the now defunct PNDCL 110 of 1985. The book has not yet been revised to take account of new developments under Act 690 of 2005, and there are no signals that the author will be revising the book in the near future.[40] Paul Kuruk's brief overview of the IP framework of Ghana, published in 1999,[41] is also based on the old PNDCL 110.

There are several journal articles directly addressing Ghanaian copyright law. One is Josephine Asmah's 'Historical threads: Intellectual property protection of traditional textile designs: the Ghanaian experience and African perspectives' published in the *International Journal of Cultural Property* (2008). Here, Asmah makes a case for folklore protection in Ghana and urges international cooperation to strengthen the protection of folklore.There are also two recent journal articles on copyright written by Poku Adusei, the leader of the Ghana ACA2K country research team. In 'Cyberspace and the dilemma of traditional copyright law,'[42] Adusei articulates the view that digital technologies have upset the social policy objective of copyright law, and have further rendered traditional copyright issues ,such as jurisdiction, choice of law and enforcement, immaterial. In rejecting the modern approach of locking down online materials with technological protection measures due to the negative impact on public access, the author argues for the adoption of international copyright principles and concepts that defy geographical limitations; this in order to address the thorny legal issue of cyberspace, since, after all, there are no borders in cyberspace. Adusei's second article[43] traces the evolutionary trajectory of Ghana's copyright regime since independence. It posits that the copyright system moved from a purely territorial legal framework to an international system of limited harmonisation of copyright norms, then to the current global system whereby IP issues are considered international trade policies. Throughout this evolution, three substantive copyright statutes have been enacted to establish Ghana's domestic copyright system.

However, judicial responses in shaping the law in Ghana have not been encouraging. Adusei's second paper articulates the legal developments and addresses the gaps created in Ghana's quest to institutionalise a perfect copyright system. It further examines how the current global system can support the increasing demand for copyright works, especially in the era of 'free use of musical works' by radio stations in Ghana.

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[40]The leader of the Ghana ACA2K team has a five-year plan to write a book on IP law in Ghana. This research will, therefore, contribute meaningfully to the section on copyright in the proposed book.

[41]Paul Kuruk 'Trends in the protection of IPRs: a case study from Ghana' in Melvin Simensky et al (eds) *Intellectual property in the marketplace* (1999) John Wiley & Sons, Inc, New York, Chapter 18.

[42]Poku Adusei 'Cyberspace and the dilemma of traditional copyright law: an assessment of the impact on the legal community' (2002-2004) 22 *University of Ghana Law Journal* 202.

[43]Poku Adusei 'The evolution of Ghana's copyright regime since independence: a critical appraisal' in Mensa-Bonsu et al (eds) *Ghana law since independence: history, development and prospects* (2007) Accra: Black Mask Publication, Accra, at 11.

Also, there is an ongoing University of Ghana MPhil research project that relates to copyright and access. It is being undertaken by Emmanuel Darkey, the Librarian of the Law Faculty of the University of Ghana and one of the interviewees for this study. Darkey's research examines, among other things, access and impacts on the work of librarians in Ghana. Darkey notes in his unpublished dissertation that his research 'attempts to look at copyright [as to whether it is] as a barrier to access to knowledge and information provision' in Ghana.

Apart from the above commentaries, secondary literature on the copyright law in Ghana is lacking; some of the secondary literature mentioned in this report is also dated.

3.2 Impact Assessment Interviews

The researchers interviewed 17 people who have connections to the Ghanaian copyright environment. They come from the main stakeholder bodies identified for this research. Those stakeholders are:

- **Government:** the Ministry of Justice (Copyright Office, Legislative Drafting Section and the Law Reform Commission) and the Ghana Education Service;
- **Educational communities/users:** University of Ghana (Balme Library, Faculty of Law Library, administrators and students), KNUST (university library, administrators, lecturers and students); and
- **Copyright-holders:** Ghana Book Publishers Association, Ghana Association of Writers, Copy Ghana and Ghana Universities Press.

The following sub-sections present the findings from the interviews and an analysis of the results.

