



# ACA2K

## Country Report

AUGUST 2009

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

[www.aca2k.org](http://www.aca2k.org)

## SOUTH AFRICA

By Dr. Tobias Schonwetter, Caroline Ncube and Pria Chetty



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# About the Authors

## **Dr. Tobias Schonwetter**

University of Cape Town, South Africa  
tobias.schonwetter@uct.ac.za

Tobias Schonwetter of the ACA2K South Africa team is a Postdoctoral Fellow at the University of Cape Town's Intellectual Property Research Unit in the Department of Private Law. He is also a legal advisor for Chetty Law, Johannesburg.

## **Caroline Ncube**

University of Cape Town, South Africa  
caroline.ncube@uct.ac.za

Caroline Ncube, ACA2K South Africa team member, is a Law Lecturer and member of the University of Cape Town's Intellectual Property Research Unit, Department of Private Law.

## **Pria Chetty**

Chetty Law, Johannesburg  
pria@chettylaw.co.za

Pria Chetty, member of the ACA2K South Africa team, is founder and Managing Director of Chetty Law, Johannesburg.

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# Executive Summary

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Access to knowledge in general, and access to learning materials more particularly, are of crucial importance to developing nations as they are keys to sustainable development. This research project seeks to establish to what extent, if any, copyright is fulfilling the objective of facilitating access to knowledge, particularly learning materials, in South Africa. The research tested the following two hypotheses:

- The South African copyright environment does not maximise effective access to learning materials; and
- The South African copyright environment can be changed to maximise effective access to learning materials.

In testing these hypotheses, this research examined the South African copyright environment and its potential impact on access to learning materials. The copyright environment as it is understood by this project encompasses laws, policies and practices. Therefore the report canvasses each of these in detail. The report includes a survey of relevant legislation, policies, reported case law, secondary literature and the results of impact assessment interviews conducted with relevant stakeholders.

The report observes that in South Africa, copyright law in general, and the issue of access to learning materials in particular, have recently started to attract more attention. Thus, the issues are on the radar of the relevant stakeholders.

The survey of statutes showed that South Africa's primary piece of legislation in this field, the Copyright Act 98 of 1978, is in many respects in need of review and amendment to keep pace with international copyright legislative developments relevant to access to knowledge. As an example, it is evident that the legislation needs to be updated to speak to copyright questions born from advances in information and communication technology (ICT).

In addition to the legislation, the South African Government has recently adopted a notable policy on free and open source software (FOSS). The policy is indicative of the intention of the South African Government to lower barriers for adopting ICTs. The policy is significant in that the realisation of improved access to knowledge in South Africa relies to a significant extent on lowering barriers to adoption of ICTs.

With regard to policies implemented by stakeholders, it was evident that the university under study has a number of relevant policies. These comprehensive policies address intellectual property rights and educational technology.

The research team found that there is no reported case law that directly addresses access to learning materials. The report offers some suggestions as to why this is the case. However, there are important parallel importation and general infringement cases that may have significance for access to learning materials.

It was also found that there is a growing body of South African secondary literature that addresses the relationship between the copyright environment and access to knowledge. However, as far as access to learning materials is concerned, only a few legal academics participate in the discussion. Most relevant articles are penned either by rights-holder associations or by user advocacy groups and library associations. The majority of the (few) legal academics dealing with copyright law and access to knowledge appear to favour a less stringent copyright protection regime in South Africa in order to facilitate access to learning materials and to foster education in South Africa. In other words, this subset of the secondary literature supports the research project's hypotheses.

In addition to the above-described desk research and its findings, the study team conducted a series of impact assessment interviews with individuals from government departments, the publishing industry and universities. Each interviewee gave insight into the intended effect and actual impact of the copyright environment on access to learning materials.

The report concludes that there is meaningful appreciation of the issues at stake but that more can be done to ensure that the copyright environment is more conducive to learning materials access.

In order to provide a holistic discussion, the report ends with case studies illustrating important issues which did not emerge clearly from the interviews. For example, case studies of a distance learning institution and of an under-resourced university are presented because the 'educational institution' interviewees conducted for the research came from a well-resourced university that does not provide distance learning.

Ultimately, the report confirms the two hypotheses that were tested and concludes that the South African copyright legislation must be reformed to keep pace with technological advancements and recent policy and legislative advancements related to access to knowledge and learning materials.

# 1. Background

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This report probes the relationship between South Africa's copyright environment on the one hand and access to learning materials on the other. The copyright environment encompasses, among other things, policies; statutes; regulations; case law; interpretations; implementations and practices. Undisputedly, access to learning material is integral to social, economic and political development in every country around the world.

Before tackling the specific research issue at hand, it is instructive to describe the South African context that frames this report.

## 1.1 General-Geography

South Africa is the world's 25th-largest country by surface area,<sup>1</sup> and 24th-largest by population.<sup>2</sup> It is located at the southernmost region of Africa, and its northern neighbouring states are Namibia, Botswana, Zimbabwe, Mozambique and Swaziland. South Africa's southern, western and eastern borders are surrounded by the Atlantic and Indian Oceans. South Africa is divided into nine provinces: Eastern Cape, Free State, Gauteng, KwaZulu-Natal, Mpumalanga, Northern Cape, Limpopo, North West and Western Cape.<sup>3</sup>

## 1.2 Political History

South Africa's colonial past dates back to the 16th Century and slavery was entrenched and widespread by the 17th Century.<sup>4</sup> Slavery was abolished in 1834 and slaves were fully liberated on 1 December 1838.<sup>5</sup> Colonisation led to racial discrimination which reached its height during 1948-94 when South Africa was governed by the National Party.<sup>6</sup> After protracted negotiations, the first democratic elections were held under an Interim Constitution in 1994. This negotiated transition from apartheid to democracy has been hailed as both 'one of the most astonishing political achievements of our time' and 'a miracle'.<sup>7</sup> Since 1994 the government has been led by the African National Congress (ANC). There are various opposition parties, which include the Independent Democrats (ID), the Inkatha Freedom Party (IFP) and the Democratic Alliance (DA). The second democratic elections were held in 1999, the third in 2004, and the fourth in April 2009.

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<sup>1</sup>United Nations Statistics Division *Demographic and social statistics, demographic yearbook* (2006) Table 3. Available at <http://unstats.un.org/unsd/demographic/products/dyb/dyb2006/Table03.pdf> [Accessed 30 March 2009].

<sup>2</sup>World Population Division of the Department of Economic and Social Affairs of the United Nations Secretariat *World population prospects: the 2008 revision* (2009) Table A.3. Available at [http://www.un.org/esa/population/publications/wpp2008/wpp2008\\_text\\_tables.pdf](http://www.un.org/esa/population/publications/wpp2008/wpp2008_text_tables.pdf) [Accessed 30 March 2009].

<sup>3</sup>Section 103(1) of the South African Constitution.

<sup>4</sup>Government communication and information system (GCIS) *2006/2007 South Africa yearbook* at 31.

<sup>5</sup>*Ibid.* at 31.

<sup>6</sup>*Ibid.* at 31-44.

<sup>7</sup>World Bank *South Africa – country brief* (2009). Available at <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/SOUTHAFRICAEXTN/0,,menuPK:368086~pagePK:141132~piPK:141107~theSitePK:368057,00.html> [Accessed 30 March 2009] and B Kalima-Phiri *South Africa's trade policy: country background paper for CUTS-CITEE's trade, development and poverty (TDP) project* (2005) Southern African Regional Poverty Network, at 4.

Since 1994 the government has engaged in the pursuit of democratisation, socioeconomic change and reconciliation. The main activities of these pursuits have been the constitution-making process, local government elections and the establishment of the Truth and Reconciliation Commission.

The aforementioned Interim Constitution resulted from a volatile and protracted negotiation between the apartheid government led by the National Party (NP), and its opponents. It came into force on 27 April 1994 and wrought the following revolutionary changes to South Africa: first, it ended racial discrimination by according all fundamental (human) rights to all citizens. Second, it converted South Africa from parliamentary sovereignty to constitutional sovereignty. Third, it replaced the central government system with a federal one. The Interim Constitution provided for the drafting of a final Constitution by the Constitutional Assembly in accordance with constitutional principles. Once drafted, the final Constitution had to be certified by the Constitutional Court. The first application in 1996 for certification failed and a second application had to be made. The Constitutional Court granted this application in 1997.

### 1.3 Cultural Diversity, Education and Literacy

As at July 2008, South Africa's population was estimated to be 48.7 million, and 79.2 per cent of the population is black African, 9 per cent is 'Coloured', 2.6 per cent is Indian, and 9.2 per cent is white. Fifty-two per cent of the entire population is female.<sup>8</sup> This population is divided into several ethnic groups, and immigrants from all over the world.<sup>9</sup> The country has 11 official languages: Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.<sup>10</sup>

Sections 30 and 31 of the South African Constitution protect people's right to 'use the language and to participate in the cultural life of their choice' and the right to practice their religion. Section 29(1) of the Constitution provides that 'everyone has the right to a basic education, including adult basic education and further education, which the State, through reasonable measures, must progressively make available and accessible'. Section 29(2) of the Constitution provides for the right to receive educational instruction in the official language or languages of one's choice.

South Africa's national budget for 2008/09 provides for Government expenditure of 716 billion Rand, of which 121.1 billion Rand is set aside for educational purposes.<sup>11</sup> Thus, South Africa spends more than 5 per cent of the country's GDP on education. This educational expenditure (as a proportion of the GDP) is roughly at OECD level<sup>12</sup> but falls short of the 6 per cent figure recommended by UNESCO for developing countries. Almost 17 per cent of total South African Government spending is allocated to education. This budget is supplemented by various education-related expenditures. It should be noted, however, that both aforementioned proportions for educational expenditures in South Africa (percentage of GDP and percentage of total government spending) have been declining in recent years. The absolute amount spent on education has, however, risen significantly in this time. In spite of all these efforts, the performance of South African learners in comparative tests with other countries remains poor.<sup>13</sup>

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<sup>8</sup>Mid-year population estimates – 2008 Statistics SA. Available at <http://www.statssa.gov.za/publications/statsdownload.asp?PPN=P0302&SCH=4203> at 3 [Accessed 30 March 2009].

<sup>9</sup>2006/2007 South Africa Yearbook supra note 4 at 1.

<sup>10</sup>Section 6 of the South African Constitution.

<sup>11</sup>SA National Treasury *Budget at a glance*. Available at <http://www.treasury.gov.za/documents/national%20budget/2008/guides/Budget%20at%20a%20glance.pdf> [Accessed 30 March 2009].

<sup>12</sup>In 2005, the OECD average expenditure on educational institutions as a percentage of GDP from public and private sources was at 5.8 per cent, see OECD *Education at a glance 2008: OECD indicators* (2008) chapter B indicator B.2. Available at [http://www.oecd.org/document/9/0,3343,en\\_2649\\_39263238\\_41266761\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/9/0,3343,en_2649_39263238_41266761_1_1_1_1,00.html) [Accessed 30 March 2009].

<sup>13</sup>OECD *Reviews of national policies for education: South Africa* (2008) at 129.

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South Africa has a single national education system, which is managed by the national Departments of Basic Education and Higher Education and the nine provincial education departments. The education system is divided into three stages, namely General Education and Training (GET), Further Education and Training (FET) and Higher Education (HE). The GET stage begins with Reception Year (Grade R) and is capped at Grade 9. There is an equivalent Adult Basic Education and Training (ABET) qualification. The FET stage begins at Grade 10 and is capped at Grade 12. The HE stage consists of a range of degrees, diplomas and certificates up to and including postdoctoral degrees. Only Grades 1 to 9 are compulsory. Learners usually begin Grade 1 at the age of 6. Therefore, if their studies are uninterrupted and they complete a grade each year, they should complete Grade 9 at the age of 14 or 15.

By mid-2007, there were 26 592 public schools in South Africa and 23 Higher Education institutions. Altogether, 12.3 million learners were in South Africa's education system.<sup>14</sup> The numbers of children aged between 5 and 14 by mid-2007 were estimated to be 10 088 100.<sup>15</sup> These numbers suggest a far higher enrolment rate than in most developing countries. It is said that the gross enrolment rate at primary school level is at 100 per cent and still very high up to Grade 9. The OECD averages are at 98.5 per cent and 81.5 per cent respectively.<sup>16</sup> These figures indicate very high levels of access to the compulsory stage of formal education in South Africa. However, older members of the population who were of school-going age during the colonial and apartheid era had much less access to education; and the need to correct the economic distortions due to the education and skills deficit of the majority of the older population remains one of the greatest challenges facing the government today.<sup>17</sup> Largely as a result of past poor access to education, there are high levels of illiteracy. For example, in 2004 it was said that at least 3 million adults were completely illiterate and between '5 to 8 million were functionally illiterate – unable to function adequately in the modern world due to under-developed reading and writing skills'.<sup>18</sup>

According to the 2008 *Development indicators* issued by the South African Government:<sup>19</sup>

Gender parity is considered to have been attained when [the Gender Parity Index [GPI]] lies between 0.97 and 1.03. The GPI for total school enrolment (Grade 1 to Grade 12) indicates that gender parity has been achieved. The 2007 GPI for secondary education shows a disparity in favour of girl learners [GPI: 1.058] whilst for primary education the picture is reversed, with more boys in primary schools than girls [GPI:0.966]. The trend across the years may mean that, relative to the appropriate school-age population, more male learners in the school system repeat some of the lower grades.

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<sup>14</sup>2006/2007 *South Africa Yearbook* supra note 4 at 195.

<sup>15</sup>*Mid-year population estimates 2007* at 9. Available at <http://www.statssa.gov.za/publications/P0302/P03022007.pdf> [Accessed 30 March 2009].

<sup>16</sup>OECD *Education at a glance 2008: OECD indicators* supra note 12 at 343.

<sup>17</sup>B Khalima-Phiri supra note 7 at 4.

<sup>18</sup>E Sisulu 'The culture of reading and the book chain: how do we achieve a quantum leap?' 2004, keynote address at the Symposium on Cost of a culture of reading, 16 -17 September 2004. Available at <http://www.nlsa.ac.za/NLSA/News/publications/culture-of-reading> [Accessed 30 March 2009].

<sup>19</sup>The Presidency of the Republic of South Africa *Development indicators 2008* (2008) at 46. Available at <http://www.info.gov.za/view/DownloadFileAction?id=84952> [Accessed 30 March 2009].

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The *Development indicators* do not provide similar statistics or analysis for tertiary education. The United Nations has however compiled the following data for South Africa:<sup>20</sup>

**Table 1: Gender Parity Index in tertiary level enrolment in South Africa**

1991	1999	2000	2001	2002	2003	2004	2005	2006
0.83	1.16	1.24	1.15	1.16	1.17	1.19	1.21	1.24

(last updated: 14 July 2008)

Applying the principle that gender parity is attained when the GPI is between 0.97 and 1.03, a growing gender disparity in favour of female students can be observed in tertiary education enrolment in South Africa.

In spite of the increasing availability of digital technologies, printed books are still the most accessible and readily available learning tool in South Africa.

## 1.4 Economy

According to the International Monetary Fund (IMF), South Africa has the world's 25th-largest economy by GDP (PPP).<sup>21</sup> This makes South Africa the leading economy in Africa. As such, South Africa plays an important leadership role for developing countries on the world stage.<sup>22</sup> South Africa's economy has demonstrated sustained growth and recently reached an alltime high.<sup>23</sup> The country's tax collection and financial and debt administration are lauded by the World Bank as 'international best practice'.

This promising economy is, however, confronted with several challenges. First, a large portion of the population remains steeped in dire poverty to the extent that some, most notably former President Thabo Mbeki, view South Africa as having two economies or nations, 'one nation, white and rich, and the other, poor and black'.<sup>24</sup> Second, there are very high levels of unemployment which as at September 2007 stood at 22.7 per cent.<sup>25</sup> Third, efforts need to be made to 'correct the distortions that the apartheid policy created within the economy' such as the 'exclusion from the formal, "first" economy, the education and skills deficit of the majority of the population, the racially biased distribution of wealth, services and infrastructure and worsening poverty amongst the majority of its black population'.<sup>26</sup>

## 1.5 South Africa's Access to Knowledge Movement

The access to knowledge movement in South Africa gained significant momentum in 2004-5 with the commencements of the Access to Learning Materials in Southern Africa project and the Commons-Sense Project. Several related projects have been established since, such as the African Access to Knowledge Alliance (AAKA). Many of these projects reach beyond the national borders of South Africa, aiming to accomplish a coordinated African approach.

<sup>20</sup>United Nations Millennium Development Indicators *Gender parity index in tertiary level enrolment* (2008). Available at <http://mdgs.un.org/unsd/mdg/SeriesDetail.aspx?srid=614> [Accessed 30 March 2009].

<sup>21</sup>International Monetary Fund *World economic outlook database (April 2008 - data for 2007)*. Available at <http://www.imf.org> [Accessed 30 March 2009].

<sup>22</sup>*World Bank South Africa – Country Brief (Economy)* supra note 7.

<sup>23</sup>T Contogiannis 'Economic growth: constraints and prospects for the South African economy' (2007) 35 *Discourse at 42; 2006/2007 South Africa yearbook*, supra note 4 at 157.

<sup>24</sup>WJ Breytenbach 'The Presidencies of Nelson Mandela and Thabo Mbeki compared: implications for the consolidation of democracy in South Africa' (2006) 36 *Africa Insight* at 177.

<sup>25</sup>Statistics SA *Labour force survey – September 2007* (March 2008) at iv. Available at <http://www.statssa.gov.za/publications/P0210/P0210September2007.pdf> [Accessed 30 March 2009].

