



Research Findings from Africa Relevant to WIPO SCCR 19

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



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The African Copyright and Access to Knowledge (ACA2K) network has been undertaking research in the continent aimed at furthering understanding of the relationship between national copyright environments and access to knowledge (A2K), specifically access to learning materials. The ACA2K research focuses on eight African countries: Egypt, Ghana, Kenya, Morocco, Mozambique, Senegal, South Africa and Uganda. The research has tested and confirmed via doctrinal and qualitative interview research, two main research hypotheses: 1) that the copyright environments in the eight study countries are not maximising access to knowledge; and 2) that the copyright environments can be changed in order to better facilitate access to learning materials. The ‘copyright environment’, for the ACA2K research network, is the combined effect of the copyright legal framework and the interpretations/practices in relation to the legal framework.

In this briefing paper, we share findings based on the Country Reports and Executive Policy Briefs, some still in draft form, from the ACA2K study countries. Most Country Reports and Executive Policy Briefs are available on ACA2K’s website, www.aca2k.org. In line with the Nineteenth Session of the World Intellectual Property Organisation (WIPO)’s Standing Committee on Copyright and Related Rights (SCCR 19, 14-18 December 2009) main focus, emphasis of this briefing paper is on copyright limitations and exceptions (L&E) dealing with:

- Distance learning;
- Visually-impaired persons; and
- Libraries and archives.

In general, ACA2K research has found strong copyright protection, and inadequate utilisation of limitations and exceptions relevant to learning materials, in the national copyright laws of the eight study countries. Learning-based copyright limitations and exceptions are, in many cases, either non-existent or too narrowly and/or vaguely defined to facilitate access in a balanced and effective manner. Addressing the need for appropriate limitations and exceptions for learning materials is urgent, because it is clear from the ACA2K research that in many cases the law is not reflecting the practical realities of the African countries studied, and that in many cases learners feel compelled by their socioeconomic circumstances to access learning materials via infringing practices (either knowingly or unknowingly).

In brief, the ACA2K findings for the three categories of limitations and exceptions currently at the top of the SCCR agenda – distance learning, visually-impaired persons and libraries and archives – are as follows:

- **Distance learning:** A number of institutions in the study countries have established distance learning programmes. However, none of the national copyright laws of any of the eight study countries specifically addresses distance learning. As a result, distance learning institutions often operate in a legal grey area.
- **Visually-impaired persons:** only one of the eight ACA2K study countries, Uganda, makes specific mention of the needs of the visually-impaired in its copyright law. In the other countries the lack of mention of the visually-impaired in copyright law in some cases contradicts other policies or laws, including constitutional rights, and conflicts with access-enabling practices such as conversion of copyright-protected materials into Braille.
- **Libraries and archives:** generally, provisions for libraries and archives have been found to be inadequate in the ACA2K study countries for facilitating meaningful access to learning materials. Other than for preservation and replacement purposes, and with the exception of Egypt and Kenya, the copying of entire works by libraries

and archives is not explicitly permitted in ACA2K study countries, and there is a great deal of uncertainty in most countries as to what portions of works can be copied by libraries, and on what scale. Meanwhile, on the practical level, many libraries in the study countries lack the resources necessary to build and maintain collections that meet the needs of their users.

1. The ACA2K Project – An Introduction

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

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

For more information on ACA2K’s study design including the conceptual framework and methodologies, please refer to ACA2K’s website, www.aca2k.org. Also on the website are ACA2K WIPO Geneva Briefing Papers 1 and 2 of April and May 2009 in the ‘Dissemination and Policy Inputs’ section.

2. Selected ACA2K Findings Relevant to SCCR 19

ACA2K’s findings presented below are focused on the three broad limitation and exception (L&E) areas currently prominent on SCCR’s agenda, ie, distance learning, visually-impaired persons and library and archives.