3.2.1 General Resource Constraints in Ghana that Affect Access to Learning Materials

Interviews revealed that the Government of Ghana has a book policy for the basic and secondary education levels, but not the tertiary education level. Pursuant to this policy, publishers are invited to write text books according to the syllabuses of the basic and secondary schools. These manuscripts are then submitted for evaluation and eventual selection. Upon selection, the government negotiates a price and places an order for the quantity to be produced and distributed to the basic schools. Research uncovered that the government's book policy serves as a disincentive to local publishers. This is because the policy is based on a 'winner- takes-all' system. Thus, if one fails in the bid, one gets nothing. That aside, the study found that the book policy has reduced the control of the private textbook publishers in the country. Students at the basic and secondary levels buy text books published by private publishers in Ghana only if they need personal copies or if they need to replace lost copies. This, in part, has caused many book shops to close down.

Concerns were also expressed that local publishers sometimes are disadvantaged when big companies like MacMillan participate in the bid for government publishing jobs. As shown earlier (in the *Book Publishers Association* case), this perceived lack of fair-play prompted the Ghana Publishers Association to take the Ghana Education Service to court over their grievances.

Mainly as a result of the government's book policy, photocopying of books is not an issue of concern at the basic and secondary levels. However, photocopying is a major issue in the universities and other tertiary institutions.

The policy of supplying free books at the basic and secondary levels does not take the needs of the disabled into account. However, it is hoped that, with the passing of the disability law in 2007, efforts will be made to ameliorate the situation. The Disability Act seeks to promote policies that will provide fair opportunities to the disabled. Therefore, progressive implementation of both the Disability Act and the Copyright Act should allow issues relating to access to teaching and learning materials for the disabled to be addressed in legislative instruments that implement both Acts.

Interviewees from universities reported that there are insufficient numbers of text books to support the large student population. Photocopying is the only way to obtain meaningful access to teaching and learning materials. For instance, in the library at the Faculty of Law at the University of Ghana, two text books on a particular subject may serve approximately 130 students. The situation is even worse in the arts and humanities departments. Here, 800 to 1000 students may be sharing two or three copies of a book for a particular course. The cost of procuring electronic materials was also beyond the means of the educational institutions. The universities sometimes receive support from international organisations, one such being Carnegie (an American corporation). The probe found, for instance, that the University of Ghana commits 10 per cent of its academic facility user fees towards the acquisition of books and other materials for the libraries every year. KNUST's total financial allocation to the libraries in 2008 was GH¢300,000.00 (roughly equivalent to US$300,000.00). It is from this sum that books must be procured and other administrative overheads catered for.

The Law Faculty at Legon paid an undisclosed sum to procure the Digital Attorney (an electronic database for Ghana cases and statutes) and also pays US$1500 every year in service fees. However, there are restrictions on the use of this database: technological protection measures make it impossible to copy its contents. Should a student attempt to copy information, the database becomes corrupt and servicing, though covered by the US$1500 service fee, is not prompt.

As a matter of law, circumventing technological protection measures constitutes an offence under Section 42 of the Copyright Act. There are no exceptions to circumvent technological protection measures for non-infringing purposes. In effect, fair dealing with the legal materials in the database is impossible; it is permitted legally but prevented technologically. This is a concrete, real-world example of digital access difficulties. Besides the fact that the Digital Attorney is expensive, encryption makes it difficult for students and researchers to fully use its contents. This restrictive condition, coupled with bad service delivery, impedes access to knowledge.

Books published locally are cheaper than those that are imported. For instance, one librarian suggested that if AKP Kludze's books on equity and succession, published by Kluwer, were published by the Universities Press, they would have been much cheaper. 'The price of a copy published by Kluwer sells at US$180. It would have cost about US$60 if published here,' he added. Import duties and taxes are partly to blame. Even though a locally manufactured book may be cheaper, publishers in Ghana who were interviewed during this research expressed concern over taxes on materials used in publishing books. They believed prices would have been very much lower if taxes were waived on some of the materials, such as printing paper and equipment.