<sup>26</sup>B Khalima-Phiri supra note 7 at 4.

## 2. Doctrinal Analysis

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### 2.1 Statutes and Regulations

#### 2.1.1 Primary Legislation: The Copyright Act 98 of 1978

##### 2.1.1.1 Historical Background

The road to the enactment of the Copyright Act 98 of 1978 ('Copyright Act') provides insight into South Africa's road from a self-governing Dominion of the British Empire through to the democratic country we know today.

The current Copyright Act stemmed from the British Copyright Act of 1911, which was enacted in South Africa under the title 'Imperial Copyright Act'. From the late 1940s onwards, a number of international treaties and instruments in the intellectual property field were developed, including the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of 1961 (Rome Convention) and the Convention for Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms (Geneva Convention). The Berne Convention was revised at Stockholm in 1967 and Paris in 1971. In addition, the Universal Copyright Convention came into being. South Africa did not accede to any of these treaties, with the exception of the administrative provisions of the Paris text of the Berne Convention. The Berne Convention, which requires member countries to conform their copyright law to certain prescribed standards, has shaped the later amendments to the Copyright Act.

Specific requirements incorporated from the Berne Convention include:

- that copyright be an automatic right;
- that an author or creator obtains the right as soon as her work has been 'fixed' without the author having to declare or assert it;
- an 'international reciprocity for copyright works' which means that a work that is created in one country is automatically protected by copyright in any other country that is also a signatory to the convention;
- the copyright exceptions and limitations meet the requirements of the so-called 'three-step test'; and
- recognition of moral rights.

As with other countries, the Copyright Act provides the foundation for the understanding and advancement of the legislative landscape for access to knowledge in South Africa. The specific topics for this research project's analysis of the Copyright Act are largely derived from the 'Commonwealth of Learning copyright audit',<sup>27</sup> which is an inquiry into whether, and to what extent, the copyright law of a country incorporates flexibilities that promote access to knowledge.

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<sup>27</sup>Prepared by Achal Prabhala and Tobias Schonwetter.

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### 2.1.1.2 Eligibility for Copyright

In accordance with Section 2 of the Copyright Act, the following original works are eligible for copyright in South Africa: literary works; musical works; artistic works; sound recordings; cinematograph films; broadcasts; programme-carrying signals; published editions, and computer programs.

In addition to the requirement of originality, Section 2(2) requires works other than broadcasts and programme-carrying signals to be reduced to material format, ie, written down, recorded, represented in digital data or signals or otherwise. A potential broadcast is not eligible for copyright until it is actually broadcast and a programme-carrying signal must be transmitted by satellite in order to qualify for copyright as per Section 2(2A).

The question of which works are eligible for copyright forms an important backdrop to understanding the restrictions on the use of these works in which copyright is held, and in the converse, the exceptions to such restrictions which may promote access to knowledge.

### 2.1.1.3 Exclusive Rights

The Copyright Act vests exclusive rights – to do or authorise the doing of specific acts in South Africa in respect of the work concerned – with the copyright-holder. In the absence of a valid exception to the rights, or permission from the copyright-holder, or payment of royalties or fulfilment of required obligations necessary to contractually be granted rights to the work, the exercise of any of the exclusive rights by anyone other than the rights-holder qualifies as copyright infringement. Below is outlining key exclusive rights in the South African Copyright Act. Whilst any of the works below may qualify as knowledge, literary works are the most important category for the purposes of this study, in the context of learning materials.

SECTION	WORK	EXCLUSIVE RIGHTS
6	Literary or Musical Works	<ul style="list-style-type: none"> <li>(a) Reproduce;</li> <li>(b) Publish;</li> <li>(c) Perform;</li> <li>(d) Broadcast;</li> <li>(e) Transmit in a diffusion service unless such service transmits a lawful broadcast, including the work, and is operated by the original broadcaster;</li> <li>(f) Make an adaptation of the work; and</li> <li>(g) Do, in relation to an adaptation of the work, any of the acts specified in relation to the work in (a) to (e) above.</li> </ul>
7	Artistic Works	<ul style="list-style-type: none"> <li>(a) Reproduce;</li> <li>(b) Publish;</li> <li>(c) Include the work in a cinematograph film or a television broadcast;</li> <li>(d) Cause a television or other programme, which includes the work, to be transmitted in a diffusion service, unless such service transmits a lawful television broadcast, including the work, and is operated by the original broadcaster;</li> <li>(e) Make an adaptation of the work; and</li> <li>(f) Do, in relation to an adaptation of the work, any of the acts specified in relation to the work in (a) to (d) above.</li> </ul>

SECTION	WORK	EXCLUSIVE RIGHTS
8	Cinematograph Films	(a) Reproduce including making a still photograph; (b) Cause the film, in so far as it consists of images, to be seen in public, or, in so far as it consists of sounds, to be heard in public; (c) Broadcast; (d) Cause the film to be transmitted in a diffusion service, unless such service transmits a lawful television broadcast, including the film, and is operated by the original broadcaster; (e) Make an adaptation of the work; (f) Do, in relation to an adaptation of the work, any of the acts specified in relation to the work in (a) to (d) above; and (g) Let, or offer or expose for hire by way of trade, directly or indirectly, a copy of the film.
9	Sound Recordings	(a) Make, directly or indirectly, a record embodying the sound recording; (b) Let, or offer, or expose for hire by way of trade, directly or indirectly, a reproduction of the sound recording; (c) Broadcast the sound recording; (d) Cause the sound recording to be transmitted in a diffusion service, unless that diffusion service transmits a lawful broadcast, including the sound recording, and is operated by the original broadcaster; and (e) Communicate the sound recording to the public.
10	Broadcasts	(a) Reproduce; (b) Rebroadcast; and (c) Cause the broadcast to be transmitted in a diffusion service, unless such service is operated by the original broadcaster.
11	Programme-Carrying Signals	Undertake or authorise, the direct or indirect distribution of such signals by any distributor to the general public or any section thereof in the Republic, or from the Republic.
11A	Published Editions	Make or authorise the making of a reproduction of the edition in any manner.
11B	Computer programs	(a) Reproduce; (b) Publish; (c) Perform; (d) Broadcast; (e) Cause the computer program to be transmitted in a diffusion service, unless such service transmits a lawful broadcast, including the computer program, and is operated by the original broadcaster; (f) Make an adaptation of the work; (g) Do, in relation to an adaptation of the work, any of the acts specified in relation to the work in (a) to (e) above; (h) Let, or offer or expose for hire by way of trade, directly or indirectly, a copy of the computer program.

#### 2.1.1.4 Registration

Save for cinematograph films which may be registered at the copyright-holder's discretion (it is optional), copyright subsists automatically in all other works, provided that the work is eligible for copyright. Registration of copyright in cinematograph films is provided for by the Registration of Copyright in Cinematograph Films Act 62 of 1977. By comparison, where the formality of registration of a work is not exercised in the case of trademarks and patents, such works fall into the public domain, resulting in accessibility to such work by the public, in the absence of authorisation from the rights-holder or payment of any royalties or fees. Copyright, however, subsists automatically which, in turn, potentially limits the flow of works into the public domain.

#### 2.1.1.5 Term of Copyright

The term of copyright is dealt with in Section 3 of the Act. Copyright in literary or musical works or artistic works other than photographs subsists for the duration of the life of the author plus 50 years from the end of the year in which the author dies. If before the death of the author no (1) publication, (2) public performance, (3) offer for sale to the public of records, or (4) broadcasting of the work has taken place, the term of copyright continues for 50 years from the end of the year in which such act takes place.

The copyright protection term for cinematograph films, photographs and computer programs is 50 years from the end of the year in which the work (1) is made available to the public with the consent of the owner of the copyright; or (2) is first published, whichever term is the longer. If the work is neither made available to the public nor published within 50 years of the making of the work, the copyright term is 50 years from the end of the year in which the work is made.

Copyright in sound recordings subsists for 50 years from the end of the year in which the recording is first published. The copyright protection term for broadcasts is 50 years from the end of the year in which the broadcast first takes place. Programme-carrying signals are copyright-protected for 50 years from the end of the year in which the signals are emitted to a satellite.

Lastly, published editions are copyright-protected for 50 years from the end of the year in which the edition is first published.

The copyright term impacts the date on which a work falls into the public domain, and may therefore be used freely, ie, without authorisation from the copyright-holder or the payment of any fees. While the term of copyright in South Africa is shorter than in the European Union and the United States, an even shorter copyright term, perhaps with the option of term renewals, could result in a knowledge-related work falling into the public domain sooner, promoting access to such work. Of course, under the Berne Convention, the signatory states (including South Africa) are required to provide copyright protection for a minimum term of the life of the author plus 50 years. However, there is nothing currently preventing legislation that makes the registration of copyright compulsory at some early stage (and after the initial automatic vesting). Compulsory registration could be an important tool to further access to knowledge, since, in the absence of renewal of registration – but during the term as specified under the Berne Convention – works could fall into the public domain.

Section 3(3) states that in the case of anonymous or pseudonymous works, copyright subsists for 50 years from the end of the year in which the work is made available to the public with the consent of the owner of the copyright or from the end of the year in which it is reasonable to presume that the author died, whichever term is the shorter. By comparison, in the United States the term of protection for anonymous or pseudonymous works is 120 years from date of creation. As with the other categories of works, a shorter term of copyright in anonymous or pseudonymous works could result in improved access to knowledge resources.

### 2.1.1.6 Orphan Works

'Orphan works' are works that are still copyright-protected but for which the copyright-holder is not identifiable or locatable. Whilst the copyright holder of an orphan work is entitled to the benefits of copyright, the fact that the owner is unknown prevents any transaction to secure the rights to use the work. In South Africa, the problem of orphan works is not sufficiently discussed at the moment. In other countries and regions where discussions of the issue have reached an advanced stage, however, solutions have been proposed that could also work for South Africa. For instance, the Copyright Act could be amended to permit use of orphan works on reasonable terms when copyright owners cannot be identified or located to negotiate voluntary licences. Some countries require, for example, a reasonable investigation into the identity of the copyright owner. Other solutions are, however, available and at this point it seems most important that the South African lawmaker realises the need to address the problem in the first place.

### 2.1.1.7 Moral Rights

In compliance with the Berne Convention, Section 20 of the Copyright Act provides for the protection of moral rights, ie, the right to claim authorship as well as the right to object to any distortion, mutilation or other modification of the work where such action is or would be prejudicial to the honour or reputation of the creator. Specific concerns with moral rights include (i) that the inability to locate the author (as in the case of orphan works) to attribute the work to the author and the resulting fear of violation of a moral right may at times result in a decision not to use a work, and (ii) the lack of clarity on the definition of moral rights among copyright stakeholders. While the concerns regarding orphan works were discussed above, the second concern could be addressed via legislative amendment to the definition of moral rights.

### 2.1.1.8 Specific Provisions for Libraries or Archives

The current Copyright Regulations contain specific provisions for libraries and archives.<sup>28</sup> Libraries and archives play an important role where learners are unable to afford personal copies of learning materials and rely on libraries to access such learning materials. Thus, any (unreasonable) restriction on libraries and archives can be expected to have a direct negative impact on access to learning materials.

Section 3 of the Copyright 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:

- 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.

In many cases, the library and archive reproduction rights in Section 3 of the Regulations are subject to the provisions of Section 2 of the Regulations. Section 2 requires that the reproduction must be a 'reasonable portion' of a work and must 'not conflict with the normal exploration of the work'.

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.

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<sup>28</sup>Section 3 of the Copyright Act 1978 Regulations as published in GN R1211 in GG 9775 of 7 June 1985 as amended by GN 1375 in GG 9807 of 28 June 1985.

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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.

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.

The Copyright Regulations regarding library and archive reproductions are problematic for a number of reasons. Crucial terms such as 'reasonable portion' are often not defined and the requirements for specific copyright exceptions and limitations appear overly restrictive. It is for these reasons that the general usefulness of these provisions has been doubted.<sup>29</sup> It seems that from a practical point of view, the adoption of more specific guidelines is necessary, especially for the key issue of multiple copying. Also, it is clear from the cited provision that under the Regulations libraries may not translate, adapt or convert material into other formats. In essence, digitisation of works by the libraries for access by users is not addressed. In addition libraries do not have the necessary clarity on whether they may distribute works in a digital format within the allowed reproduction and distribution rights purported in the Regulations.

#### 2.1.1.9 Specific Provisions in Respect of Sensory Disabilities

The Act does not include specific provisions that deal with the needs of sensory-disabled people. This is problematic from an access to learning materials perspective because people with sensory disabilities face additional barriers to access to learning materials by virtue of their disability. The law should make special provisions to enhance their access to learning materials. However, whether or not there should be a provision for conversion of a book into Braille without seeking permission from, or paying royalties to, the rights-holder of that book, when such a book is for use by a blind learner, is a contentious issue.

#### 2.1.1.10 'Fair Dealing' and Specific Provisions for Educational Purposes

When trying to make use of copyright protected material without the permission of the rights-holder, learners and researchers alike will most likely invoke the general fair dealing provision contained in Section 12(1)(a) of the Act.<sup>30</sup> Section 12(1)(a) of the Act stipulates that 'copyright shall not be infringed by any fair dealing with a literary or musical work [...] for the purposes of research or private study by, or the personal or private use of, the person using the work'. There are, however, various more specific provisions available for educational uses. It goes without saying that specific provisions for educational purposes have marked relevance for access to learning materials.

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<sup>29</sup>DJ Pienaar *Statutory defences against actions for infringement of copyright* LL.M. thesis University of South Africa (1988) at 95-7.

<sup>30</sup>The concept of fair dealing must, however, not be confused with the much broader 'fair use' doctrine as utilised, for instance, by the US Copyright Act.

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Firstly, section 12(4) of the Act provides that a work may be used 'to the extent justified by the purpose, by way of illustration in any publication, broadcast or sound or visual record for teaching: Provided that such use shall be compatible with fair practice and that the source shall be mentioned, as well as the name of the author if it appears on the work'. Section 12(11) of the Act deals with translation and states that translation of works for the purposes of educational use is allowed.

In addition, the Copyright Regulations linked to Section 13 of the Act also contain specific exceptions for educational purposes. Apart from the aforementioned provisions for the benefit of libraries and archives, the Regulations permit the making of multiple copies for class-room use, not exceeding one copy per pupil per course.<sup>31</sup> Furthermore, Regulation 8 allows the making of a single copy by or for a teacher for the purpose of research, teaching or preparation for teaching in a class. Both the 'multiple copies' exception in Regulation 7 and the 'copies for teachers' exception in Regulation 8 are, however, subject to the provisions of Regulation 2. Hence, reproductions are only permitted (a) if not more than one copy of a reasonable portion of the work is made, and (b) 'if the cumulative effect of the reproductions does not conflict with the normal exploitation of the work to the unreasonable prejudice of the legal interest and residuary rights of the author'.<sup>32</sup>

The educational exceptions provided for in the Regulations present a few challenges. Firstly, it remains unclear what constitutes a 'reasonable portion'. The vagueness of the law necessitates an individual interpretation by the affected persons. As a result, students would often be unsure of how much they could lawfully photocopy. Furthermore, copies may not be made for purposes other than classroom use. This, of course, prevents productive distance learning, where learners are not in possession of the original copy in order to exercise the right granted under the Regulations.

### 2.1.1.11 Media Freedom and Expression

The following provisions of the Copyright Act have a bearing on media freedom and expression:

- Section 12(1)(b) of the Act allows 'fair dealing' reproduction for review and criticism of literary and musical works and is applied to other works: artistic works, cinematograph films, sound recordings, broadcasts, published editions and computer programs;
- Section 12(8)(a) of the Act provides that '[n]o copyright shall subsist in [...] speeches of a political nature';
- Section 12(6)(a) of the Act provides that 'copyright in a lecture, address or other work of a similar nature which is delivered in public shall not be infringed by reproducing it in the press or by broadcasting it, if such reproduction or broadcast is for an informatory purpose';
- Section 12(3) of the Act permits quotation of literary and musical works and the provisions of Section 12(3) are applied to other works: cinematograph films, sound recordings, broadcasts and computer programs;
- Section 12(1)(c) of the Act provides that copyright shall not be infringed by any fair dealing with a literary or musical work for the purpose of reporting current events in a newspaper, magazine or similar periodical; or by means of broadcasting or in a cinematograph film. The provisions of Section 12(1)(c) are applied to other works: artistic works, cinematograph films, sound recordings, broadcasts, published editions and computer programs; and
- Section 19 of the Act provides that copyright in programme-carrying signals shall not be infringed by the distribution of short excerpts of the programme so carried that consist of reports of current events; or as are compatible with fair practice, and to the extent justified by the informatory purpose of such excerpts. These provisions do not apply to programmes that consist of sporting events.

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<sup>31</sup>Regulation 7.

<sup>32</sup>Regulation 2(b).

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### 2.1.1.12 Remixing

A remix is an adaptation of a work, more popularly used in the context of musical works. In the context of musical works, remixing results in the creation of new songs and new recordings of songs. Section 14 of the Act sets out a statutory licensing scheme which permits remixing, provided that statutory notice is given and prescribed royalties are paid. This permission pertains, however, to a very specific segment of users – persons designated as ‘manufacturers’ who intend to sell the record by retail, or supply it for the purpose of resale by retail, to another person, or to use it for making other records to be sold or so supplied – rather than the general public. Otherwise, a person intending to remix a work must obtain permission from the copyright-holder. ICTs present numerous formats for works and the opportunity for ease of remix. The remix of a work may however be limited in the situation that the copyright-holder is unknown (referencing an earlier discussion on orphan works). More notably however, the remixing or adaptation of a work from print to Braille, for persons with sensory disabilities, is not provided for in the Copyright Act – and this negatively impacts access to knowledge by the sensory-disabled.