2.1 Distance Learning

ACA2K study findings point to a growing demand for distance learning in Africa, which is attributed to the lack of adequate infrastructure for traditional education models. Distance learning is making education affordable and accessible even for economically disadvantaged sections of societies in Africa. Unsurprisingly, therefore, the distance education university UNISA in South Africa is, with more than 200 000 enrolled students, the largest university on the African continent; and in Mozambique, the Universidade Eduardo Mondlane (UEM), through its Centre for Distance Learning, is piloting online learning using digitised modules, e-learning platforms, online tutoring, online fora, chats and conferencing.

Increasingly, distance learning is web-based, necessitating the generation, distribution and use of digital content. Online learning programmes such as the one at UEM are made possible by the ever-expanding digital content and ICT infrastructure of some universities. UNISA, for instance, is experimenting with digital content in the form of kiosks that allow students to download files relevant to their course onto CDs, DVDs, and flash drives.

Notwithstanding the potential of (and the high demand for) distance and online learning, national copyright laws in all the study countries do not address these issues – perhaps as a result of a lack of international standards in this respect. Consequently, institutions offering distance and online learning exist in a state of uncertainty as to what is permitted.

Also problematic for distance learning in Africa is the existence of provisions prohibiting the circumvention of technological protection measures (TPMs) in some national laws. This is because such provisions effectively prohibit the permission-free use of TPM-protected digital learning material even if the use in question would ordinarily fall within the scope of a well-established educational copyright L&E. Research confirms that anti-circumvention provisions exist in six ACA2K study countries, either in the copyright statute (eg, Egypt, Ghana, Kenya, Senegal, Morocco) or in other associated law (eg, South Africa’s Electronic Communications and Transactions Act). Only in Morocco is there a specific exception allowing circumvention of TPMs for non-commercial purposes by libraries, archives, educational institutions and some broadcasters. The only two countries in the study circle that have not enacted anti-circumvention provisions are Mozambique and Uganda.

Provisions preventing the circumvention of TPMs are usually introduced into national copyright laws as a result of a country’s accession to the so-called ‘WIPO Internet Treaties’, the WCT and WPPT. These instruments require member states, among other things, to prohibit the circumvention of TPMs and/or tampering with rights management information (RMI). South Africa, Ghana and Senegal have all signed the WIPO Internet Treaties (and Morocco is in the process of ratifying them, as per the terms of its free trade agreement (FTA) with the United States). Thus it is not unexpected to find anti-circumvention provisions in these countries’ copyright laws. However, the introduction of TPMs and anti-circumvention in the laws of Kenya and Egypt is noteworthy, as these countries have not yet signed the WIPO Internet Treaties.

It is also notable that in Morocco, libraries, archives, educational institutions and some broadcasters are not subject to prohibitions on circumvention. Morocco, it seems, has managed to avail itself of a small amount of flexibility available in the Internet Treaties – a move likely to benefit distance learning in that country.

Lastly, another category of copyright L&E relevant to distance learning relates to more broadly phrased provisions, particularly ‘fair dealing’ (eg, Kenya and South Africa) or ‘fair use’ (eg, Uganda) provisions. It should be noted, however, that the wording of Uganda’s ‘fair use’ provision is decisively different from the US fair use doctrine. The fair dealing/fair use provisions in Kenya, South Africa and Uganda allow limited copying or use of copyright-protected materials without the permission of the rights-holder for purposes such as private research/study or criticism/quotation. ACA2K research has found that these broad provisions in the copyright statutes of Kenya, South Africa and Uganda are too vaguely crafted to be a reliable access mechanism, for either traditional or distance learning; and clarifying case law remains scarce in these countries. For instance, it is not clear in these countries as to what the law regards as ‘fair’ in terms of the portion of a copyright-protected work that can be copied for private research/study, whether for traditional or distance learning.

2.2 Visually-Impaired Persons

Africa carries a disproportionate burden in terms of cases of blindness and visual impairment. Limitations and exceptions for individuals with visual impairment are therefore particularly important, especially because learning materials are often not available in formats accessible to these individuals. Access for visually-impaired persons often requires the adaptation of a copyrighted work. A number of ACA2K study countries have taken steps to cater for individuals with visual impairment.

