



ACA2K

Executive Policy Brief

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**African Copyright and Access to
Knowledge (ACA2K) Project**

www.aca2k.org

KENYA

By Marisella Ouma and Dr Bernard Sihanya



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The Authors

Marisella Ouma

Executive Director, Kenya Copyright Board, Nairobi, Kenya
mouma@ag.go.ke or mwarsie@justice.com

Dr Bernard Sihanya

Dean, Faculty of Law, University of Nairobi
Director, Innovative Lawyering and Copyright Africa
Nairobi, Kenya
sihanya@innovativelawyering.com

RESEARCH ASSISTANT

Angela Waweru

Innovative Lawyering, Nairobi, Kenya
angelawaweru@gmail.com

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1. Introduction: the ACA2K Project and the ACA2K Research

The fundamental conceptual premise underlying the ACA2K research project is that knowledge is essential to human development. Access to knowledge is an essential component of economic progress, cultural growth and individual fulfilment. A just copyright system would, therefore, enable access to knowledge.¹

Kenya is one of the eight countries in which the research on copyright and access to teaching and learning materials is being carried out. The team of two, led by Marisella Ouma, started working on the project in May 2008. Ms Ouma is the Executive Director of the Kenya Copyright Board and recently completed her doctoral research at the Queen Mary University of London. She has published several articles on copyright, presented papers and attended meetings on access to knowledge. Dr Bernard Sihanya is the Dean of the Faculty of Law, University of Nairobi, where he teaches and carries out research on Intellectual Property Law, Education, Training and Research Law, ICT Law and Constitutionalism. He is a Director at Innovative Lawyering and Copyright Africa.

The main hypothesis tested by the ACA2K research is that the Kenyan copyright system, a key element of the architecture for education in Kenya, does not facilitate optimal access to knowledge (and specifically teaching and learning material). Meanwhile, the variables of copyright protection (on the one hand) and the enhancement of materials access (on the other hand) tend to be discussed largely in polemical terms. Some copyright-holders and supporters advocate absolute protection, while some users or anti-copyright activists argue for no or limited copyright laws.

These conflicting interests have necessitated this research project, with a view to establishing some common ground in which the antagonistic standpoints can converge through (the essential and intricate process of) consensus-building. In as much as the need to protect copyright cannot be overstated, protection should not function to deny users or consumers access to works that are crucial to teaching and learning. And if creativity is to be encouraged and rewarded, there must be a ready market for literary works and related educational materials.

One of the goals of the government at independence was to eradicate illiteracy in the country. It recognised education as a basic tool to address ignorance and secure human resource development. The government took several steps to provide education to all Kenyans and introduced free primary and secondary education.² The provision of free basic education saw a sharp increase in school enrolment, which in turn had an impact on the provision of teaching and learning materials to schools. The government fully subsidises the books and other teaching materials that are sourced/ procured using the set government procurement procedures. The government has had to enact policies that facilitate access to these materials, including the National Text Book Policy on Publication, Procurement and Supply of June 1998.³ The adult literacy rate in Kenya stands at 73.6 per cent.⁴ The government's expenditure on education is equivalent to 7.0 per cent of the country's GDP.⁵

The ACA2K research found that the Kenyan copyright environment could be utilised and changed to ensure more effective access to teaching and learning material.

¹See the ACA2K Project *Methodology guide* (2008). Available at http://www.aca2k.org/index.php?option=com_content&view=article&id=179&Itemid=61&lang=en [Accessed 31 March 2009].

²This covers the waiver of tuition fee and the provision of text books and classroom material only. Free primary education was introduced in 2003; free secondary education was introduced in 2008.

³Daniel Rotich 'Text book policy in Kenya under a new policy on school text book procurement' (2000) *Publishing Research Quarterly* Vol. 16, No. 2/June 2000.

⁴UNDP 2007/2008 *human development report* (2008). Available at http://hdrstats.undp.org/countries/country_fact_sheets/cty_fs_KEN.html[Accessed 31 March 2009].

⁵Ministry of Planning and Vision 2030, *Kenya vision 2030; a globally competitive and prosperous Kenya* (2007) Government of Kenya.

2. The Copyright Environment in Kenya

The main legal instrument governing copyright in Kenya is the Copyright Act of 2001. There are, however, other statutes that have an impact on access to knowledge, such as the Kenya Communications (Amendment Act) of 2008, the Constitution of Kenya, the Kenya National Library Services Board Act and also other relevant legal instruments, national and institutional policies and case law, as well as social, political, economic and technological factors.