### 2.1.1.13 Other Relevant Exceptions and Limitations

The following are some of the exceptions to copyright infringement as provided for in the Copyright Act, which can have relevance to learning materials access:

- Uses related to judicial proceedings;
- Uses relating to official texts of a legislative, administrative or legal nature; political and legal speeches; news of the day that are mere items of press information; and
- Back-up copies of computer programs.

### 2.1.1.14 Anti-circumvention Provisions

The South African Copyright Act does not contain any provisions prohibiting the circumvention of technological protection measures (TPMs). South Africa is not obliged to introduce such provisions since it has not yet ratified the ‘WIPO Internet Treaties’ which established such an obligation. Having said this, the Electronic Communications and Transactions (ECT) Act of 2002 contains a provision that can be interpreted as an anti-circumvention provision. This provision is discussed in the subsection dealing with the ECT Act.

### 2.1.1.15 Parallel Importation

A parallel import refers to a copyright-protected product placed on the market in one country, which is subsequently imported into a second country, without the permission of the copyright-holder in the second country. The relationship between parallel import and access to knowledge lies in the extent to which parallel import of, say, a mathematics textbook, can make such a textbook more affordable in a country where it is otherwise unaffordable. It is important to not confuse this with piracy, because there has been due compensation to the rights-holder in the country of sale, and the textbook is merely subsequently traded. In South Africa, Section 28 of the Copyright Act provides that the owner of any published work or the exclusive licensee of a published work (with the right to import such work into South Africa) may request to the Commissioner of Customs and Excise to declare any other importation of the work prohibited.

This provision, which may block parallel importation, is not required by TRIPs and otherwise prevents the positive impact (both directly and indirectly, through competition) that the parallel import of learning materials may have on access to knowledge.

### 2.1.1.16 Non-voluntary (Compulsory and Statutory) Licences

Uses that are authorisation-free but against a fixed remuneration fall into the category of so-called 'statutory licences'. If both an authorisation and payment of remuneration are required but also an obligation exists for the copyright-holder to give permission for the use in question, then one speaks of 'compulsory licences'. Statutory and compulsory licences can be grouped under the more general term 'non-voluntary licences'. South Africa's Copyright Act addresses non-voluntary licensing only in a few instances. More precisely, copyright is not infringed if an act is conducted in compliance with a compulsory licence granted by the South African Copyright Tribunal, for which provision is made in Sections 29-36 of the South African Copyright Act. The function of the Tribunal is to determine disputes arising between licensing bodies, or between persons from whom licences are required and persons requiring licences.<sup>33</sup> The Tribunal will grant a licence where the refusal to do so by the copyright-holder is unreasonable.

In addition, Section 45 of the Copyright Act could form the basis for future non-voluntary licence schemes as it allows regulations by the Minister in respect of circulation, presentation or exhibition of any work or production. These regulations could empower any person to authorise the circulation, presentation or exhibition of a work in certain conditions that would not constitute copyright infringement. Section 45, however, makes it clear that the author must not be deprived of his right to a reasonable remuneration determined in accordance with the agreement applicable, failing which by arbitration.

Further compulsory licensing, eg, for orphan works (as possible in Canada and elsewhere), is not provided for under the South African Copyright Act.

### 2.1.2 Intellectual Property Rights from Publicly Financed Research and Development Act 51 of 2008

This very recent legislation primarily intends to provide for more effective utilisation of intellectual property emanating from publicly-financed research and development; to establish a National Intellectual Property Management Office (NIPMO) and Intellectual Property Fund; and to provide for the establishment of offices of technology transfer at the relevant institutions. Institutions that fall within the scope of application of the legislation include universities and public research institutes such as the Medical Research Council, the Human Sciences Research Council, the South African Bureau of Standards and the Water Research Commission.

'Intellectual property' is qualified under the legislation as any creation of the mind that is capable of being protected by law from use by another person, whether in terms of South African law or foreign intellectual property law, and includes any rights in such creation, but excludes copyrighted works such as a thesis, dissertation, article, handbook or other publication which, in the ordinary course of business, is associated with conventional academic work. A 'recipient' under the Act refers to a person, juristic or otherwise, that undertakes research and development using funds allocated by the state or a state organ or agency with the exception of funds allocated for scholarships and bursaries. The term 'commercialisation' refers to the process by which any intellectual property emanating from publicly-financed research and development is or may be adapted or used for any purpose that may provide any benefit to society or commercial use on reasonable terms.

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<sup>33</sup>Section 30 of the Copyright Act.

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Salient points under the legislation are:

- A recipient has a choice regarding retention of ownership of intellectual property emanating from publicly-financed research and development but in the case of electing not to retain ownership, subject to certain conditions, such ownership will either fall into the hands of NIPMO, or a private organisation that provided funding, or the intellectual property creator as per Section 4 of the Act;
- A recipient has specific obligations and disclosure duties including ensuring that intellectual property emanating from the aforementioned funds is appropriately protected before the results of such research and development are published or publicly disclosed by other means as per Section 5(b);
- Section 5(g) confers on recipients the duties to licence and otherwise transfer rights in respect of the pertinent intellectual property as well as manage commercialisation of the intellectual property;
- Affected institutions must establish technology transfer offices as per Section 6 of the Act;
- Intellectual property creators and their heirs are granted specific rights to portions of revenues accrued to the institution as per Section 10 of the Act;
- A recipient is charged with assessing the intellectual property to determine whether it merits statutory protection and, where appropriate, apply for and use best efforts to obtain statutory protection in its name as per Section 5(d);
- Section 11(a)(b) provides for a preference to non-exclusive licensing and to Broad-Based Black Economic Empowerment (BBBEE) entities; and
- Section 11(e) provides that the State must be granted an irrevocable and royalty-free licence authorising the State to use the intellectual property anywhere in the world for health, security and emergency needs of South Africa.

According to Section 12(2), a recipient wishing to undertake an intellectual property transaction offshore, in the form of an assignment or exclusive licence, must satisfy the National Intellectual Property Management Office (NIPMO) that:

- There is insufficient capacity in the republic to develop or commercialise the intellectual property locally; and
- The republic will benefit from such offshore transaction.

The legislation potentially negatively impacts access to knowledge to the extent that the Act (i) does not support publicly-funded research falling into the public domain; and (ii) establishes a regime that may not be endorsed by research partners in other countries which may frustrate international research collaborations; (iii) is likely to result in significant delays for the publication of research.

Although the Act excludes many kinds of copyright-protected works by excluding these works from the definition of 'intellectual property' in Section 1, the Act defines intellectual property in such a way that it could be read to prohibit granting access to databases, software, and medical diagnostic methods. It also prohibits the disclosure of research while it is scrutinised for patentability by bureaucrats who are unlikely to be experts in the research field in question. This may result in significant delays in local knowledge becoming available. This is an issue of particular concern in respect of neglected diseases, and other knowledge fields where local research is critical to development.

Some commentators suggest that the Intellectual Property Rights from Publicly Financed Research and Development Act, together with its Regulations, may even be unconstitutional.<sup>34</sup> This is because the Constitution of South Africa provides in its Section 16(1) that '[e]veryone has the right to freedom of expression, which includes – [...] (d) academic freedom and freedom of scientific research.' This freedom may be compromised if South Africans, as a result of the Act and its Regulations, can no longer participate in important international research consortia. Having said this, the Act and its Regulations do not directly proscribe access to copyright-protected works in South Africa as the Act expressly excludes scholarly copyright-protected works from its scope.

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<sup>34</sup>R Khan 'Draft Intellectual Property Bill could be the end of South African scientific research' (2009). Available at <http://sacsis.org.za/site/News/detail.asp?iData=295&iCat=1446&iChannel=1&nChannel=News> [Accessed 6 July 2009].

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Yet, if it turns out to be true – as feared by some – that the introduction of the Act and its Regulation will result in less research being generated in South Africa, then, inevitably, less research-related writing will be published in South Africa, which is problematic from an access to knowledge perspective. More generally, by merely focussing on the potential financial rewards from intellectual property creation, the new legislation seemingly disregards the many other advantages that intellectual property creation brings about for society as a whole. And by reinforcing a protectionist culture in relation to intellectual property it certainly conflicts with the principles of openness and access that are investigated in this report. At the time of writing of this report, the Act and Regulations have not been put in force.

### 2.1.3 The Constitution of South Africa

The South African Constitution of 1996, being the supreme law of the land, supersedes all other laws in the republic. In respect of the supremacy of the Constitution, the 'Founding Provisions' state that the 'Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.' The rights outlined below, contained in the Constitution's Bill of Rights, are therefore crucial considerations in shaping the right of access to knowledge.

#### 2.1.3.1 Right to Equality

This right is particularly relevant in the context of the legislative exceptions that could be introduced into the Copyright Act and other acts to fulfil equal rights of access to education for disabled persons as well as equal rights of access to education for men and women. Section 9 of the Constitution provides that 'everyone is equal before the law and has the rights to equal protection and benefit of the law' and that 'equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.'

Further, the Section provides that 'the State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.'

#### 2.1.3.2 Right to Freedom of Expression

Under Section 16 of the Constitution, and of importance to access to knowledge specifically, everyone has the right to freedom of expression, which includes the freedom to receive or impart information or ideas, academic freedom and freedom of scientific research.<sup>35</sup>

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<sup>35</sup>Section 16(1).

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### 2.1.3.3 Right to Education<sup>36</sup>

The Constitution provides in Section 29 that everyone has the right to a basic education, including adult education and further education, which the state through reasonable measures must make progressively available and accessible.<sup>37</sup>

Arguably, this Section, as with other socioeconomic rights in the Constitutional Bill of Rights, puts a positive duty on the state to realise the right. An important aspect of the right to education is the right to access learning materials, a necessary condition required to fulfil the right to education. Whilst Section 12(1) of the Copyright Act provides that fair dealing in a work for the purpose of research or private study is not an infringement of copyright, this exception to copyright infringement is useful only in the case of learners making copies of a portion of a copyright work for individual use; it does not address the case of learners who do not even have access to original learning materials in order to make copies for themselves. A possible change in the Copyright Act would clarify whether teachers may make copies of a work for and on behalf of students where such work will be used for research or private study.

In respect of the possible need for an exception under the Copyright Act for translation of works into a language of choice, it is useful to note that under the South African Constitution, everyone has the right to receive education in the official languages of their choice in public educational institutions, where that education is reasonably practicable.

### 2.1.3.4 Supremacy of the Constitutional Bill of Rights

Another important clause of the Constitution is in respect of the interpretation of other laws in the country. Section 39(2) provides as follows: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.' It is therefore required that any and every piece of legislation be interpreted in accordance with the intentions of the Bill of Rights, rather than against it. This makes the rights detailed above (which relate to access to knowledge) an important interpretative reference in giving meaning to legislation.

With regard to the reach and application of the Bill of Rights, it applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.<sup>38</sup> The Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.<sup>39</sup>

## 2.1.4 Electronic Communications and Transactions Act 25 of 2002

The Electronic Communications and Transactions Act 25 of 2002 ('ECT Act') may have the effect of overriding certain copyright exceptions and limitations, including the fair dealing provisions, contained in the Copyright Act<sup>40</sup> and may attach criminal liability for use of a work that is legitimated by the Copyright Act.

<sup>36</sup>Section 29.

<sup>37</sup>Section 29(1).

<sup>38</sup>Section 8(1).

<sup>39</sup>Section 8(2).

<sup>40</sup>See the discussion by T Pistorius 'Developing countries and copyright in the information age - the functional equivalent implementation of the WCT' (2006) 2 *Potchefstroom Electronic Law Journal*. Available at [http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/issues/2006\\_2\\_\\_Pistorius\\_art.pdf](http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/issues/2006_2__Pistorius_art.pdf) [Accessed 30 March 2009].

Section 86(3) of the ECT Act states that:

a person who unlawfully produces, sells, offers to sell, procures for use, designs, adapts for use, distributes or possesses any device, including a computer program or a component, which is designed primarily to overcome security measures for the protection of data, or performs any of those acts with regard to a password, access code or any other similar kind of data with the intent to unlawfully utilise such item to contravene this section, is guilty of an offence.

Section 86(4) states: 'A person who utilises any device or computer program mentioned in subsection (3) in order to unlawfully overcome security measures designed to protect such data or access thereto, is guilty of an offence.'

By way of protecting data, Section 86 of the ECT Act essentially prohibits the anti-circumvention of technological protection measures (TPMs) designed to protect copyright-protected material in digital form. This protection of TPMs is remarkably comprehensive and ultimately even exceeds the protection required by the WIPO Internet Treaties and granted in most other countries. Effectively, such blanket protection of rights-holder TPMs can have the effect of undermining existing and well-established copyright exceptions and limitations if such permitted uses are prohibited through TPMs.

### 2.1.5 The Counterfeit Goods Act 37 of 1997

This Act introduced measures against the trade in counterfeit goods so as to further protect owners of copyright (as well as trademarks and other marks) against the unlawful application, to goods, of the subject matter of their respective intellectual property rights and against the release of such goods ('counterfeit goods') into the channels of commerce. Section 2(1) outlines a wide range of activities that constitute offences if conducted in relation to trade in counterfeit goods, including possession, production, selling, hiring, bartering, exchanging, distributing, or importing/exporting.

The Publishers' Association of South Africa (PASA) website ([www.publishsa.co.za](http://www.publishsa.co.za)) aptly contextualises the Counterfeit Goods Act in respect of learning materials and the relationship between the Copyright Act and the Counterfeit Goods Act as follows:

The Counterfeit Goods Act could render the making and sale of unauthorised copies of a book an act of dealing in counterfeit goods. The Counterfeit Goods Act gives wide ranging powers of search and seizure to inspectors (police officers, customs officials, and the inspectors appointed by the Department of Trade and Industry). The Counterfeit Goods Act has certain advantages over the Copyright Act[:] the mere possession of counterfeit goods in the course of trade is a criminal offence, whereas under the Copyright Act in equivalent circumstances proving that the goods have been made and/or sold by the accused is necessary before an offence can take place.

Whilst the Counterfeit Goods Act offers publishers the advantage of increased protection, the opposite effect is achieved in respect of users of learning materials. The stringency of the Counterfeit Goods Act and the additional offences imposed by the legislation increases the exposure of users of learning materials to possibilities of legal sanction where the exceptions under the Copyright Act are insufficient for the purposes of accessing learning materials.

## 2.1.6 Free and Open Source Software (FOSS) Policy

On 22 February 2007 the South African Cabinet approved a policy and strategy for the adoption in government of free and open source software, or 'FOSS'. In summary, all new software developed for or by the government will, in future, be based on open standards, and government will migrate all current software to FOSS. Whilst the policy refers specifically to the adoption of FOSS in government, 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.

The FOSS Policy of South Africa has positive implications for access to knowledge. By endorsing open source software and open standards, the intention is to lower barriers for accessing information and communication technologies.

According to the policy:

- 1) The South African Government will implement FOSS unless proprietary software is demonstrated to be significantly superior. Whenever the advantages of FOSS and proprietary software are comparable FOSS will be implemented when choosing a software solution for a new project. Whenever FOSS is not implemented, then reasons must be provided in order to justify the implementation of proprietary software.
- 2) The South African Government will migrate current proprietary software to FOSS whenever comparable software exists.
- 3) All new software developed for or by the South African Government will be based on open standards, adherent to FOSS principles, and licensed using a FOSS licence where possible.
- 4) The South African Government will ensure all government content and content developed using government resources is made Open Content, unless analysis on specific content shows that proprietary licensing or confidentiality is substantially beneficial.
- 5) The South African Government will encourage the use of Open Content and Open Standards within South Africa.<sup>41</sup>

## 2.1.7 Other Legislation

### 2.1.7.1 Promotion of Access to Information Act 2 of 2000

The address of then-Deputy President Thabo Mbeki at the Consultative Workshop of Freedom of Information Legislation at Johannesburg on 28 November 1994 clarified the importance of access to information in the context of access to knowledge. He urged the delegates attending as follows: 'Let what you do also contribute to ensuring that the people as a whole gain access to knowledge so that they have the power to reconstruct and develop their lives and their society in an informed, conscious and purposive manner.'<sup>42</sup>

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<sup>41</sup>Policy on Free and Open Source Software Use for South African Government. Available at [http://www.oss.gov.za/FOSS\\_OC\\_POLICY\\_2006.pdf](http://www.oss.gov.za/FOSS_OC_POLICY_2006.pdf) [Accessed 30 March 2009].

<sup>42</sup>Address of Deputy President Thabo Mbeki at the consultative workshop of freedom of information legislation (28 November 1994). Available at [http://www.search.gov.za/info/previewDocument.jsp?dk=%2Fdata%2Fstatic%2Finfo%2Fspeeches%2F1994%2F181095003.htm%40Gov&q=\(+\(mbeki\)%3CIN%3ETitle\)+\)%3CAND%3E\(+Category%3Cmatches%3Es+\)&t=T+MBEKI%3A+CONSULTATIVE+WORKSHOP+OF+FREEDOM+OF+INFORMATION+LEGISLATION](http://www.search.gov.za/info/previewDocument.jsp?dk=%2Fdata%2Fstatic%2Finfo%2Fspeeches%2F1994%2F181095003.htm%40Gov&q=(+(mbeki)%3CIN%3ETitle)+)%3CAND%3E(+Category%3Cmatches%3Es+)&t=T+MBEKI%3A+CONSULTATIVE+WORKSHOP+OF+FREEDOM+OF+INFORMATION+LEGISLATION) [Accessed 30 March 2009].