Several of the study countries have national laws and programmes that aim to afford equal opportunities for individuals with visual impairment, including special training institutions and facilities in Mozambique, Kenya, South Africa and Uganda. South Africa, for instance, imposes a constitutional imperative on the state to uphold the right of visually-impaired persons to education and access to knowledge in a non-discriminatory manner. Also, South Africa has established a library for the blind through the South African Library for the Blind Act 91 of 1998, and UNISA provides Braille and audio tapes for over 1 000 students with visual and/or hearing disabilities. Uganda has a public institution for individuals with special needs, as well as limited facilities and services in institutions like libraries. Makerere University, Uganda's largest public university, provides guides for students with visual impairment and has the requisite Braille technology to support the learning needs of such students. In Egypt, Alexandria University makes available human readers for students with visual disabilities, a programme that has proven popular. Likewise, the world-renowned Bibliotheca Alexandrina provides training courses on how to use technology for the visually impaired.

In conflict with these efforts, researchers in seven of the eight ACA2K study countries reported that their copyright laws contain no specific provisions for the benefit of visually impaired persons. Only Uganda's copyright law makes specific mention of the needs of the visually-impaired by stipulating that it is not an infringement of copyright when a work is adapted into Braille or sign language for print-disabled people. It appears, therefore, that no other ACA2K study country considers that individuals with a visual disability require enabling copyright provisions to cater to their particular educational needs. This means that adaptations which are allowed in several countries around the world permission-free, such as the conversion of content into accessible formats (eg, Braille or audio), can only be done with express permission of the rights-holder in those seven study countries. Thus, in the majority of ACA2K study countries, while enabling laws aim to provide for visually-impaired persons, copyright law does not.

2.3 Libraries and Archives

Libraries, particularly those open to the public at large, are extremely important in Africa. This is because the majority of people cannot afford to purchase personal original copies of learning materials themselves. However, in all study countries except South Africa, libraries and archives are reported to be under-resourced. Even several parts of South Africa have poorly-resourced libraries and archives.

Particular attention has been paid in ACA2K research to the tertiary library sector. University libraries in Senegal (among the least economically developed of ACA2K study countries) face some of the most significant access challenges. For example, the law library at the Université Cheikh Anta Diop (UCAD) in Dakar has book stacks full of photocopies rather than printed textbooks because the university cannot afford original copies. Tertiary libraries investigated in most other study countries have been found to be somewhat better-resourced than UCAD's but still not as well-resourced as necessary, and activities such as ripping pages out of library books and rampant photocopying are not uncommon. In Egypt, partially to combat vandalism, the two libraries examined both disallow the borrowing of books.

Given the resource shortages at tertiary libraries, it is thus not surprising that photocopying of learning materials at and near tertiary educational institutions is commonplace in most ACA2K study countries. Much of the copying activity – such as selling photocopies of entire copyright-protected books that are still in print, for example – is clearly illegal. Meanwhile, other photocopying activities, such as students or teachers copying only parts of books, may or may not fall within the scope of copyright L&E allowing certain personal or educational uses.

In light of the under-resourced state of Africa’s libraries, and the scale of photocopying, it is significant that ACA2K research has found that provisions for libraries and archives in copyright law are generally inadequate – across all ACA2K study countries. Typically, there is a lack of clarity regarding the nature of reproduction that libraries and archives are permitted to carry out for crucial activities such as lending or digitisation.

All eight countries studied allow libraries and archives to reproduce entire works for preservation and replacement purposes, while only Egypt and Kenya allow the copying of entire works for other purposes. In the case of library/archive copying of portions of works, which is seemingly allowed in all the study countries, there is great uncertainty about the extent and frequency of – and purposes allowed for – such copying in national laws. Moreover, limitations and exceptions in all ACA2K study countries lack clarity regarding the digitisation of library and archival collections. However, it must be noted that none of the ACA2K study countries currently has a public lending right (PLR) system, which has been instituted in some parts of the world to financially compensate rights-holders for the availability of their works in libraries, and which thus has the potential to undermine access to learning materials.