3.2.2 Copyright Law Amid Resource Constraints

The librarians interviewed were aware of the copyright law. Though they welcomed the copyright system as a mechanism for rewarding creators for their intellectual efforts, they expressed reservations about the scope of permitted use under Ghana law. The librarian at the Faculty of Law, Legon expressed his concerns in the following words:

> The law says that we can photocopy a single copy of a book for use in the library, and I think that will not work when we have over a hundred students in need of that book. Also, lawyers are coming to use the books. When the books are getting torn, we photocopy and allow students to photocopy as well. So that section of the copyright law dealing with libraries and archives does not favour a librarian, students and researchers…. If we insist on it, we cannot work. Another section of the law that is unworkable is the seeking of permission from authors before we can exceed the limit of copying. We don't know where the authors are so we cannot get to the author.

The scope of permitted use under the copyright law is restrictive, but there is no regime of strict enforcement mechanism in place. Because copyright is not enforced, students and researchers do not feel its impact. One interviewee reported: 'The law is not strictly enforced and that helps us. If the law enforcement agencies come hard on us there will be a public outcry and that will force the government to take a second look at the copyright system.'

3.2.3 Universities and Access Policies

Research interviews revealed that the universities in Ghana do not have copyright and access policies. There are also no notices displayed at places where photocopying activities are undertaken, which would inform students and other users of the implications of violating copyright law and the quantum of materials that may legally be photocopied. Universities have, however, adopted a convention to guide staff operating the university-owned photocopiers. The practice is that students are allowed to photocopy a maximum of a chapter out of a book. In the case of journals, a student may photocopy one article. However, students beat the system by showing up at different times and locations until they have what they need.

This is only one aspect of the story. Apart from the official university photocopiers, there are many unofficial photocopy machines on university campuses. These unofficial ones are not strictly regulated and they are used for commercial purposes.

Although the universities and their librarians are key players in the copyright industry, they do not play any role in the formulation of copyright policies at the national level. Librarians and university administrators interviewed confirmed that they have never been invited to participate in copyright stakeholder meetings. They expressed their willingness to make a significant contribution if given the opportunity. Most of the private rights-holders interviewed, on the other hand, said that they have participated in copyright policy discussions.

3.2.4 Collective Societies, Copy Ghana and Public Use

Copyright law requires that a user obtain permission from the copyright owner or an authorized collective society of owners before photocopying beyond a certain amount. The difficulty in seeking approval from owners brings to the fore questions about collective administration in Ghana.

This research determined that private collective administration is in disarray. New collectives are formed almost every year, especially as splinter groups emerge in the music sector. The dominant society is COSGA, which previously oversaw the activities of all other collective societies. Their monopoly position was criticised as being undesirable, so they no longer oversee many societies. Concerns about transparency and alleged financial irregularities resulted in the Attorney General requesting that COSGA's account be investigated for the period commencing June 2008.

The Copy Ghana society represents literary writers. For purposes of access to teaching and research materials, Copy Ghana is the most important collective society. There is also the Professional Musicians Association of Ghana (PROMAG) and the Ghana Association of Phonographic Industries (GAPI), among others. As at the time of writing this report, there were no established royalty distribution formulae in place among the collective societies.

The new copyright law now allows for multiple collective societies. This changes the previous system that made COSGA the dominant body. The Copyright Administrator of Ghana sees this as an unfortunate provision, however. In his view, the copyright industry is too small to have multiple collective societies. The sentiments expressed by the Copyright Administrator were also backed by the Executive Director of the Ghana Universities Press. Others have argued, however, that forcing one collective society on copyright owners infringed the freedom of association, which is constitutionally guaranteed in Ghana.

Regardless, in practice, Copy Ghana is the reprographic rights organisation for literary work owners in Ghana. Although Copy Ghana is a private collective society of authors, it works co-operatively with the Copyright Office in matters of administration. Indeed, its office space is provided by the Copyright Office of Ghana; the offices are adjacent to each other in the same building. Copy Ghana also receives financial and administrative support from Kopinor (Norway's reprographic rights organisation) and also from the International Federation of Reprographic Rights Organisations (IFRO).