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The 'Freedom of Information Legislation' referred to was enacted as the Promotion of Access to Information Act 2 of 2000 ('PAIA'). The Preamble of the PAIA states that the purpose of enactment of the PAIA is to foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information; and to actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights. While the concept of access to information is not synonymous with and must not be confused with access to knowledge, the importance of information to enable the meaningful exercise of rights is akin to the importance of knowledge in its relation to the right to education.

### **2.1.7.2 National Archives and Records Service Act 43 of 1996**

Archives are a source of learning materials for some disciplines, and as such, any regulation of archives is of significance to access to learning materials. The main legislation regulating archives is the National Archives and Records Service Act. According to Section 3 of this Act, the objectives of the National Archives are to:

preserve public and non-public records with enduring value for use by the public and the State; make such records accessible and promote their use by the public; ensure the proper management and care of all public records; collect non-public records with enduring value of national significance which cannot be more appropriately preserved by another institution, with due regard to the need to document aspects of the nation's experience neglected by archives repositories in the past.

### **2.1.7.3 Legal Deposit Act 54 of 1997**

The Legal Deposit Act 54 of 1997 provides for the preservation of the national documentary heritage through legal deposit of published documents to ensure the preservation and cataloguing of, and access to, published documents emanating from, or adapted for South Africa and to provide for access to government information. As with other legislation in South Africa that pertains to repositories of information, specific permissions, such as the permission to reformat the published editions available, are not present.

### **2.1.7.4 South African Library for the Blind Act 91 of 1998**

Section 4(1) of the South African Library for the Blind Act 91 of 1998 states that the functions of the Library for the Blind are:

- (a) to build up a balanced and appropriate collection of South African and other documents for the use of blind and print-handicapped readers;
- (b) (i) to record its collections appropriately;
- (ii) to provide a bibliographic service to those readers;
- (c) to provide access to documents nationally and internationally to those readers;
- (d) to provide library and information services on a national basis to those readers;
- (e) to co-ordinate and preserve the national audio and Braille literary heritage;
- (f) to produce documents in special mediums such as Braille and audio in the formats required by those readers;
- (g) to develop standards for the production of those documents;
- (h) to research production methods and technology in the appropriate fields; and
- (i) to acquire, manufacture and disseminate the necessary technology required to read, replay or reproduce the media referred to in paragraph (f).

In view of the responsibilities outlined above, the Library for the Blind is an important promoter of access to knowledge for sensory-disabled persons. The ability to produce documents for blind persons in Braille and audio formats may, however, be inhibited by the lack of corresponding legislative provision for such reformatting in the Copyright Act.

## 2.2 International Treaties and Agreements

In 1928, South Africa became a signatory of the Berne Convention for the Protection of Literary and Artistic Works. There is no evidence of South Africa's signature to the Berne Convention's Appendix.<sup>43</sup> As a WTO member, South Africa is a party to the Agreement on Trade-Related Aspects of Intellectual Property (TRIPs) of 1994. South Africa is signatory to both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) of 1996.

South Africa is not a party/signatory to the other relevant international treaties such as the Universal Copyright Convention of 1952; the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations; the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of Their Phonograms; or the Brussels Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite.

Of course, international treaties are not binding locally unless they have been ratified and incorporated into domestic legislation. In light of this, it is important to note that South Africa has not yet ratified either the WCT or the WPPT. Having said this, South African law nonetheless complies with and arguably exceeds the essential obligations contained in these treaties to legally protect technological protection measures. Interestingly, however, this protection is not afforded by the Copyright Act but – perhaps inadvertently – by the Electronic Communications and Transactions (ECT) Act.

It is noteworthy in this context that free trade negotiations between the United States and the Southern African Customs Union (SACU)<sup>44</sup> have stalled for now, partly because of the demands made by the United States in relation to intellectual property rights protection. Free trade agreements (FTAs) with the United States usually impose strict copyright protection regimes with significant implications for copyright and access to knowledge.

## 2.3 Regional Treaties

There are no cooperative copyright treaties within the SADC region, nor is there any harmonisation of copyright laws in the Southern African region.

## 2.4 Judicial and Administrative Decisions

There are many reported cases on copyright in South Africa; however, there is a dearth of case law on copyright infringement related to learning materials. This is at first surprising in view of the fact that the publishing industry estimates the extent of copyright infringement in relation to learning materials as quite high. For example, in 2002, it was estimated by the then-President of PASA that 'approximately 40-50 per cent of the potential R400-million market [wa]s lost to piracy and illegal photocopying'.<sup>45</sup> This is said to affect mostly international works and the copyright infringers are identified as students; educational institutions which issue course packs with infringing material; and copy-shop owners.<sup>46</sup>

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<sup>43</sup>The Berne Appendix provides that under certain circumstances – and subject to the compensation of the rights-holder – for a system of non-exclusive and non-transferable non-voluntary licences in developing countries regarding (a) the translation for the purposes of teaching, scholarship or research, and for use in connection with systematic instructional activities and (b) the reproduction of works protected under the Berne Convention.

<sup>44</sup>The five members of SACU are South Africa, Lesotho, Botswana, Namibia and Swaziland.

<sup>45</sup>B Wafawarowa 'Legislation, law enforcement and education: copyright protection in developing region' (2002) Bellagio Publishing Network (BPN) Newsletter 30. Available at [www.bellagiopublishingnetwork.com/newsletter30/wafawarowa.htm](http://www.bellagiopublishingnetwork.com/newsletter30/wafawarowa.htm) [Accessed 30 March 2009].

<sup>46</sup>Ibid.

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As already stated, there is a substantial body of case law on copyright generally. The copyright subject matter in these cases ranges from blank audio cassettes<sup>47</sup> to computer programmes<sup>48</sup> to academic texts.<sup>49</sup> The cases relate to locus standi,<sup>50</sup> parallel importation,<sup>51</sup> ownership,<sup>52</sup> authorship<sup>53</sup> and plagiarism.<sup>54</sup> It is difficult to link general copyright case law to access to learning materials, as the disputes often relate to rights-holders' rights vis-à-vis an infringer of those rights and do not have an obvious impact on the general public's right to access materials. However, where you have two competing academic texts or learning materials, and a dispute arises that may result in one of the works being withdrawn from the market, then access to learning materials is negatively impacted. This is because there will simply be fewer options on the market and because the remaining text may then become more expensive because of high demand (and its ensuing monopoly). Another example would be where a dispute pertaining to authorship delays or prevents the publication of a text.<sup>55</sup> In such a case the public is deprived of access to a potentially useful learning material.

Despite the general difficulty in relating copyright cases to access to learning materials, there are some cases that are clearly relevant to the subject.

A particularly significant case is *Frank & Hirsch v Roopanand Brothers (Pty) Ltd*,<sup>56</sup> which dealt with parallel importation. Parallel importation occurs when authentic articles made by or with the authorisation of the copyright-holder in one country are imported, without authorisation, into a second country, to compete with the copyright-holder or licensees in that second country.<sup>57</sup> These imported or 'grey goods' are often cheaper than the authorised goods.<sup>58</sup> The parallel importation of learning materials thus seems to be a viable solution to counter the problems posed by the unavailability of cheap local texts. Importing cheaper texts into a market that is dominated by expensive texts seems to be an easy way to ensure readier access to learning materials. The court's ruling on parallel importation in *Frank & Hirsch* is thus important, because it indicates how the courts are likely to rule on a dispute pertaining to the parallel importation of learning materials. This case related to the parallel importation of blank audio cassettes. The court held that such importation amounted to indirect copyright infringement, because the production of those cassettes in South Africa would have amounted to direct copyright infringement. Therefore, it appears that importing learning materials would be considered indirect copyright infringement if the production of those books in South Africa (by the importer or other person) would have been direct copyright infringement.

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<sup>47</sup>*Frank & Hirsch (Pty) Ltd v Roopanand Brothers (Pty) Ltd* 1993 (4) SA 279 (A); 457 JOC (A).

<sup>48</sup>*Northern Office Micro Computers (Pty) Ltd and Others v Rosenstein* 1981 (4) SA 123 (C); *Prism Holdings Ltd and Another v Liversage and Others* 2004 (2) SA 478 (W); *Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd and Others* 2006 (4) SA 458 (SCA).

<sup>49</sup>*Juta & Co Ltd and Others v De Koker and Others* 1994 (3) SA 499 (T).

<sup>50</sup>*Klep Valves (Pty) Ltd v Saunders Valve Co Ltd* 1987 (2) SA 1 (A).

<sup>51</sup>*Frank & Hirsch supra note 47; Golden China TV Game Centre and Others v Nintendo Co Ltd* 1997 (1) SA 405 (A).

<sup>52</sup>*Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd and Others* 2006 (4) SA 458 (SCA).

<sup>53</sup>*Peter-Ross v Ramesar and Another* 2008 (4) SA 168 (C).

<sup>54</sup>*Juta v De Koker supra note 49.*

<sup>55</sup>As was the case in *Peter-Ross v Ramesar supra note 53.*

<sup>56</sup>*Supra note 47.* It is important to note that this case was decided on an earlier version of the Copyright Act. The Act has since been amended. However, the amendment does not change the essence of the provision (Section 23), and the result or ruling would have been the same had the case been decided under the amended Act.

<sup>57</sup>O Dean 'Parallel importation infringement of copyright' (1983) 100 *SAJ* 258.

<sup>58</sup>O Dean 'Copyright v grey goods in South Africa, Australia and Singapore' (1994) 111 *SAJ* 746.

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The rich jurisprudence that has been developed in these and other cases shows that South African courts are equal to the task of settling copyright law disputes and indicates that they are in a position to competently adjudicate matters relating to copyright infringement of learning materials. Therefore, it cannot be said that the dearth of case law is due to a lack of confidence in the courts. There must be some other reasons why cases dealing with learning materials do not end up before the courts.

It has been suggested that these reasons are mostly related to several difficulties that learning materials rights-holders encounter in pursuing remedies for infringement.<sup>59</sup> First, there is the complexity of copyright law and the law of evidence that makes it difficult for rights-holders to secure evidence on which to mount litigation. Secondly, the view or attitude of police, customs officials and prosecutors, that copyright infringement in learning materials is not a serious offence, means that rights-holders do not have meaningful support in pursuing criminal copyright infringement. Thirdly, some educational institutions take a similar view and are thus unwilling to assist rights-holders to enforce their rights. Finally, the remedies are inadequate, in that fines imposed after convictions have been historically low, and proving civil damages is an almost insurmountable task due to the lack of statistical data. The net effect of these factors appears to be that publishers are reluctant to bring litigation or instigate criminal prosecutions and run the risk of substantial expense for an uncertain outcome.

There was a much-lauded successful prosecution in 2001, which is, however, not reported in the law reports. The facts pertaining to this matter have therefore been gleaned from interviews and publications.<sup>60</sup> Briefly, the facts of the matter are that a 'pirate photocopying shop' operating in Empangeni, KwaZulu-Natal was engaged in large-scale infringing reproduction of copyright-protected works. A group of publishers pooled financial resources and worked together to obtain evidence, to lay criminal charges and to meet with the prosecutor assigned to the case. A conviction was obtained in this matter, with the infringer being sentenced to three years' imprisonment or a fine of R30 000 (of which only half was payable).

Another publicised incident occurred in 2003 in the Western Cape. This matter did not result in criminal prosecution or a civil claim for damages. Like the case discussed above, the facts outlined here are gleaned from publication<sup>61</sup> and interviews. The Dramatic, Artistic and Literary Rights Organisation (DALRO) collecting society requested a police raid of two shipping containers located near tertiary education institutions from which a large-scale illegal photocopying business was being run. Infringing copies, master-copies and the copying equipment were confiscated by the police. However, neither criminal nor civil action was taken thereafter.

It appears that many copyright infringement matters relating to learning materials are disposed of by settlement or the abandonment of claims by rights-holders due to the difficulties and uncertainty encountered in securing adequate remedies. The resultant lack of case law means that there are no authoritative judicial findings in relation to copyright in learning materials.

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<sup>59</sup>Ibid.

<sup>60</sup>Ibid and E Gray and M Seeber *PICC report on intellectual property rights in the print industries sector* (2004) at 57. Available at [http://www.publishsa.co.za/docs/Intellectual\\_Copyright\\_Report.pdf](http://www.publishsa.co.za/docs/Intellectual_Copyright_Report.pdf) [Accessed 30 March 2009].

<sup>61</sup>Ibid at 58.

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## 2.5 Summary of Doctrinal Analysis

Whilst there is no reported case law directly relating to copyright and learning materials, several themes emerge from the legislation.

Positive findings in the legislation, conducive to the promotion of access to knowledge, include the shorter terms of copyright protection as compared with numerous other jurisdictions, especially the European Union and United States. South Africa has for the most part implemented the minimum protection terms required by the Berne Convention and other relevant international treaties and agreements.

The Constitution, being the supreme law of the country, supersedes all other laws in the republic. The rights in the Constitution's Bill of Rights are therefore crucial considerations for the judiciary in any question of the right of access to knowledge. The right to freedom of expression includes the right to academic freedom and freedom of scientific research. The Constitution expressly provides for the right to education, which, in turn, arguably places a duty on the state to facilitate access to learning materials required to exercise the right to education. Further and in the same section of the Constitution, a right to education in the official language of choice is offered, and this may be used as a basis for the inclusion of specific translation exceptions. Another important clause of the Constitution is in respect of the interpretation of other law; Section 39(2) provides as follows: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

The government's FOSS Policy, if implemented successfully, may address barriers to access to ICTs as experienced by schools and libraries. However, it is submitted that in order to more fully realise the benefits of such a policy, corresponding legislative amendments pertaining to access to the learning materials housed on such ICTs should be considered.

Notwithstanding these positive findings in the law, there is no doubt that the legislative landscape may be improved, or amended for clarity, in order to facilitate access to learning materials in South Africa. This applies in particular to legal flexibilities that advance access to learning materials, such as fair dealing and the Copyright Regulations based on Section 13 of the Copyright Act. Recently-revised copyright laws in other countries, eg, Australia, could provide a basis for a revision process in South Africa that enhances and clarifies access possibilities in terms of learning materials.

For instance, currently the South African Copyright Act does not permit the scanning, translation, adaptation or conversion of works for the sensory-disabled in the absence of permission from the copyright-holder. The Act also fails to adequately address fair dealing in the context of digitised works.

Legislative and policy advancements in South Africa of late have had an enabling and progressive tone. Yet, when applied in the context of the Copyright Act, these advancements fail to cohesively deal with the relevant subject. To illustrate, despite forays into electronic communications access in South Africa, the Electronic Communications and Transactions (ECT) Act may serve to override copyright exceptions and limitations, including fair dealing provisions contained in the Copyright Act, and may attach criminal liability for use of a work that is legitimated by the Copyright Act.

In summary, the South African Copyright Act makes little use of the copyright flexibilities available under the relevant copyright treaties and agreements, particularly TRIPs. Such flexibilities pertain to the duration of copyright protection, the scope of copyright protection and especially the utilisation of copyright exceptions and limitations. The current set of copyright exceptions and limitations appear vague and fragmentary and are, in many instances, outdated. The use of modern technologies for educational purposes, for example in distance education, remains largely unconsidered.

Thus, it is concluded that the South African Copyright Act must be updated to keep pace with technological advancements and recent surrounding policy and legislative advancements related to access to knowledge.<sup>62</sup>

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<sup>62</sup>W Baude et al have offered model language for some exceptions and limitations to enhance access to learning materials, see W Baude et al 'Model language for exceptions and limitations to copyright concerning access to learning materials in South Africa' 7 *The Southern African Journal of Information and Communication* (2006) at 95-105.

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## 3. Qualitative Analysis

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### 3.1 Secondary Literature

This section of the report describes the results of the review of domestic secondary materials from a variety of sources. These include books, academic articles, reports, pamphlets, brochures and guidelines. Although emphasis is placed on South African and Southern African materials, it must be noted that international materials and materials from outside Africa significantly influence the current debate regarding the relationship between copyright laws and access to learning materials. The following foreign/international materials are of particular importance:

- The *Gowers review of intellectual property*; <sup>63</sup>
- WIPO reports and documents, especially those of the Standing Committee on Copyright and Related Rights (eg, Sam Ricketson's *Study on limitations and exceptions of copyright and related rights in the digital environment* <sup>64</sup> and Kenneth Crews' *Study on copyright limitations and exceptions for libraries and archives*); <sup>65</sup>
- The *Copy/South dossier – issues in the economics, politics, and ideology of copyright in the global South*; <sup>66</sup>
- Consumers International report, *Copyright and access to knowledge*; <sup>67</sup>
- 'Report on copyright exceptions and limitations' by Bernt Hugenholtz and Ruth Okediji; <sup>68</sup>
- The Alternative Law Forum's (ALF) 'Review of the proposed amendment to the [Indian] Copyright Act'; <sup>69</sup>
- The UNCTAD-ICTSD Issue Paper by Ruth Okediji; <sup>70</sup>
- Commonwealth of Learning (COL) 'Document for Commonwealth countries on copyright matters in education'; <sup>71</sup>
- A Foundational White Paper by the Berkman Centre for Internet & Society, 'The digital learning challenge: obstacles to educational use of copyrighted material in the digital age' (WW Fisher and W McGeeveran); <sup>72</sup>
- UK Commission on Intellectual Property Rights report. <sup>73</sup>

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<sup>63</sup>A Gowers *Gowers review of intellectual property* (2006). Available at [http://www.hm-treasury.gov.uk/d/pbr06\\_gowers\\_report\\_755.pdf](http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf) [Accessed 30 March 2009].

