



Research Findings from Africa in Relation to WIPO Development Agenda Priorities

Briefing Paper 1 – April 2009

This Briefing Paper was developed collaboratively by ACA2K Project members, with support from Canada's International Development Research Centre (IDRC), South Africa's Shuttleworth Foundation, IQsensato and South Africa's LINK Centre at the Graduate School of Public & Development Management (P&DM), University of the Witwatersrand, Johannesburg.



This work was carried out with the aid of a grant from the International Development Research Centre, Ottawa, Canada.



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



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Executive Summary

The WIPO Development Agenda provides an important platform for WIPO Member States and other stakeholders to work towards integrating development into IP policymaking and legislative action. Among other things, the WIPO Development Agenda recognises that empirical on-the-ground research will be critical in informing decision-making nationally, regionally and internationally. The Development Agenda also recognises that renewed efforts are required ‘to further facilitate access to knowledge and technology for developing countries and LDCs to foster creativity and innovation...’. In this context, the African Copyright and Access to Knowledge (ACA2K) network has been undertaking research in Africa that aims at furthering the understanding of the relationship between national copyright environments and access to knowledge (learning materials in particular) in selected African countries. We share, in this briefing paper, the findings so far that are most relevant to the WIPO Development Agenda.

In general, ACA2K research indicates that creative works are strongly protected by national copyright laws in all the African countries studied. At the same time, there is little awareness and implementation of copyright flexibilities that could facilitate access to knowledge. Indeed, the term ‘access to knowledge’ has little salience within the corridors of copyright lawmaking and policymaking in most study countries. The connection between copyright law and knowledge production/consumption is, therefore, often ignored. While there are several aspects of national copyright law that are crucial to access to knowledge, the role of limitations and exceptions is particularly noteworthy towards this end. In this respect, ACA2K research indicates that in all eight ACA2K study countries, copyright limitations and exceptions are too narrowly and/or vaguely defined to facilitate access in a balanced and effective manner.

An additional problem in all eight study countries is that copyright law remains relatively untested. In some cases, colonial statutes have only been recently amended to keep up with developments at the international level (particularly as defined by WIPO and the WTO). This creates the attendant problem of a thin file of case law relating to copyright, and this in turn means that the interpretation of potentially access-providing provisions is yet unclear. This lack of interpretive guidance is aggravated by the fact that copyright case law, in so much as it exists, is not connected to the educational sector or learning materials.

Research findings indicate that across the board, there are several factors – not copyright law alone – that inhibit or restrict access to knowledge; these include unaffordability, unavailability and in some cases, the lack of a reading culture. Research also indicates that in all 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 South Africa, the relative strength of the law, coupled with the prevalence of globally integrated higher education institutions, results in an atmosphere where copyright is treated more significantly.

Therefore, with the exception of South Africa, unpunished copyright infringement (with regards to learning materials) is the main channel for access to knowledge. Having said this, research from most ACA2K study countries indicates that rights-holders are systematically beginning to enforce sanctions against perceived copyright violation and infringement. It becomes increasingly obvious that national copyright laws as they are currently formulated, when enforced, will create significant barriers to accessing knowledge. The WIPO Committee on Development and Intellectual Property (CDIP) should therefore pay particular attention to this challenge as it works to implement recommendations such as that which calls for work to further facilitate access to knowledge and technology for developing countries and LDCs.

1. The ACA2K Project – An Introduction

The African Copyright and Access to Knowledge (ACA2K) project probes the relationship between national copyright environments and access to knowledge (learning materials in particular) in African countries. The project engages a network of over 30 independent experts from law, economics, information sciences and gender studies, based almost exclusively in Africa. It is supported by Canada's IDRC and South Africa's Shuttleworth Foundation and managed by the LINK Centre at the University of the Witwatersrand's Graduate School of Public & Development Management in Johannesburg. It has research nodes in eight African countries. These countries are Egypt, Ghana, Kenya, Morocco, Mozambique, Senegal, South Africa and Uganda. ACA2K study countries were selected to represent differences in socioeconomic, political, cultural and linguistic contexts.

In essence, the ACA2K project seeks to establish to what extent copyright is fulfilling its objective of facilitating access to knowledge in the eight study countries. It objectively tests the two following hypotheses through a rigorous, evidence-based research methodology:

- The copyright environment does not maximise effective access to learning materials.
- The copyright environment needs to be changed to maximise effective access to learning materials.

In testing the project's hypotheses, the eight country research teams have recently completed reports which examine the copyright environments in their respective countries and the impact thereof on access to learning materials. The copyright environment encompasses not only laws and policies, but also actual practices. The ACA2K country reports include surveys of relevant legislation, policies, secondary literature and reported case law. In addition, the reports contain the results of qualitative analysis which included reviews of relevant secondary literature in the eight study countries as well as on-the-ground impact assessment interviews with relevant stakeholders, particularly from government departments, the educational community and rights-holders.