3. Conclusion

In general, ACA2K research has found that the state of access to knowledge (and learning materials in particular) is precarious in the study countries. Thus, reforms are necessary to improve both the legal and practical conditions that impact on access to learning materials in these countries.

In terms of reform of copyright law, it is clear that all eight ACA2K study countries can do more in their copyright statutes and regulations, and related policies, to provide a set of copyright limitations and exceptions catering to the areas currently at the forefront of the SCCR agenda: distance learning, visually-impaired persons, and libraries and archives. It follows from our research that the following immediate steps should be taken:

- All eight study countries need to incorporate clear and access-enabling copyright L&E specific to **distance learning** into their copyright frameworks, as such provisions are currently absent.
- Seven of the study countries (all except Uganda) lack exceptions and limitations for **visually-impaired persons** in their copyright regimes, and must take steps to redress this situation.
- All eight study countries need to reform their copyright systems by adding provisions that specifically address typical **library and archive activities**, including the digitisation of their collections for preservation purposes, among other things. Furthermore, the specific library and archive provisions should enable libraries and archives to carry out a variety of other non-commercial, public interest activities. The reforms are also required to provide libraries with greater scope and clarity regarding the permissibility of photocopying of their collections, an activity that is so necessary to provide access to copyright protected works for personal, research, and/or educational uses.

It appears that guidance on the international level – by way of introducing international standards for copyright L&E – could, at least in some areas, help national lawmakers in the eight ACA2K study countries and beyond to overcome several of the described problems.



Appendix 1: Selected ACA2K Country Findings in Relation to Distance Learning, Visually-Impaired Persons, Libraries and Archives

<p>Egypt</p>	<p><u>Distance Learning:</u> The Egyptian Intellectual Property Rights Protection Act (EIPRPA) of 2002 does not contain any specific exceptions related to distance learning.</p> <p><u>Visually-Impaired Persons:</u> The EIPRPA does not include any specific provisions for people with a disability, but both libraries studied in the ACA2K research make provision for blind users.</p> <p><u>Libraries and Archives:</u> Article 171(8) of the EIPRPA allows documentation centres, the national archives and non-profit libraries to make one single copy of a work – either directly or indirectly – in the following cases: <ul style="list-style-type: none"> • The reproduction is made for a published article, a short work or a derivative of a work, as long as the purpose of reproduction has been in fulfilment of a request made by a natural person, for using in study or research. Such reproduction shall be made for once or on irregular intervals; or • The reproduction is made for the purpose of preserving the original copy or of substituting a lost, destroyed or spoiled copy, where it became impracticable to obtain a substitute thereof under reasonable conditions. </p>
<p>Ghana</p>	<p><u>Distance Learning:</u> The Copyright Act of 2005 does not contain special provisions made specifically to allow for access to materials for purposes of distance learning.</p> <p><u>Visually-Impaired Persons:</u> No special mention is made in the Copyright Act of copyright exceptions for persons with disabilities. A Disability Act was, however, passed in 2007. In practice, as ACA2K impact assessment interviews uncovered, universities convert some of their learning materials into Braille form for the visually-impaired.</p> <p><u>Libraries and Archives:</u> Under Section 21 of the Copyright Act of 2005, libraries and archives ‘with activities that are not for gain’ are permitted to make a single copy of ‘a published article, other short work or short extract of a work’ for an individual, as long as they ensure that the individual uses the copy for purposes of study, research or scholarship. 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.</p>
<p>Kenya</p>	<p><u>Distance Learning:</u> There are no specific provisions in the Copyright Act of 2001 for exceptions in relation to distance learning.</p> <p><u>Visually-Impaired Persons:</u> The exceptions and limitations contained in the Kenyan Copyright Act do not specifically address people with disabilities. The right to control the adaptation of any work vests in the rights-holder.</p> <p><u>Libraries and Archives:</u> Libraries and archives in Kenya must usually obtain a licence to reproduce works, even for educational purposes, because the access-enabling copyright exceptions and limitations (Sections 26-29) of the Copyright Act are narrowly constructed, making it (in most cases) illegal to create copies of works without the authority of the copyright-holder. However, public libraries are allowed to reproduce copyright-protected material without obtaining permission from authors or rights-holders if it is deemed to be in the ‘public interest’ to do so and no revenue is derived from such copying.</p>