In order to test the project hypothesis outlined above (that the copyright system is not facilitating optimal access), the researchers examined the copyright environment in relation to access to teaching and learning materials.

First, the research team spent three months developing a fieldwork strategy, data collection tools (interview guides) and plans for monitoring the outcomes of the research and subsequent policy engagement. The team also collected documentation on judicial decisions and the legal framework during this preparatory period.

The first stage of research required an in-depth doctrinal analysis of the existing legislative framework and decided cases. Library research was carried out on secondary materials such as books, scholarly articles and conference papers, especially those that deal with copyright and access to teaching and learning material in Kenya.

The team then embarked on the collection of qualitative data through interviews with respondents from three key copyright stakeholder groupings, ie: 1) policymaking/ government/ enforcement stakeholders; 2) educational communities (universities and libraries); and 3) copyright-holders. These interviews took two months, during which time the team worked from interview guides that incorporated the questions contained in the continent-wide ACA2K research project's Methodology guide.

The research found that copyright is indeed one of the factors that affect access to teaching and learning material in Kenya. The rights of copyright-holders are very broad in the law and the legal exceptions and limitations are very narrowly constructed, which does not allow maximum access to teaching and learning material. Very few institutions have policies on intellectual property (IP) and government policy on access to teaching and learning material also needs to be revisited. In addition, information communication technology (ICT) enhances the dissemination of teaching and learning material, but it is hampered by economic and technical constraints.

The copyright laws in Kenya have not been strictly enforced in the past. However, as the existing legal rights of copyright-holders become more effectively enforced, this increased enforcement, if allowed to take place without reform of the existing too-narrowly-constructed educational exceptions and limitations in the law, will increasingly impede access to teaching and learning material. Already, with the establishment of collective management organisations (CMOs), educational institutions and libraries have to obtain a licence to reproduce work for educational purposes – an indication of increased rights-holder enforcement.

3. Legal and Regulatory Recommendations

3.1 Improving Exceptions and Limitations for Teaching and Learning

Section 26 of the Copyright Act provides limitations and exceptions to the exercise of exclusive rights by the copyright owner, including a 'fair dealing' provision in Section 26(1)(a). However, the fair dealing provision - for purposes of criticism, review, scientific research, private use and reporting of current events - is vague, with no clear definition of 'fairness'. Meanwhile, the other exceptions are quite limited and narrowly drafted, especially in relation to access to teaching and learning material.

The section should be reviewed to cover the following:

- The section should include provisions for disabled people, such as exceptions to allow for access by visually-impaired persons;
- Section 26(1)(d) provides for the exclusion from protection of work consisting of not more than two passages of a work for educational purposes. It is necessary to review this provision to allow for the use of increased amounts of works for educational purposes, such as in course packs, instead of limiting this to two short passages;
- The section should better specify the provisions relating to non-commercial library and educational use. Section 26(1)(h) currently provides for use under the direction of the government or non-commercial libraries and documentation centres, where reproduction is deemed to be in the public interest. This has the potential for narrow interpretation, locking out users where there is deemed to be no public interest;
- Exceptions and limitations are needed in relation to non-commercial digitisation of copyright-protected works for archival purposes and library use; and
- The exceptions and limitations should include all educational institutions and libraries and not be limited to those established under the Education Act.

Section 35(3) makes it an infringement to circumvent digital rights management (DRM) as well as technological protection measures (TPMs). The law should be reviewed to ensure that it does not negate teaching, learning and fair use exceptions and limitations. The amendments to this section should include the following:

- There should be provisions to exclude from the anti-circumvention rules the use of works within the confines of the fair dealing exceptions contained in the Act;
- The section should have a proviso to exclude, from anti-circumvention rules, the use of copyright-protected works in the digital environment by disabled people such as the visually-impaired; and
- The section should ensure that the anti-circumvention provisions do not extend to works already in the public domain.

4. Policy Recommendations

Universities, libraries and government in Kenya do not have specific policies on copyright, but do have in place various policies that may have an impact on access to teaching and learning material. It is imperative that the policies are re-examined and, in some cases, re-formulated to ensure maximum access to teaching and learning material.