Comparisons are being drawn among study countries in order to identify similarities, differences, themes and trends. The findings of both the country reports and the comparative analysis will be published online and in book format. In addition, the ACA2K teams will get actively involved in the copyright policy space at national, regional and international levels, beginning with national workshops and seminars organised by the ACA2K country teams. More information about ACA2K can be found at <http://www.aca2k.org>.

2. ACA2K & the WIPO Development Agenda: Selected Findings from ACA2K's Legal Research

- a) All ACA2K study countries afford copyright protection that exceeds minimum standards imposed by the relevant international treaties and agreements that they are bound by, 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.

- b) 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, two ways in which they are important are their role in enabling the proliferation of distance learning (which, in many developing countries, is a dominant system of education) and facilitating the entry of disabled learners into the mainstream. Yet, ACA2K research indicates that Mozambique, South Africa, Egypt and Uganda, among other countries in the study circle, do not have any copyright limitations or exceptions that deal with either group specifically. Thus, distance learners and disabled learners cannot enjoy the right to access copyrighted works in such jurisdictions.
- c) The advent of the Internet and ICTs in general has created 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, that is, clauses in the law that make it illegal to circumvent technological protection mechanisms – even while, for instance, a user is taking advantage of copyright limitations and exceptions, including fair dealing in a work. Yet, in ACA2K study countries such as Morocco, Egypt and Kenya, we find that: (a) anti-circumvention provisions have been implemented in the law along with a recognition of technological protection measures (even though digital technologies are at a nascent, growing stage in these countries); and (b) no provision has been made to allow circumvention when exercising fair dealing and other limitations and exceptions, thus jeopardising the whole set of copyright limitations and exceptions within their national copyright laws.
- d) For countries with a small or non-existent domestic publishing industry, the ability to cost-effectively purchase learning materials from elsewhere in the world (ie, the ability to parallel import) becomes a crucial factor in access to knowledge. Yet, countries such as Kenya, Uganda and Morocco disallow the parallel importation of copyright goods.

3. ACA2K & the WIPO Development Agenda: Selected Findings from ACA2K’s Qualitative Research

- a) 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 knowledge domain. In South Africa, for instance, a recently implemented policy endorses open source software and open standards, thereby lowering barriers for accessing information and communication technologies. This policy mandates that all new software developed for or by the government will be based on open standards and government will migrate all current software to free and open source software (FOSS). This decision will impact on the use of FOSS in South Africa as it will encourage all entities engaging with government to use compatible software. 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.
- b) 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.

- c) 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.
- d) 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.

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 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.



Linkages between the WIPO Development Agenda Recommendations & ACA2K's Research

The work of ACA2K is closely aligned with the mandate of the WIPO Development Agenda, as expressed in the recommendations made at the 2007 General Assembly. ACA2K is an academic project that puts forth the current situation vis-à-vis learning and copyright from a Southern perspective, specifically from the perspective of eight countries on the African continent. While all clusters of recommendations related to the WIPO Development Agenda align closely with the goals of the ACA2K project, its work is most relevant to the following recommendations:

Cluster A:

Recommendation 10 – ‘To assist Member States to develop and improve national intellectual property institutional capacity through further development of infrastructure and other facilities with a view to making national intellectual property institutions more efficient and promote fair balance between intellectual property protection and the public interest. This technical assistance should also be extended to sub-regional and regional organizations dealing with intellectual property’

Cluster B:

Recommendation 19 – ‘To initiate discussions on how, within WIPO’s mandate, to further facilitate access to knowledge and technology for developing countries and LDCs to foster creativity and innovation and to strengthen such existing activities within WIPO’

Cluster C:

Recommendation 27 – ‘Facilitating intellectual property-related aspects of ICT for growth and development: Provide for, in an appropriate WIPO body, discussions focused on the importance of intellectual property-related aspects of ICT, and its role in economic and cultural development, with specific attention focused on assisting Member States to identify practical intellectual property-related strategies to use ICT for economic, social and cultural development’

Cluster D:

Recommendation 35 – ‘To request WIPO to undertake, upon request of Member States, new studies to assess the economic, social and cultural impact of the use of intellectual property systems in these States’

Recommendation 37 – ‘Upon request and as directed by Member States, WIPO may conduct studies on the protection of intellectual property, to identify the possible links and impacts between intellectual property and development’

Cluster E:

Recommendation 43 – ‘To consider how to improve WIPO’s role in finding partners to fund and execute projects for intellectual property -related assistance in a transparent and member-driven process and without prejudice to ongoing WIPO activities’

Cluster F:

Recommendation 45 – ‘To approach intellectual property enforcement in the context of broader societal interests and especially development-oriented concerns, with a view that “the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations”, in accordance with Article 7 of the TRIPS Agreement’.