<sup>64</sup>S Ricketson *Study on limitations and exceptions of copyright and related rights in the digital environment* (2003) WIPO doc SCCR/9/7. Available at [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_9/sccr\\_9\\_7.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_7.pdf) [Accessed 30 March 2009].

<sup>65</sup>K Crews *Study on copyright limitations and exceptions for libraries and archives* (2008) WIPO doc SCCR/17/2. Available at [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_17/sccr\\_17\\_2.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_17/sccr_17_2.pdf) [Accessed 30 March 2009].

<sup>66</sup>A Story, C Darch, D Halbert *The Copy/South Dossier – issues in the economics, politics, and ideology of copyright in the global South* (2006). Available at <http://www.kent.ac.uk/law/copysouth/en/dossier.htm> [Accessed 20 October 2008].

<sup>67</sup>Consumers International *Copyright and access to knowledge* (2006). Available at [http://www.consumersinternational.org/Shared\\_ASP\\_Files/UploadedFiles/C50257F3-A4A3-4C41-86D9-74CABA4CBCB1\\_COPYRIGHTFinal16.02.06.pdf](http://www.consumersinternational.org/Shared_ASP_Files/UploadedFiles/C50257F3-A4A3-4C41-86D9-74CABA4CBCB1_COPYRIGHTFinal16.02.06.pdf) [Accessed 30 March 2009].

<sup>68</sup>B Hugenholtz and RL Okediji *Conceiving an international instrument on limitations and exceptions to copyright* (2008). Available at <http://www.ivir.nl/publicaties/hughholtz/finalreport2008.pdf> [Accessed 30 March 2009].

<sup>69</sup>Alternative Law Forum (India) 'Response to the proposed copyright amendment' (2006). Available at [http://www.altlawforum.org/ADVOCACY\\_CAMPAIGNS/copyright\\_amdt/Copyright%20Amdt-Response-13th%20July%202006.pdf](http://www.altlawforum.org/ADVOCACY_CAMPAIGNS/copyright_amdt/Copyright%20Amdt-Response-13th%20July%202006.pdf) [Accessed 30 March 2009].

<sup>70</sup>RL Okediji *The international copyright system: limitations, exceptions and public interest considerations for developing countries* (2006) UNCTAD-ICTSD Project on IPRs and Sustainable Development. Available at [http://www.unctad.org/en/docs/iteipc200610\\_en.pdf](http://www.unctad.org/en/docs/iteipc200610_en.pdf) [Accessed 30 March 2009].

<sup>71</sup>(2005). Available at <http://www.col.org/SiteCollectionDocuments/Copyright%20Document.pdf> [Accessed 30 March 2009].

<sup>72</sup>(2006). Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=923465](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=923465) [Accessed 30 March 2009].

<sup>73</sup>UK CIPR *Integrating intellectual property rights and development* (2002). Available at [http://www.iprcommission.org/papers/pdfs/final\\_report/CIPRfullfinal.pdf](http://www.iprcommission.org/papers/pdfs/final_report/CIPRfullfinal.pdf) [Accessed 30 March 2000].

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The *Copy/South dossier* contains critical comments on a number of issues on IP in South Africa including educational materials. Moreover, the report by the UK Commission on Intellectual Property Rights contains specific discussions of South Africa and the South African Dramatic, Artistic and Literary Rights Organisation (DALRO) in its annexes.

Considerable (international) material has also been generated in the course of recent discussions about drafting an access to knowledge treaty,<sup>74</sup> as well as by organisations and programmes generally committed to the issue of access to knowledge, such as Creative Commons/iCommons<sup>75</sup> and the Yale Law School A2K Research Programme.<sup>76</sup>

In South Africa, as with many developing countries, copyright law is only beginning to be recognised as an important aspect of development policy. As a result, copyright law in general and, more specifically, the correlation between copyright law and access to knowledge/learning materials is under-explored in South Africa's (legal) secondary literature.

Very few books are entirely devoted to South African copyright law. Notable exceptions are OH Dean's continuously updated loose-leaf *Handbook of South African copyright law*, A Smith's *Copyright companion* of 1995 and AJC Copeling's rather outdated *Copyright and the Act of 1978*. Naturally, these books address copyright law from a fairly broad perspective. Thus, emphasis is placed on general issues such as requirements for copyright protection, nature and scope of copyright protection, ownership and transfer of copyright, duration of copyright and infringement of copyright. The matter of access to learning material, however, is neither expressly mentioned in the table of contents of Dean's, Smith's and Copeling's books nor referred to in the indices of these books. This is not to say, however, that this subject is ignored. On the contrary, achieving a fair balance between the interests of rights-holders and users is singled out as a major objective of copyright law.<sup>77</sup> Moreover, copyright exceptions and limitations as the main access-enabling tools for users are dealt with in detail.<sup>78</sup>

Apart from the above books, copyright law is often briefly discussed in single chapters in textbooks dealing with business/commercial law.<sup>79</sup> Yet again, access to learning materials is usually not specifically addressed in these chapters. Mention is, however, typically made of the legitimate interests of users safeguarded by copyright exceptions and limitations.<sup>80</sup>

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<sup>74</sup>See, for instance, the material listed on the CPTech website, <http://www.cptech.org/a2k/a2k-debate.html> [Accessed 30 March 2009].

<sup>75</sup>For more information regarding Creative Commons in South Africa, see A Rens and H Ford *Some rights reserved – copyright contracts that give content away?* (2004) 12 *De Rebus* 21. Recently, the 'BISA Copyright Review project' (2008) was introduced on the iCommons website. This review project is a comparative project being run by FGV, The Alternative Law Forum and iCommons. For more information see <http://icommons.org/articles/comparative-study-of-copyright-in-brazil-india-and-south-africa> [Accessed 30 March 2009].

<sup>76</sup>See <http://www.law.yale.edu/intellecutallife/6542.htm> [Accessed 30 March 2009].

<sup>77</sup>See, for instance, OH Dean *Handbook of South African copyright law* (1987) at 1-2.

<sup>78</sup>*Ibid* at chapter 9.

<sup>79</sup>See, for instance, JTR Gibson *South African mercantile and company law* (2003) chapter 15 and D Collier-Reed and K Lehmann *Basic principles of business law* (2006) chapter 17. See also, for Internet-related copyright issues, F Cronje and R Buys *Cyberlaw@SA II: The law of the Internet in South Africa* (2004) chapter 1.

<sup>80</sup>See, for instance, JTR Gibson *supra* note 79 at 723.

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In recent years, copyright law in general and the issue of access to learning materials in particular have started to attract more (academic) attention in South Africa. One spur for this increased interest was arguably the commencement of the pioneering Access to Learning Materials (A2LM) Southern Africa project in 2004 – 2005. The project was run through the Consumer Institute South Africa, supported by the Open Society Institute, and included an international conference in Johannesburg in January 2005. Outputs from the project included two research papers:

- A Prabhala, 'Economic analysis of income and expenditure patterns in South Africa: implications for the affordability of essential learning materials'; and
- A Prabhala and C Caine, 'Memorandum on the free trade agreement negotiations between the United States and the Southern African Customs Union'.

The first paper essentially argues, on the basis of household survey data from South Africa, that certain basic needs (such as food, water, electricity/energy, transport and shelter) need to be taken into account when determining the affordability of learning materials. The paper concludes that at 'current prices for learning materials, a vast number of poor South Africans are excluded from education'. Consequently, providing low-cost learning material would be an attractive policy tool for stimulating education.

The second paper, by Prabhala and Caine, voices a number of concerns against the proposed FTA between the United States and the Southern African Customs Union (SACU). In particular, the authors criticise the draft FTA's proposed extension of the copyright term; impediments to educational licensing and adaptations; impediments to parallel trade; and legal protection of TPMs. The authors conclude that a US-SACU FTA 'has the potential to undermine access to learning materials, and consequently, affect access to education in SACU member countries'. Particularly the adoption of the TPM provisions in the SACU-US FTA would increase the cost of accessing information and therefore widen the knowledge gap between developed and developing countries. The FTA has not been signed, and talks have stalled.

Also in 2005, the Commons-Sense Conference was convened by the LINK Centre, Graduate School of Public and Development Management (P&DM), Wits University, Johannesburg. The conference drew together African stakeholders concerned with finding alternative approaches to copyright and digital knowledge resources. As well as numerous conference papers, the conference resulted in the publishing of *The digital information commons: an African participant's guide*.<sup>81</sup> Among other things, the guide deals with important global players, processes, issues and projects in this field, such as WIPO, the WTO, UN agencies, activists, copyright exceptions, compulsory licensing, parallel importation and open access. The guide also identifies and briefly summarises a number of African players, processes, issues and projects.

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<sup>81</sup>C Armstrong, H Ford, S Hirano, D Nicholson and A Prabhala *The digital information commons: an African participant's guide* (2005). Available at <http://www.sivulile.org/workshops/commons-sense/Digital%20Commons%20Guide-19-May-05.doc> [Accessed 30 March 2009].

<sup>82</sup>Unfortunately, both the A2LM website ([www.access.org](http://www.access.org)) and the Commons-Sense website ([www.common-sense.org](http://www.common-sense.org)) are defunct by now. However, some of the material created for these projects may still be accessed via the 'Wayback Machine' Internet archive ([www.waybackmachine.org](http://www.waybackmachine.org)).

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In connection with the aforementioned Commons-Sense Project, a special 'African digital information commons' edition of the Wits LINK Centre's *Southern African Journal of Information and Communication (SAJIC)* was published in 2006.<sup>83</sup> This edition included the following access to knowledge-related contributions:

- C Armstrong and H Ford, 'Africa and the digital information commons: an overview'
- A Rens and L Lessig, 'Forever minus a day: a consideration of copyright term extension in South Africa'
- T Schonwetter, 'The implications of digitizing and the Internet for "fair use" in South Africa'
- C Visser, 'Technological protection measures: South Africa goes overboard. Overboard.'
- C A Masango, 'The future of the first sale doctrine with the advent of licences to govern access to digital content'
- W Baude, J Hofman, E Katz, K McDaniel, A Rens and C Riley, 'Model language for exceptions and limitations to copyright concerning access to learning materials in South Africa'

Other relevant law journal articles were, for instance, published by V van Coppenhagen 'Copyright and the WIPO Copyright Treaty', with specific reference to the rights applicable in a digital environment and the protection of technological measures<sup>84</sup> and T Pistorius 'Developing countries and copyright in the information age - the functional equivalent implementation of the WCT'<sup>85</sup> and 'Copyright in the information age: the catch-22 of digital technology'.<sup>86</sup> Professor Pistorius also delivered a related paper at the South African Commercial Law in a Globalised Environment Workshop 2006, titled 'Digital copyright law: the impact on access to information'.<sup>87</sup>

Of particular importance for the purposes of this report is a report penned by T Rufus in 2005. In her report titled *Sub-Saharan Africa, education and the knowledge divide: copyright law a barrier to information*<sup>88</sup> Rufus addresses some of the barriers that the current copyright regime creates for education and research in developing countries, particularly in South Africa. The author first discusses selected problems for the lack of access to knowledge in Sub-Saharan Africa such as the lack of translation rights and the absence of provisions for the benefit of the disabled. Thereafter, Rufus points out that while the advent of digital technologies has, on the one hand, increased access possibilities, 'these advances have also stemmed new possibilities for the control and increase of knowledge gaps within societies'.<sup>89</sup> Subsequently, Rufus argues that 'the international knowledge system is a highly imbalanced state of affairs, which prioritise[s] the economic rights of information providers, by monopolising societies need to gain access to knowledge'.<sup>90</sup> In her conclusion, Rufus essentially states that (a) suppressing knowledge into the straitjacket of a Western world intellectual property system is a wrongdoing of developed nations, and that (b) the profit oriented approach currently followed with regard to intellectual property needs to be modified.<sup>91</sup> Rufus does not, however, offer any suggestions as to how the current IP system can be enhanced.

<sup>83</sup>Issue 7 2006.

<sup>84</sup>(2002) 119 (2) *South African Law Journal* 442.

<sup>85</sup>T Pistorius supra note 40.

<sup>86</sup>(2006) 1 *Critical Arts* 47-61.

<sup>87</sup>Centre for Business Law, University of South Africa, Sandton, South Africa, 22 August 2006.

<sup>88</sup>T Rufus *Sub-Saharan Africa, education and the knowledge divide: copyright law a barrier to information* (2005). Available at [http://afro-ip.googlegroups.com/web/rufus.pdf?hl=en&gda=IWshKDAAADqBJO4XTXJzpnWrt6ldFltHOcnoEOpE3GncGtpFJ\\_3cgpFILAnNlPbA8jWbuU\\_owGRdr3QrylPkw2aRbXD\\_gf&gsc=5AbqRYAAAAqtg42Zg7\\_EyhpuOTOPQDss2eVkvJep6Sz3iYVdrhVIA](http://afro-ip.googlegroups.com/web/rufus.pdf?hl=en&gda=IWshKDAAADqBJO4XTXJzpnWrt6ldFltHOcnoEOpE3GncGtpFJ_3cgpFILAnNlPbA8jWbuU_owGRdr3QrylPkw2aRbXD_gf&gsc=5AbqRYAAAAqtg42Zg7_EyhpuOTOPQDss2eVkvJep6Sz3iYVdrhVIA) [Accessed 1 August 2009].

<sup>89</sup>Ibid at 12.

<sup>90</sup>Ibid at 16.

<sup>91</sup>Ibid at 20.

Apart from the above-mentioned efforts and publications, it can be observed that a growing number of theses on both LL.M. and Ph.D./LL.D. levels address copyright-related issues such as copyright exceptions and limitations and technological protection measures. DJ Pienaar's LL.M. thesis entitled *Statutory defences against actions for infringement of copyright* (1988) and M Conroy's LL.D. thesis entitled *A comparative study of technological protection measures in copyright law* (2006) are but two examples. Master's theses and Doctoral theses related to copyright can best be found in institutional digital repositories such as UCT's lawspace (<http://lawspace2.lib.law.uct.ac.za>) or the UnisaETD (<http://www.unisa.ac.za/Default.asp?Cmd=ViewContent&ContentID=15350>). In addition, there are various other electronic resources for theses, some of which are subscription-based. For instance, Sabinet's Union Catalogue of Theses and Dissertations (UCTD) provides access to 65 000 records of dissertations at Master's and Doctorate levels submitted to universities in South Africa in all disciplines. The search in UCTD for the keyword 'copyright' produces 45 results. Other databases include ALEPH, Current Law Research (via LexisNexis Butterworth), Nexus database of current and completed research in South Africa (via AfricaWide) and Nexus current and completed research projects (via National Research Foundation). However, the majority of secondary literature in South Africa dealing with copyright law and access to learning material issues originates from, or is contained in, a relatively large number of independent reports or articles published in media other than law journals.

Arguably the most important South African reports dealing with the copyright environment that the ACA2K project strives to examine are:

- the *PICC report on intellectual property rights in the print industries sector* (2004)<sup>92</sup> by E Gray and M Seeber;
- the *Intellectual property, education and access to knowledge in Southern Africa* report (2006)<sup>93</sup> by A Rens, A Prabhala and D Kawooya; and
- the recent 'Open review of the South African Copyright Act' (2008).

The PICC report probes the impact of copyright protection on growth and development in the print industries sector and makes recommendations for further action that could contribute towards growth. It is primarily meant as a theoretical underpinning for rights-holders in the print industry sector who want to engage in a dialogue with users of copyright-protected material. To this end, the report provides:

- a background on international best practice;
- a review of intellectual property rights issues and the status quo in the print industry sector in South Africa;
- an identification of which intellectual property issues are helping or inhibiting growth in the sector; and
- recommendations for policy interventions and strategic actions.

The report concludes 'that the industry sector needs to participate more actively in the promotion of intellectual property issues and that this would best be pursued in collaboration with other rights holders, in order to maintain a united front in pursuing the implementation of the necessary policy, legislative and strategic actions that need to be taken if the print industry is to prosper and grow'.<sup>94</sup>

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<sup>92</sup>(2004). Available at [http://www.publishsa.co.za/docs/Intellectual\\_Copyright\\_Report.pdf](http://www.publishsa.co.za/docs/Intellectual_Copyright_Report.pdf) [Accessed 30 March 2009].

<sup>93</sup>2006). Available at <http://www.iprsonline.org/unctadictsd/docs/06%2005%2031%20tralac%20amended-pdf.pdf> [Accessed 30 March 2009].

<sup>94</sup>E Gray and M Seeber *supra* 60 at 8.