Contacts between the universities and private collective societies are now developing. Copy Ghana (representing literary writers) has managed to convince three private universities to charge GH¢2 (almost US$2) per annum per student as fees for a blanket royalty scheme. In the case of the public universities, Copy Ghana is yet to sign an agreement with any of them. The Executive Secretary of Copy Ghana has indicated the society's preparedness to sue students and the universities for infringement of copyright law 'at the appropriate time'. He said that his organisation's survey had revealed that students spend an average of GH¢35 (US$35) photocopying books every year.

The study found that in addition to Copy Ghana's decision to charge GH¢2 per student each year, Copy Ghana wants to limit the extent of copying to 15 per cent of a book. Such license would be more of a restriction than a benefit since the copyright law of Ghana (especially Section 19) allows photocopying beyond 15 per cent for private study or research purposes in Ghana. Universities should, therefore, question the 15 per cent restriction in future negotiations with Copy Ghana; instead they should argue for an extended per cent (i.e. beyond an amount probably freely permitted under copyright law) if they are to accept the requirement to collect the GH¢2 annual payment from each student. Otherwise, there is a risk of liability not only for copyright infringement but also for a breach of the royalty-payment contract. After paying blanket licence fees, photocopying should be free from further substantial restrictions in order to reflect the reality of students' practices. The Executive Secretary of Copy Ghana seems to have accepted this principle, though formal institutional arrangements are required to avoid future disputes. Also, if the universities accept having to collect the monies from students on behalf of Copy Ghana, they will have to factor in their administrative overhead costs.

3.2.5 Pro-Access Library Consortium

The study also found that the universities' libraries operate under an association called CARLIGH (Consortium of Academic and Research Libraries in Ghana). Through CARLIGH, they operate the inter-library lending system, allowing students to borrow books from libraries in other universities in Ghana. Another important issue that the study uncovered was that under CARLIGH, the universities pool resources together to procure materials. Thus far they have procured electronic journals under the system. One interviewee stated: 'The reason for starting with the electronic journals is that they are very expensive. It is only in contributing and sharing that we have been able to do our work well.' This policy, if well implemented, can be used to procure expensive materials which one institution cannot afford alone. After pooling resources to procure the materials, these can be shared by making more copies or through the inter-library lending system.

3.2.6 Copyright Office

The researchers also interviewed the head of the Copyright Office in Accra. The Copyright Office is statutorily mandated to execute the Copyright Act. The Office registers copyright works, which is optional in Ghana. The study found that the Office takes its anti-piracy activities seriously. It is not uncommon to find public notices warning people about piracy. The Office has an anti-piracy committee that tracks down copyright pirates and prosecutes them. The anti-piracy activities have focused on the music industry where copyright piracy is rampant and the prosecutions take place in the lower courts and proper records are not kept.

The law envisages a body called the 'copyright monitoring' team doing the anti-piracy work. This monitoring team has not formally been established, but the Copyright Administrator stated that his Office is still doing the anti-piracy work. Though piracy is common in the music and film industry, it is minimal in the book industry. The Office does not define photocopying activities on university campuses as 'piracy.'

On the issue of public education, the Administrator pointed out that his Office is not required to educate the public on the law; his Office is required to enforce it. Public education, he said, must be done by the Ministry of Education. He added that in the process of enforcing the law, they educate the public indirectly. He defended the TRIPs-plus requirement (life plus 70 years) in Ghana on the grounds that Ghanaians are also creative and that granting protection for a longer period serves 'our' interest. The interview with the Copyright Office showed that 'technical assistance' from WIPO has played a role in the push for TRIPs-plus obligations in Ghana. However, the claim that TRIPs-plus serves 'our' interest is questionable, as there is no evidence that longer periods of copyright protection spur creativity. Instead, arguably, it limits access to works and their entry into the public domain for too long.