4.1 Educational Communities

Both the University of Nairobi and Strathmore University have IP policies, but not much on copyright and access to teaching material can be found within the policies. The universities need to ensure that students have access to both electronic and non-electronic books, journals and databases. These should be equitably available to both female and male students. Students and lecturers should be aware of existing copyright policies as well as other policies that might have an impact on access to learning materials. The current policies are silent on copyright and access to knowledge and only acknowledge the rights of the rights-holder. The policies should be re-examined to ensure that:

- Students have access to digital content from their respective institutions.
- The use of information and communication technology (ICT) is encouraged in teaching both on-campus and distance learning courses.
- Awareness creation is included in the policies formulated and in the policy formulation process.
- The publication of books is encouraged through subsidised printing services where publishers have their own printing presses, as is the case with the University of Nairobi.

Kenya National Library Services (KNLS) has no policy on copyright. The KNLS does, however, have branches throughout the country and mobile libraries where there are no permanent libraries. These outlets should develop policies that encourage use of their services that go beyond recreational reading. The libraries should have a more user-friendly approach to allow for access to the knowledge repositories. The university libraries, meanwhile, will be covered by the policies of their parent institutions.

4.2 Policymakers

Policymakers such as the Kenya Copyright Board and the Ministry of Higher Education, Science and Technology have to formulate clear policies on copyright and access to teaching and learning material. There is a need to ensure that the copyright law does not in any way impede the right of access to knowledge, but rather facilitates it. Every child in Kenya should have equal access to education and tools such as books, libraries, journals and digital content. These policies may be used to guide and inform the amendment of laws such as the Copyright Act.

The Ministry of Higher Education, Science and Technology should formulate policies that ensure government provides the necessary teaching and learning materials at tertiary level. The provision of universal primary and secondary education is a step in the right direction, but needs to be complemented with the provision of books and other relevant learning material at universities and tertiary institutions. Although affirmative action raises the number of women enrolled in higher education institutions, it is important to put policies in place that ensure the girl-child is not disadvantaged at any level within the education system. The policy change should ensure that once students enter tertiary institutions, they have maximum access to learning material without any impediment. This would include the provision of affordable books locally, especially for highly specialised areas where books are not available locally.

ICT forms an integral part of access to teaching and learning material. It is not enough to create policies that incorporate ICTs: the policies should integrate ICT as a basic course within the institutes of higher education and make it available to students and lecturers. The policy should make it mandatory for institutions to provide tools such as computers and Internet access.

The Kenya Copyright Board (within the State Law Office) should engage in policy decisions that will inform amendment of the Copyright Act and implementation of regulations to create a legal environment that allows access to learning material in Kenya. There is currently no specific government policy on copyright and access to learning material. The Copyright Act amendments should allow for maximum effective access to learning material and the Board should thus formulate a comprehensive copyright policy that incorporates access to learning material in Kenya.

As mentioned above in part 3.1 of this brief, the Copyright Law of 2001 provides for the criminalisation, without exception, of circumvention of TPMs; this, even in cases of fair dealing and use by the disabled. The Ministry of Higher Education, Science and Technology, as well as the State Law Office should ensure there is a policy that provides access for all, including the visually-impaired; this will require legal exceptions to the current provisions prohibiting circumvention of TPMs.

The National Book Development Council (NBDC) recognises that the information base in a country is crucial for self-identity and cultural preservation. The Council further recognises that the country does not have a strong reading culture, as research indicates the majority of Kenyans rarely read beyond their formal education. In order to foster personal and national development, the NBDC, in conjunction with the Ministry of Education, Science and Technology, should create a policy that promotes a book-reading culture within the country.

National and institutional copyright policies should allow for access in line with the amended copyright law.

5. Action Points for Stakeholders: the Way Forward

From the foregoing, it is evident there is a nexus in Kenya between copyright protection and access to teaching and learning material. There are several activities that may be carried out to ensure the recommendations put forward by the ACA2K team are implemented or actualised.

5.1 Educational Communities

The educational communities should facilitate the dissemination of information on copyright and access to knowledge through the following:

- Hold an internal workshop for the relevant departments within the University of Nairobi on copyright and access to learning material;
- Facilitate an inter-university workshop on access to learning materials for the University and other stakeholders; and
- Participate in a national stakeholders' workshop on amendments to the Copyright Act.

5.2 Policymakers

The Ministry of Education and the Kenya Copyright Board are the key policymakers and they can influence their Cabinet colleagues to provide a clear and specific policy that pushes for maximum access to teaching and learning material via amendments to the 2001 Copyright Act. They can exert this influence through the following:

- Draft a position paper and a policy to be tabled before Cabinet for approval;
- Convene a stakeholders' workshop on the draft policy document and amendment of the copyright law;
- Prepare internal guidelines for the enhancement of access within the institutions of higher learning; and
- Engage other stakeholders in the formulation of relevant policies to allow for maximum access.

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