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The *Intellectual property, education and access to knowledge in Southern Africa* report examines the responsibility of intellectual property legislation for hurdles to access to learning materials in countries of the Southern African Customs Union (Botswana, Lesotho, Namibia, Swaziland and South Africa). Furthermore, the report audits domestic copyright exceptions and limitations which are relevant in the context of access to learning materials. The report concludes that 'neither does copyright legislation in SACU countries make significantly positive provisions for access to learning materials, nor does it take full advantage of the flexibilities provided by TRIPs'.<sup>95</sup>

The 'Open review of the South African Copyright Act' report provides a section-by-section review of the provisions of the South African Copyright Act of 1978, with emphasis on sections impacting access to knowledge. The review essentially links the knowledge policy debate on the one hand and technical details of copyright legislation on the other. The following recommendations are contained in the report:

- Do not extend the term or scope of exclusive rights granted under copyright beyond what is required by the international treaties by which South Africa is bound;
- Expand and adapt the current set of exceptions and limitations to better enable access to knowledge. State exceptions and limitations clearly. Exceptions and limitations should address new technologies;
- Protect the public domain;
- Address the problem of orphan works;
- Explicitly permit circumvention of technologies which jeopardise the balance of copyright by preventing users from exercising their rights under exceptions and limitations;
- Permit parallel importation of copyright-protected material;
- Provide that all government-funded works which do not immediately fall into the public domain are freely available on equal terms to all South Africans;
- Define 'licence' so as to explicitly support free copyright licences;
- Commence a government inquiry into a provision that authors can reclaim title to works which subsequent rights-holders fail to use over long periods of time, eg. five years;
- Commence a government inquiry into feasibility of making use of the Berne Appendix special provisions for developing countries.<sup>96</sup>

Relevant material in South Africa has also been produced for or by different advocacy groups, especially library associations such as IFLA and publishers/authors associations such as PASA and ANFASA. The aforementioned PICC report also falls into this category. PASA has published several position statements and discussion documents on copyright which can be accessed on PASA's website ([www.publishsa.co.za](http://www.publishsa.co.za)). In one of its documents, PASA expressly addressed the relationship between copyright and access to information. This document reads as follows:<sup>97</sup>

Given the need in South Africa to promote literacy and education in the broadest sense, the Publishers' Association of South Africa recognises the right of access to information by all individuals, and acknowledges that books are central to the learning process.

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<sup>95</sup>A Rens, A Prabhala and D Kawooya *supra* note 93 at 65.

<sup>96</sup>Draft Review (in possession of the authors of this report). The Final Review will be available shortly at <http://www.shuttleworthfoundation.org/our-work/intellectual-property-rights>.

<sup>97</sup>Document in possession of the authors of this report.

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In addition, numerous reports and papers have been created by PASA and others to describe the South African publishing market. The 'PASA annual industry survey 2006 report'<sup>98</sup> and the 'PASA annual industry surveys – broad trends over three years (2004-2006)'<sup>99</sup> provide useful background data regarding (1) turnover profiles, (2) production profiles, (3) author profiles, and (4) royalty profiles in South Africa. The 'Publishing market profile South Africa' (2004), issued by the UK Publishers Association and the British Council, contains further valuable background information about the publishing environment in South Africa. Additional information can be found in a PASA submission to the OECD entitled 'Policies and procedures governing school publishing in South Africa: South Africa educational publishing'.<sup>100</sup> Of particular interest is the Genesis Analytics 'Factors influencing the cost of books in South Africa' report of 2007, commissioned by the South African Department of Arts and Culture through PICC.<sup>101</sup> The Genesis report makes mention of copyright protection in two instances. Firstly, it states that obtaining permission to use copyright-protected material is part of the origination costs for a publisher, ie, costs that a publisher has to incur to create a book.<sup>102</sup> Secondly, the report suggests that part of the failure of academic books to adequately sell is due to illegal photocopying which diminishes their deserved market.<sup>103</sup>

Of the many publications penned and issued by library associations, a most recent IFLA paper by D Nicholson and D Kawooya is to be singled out in the present context: The paper 'The impact of copyright on access to public information in African countries: a perspective from Uganda and South Africa'<sup>104</sup> focuses on access to government information in South Africa and Uganda and examines the impact of copyright in the access process. The authors of the paper stress the importance of access to government information in a democratic country and briefly summarise the relevant pieces of South African legislation other than the Copyright Act 98 of 1978, including the South African Constitution, the Promotion of Access to Information Act (PAIA) 2 of 2000 and the Electronic Communications and Transactions (ECT) Act 25 of 2002. Moreover, the paper touches upon the issue of access to digital information by the public and makes mention of South Africa's recent decision to adopt the Open Document Format (ODF) as the official standard for South African government communications.

The issue of access to government information is also discussed in various other articles and publications under the heading of 'access to information'. It must be stressed, however, that this issue primarily concerns government rules for transparency. Hence, the issue is for the most part not about copyright.

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<sup>98</sup>(2007). Available at [http://www.publishsa.co.za/docs/PASA\\_Survey\\_Report\\_2006\\_13Sept2007.pdf](http://www.publishsa.co.za/docs/PASA_Survey_Report_2006_13Sept2007.pdf) [Accessed 30 March 2009].

<sup>99</sup>(2007). Available at [http://www.publishsa.co.za/docs/Broad%20Trends%20Report%20\(2004-2006\)%2023Nov2007.pdf](http://www.publishsa.co.za/docs/Broad%20Trends%20Report%20(2004-2006)%2023Nov2007.pdf) [Accessed 30 March 2009].

<sup>100</sup>Paper in possession of the authors of this report.

<sup>101</sup>The report is available at [http://www.sabookcouncil.co.za/pdf/PICC\\_Cost%20of%20books%20studyFinal.pdf](http://www.sabookcouncil.co.za/pdf/PICC_Cost%20of%20books%20studyFinal.pdf) [Accessed 30 March 2009].

<sup>102</sup>Ibid at 19.

<sup>103</sup>Ibid at 71.

<sup>104</sup>(2008). Available at [http://www.ifla.org/IV/ifla74/papers/087-Nicholson\\_Kawooya-en.pdf](http://www.ifla.org/IV/ifla74/papers/087-Nicholson_Kawooya-en.pdf) [Accessed 30 March 2009].

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Another significant contribution to the literature occurred in 2005, when the Commonwealth of Learning (CoL) convened a group of copyright experts in Johannesburg to develop a guideline document on copyright limitations and exceptions.<sup>105</sup> Later, CoL also commissioned a 'copyright audit' document,<sup>106</sup> which provides an explanatory checklist for researchers seeking to examine their country's national copyright environments in terms of provisions in support of education.

Furthermore, in January 2008, the 'Cape Town Open Education Declaration' was launched.<sup>107</sup> The declaration urges governments and publishers to make publicly-funded educational materials available freely over the Internet, and encourages teachers and students around the world to use the Internet to share, remix and translate classroom materials to make education more accessible, effective, and flexible.

Meanwhile, a 2008 working paper by A Rens of South Africa's Shuttleworth Foundation addresses the issue of copyright exceptions and limitations.<sup>108</sup> Rens argues that 'the [WIPO] Development Agenda presents the right opportunity to create globally applicable minimum exceptions to copyrights for educational purposes. Absent such harmonisation, educators and educational institutions around the world will face unnecessary hurdles to facilitating development'.

Also, A Haupt examines, among other things, in his recent book *Stealing empire*,<sup>109</sup> Creative Commons and open source licences in South Africa. Haupt notes that on the one hand, '[t]he adoption of Creative Commons licences in South Africa could go a long way towards reducing the costs of publishing and distributing works as well as simplifying legal processes, provided that the digital divide is narrowed significantly over the next few years'.<sup>110</sup> On the other hand, however, he argues that the success of Creative Commons eventually depends on the ability of American advocates of Creative Commons to enter into partnerships with activists in the developing world: 'These partnerships would be most successful when some of the basic premises from which Creative Commons operates are interrogated in order to create room for alternative perspectives from poorer countries of the southern hemisphere'.<sup>111</sup>

Furthermore, several blogs in South Africa consistently address copyright and access to knowledge-related issues. Arguably the most popular blogs are presently

- Ex Africa Semper Aliquid Novi ([www.aliquidnovi.org](http://www.aliquidnovi.org));
- Gray Area (<http://blogs.uct.ac.za/blog/gray-area>); and
- Sharing Nicely (<http://bokaap.net/>).

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<sup>105</sup>J Hofman, D Kawooya, D Nicholson, A Ntuma, A Prabhala, R Schad, T Schonwetter, L Tladi and P West, 'Document for Commonwealth countries on copyright matters in education' (2005). Available at <http://www.col.org/SiteCollectionDocuments/Copyright%20Document.pdf> [Accessed 30 March 2009].

<sup>106</sup>A Prabhala and T Schonwetter 'Commonwealth of Learning copyright audit' (2006). Available at <http://www.col.org/resources/knowServices/copyright/Pages/lawEduc.aspx> [Accessed 30 March 2009].

<sup>107</sup>Available at <http://www.capetowndeclaration.org/read-the-declaration> [Accessed 30 March 2009].

<sup>108</sup>A Rens in J de Beer (ed) 'Implementing the world intellectual property organizations' development agenda' (2009) at 158-169. Available at [http://www.shuttleworthfoundation.org/sites/shuttleworthfoundation.org/files/ShuttleworthFoundation\\_Exceptions\\_Working\\_Paper\\_October\\_2008.pdf](http://www.shuttleworthfoundation.org/sites/shuttleworthfoundation.org/files/ShuttleworthFoundation_Exceptions_Working_Paper_October_2008.pdf) [Accessed 30 March 2009].

<sup>109</sup>(2008). Available at <http://www.hsrcpress.ac.za/product.php?productid=2219> [Accessed 30 March 2009].

<sup>110</sup>ibid at 122.

<sup>111</sup>ibid at 126.

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Lastly, the findings of the PALM Africa project can be expected to be a valuable contribution to the literature on copyright in relation to access to learning materials. The PALM Africa project, closely connected with ACA2K's research work, is examining how open content approaches employing flexible licensing could work in conjunction with local publishing in developing countries to improve access to learning materials.

## 3.2 Impact Assessment Interviews

### 3.2.1 Stakeholders Interviewed

Interviewees were selected from the following stakeholder groupings:

- Government – represented by employees of the Department of Arts and Culture (DAC) and the Department of Trade and Industry (DTI).<sup>112</sup> These are two government departments entrusted with legislative and policymaking powers in the field of copyright law.
- Education community – represented by employees of the University of Cape Town (UCT) who are responsible for copyright-related matters. In particular, these employees were drawn from the IP and research department, the library and the Educational Technology department of the institution.
- Copyright-holders – represented by the Publishers' Association of South Africa (PASA) and an authors' association (ANFASA).

The choice of UCT as a representative institution for the second category of interviewees requires further explanation, for it could be argued that UCT is not representative of South African universities generally, as there is a group of historically disadvantaged universities that have resource problems and experience copyright in a markedly different way from UCT. However, the problems faced by under-resourced universities in Africa are addressed in other ACA2K country reports. In the view of the research team, therefore, the examination of a well-resourced and highly-acclaimed African institution of education like UCT offered to provide additional and valuable insight regarding the actual effects of the copyright environment on access to learning materials. Yet, in order to also incorporate other and less-resourced educational institutions into the research, two institutions other than UCT, the University of Limpopo and the University of South Africa (UNISA), are looked at through case studies at the end of this report.

Furthermore, the decision was made to focus on tertiary education institutions. While examining the situation in primary and secondary education would have doubtless provided additional insight, it appeared preferable to concentrate our resources on one sector, to provide an in-depth analysis of this sector, rather than settling for a superficial examination of two or more sectors. The South African research team believes that the tertiary education sector, as a result of the diversity of stakeholders involved, offers the greatest variety of copyright-related issues and problems. Many of these issues and problems, though certainly not all, equally apply to institutions of primary and secondary education. Also, tertiary education institutions are arguably very well-positioned to advocate for the necessary legal, administrative and practical changes.

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<sup>112</sup>A planned interview with employees from the then-Department of Education (DoE) never materialised despite several attempts to arrange for such an interview.

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In accordance with the ACA2K's concern for gender and diversity issues, efforts were made to select interviewees in a manner so as to achieve a diversity of men and women and to achieve a measure of racial and ethnic diversity. Of the nine individuals formally interviewed, three were white males, four were black males (ie, black African, "coloured" or Indian) and two were white females. The interviewees all came from roughly the same socioeconomic background, as they were high-ranking university, government or publishing industry employees.

### 3.2.2 Stakeholders' Impressions

During the interviews, stakeholders' impressions were sought on a number of key issues. These are summarised below.<sup>113</sup>

#### 3.2.2.1 Government

The government department representatives were probed on the following issues:

- the department's general view on copyright;
- the role played by their department in copyright policy formulation;
- their views on the effect of copyright on access to learning materials;
- what prominence, if any, has been given to the issue of access to knowledge in the copyright amendment process in South Africa;
- whether or not their department is/was aware of, and/or currently involved in any 'access to knowledge' initiatives;
- whether, in their view, there was any interrelation between gender and/or race on the one hand and access to learning materials on the other; and
- their understanding of the linkage between information communication technologies (ICTs), copyright and access to learning material.

The two government interviewees both had legal training and a detailed understanding of copyright. They stated that their respective departments had expertise in the field. The DTI is the lead department on copyright law and policy, whilst the DAC plays a supportive role by providing feedback on particular issues when requested to do so by the DTI and where appropriate to bring certain issues to the attention of the DTI. Only one representative of the DTI and the DAC each were interviewed by the South African ACA2K research team. As a result, divergent views within each of these departments, especially between those who empathise with access to learning materials and those who do not, may not be fully captured and documented in this report.

Both interviewees were appreciative of the link between the copyright environment and access to learning materials and stated that their departments also held this view.

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<sup>113</sup>Transcripts of the interviews are available on request from the authors of this report.

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The DTI representative initially stressed the importance of copyright law for protecting the interests of creators and for incentivising creative activity. It emerged, however, that one of the DTI's goals is also achieving a fair balance of interests (between rights-holders and users) in the area of copyright law – particularly in relation to learning materials. Further, the department acknowledges a possible connection between copyright law and high prices for learning materials in South Africa, caused by the fact that copyright law awards a limited monopoly to the rights-holder. The DTI representative also stressed the relevance of South Africa's developing country status when drafting new copyright legislation.

The DAC is more attuned to cultural and artistic matters than the DTI but even in that context, the interviewee stated that the department was aware that the copyright environment had an impact on access to learning materials generally, and specifically, from the DAC perspective, on artistic and cultural training institutions. Indeed, the interviewee stated that copyright is an important issue for museums, librarians and community artists.

It emerged in the interviews that the DTI is in the process of commissioning research which will influence policy changes. In addition, the department engages in public and stakeholder consultation, and closely follows and engages in copyright-related discussions at the World Intellectual Property Organisation (WIPO) in Geneva. The department is therefore familiar with the views of copyright stakeholders such as publishers, open source software representatives and learning institutions.

Both departments are aware of access to knowledge initiatives and hence both interviewees expressed genuine interest in ACA2K's research and findings.

In relation to gender and race-related issues, the DTI representative expressed the opinion that the current copyright laws do not discriminate on the basis of gender, and that (other) socioeconomic elements are predominantly the reason for dissimilar access potential between men and women or between people of different racial groups. The DAC interviewee suggested, however, that gender and race issues were closely related to socioeconomic factors. This is because certain racial groups, and women in general, have been historically disadvantaged due to the country's apartheid past. The interviewee went so far as to state that black women particularly appeared most disadvantaged because they are poorer and less educated, and the copyright environment seems to affect them more adversely than other groups. Also, it seemed to this interviewee that white males are more prominent in the copyright landscape, for example as leading IP lawyers and academics.

With regard to ICTs, both government representatives were of the view that ICTs were an enabler, and an empowering tool rather than a hindrance. The DTI interviewee further stated that while he generally supported the use of technological protection measures (TPMs), he was also aware of access problems caused by such measures.

### 3.2.2.2 Educational Community

Interviews were conducted with employees from UCT's main library, the UCT Research Contracts and IP Services office, the UCT Research and Innovation office and the UCT Centre for Educational Technology. All interviewees were asked questions similar to those raised with the government departments, but with an emphasis on their specific educational environment and its needs. In particular, they were asked:

- about the role copyright plays in curriculum development and learning support at the university;
- how copyright-related issues are officially addressed/administered/dealt with and communicated at UCT;
- how the university participates in copyright policymaking, lawmaking and regulation-making;

- how copyright is generally significant to the university;
- how the university utilises existing copyright exceptions and limitations;
- whether or not there is a different impact of the copyright environment on different racial groups and genders at the university; and
- how ICT impacts the university's handling of copyright.

The respective UCT interviewees approached the issue of copyright protection and access to learning materials from very different angles. Overall, this group of interviewees demonstrated an appreciation of the relationship between the copyright environment and access to learning materials. But while the interviewee from the Centre for Educational Technology showed the greatest sympathy for enhancing access possibilities, the interest of the interviewees from UCT's Research Contracts and IP Services office were clearly focused on the financial exploitation of intellectual creations. The interviewee from UCT's main library was somewhat divided about the role of copyright, which does not come as a surprise, because university libraries usually represent both the interests of users (ie, students and teachers) and creators (ie, academics) of copyright-protected works.

Copyright plays a significant part in university curriculum development and learning support. This is evidenced by the care that needs to be taken with respect to the compilation of course-packs, so that they are in compliance with the voluntarily negotiated blanket licence agreement UCT concluded with the Dramatic, Artistic and Literary Rights Organisation (DALRO), South Africa's collecting society for literary works. There are also concerns about the dissemination of learning materials electronically via the university's online course system VULA. Whether or not the blanket licence agreement with DALRO improves or hampers access to learning materials could not be answered by the interviewees. The reason for this is that although the DALRO licence factors in existing statutory copyright exceptions and limitations when setting the rates by containing a fair dealing component, it is impossible to say if and to what extent this fair dealing component is indeed fair because it is unclear what the law in South Africa really allows in terms of the reproduction of learning materials. As one interviewee put it:

If the university view that [the law] allows generous copying, and probably even course-pack creation, is valid, then the DALRO licence is a poor deal. If the publisher view that the copying allowed [...] is seriously constrained by the application of the Berne three-step test is right, then the allocation of the percentage for fair dealing copying may be fairer.

The same interviewee noted that the blanket licence agreement may, after all, be 'too expensive' for what it offers, given the amount of work it creates for universities to track copying for DALRO and in light of the fact that universities did not aggressively, and in a united manner, engage in price negotiations with DALRO.