There is some interaction between Ghana Book Publishers, the Ministry of Education and the Copyright Office. These institutions confirmed their involvement in ongoing discussions regarding passing a new copyright legislative instrument. This was, however, not the case with the universities; these key stakeholders in the copyright industry are not involved in policy decisions that affect the education sector. This lack of participation in law and policy making has contributed to the difficulty of persuading universities to collect royalties from students for photocopying activities.

On the issue of whether gender plays any role in copyright administration, the Head of the Copyright Office answered in the negative, adding that the law is neutral and does not deal with specific gender issues.

3.3 Summary of Qualitative Analysis

There is little up-to-date secondary literature on the copyright law of Ghana in general and no literature on the impact of copyright law on access to learning materials. Generally, academics have not shown interest in writing about IP in Ghana. That is likely to change soon, however.

Photocopying of books is a common phenomenon on university campuses. The extent of such copying can sometimes be the entire book. This is clearly beyond the scope of permitted use under Sections 19 and 21 of the copyright law of Ghana, as permitted use for purposes of study and preservation respectively, are restrictive.

Interviews with relevant stakeholders revealed that there is a higher demand for printed books than for electronic materials. The cost of procuring both electronic and printed materials is beyond the means of the universities. As a consequence, inadequate numbers of text books result in students photocopying materials for study purposes.

The universities have recently resorted to a pro-access policy of pooling resources to procure electronic materials via CARLIGH; they then share materials amongst themselves to reduce costs.

Librarians and lecturers have a fair knowledge of the copyright law. As users, they have also indicated that restricting photocopying can undermine teaching and research in the universities.

Although the scope of permitted uses under the copyright law is restrictive, there is no regime of strict enforcement in place (at least not against universities and students). If the current restrictions in Ghana's copyright law are rigorously implemented and enforced, access to teaching and learning materials would be seriously curtailed.

It was found that Copy Ghana has collected some royalties, but so far no distributions have been made. This is also the case with COSGA. There are no established royalty distribution formulae in place in Ghana.

Interestingly, the universities are primary users of copyright materials but are not asked to participate in policy decisions on copyright matters. On the other hand, private rights-holders interviewed said that they had participated in one way or another in copyright policy discussions.

4. Information and Communication Technology (ICT)-Specific Findings

The research found that the bulk of materials used by educational institutions at all levels in Ghana is printed books. At the basic/primary and secondary levels, electronic materials are not usually relied upon, and it is only now that steps are being taken to include ICT in education at these levels.

The situation is, however, different at the universities and other tertiary institutions. At the tertiary level, some institutions have limited access to electronic materials in the form of CD-ROMs, databases of literature searches and electronic journals. Nevertheless, it was found that hard-copy books are the most important resource for students. University researchers and faculty members, however, prefer electronic journals and see electronic materials as a supplement to printed books.

With respect to copyright infringement of electronic materials, this is not of much interest to private rights-holders since Copy Ghana is struggling to deal with photocopying activities on university campuses. Infringement of digital materials is likely to be more of a concern in the music industry, where piracy is rampant.

It is, however, important to stress that the Copyright Act contains provisions (in Section 42) that make it an offence to alter any electronic rights management information or to circumvent any technological measure applied by the right holder to protect his/her work. Upon conviction, the infringer could face a term of imprisonment of up to three years or a fine, or both imprisonment and fines.[44] There is no exception permitting circumvention of TPMs for non-infringing purposes, such as to access public domain materials or to exercise fair dealing rights.

Sections 42 and 43 of Ghana's Copyright Act have far reaching implications. Adusei has argued that the use of technological protection measures to lock up online materials is the newest threat to permitted uses under copyright law.[45] This new approach, of using encryption-based technology to protect copyright materials on the Internet, is considered by Dratler to be a gamble. There are two reasons for this: first, the private sector cannot develop and maintain protective technologies that can ward off potential infringers; and second, the adoption of technological measures to protect copyright works may obliterate use that traditionally qualified as 'fair' use or dealing.[46]

The above implication of anti-circumvention provisions -such as Ghana's Sections 42 and 43 - is further exacerbated by the deterrent effect of criminal sanctions on an otherwise innocent user. In other words, the threat of criminal sanction can potentially impede access to digital materials in Ghana.