<p>Morocco</p>	<p><u>Distance Learning:</u> There are no special provisions in the 2006 Copyright Law to allow for distance education.</p> <p><u>Visually-Impaired Persons:</u> No special mention is made in the 2006 Copyright Law of exceptions for visually impaired persons.</p> <p><u>Libraries and Archives:</u> Libraries and archive services benefit from a special regime in the 2006 Copyright Law: Article 16 authorises libraries and archives to carry out reproduction of isolated copies of a work for non-commercial purposes in the following cases: ‘a) When the reproduced work is an article or a short work or composed of short excerpts of a work other than a computer programme, with or without illustrations, published in a collection of works or in a journal or periodical or when the aim of the reproduction is to satisfy the request of a physical person; b) When the copy is produced in order to preserve and, if necessary (in case it would be lost, destroyed or rendered unusable), to replace it within the permanent collection of another library or another archive service, to replace copies that are lost, destroyed or unusable.’ Furthermore, the Moroccan legislator, in the 2006 Copyright Law, limited the application of the newly-introduced anti-circumvention provisions relating to TPMs by stipulating that non-profit libraries and archives, among other institutions, are not subject to these anti-circumvention provisions.</p>
<p>Mozambique</p>	<p><u>Distance Learning:</u> The National System of Education in Mozambique established in 1992 includes distance learning as one of the special education systems, but there are no specific provisions for exceptions in relation to distance learning in the Mozambique Copyright Law of 2001.</p> <p><u>Visually-Impaired Persons:</u> The Mozambican Copyright Law is silent regarding exceptions for the benefit of people with disabilities, meaning that any use or adaptation of a work to allow access by disabled people has no protection in the law and needs permission from the author.</p> <p><u>Libraries and Archives:</u> The generic exception for libraries and archive services in Article 12 allows reproduction of part of or entire works through reprography if the activities of the institutions are not directly or indirectly profit-making. It can be deduced from the provision that entire works may be reproduced by those institutions but only in isolated cases, meaning that the library may not put the work at disposal of everybody for free reproduction and at any time they want. In addition, Article 12(2)(b) clarifies that ‘if repeated, [that reproduction] occurs on separate, unrelated occasions’, meaning that multiple copies cannot be made on a single occasion. Reproduction of entire works is also possible, according to Article 12(3), when such a copy is intended to preserve or, if necessary, replace a work in the permanent collection of a library or archive service, on account of the latter having been lost, destroyed or rendered unusable, as long as the work is not available in reasonable condition or the reproduction is an isolated act or, if repeated, it occurs on separate, unrelated occasions. Partial reproduction may be allowed to the library/archive where the purpose of the reproduction is to respond to a request from a natural person and the library or archive service ensures that:</p> <ul style="list-style-type: none"> • the copy will be solely used for research purposes; • the reproduction is occasional; and • a collective licence may not be obtained. <p>The law also allows libraries/archives to lend a copy of a written work to the public solely for consultation, without authorisation by the author or payment of any remuneration.</p>