UCT has an Intellectual Property Policy that in part regulates copyright ownership in material produced by its staff (when done in the scope and course of their employment at the university). As a general rule, the university holds copyright in work produced by staff in the course of their employment. However, the copyright in a number of works is subsequently assigned to the authors of the works. The net income from copyright-protected works is shared between the university and the authors.

The university has also created wide structures for copyright administration, as shown by the selected interviewees who came from three different bodies in the university. However, it was evident from the three separate interviews that the coordination of the roles played by the various structures could perhaps be improved. In some instances it seemed that the role-players were uncertain of each other's mandates and work.

The university plays an active role in national IP policy and legislation formulation and the interviewees stated that should further opportunities arise, they were confident that there would be meaningful participation from the university.

It is also noteworthy that in 2008, UCT committed to building a repository of Open Educational Resources (OER). The project is funded by the Shuttleworth Foundation. The purpose of the project is to create 'a new culture of sharing at UCT and the availability of high quality, open access learning materials organised on a UCT branded OER website'.<sup>114</sup>

With regard to gender and race dimensions, the interviewees could not easily conceptualise the impact that gender and race would have on access to learning materials. Two interviewees stated that it was more likely a broader socioeconomic phenomenon, ie, other socioeconomic factors, beyond gender and race, were responsible for differential access dynamics.

When asked about the importance of digital technology and ICTs, all interviewees stressed the growing significance of such tools. They pointed to UCT's Educational Technology Policy Document. This document refers to both staff and students at UCT and makes explicit UCT's position on educational technology within the institution. In addition, the document suggests how the expressed principles may be put into practice.<sup>115</sup>

### 3.2.2.3 Copyright-Holders

The views of the rights-holder community were obtained by interviewing a representative of the Publishers' Association of South Africa (PASA), as well as a representative from the Academic and Non-Fiction Authors' Association of South Africa (ANFASA).

In particular, the interviewees were asked:

- how their respective organisations participate in copyright policymaking;
- what their general stance on copyright protection is;
- how ICTs impact copyright-holders; and
- whether or not there are any gender and socioeconomic issues that impact on access to learning materials and/or on the South African copyright environment generally.

The PASA interviewee described the financial situation of South African publishers as generally healthy, especially due to the implementation of a new curriculum some years ago. He pointed out that most school books are produced locally; in higher education, however, the vast majority of learning materials used in South Africa originate overseas. Although digital material is increasingly utilised, the interviewee stated that printed books are still the most accessible and readily available learning material in South Africa. The ANFASA interviewee linked the choice of learning materials to the materials prescribed by the Department of Education and indicated an increase in use of learning materials originating in South Africa.

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<sup>114</sup>UCT Centre for Educational Technology website. Available at <http://www.cet.uct.ac.za/projects#OER> [Accessed 07 July 2009].

<sup>115</sup>This 'UCT educational technology policy document' is available at: <http://www.cet.uct.ac.za/policy> [Accessed 30 March 2009].

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The PASA interviewee noted that the publishing industry makes information available and ensures certain quality standards but can usually not provide information free since there are costs involved in producing and distributing the material. With regard to open access and the interests of authors, the ANFASA interviewee also raised the issue of the costs associated with the production of knowledge, and tendered the suggestion that in promoting access to knowledge, these costs could be borne by the state, which could provide, for instance, subsidies to schools for the purchase of learning materials. The point the ANFASA interviewee was making is that generation of open access content should still create a payment and revenue incentive for the producer of that content.

The PASA representative also stressed that PASA has numerous policy positions regarding copyright law but that it was difficult at times to identify people in government departments with whom these issues could be discussed. As a result, PASA often engages in direct negotiations with user associations, such as LIASA – the Library Information Association of South Africa. These discussions have become much more open and less acrimonious in recent times.

The ANFASA interviewee has been active in highlighting authors' concerns during policy and legislative processes, including input on the IPR from Publicly Financed Research and Development Act, where ANFASA promoted an exception for academic works, which was accepted.

While PASA is relatively satisfied with the current Copyright Act, it considers the Copyright Regulations as too vague, making litigation in this field difficult and costly. Moreover, PASA criticises the fact that many court cases have simply fizzled out because the judicial system appears not sufficiently prepared or informed enough to prosecute with vigour and energy. The ANFASA representative was pleased with the Copyright Act. ANFASA believes strongly in copyright, the protection of author's rights, educating authors about copyright and safeguarding copyright, especially in relationship with publishers.

The ANFASA interviewee was, however, displeased with the implementation of the Copyright Act. According to the ANFASA interviewee, when he was still practising law, his (previous) firm acted on behalf of DALRO, and represented four academic publishers whose textbooks were being photocopied by a copy-shop at a university campus. The case was based on the Counterfeit Goods Act and test purchases were made and used as evidence. The law firm approached the DTI to undertake a search-and-seizure operation, whereby they would have confiscated the machinery in the copy-shop because it was being used to produce counterfeit goods. The main objective was to get publicity for the whole operation. However, according to the ANFASA interviewee, the DTI's immediate reaction was that the matter was emotive because it had to do with education, and the DTI went on to say that it usually deals with trademark infringement where factories make fake goods and the warrant is to go and seize the fake products and machinery. In this case, however, the photocopying was happening on an ad hoc basis and they were not likely to find quantities of photocopied books in the copy-shop. According to the ANFASA interviewee, it almost seemed as if the DTI had cold feet about taking up a case of copyright infringement regarding educational material.

The PASA interviewee expressed the view that currently the South African copyright law and regime, in fact, are more inclined to make access to copyright-protected material possible rather than not making it possible. He stated, in this context, that 'if one really wants to fundamentally challenge the current copyright regime in South Africa, you have to challenge that view of what IP is', ie, the view that IP is a very personal possession that belongs to the creator like any other kind of (tangible) property.

The PASA representative frequently emphasised the importance of a balanced approach to copyright, which takes into account both the rights of the owners of copyright-protected works and those of users. Among other things, copyright laws should therefore describe ways in which users can get access to copyright-protected material. If the industry followed this balanced approach, they could better run their own businesses 'because it might mean that they would constantly investigate better ways of providing access to the user while making money through this access'. Consequently, the PASA interviewee noted that a publisher is both like a stock market and a cathedral: one has to make money because one is running a business, but one is also working with precious material which is possibly a national asset, and definitely a human asset. It followed from this that intellectual property cannot be purely exploited for business. However, the interviewee noted that this was not a universally held view amongst publishers, and that others in the industry may well have a different view.

The ANFASA interviewee clarified that ANFASA's role as an organisation was to educate authors on copyright, though the choice of licence used eventually was the author's decision entirely. The ANFASA representative further submitted that authors are becoming increasingly aware of open access and Creative Commons licences, due to the discussions at industry events. According to him, some authors were willing to publish specific works under open content licences, but sought royalties where there was a strong belief that a work was commercially viable.

The PASA interviewee also expressed great interest in alternative licensing schemes, particularly Creative Commons licences.

The PASA interviewee further mentioned that PASA's contracts state, for example, that authors have to agree that their material will be provided free of charge to an institution that would transfer the material into Braille. Regarding formats of works, ANFASA cautioned authors against signing publishing contracts that allow publishing of a work in any format 'known or unknown'.

Regarding the language of a work, the ANFASA interviewee raised the point that there is a perception of only a small market for indigenous works: this meant that those who wrote in an indigenous language were not likely to find a publisher.

The PASA representative expressed the opinion that the discussion about access to copyright-protected material often has an unrealistic ideological basis. In his view, the core access issue appears to be the cost of copyright material – and as far as (locally-produced) school materials are concerned, no huge mismatch between costs and what people can afford exists, because most material is funded by government. In other words, he felt current prices for school textbooks did not prohibit people from accessing knowledge. In fact, he added, schools often choose very expensive textbooks although cheaper textbooks are also available. In addition, parts of textbooks can be photocopied freely or at least more cheaply, by applying to DALRO. The PASA interviewee acknowledged, however, that the situation may be different when it comes to tertiary educational material produced overseas. Such material is usually very expensive and thus there is a problem around costs.

The ANFASA representative also touched on the issue of photocopying of learning materials and its effect on the publishing industry. He said that publishers' current print runs are very low because the publisher is aware that of all the books in a print run, only one quarter will be sold, because of the photocopying of such learning materials. This, he stated, raises the costs of books and limits the author's royalty payments.

The PASA interviewee stated that, in addition, there is a huge problem in South Africa regarding access to bookshops where ordinary people in the community can buy books or print material. He said: '[T]his whole issue of affordability of just general books in order to create a better informed reading public and parents that can help their children with school tasks or just for the love of reading it – I think for me that is it.' ANFASA runs a grant scheme to promote the production of knowledge. The grant covers the author's specific costs related to the book being written, such as funds that allow the author to take time off work to complete the book, conduct research or travel. This is done to promote knowledge creation, and to encourage books that break new ground, and generally, to promote a culture of reading and writing.

Furthermore, the PASA interviewee had interesting views on ICT and socioeconomic dimensions including race and gender. For example, he noted that around 90 per cent of publishing houses are run by men.

Meanwhile, the PASA interviewee said publishing houses appear to have been impacted differently by the advent of ICT dissemination channels and the possibility of production of electronic learning materials. Some houses were able to include these easily in their business models whilst others are battling to do so. Generally, the PASA representative expressed his excitement about new access possibilities brought about by digital technologies, especially by way of using cell phones. Finally, he also agreed with other interviewees from the educational community and government departments that race, gender and socioeconomic issues tend to be conflated in South Africa.

The ANFASA representative concurred that ICTs have indeed made knowledge more accessible, but stated that the use of learning materials in electronic format was linked to how well-resourced the library is – with only the more well-resourced universities using learning materials in electronic format. Regarding online publishing, the ANFASA interviewee expressed the reluctance of some authors concerned about copyright infringement of their works in the online environment.

### 3.3 Summary of Qualitative Analysis

The findings of the qualitative component of the study can be summarised as follows:

Access to knowledge in general, and the interrelation between copyright protection on the one hand and access to learning materials on the other, are indeed discussed in South Africa. As a matter of fact, a fair amount of secondary literature addresses access to knowledge. However, a large percentage of these publications focus on access to government information. As far as access to other knowledge material is concerned, such as learning materials, only a few legal academics participate in the discussion.

Most relevant articles are penned either by rights-holder associations such as PASA or user advocacy groups and library associations. The stance taken in most of these articles towards copyright protection is understandably biased: while rights-holders generally argue for firm copyright protection regimes, regardless of the copyright material in question, user groups and libraries call for less stringent copyright protection, particularly with regard to learning materials. The majority of the (few) legal academics dealing with copyright law and access to knowledge appear to favour a less stringent copyright regime in South Africa, in order to facilitate access to learning materials and foster education in South Africa.

In spite of the fact that rights-holder associations and user groups chiefly lobby for their own respective causes, the different stakeholders show notable awareness of and understanding for the interests of other stakeholders. An acrimonious debate between rights-holders and users (which is seen in other countries) could not be detected.

Generally, most stakeholders interviewed lamented in one way or another the outdated and often vague state of the current South African Copyright Act. The lack of relevant case law is seen as aggravating the situation. As a result, many interviewed stakeholders called for a revision of the present copyright legislation since it was simply not in touch with reality any longer, especially since the advent of digital technologies. Of course, the reform proposals varied considerably from stricter protection regimes (rights-holders) to significantly reduced copyright protection (user-groups).

Most interview participants from the educational community were rather uncritical of South Africa's copyright legislation. Their main concern appeared to be the implementation, rather than the questioning of, the legal framework. Such an attitude is hardly surprising given the fact that some of the interviewees from UCT were administrators. Yet, in addition, it seems that universities are generally caught in the middle of the quarrel between copyright-holders and users of copyright-protected material. Every university obviously accommodates both rights-holders and users. In essence, the educational community therefore strives towards complying with the current law. UCT's various intellectual property-related policies and agreements with rights-holders document these efforts. UCT is, however, in a rather privileged financial position in comparison with most other educational institutions in South Africa. Less affluent tertiary institutions in South Africa may not always be able to follow the law so easily, while at the same time ensuring sufficient access to learning materials for learners. The case study about the University of Limpopo at the end of this report further addresses this particular issue.

It would appear from the interviews conducted with government officials that more prominence is likely to be given to access to knowledge in any future copyright policy or legislative amendment process. This is, however, not an easy task, since even the limited number of interviews conducted for this project provided ample proof of the diverse and often conflicting positions between different stakeholders in this respect. To complicate matters further, views differ even within the same stakeholder category, particularly between different government departments and within the tertiary educational community, which naturally consists of both users and rights-holders of copyright-protected materials.

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

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South Africa has the largest Internet community on the African continent, and cell phone use is widespread. ICT access facilitates access to learning material, particularly but not exclusively via the Internet. It is laudable that all South African tertiary educational institutions (and a growing number of schools) have some form of ICT access. It is also important to acknowledge that South Africa has various ICT-related policies in place, such as the policy on e-education. The government appears determined to establish South Africa as an information society. The strategies and plans suggest that schools and other educational institutions in South Africa are set to improve ICT access and usage in the future, a fact which is going to positively influence access to learning material in the country.<sup>116</sup>

Having said this, it must not be overlooked that a large number, if not the majority, of South Africans still lack the resources to use ICTs. As a result, printed books are still the most accessible and readily available learning tool in South Africa.

During the interviews conducted for this project, the issue of ICTs was repeatedly raised by the interviewees, mostly in the context of digitised learning material. In summary, the response was the acknowledgment of the potential of ICTs as an enabler for increased access to knowledge, but suggestive of the need for more clarity on the application of copyright in this domain.

The enactment of the Electronic Communications and Transactions (ECT) Act 25 of 2002 affords electronic materials equal legal status as their printed-paper counterparts. The legal recognition and framework presented by this single piece of legislation have paved the way for a significant increase in the adoption of electronic commerce in South Africa. Notwithstanding these positive developments, issues such as the adaptation of pre-existing legislation, particularly the Copyright Act, to cope with digitisation needs, must be addressed.

To further the work of another positive development, the government Free and Open Source Software Policy, it is imperative that questions surrounding open access content are considered and a suitable legal framework tabled (that is, to do to culture broadly what the FOSS policy has done for software).

There are two case studies at the end of this report that highlight the potential of ICTs in South Africa. The intention behind the Free High School Science Texts (FHSST) project is to develop free learning materials accessible to all teachers and learners in South Africa. The success of the project is highly attributable to the ICT tools that support it.

The case study of the University of South Africa (UNISA) highlights the challenges for a distance education institution which seeks to account for the needs of a diverse student profile by offering relevant learner support, facilitated by appropriate information and communications technology. The uses of ICT are indeed innovative and to be encouraged.

The common thread between both of these case studies is a lack of clarity on copyright issues – a lack of clarity which plagues and threatens these projects.

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<sup>116</sup>For a good and relatively recent overview of ICT-related initiatives in South Africa see S Isaacs 'ICT in education in South Africa' (2007), Survey of ICT and education in Africa: South Africa Country Report, available at [www.infodev.org/en/Document.429.aspx](http://www.infodev.org/en/Document.429.aspx) [Accessed 30 March 2009].

## 5. Gender-Specific Findings

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The South African research was, among other things, guided by the belief that development-oriented research must be gender-sensitive. In many developing countries and societies, women are still treated highly unequally. This often results in women not having the same access to resources, including to learning materials, as men.

Essentially, the researchers understand gender as referring to the socio-cultural construction of roles and relationships between men and women.<sup>117</sup>

The South African research team, which consists of two female researchers and one male researcher, acknowledges the fact that even seemingly gender-neutral laws may in practice uphold existing gender discriminations. The research team also took note of the assertion made by some legal scholars that copyright laws contribute to sustaining inequalities between men and women since they were ultimately written and enforced to help men retain control over copyright-protected material.<sup>118</sup>

Apart from developing a general awareness with regard to the gender-related issues of the ACA2K project, the South African research team placed emphasis on identifying specific inequities based on gender. It was decided, however, that a deep analysis of identified inequities was beyond the scope of the current project.

The interviews conducted with main stakeholders in the copyright arena appeared to be best-suited for identifying gender-specific differences and inequities. Hence, a number of gender-related questions were incorporated into the interview guides. However, the interviewees' statements concerning this matter were primarily anecdotal and descriptive. As mentioned before, interviewees were carefully selected so as to include men and women and to ensure racial diversity.

Notably, most interviewees had difficulties detecting a correlation between the copyright environment and its impact on access to learning materials on the one hand, and gender inequities on the other. This lack of awareness is an interesting observation in itself since it suggests that key stakeholders are from the outset not overly concerned about this issue. Upon further inquiry, however, some interviewees shared a number of rather general observations and views with the research team. These observations and views implied that:

- gender-related matters and problems form arguably part of a much broader socioeconomic discourse which in South Africa currently centres on race inequities;
- knowledge tends to centre on male-dominated subject matter;
- the whole area of intellectual knowledge is male-dominated;
- from a cultural point of view, the classic idea behind, and the concept of, copyright protection is male;
- black women are particularly disadvantaged when it comes to receiving knowledge;
- a gender stereotype exists according to which a publisher in South Africa is a white male;
- the vast majority of publishers in South Africa are male but most of the larger educational publishing houses in South Africa are run by women; and
- South African authors are mostly male.

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<sup>117</sup>IDRC (Gender and Sustainable Development Unit), 'Gender analysis as a development research tool'. Available at <http://archive.idrc.ca/gender/tool.html> [Accessed 30 March 2009].