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[44]Section 43.

[45]Poku Adusei 'Cyberspace and the dilemma of traditional copyright law: an assessment of the impact on the legal community' (2002-2004) 22 *University of Ghana Law Journal* 202 at 224.

[46]Jay Dratler Jr. *Cyberspace: intellectual property in the digital millennium* (2000) Law Journal Press, New York, at 2-6.

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5. Conclusions and Recommendations

This study has shown that, over time, the scope of subject matter eligible for copyright protection in Ghana has increased considerably. The increase was not unexpected, as Ghana strives to follow its international treaty obligations. Also, copyright protection in Ghana reveals a pattern of incremental expansion in the duration of copyright protection, to the extent that Ghana has now adopted a TRIPs-plus approach to the duration of copyright protection (the life of the author plus 70 years for literary works, instead of TRIPs' standard of life plus 50 years).

It is said by some that the incremental expansion in the scope and duration of copyright in Ghana is intended to promote the creative talents of the citizenry. The reality, however, is that the current copyright environment in Ghana makes it difficult for copyright's main objectives – rewarding creativity and at the same time preserving access for teaching/ learning material – to be realised. The problems are threefold. First, there is a general lack of public awareness of the existence or the contents of the Copyright Act, so people are not really motivated by copyright to be creative. Second, those who are aware of the content of the Copyright Act primarily seem to use it to promote their parochial interests. Indeed, it is common to find the issuance of 'anti-copyright-violation' orders in the media without any corresponding counter-campaign to enlighten the public about access-enabling flexibilities under the same Act. The effect then is that the public is not encouraged/enabled to take advantage of the exceptions or permitted uses that fall outside the scope of copyright protection. Finally, the scope of permitted uses has not been advanced or clarified in any policy document. This has made the scope of permitted uses murky – thereby making both the enforcement of the law, and legitimate access by users, difficult.

The practice is that photocopying for any purpose, including personal use and study, goes on with little care on the part of those who do the photocopying. This makes the scope of legitimate access to knowledge under the copyright environment murky and, in some respects, unfavourable to researchers; it can however be changed to maximize effective access to learning materials in Ghana.

In attempting to answer the core ACA2K research question – Is the copyright environment in Ghana maximising learning materials access? – the study concludes that it would be misleading to assess the impact of the copyright law on access solely from the perspectives of formal law (statutes, case-law) and academic writing. An appreciation of the practice on the ground is crucial to understanding the impact of the copyright regime. This is because, as the probe found, the practice on the ground is different from the stipulations provided in formal law: even though the scope of permitted use under the Copyright Act of Ghana is seemingly restrictive (though much clarity is still needed on what is allowed), people do not concern themselves with the requirements of the law when making photocopies or engaging in other pro-access activities.

Thus Ghana finds itself in the situation – also present in other ACA2K study countries – where the existing laws and practices potentially undermine access to knowledge by jeopardising the sustainability of the entire copyright system. This situation is unfavourable for an effective and, for that matter, legitimate system of access to copyright-protected materials in Ghana.

The way forward is to ensure that before there is an enforcement crackdown, there is first clarification/refinement of the law/regulations so as to create better protection for learners who access copyright materials for legitimate, non-commercial purposes.

Stricter enforcement of the law would, if begun before legislative/regulatory reform, undermine some of the key objectives of any progressive copyright system. It would stifle access to teaching and learning, which, in turn, would slow 'creativity' in Ghana. Therefore, enforcement mechanisms must be balanced against policies to improve the lot of students and researchers in Ghana.

As a result of the above observations, this report recommends the following:

First, as a practical matter, the research team recommends the creation of channels of communication among copyright stakeholders, especially those identified in this study, to address concerns about the lack of involvement of some key stakeholders in copyright decision making in Ghana. Through such channels of communication, copyright administration can be improved. It will also build trust among private owners and public users of copyright materials so as to make copyright administration more effective.