<p>Senegal</p>	<p><u>Distance Learning:</u> Senegal’s 2008 Copyright Act does not have specific provisions for distance education.</p> <p><u>Visually-Impaired Persons:</u> The 2008 Copyright Act does not make use of exceptions and limitations for format adaptation for the disabled. However, Senegal’s educational policy, through its Vision for 2015, takes into account the needs of disabled people in its PDEF programme for education and training.</p> <p><u>Libraries and Archives:</u> The Copyright Act contains no exceptions for reproduction of a work that can be carried out by libraries or archive services accessible to the public. Under the laws relating to libraries, however, it is possible for libraries and archive services to copy works that are at an advanced stage of degradation so that these may be preserved.</p>
<p>South Africa</p>	<p><u>Distance Learning:</u> The South African Copyright Act of 1978 does not specifically regulate distance education.</p> <p><u>Visually-Impaired Persons:</u> Currently, the South African Copyright Act does not permit the scanning, translation, adaptation or conversion of works for the sensory-disabled without permission from the copyright-holder. However, the Constitution of South Africa expressly provides for the right to education, which arguably places a duty on the state to facilitate access to learning materials required to exercise the right to education, and thus to remove barriers to access to learning materials faced by people with disabilities by, for instance, allowing the permission-free conversion of learning material into Braille or into audio format.</p> <p><u>Libraries and Archives:</u> The current Copyright Regulations of 1978, via Section 13 of the Copyright Act, contain specific provisions for libraries and archives. Section 3 of the Regulations stipulates that a library or archives depot (or any of its employees acting within the scope of their employment) may reproduce a work and distribute a copy if:</p> <ul style="list-style-type: none"> • the reproduction or distribution is made for non-commercial purposes; • the collections of the library or archive depot are open to the public or available to researchers; and • the reproduction of the work incorporates a copyright warning. <p>The library/archive reproduction rights in Section 3 are, in many cases, subject to the provisions of Section 2, which require that the reproduction must be of a ‘reasonable portion’ of the work and must ‘not conflict with the normal exploitation of the work’.</p> <p>Section 3 of the Copyright Regulations further states the conditions under which an unpublished work may be reproduced and distributed for preservation, for security or for deposit purposes in other libraries and archive depots. In addition, Section 3 generally allows the reproduction of a published work for the purpose of replacement of a copy that is deteriorating or that has been damaged, lost or stolen, if an unused replacement cannot be obtained at a fair price.</p> <p>Most importantly, Section 3 of the Copyright Regulations stipulates that copies from the collection of a library or archive depot may be made for users upon request from the users or another library or archive depot. Such copies are confined to one article or other contribution to a copyrighted collection or periodical issue, or to a copy of a reasonable portion of any other copyrighted work. In addition, the library or archive depot must have a notice that the copy is not going to be used for purposes other than private study or personal or private use.</p> <p>Lastly, Section 3 of the Copyright Regulations allows, upon request, the copying of an entire work or substantial parts of it by a library or archive depot for their users and other libraries or archive depots if an unused copy of the copyrighted work cannot be obtained at a fair price. Section 3 requires, however, that (1) the copy must become the property of the user, and (2) the library or archive depot has had no notice that the copy would be used for purposes other than private study or the personal or private use of the person using the work.</p>



<p>Uganda</p>	<p><u>Distance Learning:</u> The Ugandan Copyright Act of 2006 is silent on distance learning.</p> <p><u>Visually-Impaired Persons:</u> There is provision for persons with disabilities under Section 15 of the Ugandan 2006 Copyright Act in the Section 15 ‘fair use’ provisions, where reference is made in subsection (k) to adaptation of works into Braille or sign language ‘for educational purpose of persons with disabilities’. For print-disabled people, under Uganda’s fair use section, there is no need to apply for a licence to adapt into Braille, and neither is it mandatory to remunerate rights-holders for this adaptation. Further, there are no restrictions on the sharing of such material and export or import of such material.</p> <p><u>Libraries and Archives:</u> There are no detailed provisions for libraries and archives under the 2006 Copyright Act. Only in Section 15, under the fair use provisions, is there provision for reproduction by a ‘public library’ or a ‘non-commercial documentation centre’, where such reproduction does not ‘conflict with the normal exploitation of the work’ or ‘unreasonably affect the right of the author’. This library/documentation centre provision is, like all provisions in Section 15, also subject to the Section’s definition of fairness – interpretation of which would affect the authority to copy, the number of copies permitted, and portions permitted. In practice, regardless of the legal provisions in place, it is commonly possible in Uganda to copy and utilise substantial portions of works from both publicly accessible libraries and commercial libraries.</p>
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Appendix 2: The ACA2K Research Network

Name	Organisation/Location
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