<sup>118</sup>See, for instance, A Bartow 'Fair use and the fairer sex: gender, feminism, and copyright law' (2006) 14 *American University Journal of Gender, Social Policy and the Law* at 551-2.

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In conclusion, it became apparent during our research that the gender dimensions in relation to copyright and access to learning materials are highly complex and under-explored. The under-exploration is partly due to a lack of awareness that gender discrimination can and does take place at many levels (both legal and practical) and that it takes on many forms. Some of the main issues at hand were highlighted above. Yet, much more research is necessary to fully understand and examine this important issue.

## 6. Conclusions

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This report has documented the South African research team's findings in its bid to answer ACA2K's central research question and to test the project's hypotheses. The central inquiry was to determine to what extent, if any, South Africa's copyright environment is fulfilling the objective of facilitating access to knowledge. This central question was deconstructed into a number of secondary questions, which are fully detailed in the *ACA2K methodology guide*. The hypotheses tested by the South African research team were:

- The copyright environment in South Africa does not maximise effective access to learning materials; and
- The copyright environment in South Africa can be changed to maximise effective access to learning materials.

The examination of the impact of the copyright environment on access to learning materials, as driven by the research questions and the two hypotheses, revealed the following:

It is evident that the issues of access to knowledge in general, and access to learning materials in particular, have started to attract more attention in recent years in the South African copyright arena. The interviews and case studies conducted provided proof that this issue is on the radar of relevant stakeholders. However, opinions varied as to the state of the law and the nature or extent of the impact that copyright has on access to learning materials. The opinions seemed to be informed by the nature of the person or institution interviewed, ie, opinions were dependent on whether the interviewee was a rights-holder or a user. It was noticeable, however, that most stakeholders in South Africa appear to have a balanced view, in that they acknowledge the validity of positions of stakeholders with differing views. This surely is a promising point of departure for future discussions in this area.

There is a growing body of secondary literature on the topic. Notably, however, only a few legal academics have participated in the discussion so far. The majority of the (few) legal academics dealing with copyright law and the issue of access to knowledge and learning materials appear to favour a less stringent copyright protection regime in South Africa in order to facilitate access to learning materials and foster education in South Africa.

This study found that the existing legislation is inadequate in a number of ways. The key pieces of legislation in the area of copyright law, the Copyright Act 98 of 1978 and its Regulations, are in need of review and amendment – particularly when compared to their international counterparts. Most notably, the current Copyright Act does not make use of many of the flexibilities contained in TRIPs, and other international copyright treaties and agreements, particularly in relation to copyright exceptions and limitations. Also, the Copyright Act does also not properly address the digital environment and its challenges. In addition, the ability to promote access to learning materials by, for instance, creating adaptations of copyright-protected works for the sensory-disabled, is hindered by the threat of copyright infringement. Many existing copyright exceptions and limitations in the South African Act and Regulations – especially the provisions on fair dealing – are generally considered to be too vague by both rights-holders and users. The failure to provide clarity for fair dealing in digitised works, for instance, hinders the distribution of knowledge through the efficient distribution mechanisms of ICTs. In addition, despite progress in electronic communications access in South Africa, the Electronic Communications and Transactions Act, through its protection of TPMs, may override some important access-enabling fair dealing provisions of the Copyright Act, and thereby attach criminal liability to materials usage that is legitimated by the Copyright Act.

A positive observation from the legislative analysis is that there is legislative and policy activity to promote the access to and use of ICTs, as evidenced by the Electronic Communications and Transactions Act and the Free and Open Source Software Policy. Notwithstanding these notable developments to promote access to ICTs, it was found that such legislation and policy is to some extent either in conflict with, or insufficiently supported by, the Copyright Act.

Meanwhile, the new Intellectual Property Rights from Publicly Financed Research and Development Act 51 of 2008 intends to provide for more effective utilisation of intellectual property emanating from publicly-funded research. A more conducive provision for access to knowledge would have been created, however, if works resulting from government-funded research were mandated to be in the public domain or, alternatively, publicly available at no charge within a reasonable timeframe, perhaps subject to reasonable exceptions.

The provisions of the Constitution, particularly the right to education and the right to equality, are important and may be relied upon when proposing the need for legislative changes that cater for improved access to knowledge. The extent to which the Copyright Act is inconsistent with the provisions of the Constitution must be resolved.

In summary, the primary South African copyright legislation must be amended to keep pace with technological advancements and other policy and legislation related to access to knowledge. It would appear, from the interviews conducted with government officials, that more prominence is likely to be given to access to learning material in any future copyright policy or legislation amendment process. This is, however, not an easy task since even the limited number of interviews conducted for this research project provided ample proof of the diverse and often conflicting positions between different stakeholders in this respect. To complicate matters further, views differ even within the same stakeholder category, particularly between different government departments, and within the tertiary educational community – which consists of both users and rights-holders of copyright-protected materials.

As well, initiatives such as the Free High School Science Texts (FHSST) project show willingness by some sectors of society to step outside traditional copyright structures to improve access to learning materials in South Africa.

The authors of this report observed a lack of directly relevant case law in the area of copyright law. It has been concluded that this is largely due to (1) difficulties that rights-holders encounter in pursuing remedies for infringement; and (2) the complexity of copyright law and the law of evidence, which make it difficult for rights-holders to secure any evidence on which to mount litigation. In addition, based on anecdotal evidence and personal experience, the interviewees opined that there is limited prosecution of offences in relation to copyright because the track record of the Department of Trade and Industry (DTI) and the attitudes of police, customs officials and prosecutors together indicate that copyright infringement is not considered a serious offence. This means that rights-holders do not have meaningful support in pursuing cases of copyright infringement. Also, it was found that some educational institutions are unwilling to assist rights-holders to enforce their rights. Furthermore, fines imposed after convictions have historically been low and proving civil damages is a difficult task due to the lack of statistical data. The net effect of these factors has been that publishers are very reluctant to bring litigation or instigate criminal prosecutions and run the risk of substantial expense for an uncertain outcome.

It is suggested by the South African research team that the lack of debate on copyright and access to knowledge may be blamed on the currently unclear and incomplete legislative framework. A law cannot be subjected to substantial criticism if it is unclear as to what it allows and prohibits. Furthermore, such ambiguity often discourages people from reverting to the courts, since the outcome of costly court proceedings is uncertain. The lack of case law, in turn, aggravates the current legal ambiguity. It appears that as a result, most people just do whatever they think is allowed under the current South African copyright regime – regardless of whether their assumptions are correct or not.

In summary, therefore, both of the research hypotheses tested are accurate in describing the current situation in South Africa: the copyright environment in South Africa does not maximise effective access to learning materials and the environment can be changed in order to maximise effective access to learning materials.

## 7. Annexure: Case Studies

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### 7.1 Access to Learning Materials: Challenges of a Historically Disadvantaged University: University of Limpopo

The University of Limpopo (formerly University of the North) is located in the Northern Province of South Africa. During apartheid it was under-resourced as part of a deliberate government policy to disadvantage black people.<sup>119</sup> In 2005 it was merged with the Medical University of South Africa (Medunsa).<sup>120</sup> While the university has overcome many of its historical disadvantages it still faces considerable challenges. One of these is that many of its students are unable to afford the prescribed textbooks required for their studies. This is compounded by the fact that the university itself is not in a position to purchase enough multiple texts to fully meet student needs.

In August 2008, press reports stated that the University of Limpopo had purchased a Xerox Nuvera 144 Digital Production System that permitted it to copy entire textbooks with a saving of 94 per cent on the cost of purchasing original texts.<sup>121</sup> This was lauded as being progressive as it would enable previously disadvantaged students to access texts which they could not otherwise afford. It was also stated that this was the first time this particular Xerox machine had been deployed in the country. As a result of these reports, DALRO and its attorneys wrote to the university to ascertain whether or not there was a breach of the licence held by the university.<sup>122</sup>

No further press reports have been published on this matter and it appears that the matter has been satisfactorily resolved. Whilst DALRO was certainly within its rights in making such enquiries, this incident illustrates how some universities experience the copyright environment.

### 7.2 Open Educational Resources: Free High School Science Texts (FHSST)

This case study presents a South African Open Educational Resource (OER) project called Free High School Science Texts (FHSST). The general aim in compiling this case study is to record the challenge of access to science textbooks in South Africa and the alternative response to this challenge presented by FHSST.

As per the definition adopted at the UNESCO 2002 Forum on the Impact of Open Courseware for Higher Education in Developing Countries, Open Educational Resources (OER) refer to '[t]he open provision of educational resources, enabled by information and communication technologies, for consultation, use and adaptation by a community of users for non-commercial purposes'.<sup>123</sup>

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<sup>119</sup>'Transforming tertiary education' (2003) South Africa.Info, Available at [http://www.southafrica.info/ess\\_info/sa\\_glance/education/higheredplan.htm](http://www.southafrica.info/ess_info/sa_glance/education/higheredplan.htm) [Accessed 30 March 2009].

<sup>120</sup>Kader Asmal, Government Gazette No. 25737 14 November 2003 Notice No. 1703; Statement by the Minister Of Education, Professor Kader Asmal, on the transformation and reconstruction of the higher education system, Pretoria, 9 December 2002. Available at [http://www.polity.org.za/article.php?a\\_id=30772](http://www.polity.org.za/article.php?a_id=30772) [Accessed 30 March 2009].

<sup>121</sup>For example see 'University of Limpopo adds Xerox Nuvera' (2008). Available at [http://www.graphicrepro.co.za/asp/news\\_long.asp?nid=10431](http://www.graphicrepro.co.za/asp/news_long.asp?nid=10431) [Accessed 30 March 2009].

<sup>122</sup>Anecdotal evidence from industry sources.

<sup>123</sup>UNESCO 'Forum on the impact of open courseware for higher education in developing countries: Final report' (2002) at 24. Available at <http://unesdoc.unesco.org/images/0012/001285/128515e.pdf> [Accessed 30 March 2009].

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Open educational resources include course materials, modules, textbooks, software, and any other tools, materials or techniques used to support access to knowledge.

In March 2002, M Horner, one of the founders of project, presented a practical demonstration on waves at a science fair. After the demonstration, several high school students approached him. They did not have a textbook, only a notebook and a pen amongst them; they asked Horner to write down a detailed explanation of the demonstration, which they wished to share with teachers and fellow students.

Horner wanted to do much more than share the notes. He recruited volunteer science students to work with him on a project now known as Free High School Science Texts (FHSST). The initial intention was to develop a free high school science textbook for all teachers and learners in South Africa. The project's objectives have since been expanded. According to the FHSST website <http://www.fhsst.org/> the objectives of FHSST are:

- To provide a complete high school science text that can be used for free [sic] anywhere else in the world as needed
- To provide a free resource, that can be used alone or in conjunction with other education initiatives in South Africa, to any/all learners and teachers
- To provide a detailed, accurate and interesting text that adheres to the South African school curriculum and the outcomes-based education system
- To provide a text that is easy to read and understand even for second-language English speakers
- Make a difference in South Africa through helping to educate our next generation.

Whilst it is still being run by volunteers, it has received support and funding from the Shuttleworth Foundation. As it stands, a set of complete textbooks for Mathematics, Physics and Chemistry for Grades 10-12 is nearing completion. The use of the GNU Free Documentation Licence will allow the materials to be both freely available and legally modifiable by anyone, ensuring that the information they contain is kept up to date and that the texts can be translated or modified according to the needs of particular groups of learners. The textbooks will also be available online for teachers and pupils who can download and print them.

Horner explained that just because textbooks are freely available, this does not mean that they are inferior. Emphasis is placed on texts which are rich in content and aligned to the South African curriculum; concurrently, the team ensures that the theory and the practical examples contained in the texts are accessible and clear enough to be understood by students for whom English is a second language.

## 7.3 Distance Education: University of South Africa (UNISA)

This case study briefly discusses the University of South Africa (UNISA), Africa's leading distance university which offers certificate and degree courses in several subjects including animal health, agriculture, law, business, education and the humanities, to an estimated 250 000 students<sup>124</sup> in South Africa and other African countries. Emphasis is placed on the challenges with the old system of 'distribution of print study guides' as accounted for by a UNISA graduate and the university's identity as an Open Distance Learning institution. The general aim in compiling this case study is to record the challenge of access to learning materials by distance learners in South Africa and, in brief, highlight aspects of the experience of this university in its response to this challenge.

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<sup>124</sup>'Study South Africa' International Education Association of South Africa (IEASA) and Higher Education South Africa (HESA). Available at <http://www.studysa.co.za/contentpage.aspx?pageid=4137> [Accessed 30 March 2009].

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The University of South Africa defines itself as an Open Distance Learning institution. According to the UNISA website,<sup>125</sup> this refers to an approach or philosophy which combines the principles of learner centeredness, lifelong learning, flexibility of learning/facilitation/provisioning, removal of barriers to access, recognition of prior learning, provision of relevant learner support, and construction of learning programmes in the expectation that learners will succeed.

The UNISA mission statement states:<sup>126</sup>

The University of South Africa is a comprehensive, open learning and distance education institution, which, in response to the diverse needs of society [...] [a]ddresses the needs of a diverse student profile by offering relevant learner support, facilitated by appropriate information and communications technology [...].

The following represents examples of the way in which UNISA has deployed information and communication technologies for the delivery of course-related resources to students.

### **The UNISA Toaster**

The UNISA Toaster (derived from the Freedom Toaster)<sup>127</sup> is a content delivery kiosk that allows students to choose and burn relevant course content onto CDs, DVDs or USB flash drives using an easy touch-screen interface. Students simply enter their student numbers onto the touch-screen interface, which then displays their curriculum in digital format. The student chooses the information required and then burns it onto CD, DVD or USB flash drive.

### **My UNISA Online**

This online portal was developed by the university to improve communication between lecturers and learners. Among other things, the portal provides access to administrative information, courseware, subject-related academic guidance, discussion groups, listings of recommended books, an e-bookshop for purchase and sale of textbooks, examination results and dates, and financial records.

### **Videoconferencing**

According to a paper presented in 2004, '[i]n the last three years the average usage of video conferencing at Unisa was measured as 600 sessions per year, with an average of 70 departments using the system.'<sup>128</sup>

The paper listed the uses of video conferencing in respect of post-graduate guidance, oral examinations (for supplementary examinations and special needs learners), interviews for positions, training of staff in remote centres, or discussions around collaborative agreements.

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<sup>125</sup>'Open Distance Learning' (2009) Unisa Online, . Available at <http://www.unisa.ac.za/default.asp?Cmd=ViewContent&ContentID=20566> [Accessed 30 March 2009].

<sup>126</sup>Available at [http://www.unisa.ac.za/contents/studyinfo/docs/download/calendar\\_2009/6\\_2009\\_e.pdf](http://www.unisa.ac.za/contents/studyinfo/docs/download/calendar_2009/6_2009_e.pdf) [Accessed 30 March 2009].

<sup>127</sup>Freedom Toasters are preloaded to dispense free digital products, including software, photography, music and literature.

<sup>128</sup>H Wilson 'Videoconferencing at UNISA: Synchronous real-time discussions for student support' (2004) e-merge 2004 conference presentation. Available at <http://emerge2004.net/connect/site/UploadWSC/emerge2004/file78/wilson.pdf>. [Accessed 30 March 2009].

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**Mlearning**

A paper presented by Willa Louw, the Coordinator for Learning Development at UNISA's Institute for Curriculum and Learning Development, titled *Taking the distance out of distance education through the means of Mlearning*, states:<sup>129</sup>

Albeit that the distance education learners in the South Africa are diverse, almost all learners have access to a cell phone, to either send or receive a text message and that it is a relatively cheap method of communication. UNISA communicates with students via sms through a certain University's Learning Management System and it costs about twenty two cents to reach a learner by sms.

**Efforts related to students with disabilities**

Further notable efforts include those related to students with disabilities. Just over 1 000 of the 250 000 UNISA students have disabilities.<sup>130</sup> UNISA makes available study material in Braille and on audio tapes for the benefit of students with visual or hearing disabilities, and 'a dedicated support has been in place since 2002' to address the need of such students.<sup>131</sup>

In summary, UNISA has made positive and noteworthy strides towards improving access to learning resources through the use of ICTs. Despite such strides, however, significant challenges remain.

The following is an insightful UNISA graduate's perspective on the challenges regarding prescribed textbooks required for preparation for examinations:

Each course has a study guide that is provided to students at the beginning of the semester. The cost of these study guides are incorporated into the tuition fees. The study guides typically refer to prescribed texts which are invariably written by Unisa lecturers. Prescribed textbooks are difficult to source through the library because they are in demand. Further, it is not possible to book or reserve these books. One may only borrow them if one is lucky enough to find the text on the shelves in the library. To avoid such problems students have to purchase the texts. The cost of these texts is high. For example, the prescribed text for a postgraduate strategic management text retailed at about R400 in 2007. Typically a postgraduate student in management studies does five courses to complete the course. If each course requires a student to purchase a R400 text, a student will need to spend about R2 000 on texts in addition to paying tuition fees. For many this is too expensive. A typical undergraduate degree at Unisa consists of 32 courses and the total cost of prescribed texts required is also quite high.<sup>132</sup>

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<sup>129</sup>Available at <http://www.mlearn.org.za/CD/papers/louw.pdf> [Accessed 30 March 2009].

<sup>130</sup>UNISA Online, 'Students with disabilities'. Available at <http://www.unisa.ac.za/default.asp?Cmd=ViewContent&ContentID=19898> [Accessed 30 March 2009].

<sup>131</sup>Ibid.

<sup>132</sup>Based on an informal discussion with a UNISA graduate, on 31 October 2008, who undertook both undergraduate and postgraduate studies with Unisa.

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