The media must also take on the task of educating the public about the contours of the copyright protection in Ghana. This education, unlike the campaigns promoted by some influential parties thus far, should not be skewed in favour of private right holders. It should also promote the public interest in having access to teaching and learning materials in Ghana.

Local publishing companies such as the Ghana Universities Press should be promoted, in order to achieve a sustainable local book industry. Also, reducing taxes on materials used for publishing books locally can reduce the prices of books in Ghana. This will make the local book industry more competitive.

Universities and private rights-holders should collaboratively begin to develop 'access guides' in the research institutions to regulate the activities of photocopying in ways that take full advantage of the copyright exceptions and limitations under the law and also to educate students and researchers about copyright restrictions. The universities should disclaim liability via the Guide for non-permitted photocopying activities on their campuses.

The Attorney General's Department should start fresh and open dialogue on copyright to solicit views from all stakeholders before passing the Copyright L.I. The outcome of such a dialogue should influence the content of the L.I. on copyright administration in Ghana. Also the L.I. must flesh out the scope of free uses, including the meaning of the term 'substantial' in Section 19 of the Copyright Act, so that the public will know the limits of free uses.

Subject-based collective societies should be established in Ghana. Subject based copyright administration will avoid the confusion currently surrounding the collective management system and will enable educational institutions and researchers to know where to seek for permission whenever they want to exceed the limits of permitted uses under the Act. Ensuring accountability in those collective societies will also serve as a morale booster for the public when paying for uses beyond what is free under the law.

The universities as primary users of learning materials should participate in policy decisions on copyright. There must be recognition that the universities play an important role in the copyright system. To be able to contribute to policy debates, the universities may need internal legal offices within the library system to advise on copyright issues. Indeed, it is erroneous for any academic or research institution to assume that they cannot be held liable for excess photocopying by students and unofficial photocopier operators on their campuses.

The private universities could also join the public universities' library consortium (CARLIGH) in order to procure learning and research materials at a relatively cheaper cost.

The government's policy on free textbooks should be extended to private primary to pre-tertiary institutions as well as tertiary institutions. This must however be undertaken in a progressive manner due to the huge financial outlay involved. Also, the libraries in private academic and research institutions should be supported financially by the Ministry of Education.

Moreover, taxes imposed on materials used by local book publishers should be reduced to bring down the cost of books in Ghana. In addition, the government must heed the recent calls from the Heads of Private Universities to reduce corporate tax on private universities. This will bring down the cost of higher education in the private universities.

The term of protection of copyright, for at least 70 years in Ghana, is too long. The net effect of such a long term protection is that it restricts the public domain. It should be reduced to a minimum period of 50 years as required by international law.

Also, policies to implement the Disability Act must include pro-access mechanisms for disabled students and researchers. Such pro-access policies for the disabled should be included in the subsidiary legislation to implement the Copyright Act and the Disability Act.

Finally, and most importantly, the thin scope of permitted uses under Ghana's copyright law deserves rethinking to include more exceptions and relax existing stringent exceptions to promote access to knowledge in Ghana. For this, experiences relating to copyright exceptions in other jurisdictions should serve as a guide.

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Appendix A: Permitted Use of Copyright Provisions

Section 19 of the 2005 Copyright Act — Permitted Use of Work Protected by Copyright

(1) The use of a literary or artistic work, either in the original language or in translation, shall not be an infringement of the rights of the author in that work and shall not require the consent of the owner of the copyright, where the use involves:

(a) the reproduction, translation, adaptation, arrangement or other transformation of the work for exclusive personal use of a person, if the user is an individual and the work has been made public,

(b) subject to subsection (2) of this section, the inclusion with an indication of the source and the name of the author of quotations from the work in another work, including quotations from articles in newspapers or periodicals in the form of press summaries, if the work from which the quotations is taken has been made public,

(c) subject to subsection (3):
  (i) the utilisation of the work by way of illustration in publications, broadcasts of sound or visual recordings for teaching, to the extent justified for the purposes, or
  (ii) the communication for teaching purposes of the work, broadcast for use in educational institutions, or
  (iii) the utilisation of the work for professional training or public education, if the work has been made public;

(d) in the case of:
  (i) an article published in one or more newspapers or periodicals on current economic, political or religious topics, or
  (ii) a broadcast on current economic, political or religious topics, the reproduction of the article in a newspaper or periodical or the broadcast or other communication to the public where a statement of the source is provided, unless the article or broadcast, when first published or made, was accompanied by an express condition prohibiting its use without consent,

(e) the reproduction or making available to the public by means of photographic works, audio-visual works or other means of communication of any work that can be seen or heard in the course of the reporting of fresh events or new information, if:
  (i) the work is reproduced or made available for the purpose of reporting by a news medium of fresh events or new information, and
  (ii) the use of the work does not extend beyond that justified for the purpose of keeping the public informed of current events,

(f) the reproduction of works of art or architecture in an audio-visual work for cinema or television or in a broadcast by television and the communication to the public of any of those works of art or architecture if those works are:
  (i) permanently located in a place where they can be viewed by the public, or
  (ii) included in an audio-visual work for cinema or television only by way of background or as incidental to essential matters represented,

(g) subject to subsection (4), the reproduction in the media or the communication to the public of:
  (i) political speech delivered in public,
  (ii) speech delivered in public during legal proceedings, or
  (iii) lecture, address, sermon or other work of a similar nature delivered in public, where the use by reproduction or communication to the public is exclusively for the purpose of reporting fresh events or new information.

(2) The permission under subsection (1)(a) shall not extend to reproduction:

(a) of a work of architecture in the form of a building or other construction;

(b) in the form of reprography of a whole or of a substantial part of a book or of musical work in the form of notation;

(c) of the whole or of a substantial part of a database in digital form; and

(d) of a computer programme, except as provided in section 16.

(3) Paragraph (b) of subsection (1) does not apply in respect of any particular quotations, unless the quotations referred to in that paragraph are compatible with fair practice and the extent of the quotations does not exceed what is justified for the purpose of the work in which the quotations are used.

(4) Paragraph (c) of subsection (1) does not apply in respect of any particular work unless the use referred to in that paragraph is compatible with fair practice and the source of the work used and the name of the author are indicated in the relevant publication, broadcast or recording.

(5) Paragraph (g) of subsection (1) does not apply unless the reproduction referred to in that paragraph and the number of copies made in the reproduction are limited to what is required in the particular circumstances.

(6) Despite the provisions of section 5(a), the temporary reproduction of a work is not an infringement of copyright if the reproduction is made in order to make a digitally stored work perceptible or in the process of a digital transmission:

(a) by a person who or entity that is authorised for that purpose by:
  (i) the owner of the copyright; or
  (ii) operation of law; and

(b) as an accessory that occurs during the normal operation of the equipment issued and which is:
  (i) automatically deleted; and
  (ii) incapable of being retrieved for any other purpose than those referred to in this subsection.

Section 21 of the 2005 Copyright Act — Permitted Use of Protected Copyright Work by a Library or Archive

(1) A library and archive with activities that are not for gain may, without the authorisation of the author or other owner of copyright, make a single copy of the work by reprographic reproduction.

(2) A reprographic reproduction under subsection (1) may be made when the work reproduced is a published article, other short work or short extract of a work and where the purpose of the reproduction is to satisfy the request of an individual.

(3) The library or archive shall, under subsection (1), ascertain that the copy is to be used solely for the purpose of study, scholarship or private research.

(4) The act of reproduction under subsection (1) shall be an isolated case, which shall occur on separate and unrelated occasions and shall occur where:

(a) there is no collective licence available under which copies can be made, or

(b) the copy is made in order to preserve or replace a copy that has been lost, destroyed or rendered unusable in the permanent collection of similar library or archive if it is impossible to obtain a copy under reasonable conditions.

(5) Where a library or archive requires more than a single copy of a work by reprographic reproduction, the permission for this shall be obtained from the author, other owner of copyright or from an appropriate collective administration society authorised by the publisher.

(6) The provisions of this section are subject to the interest of the publisher, author or the relevant collective administration society.


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