

# Chapter 4

## Kenya

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### 4.1 Background

Kenya, in East Africa, has a population of approximately 39 million people, with 42 ethnic communities.<sup>1</sup> English is the official language and Kiswahili is the national language. The adult literacy level is 73.6 per cent.<sup>2</sup> The country's economy relies largely on agriculture and tourism.

Kenya obtained independence from British rule in 1963 and has a multiparty political system. One of the goals of the government at the time of independence was to eradicate illiteracy.<sup>3</sup> The government recognised education as a basic tool to secure human resource development,<sup>4</sup> and it took several steps to provide education to all Kenyans. As a result, primary and secondary education in Kenya is free in public schools.<sup>5</sup> Universal Primary Education (UPE) was introduced in January 2003 and Universal Secondary Education (USE) was introduced in January 2008.<sup>6</sup> The provision of free basic education saw a sharp increase in public primary school enrolment,<sup>7</sup> with a gross primary school enrolment rate of 99 per cent and a total of 1.2 million children absorbed into schools.<sup>8</sup> This influx has heightened the demand for teaching and learning materials in schools.

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1 The World Bank estimated that Kenya's population was 38 million in 2008.

2 UNDP *2007/2008 Human development report* (2008). Available at <http://hdr.undp.org/en/reports/global/hdr2007-2008/> [Accessed 1 June 2010].

3 B. Sihanya 'How IMF policies constrain policy space in Kenya's education sector' in Ben Sihanya (ed) *The impact of IMF policies on education, health and women's rights in Kenya* (2008) Action Aid International at 46.

4 Ibid.

5 Free Primary Education refers to the waiver of tuition fee and provision of text books and classroom material only.

6 Universal Primary Education (UPE) was first introduced in 1979, but had to be abandoned with the implementation of the Structural Adjustment Programmes (SAPs) in the 1980s. Universal Secondary Education (USE) is a misnomer. Both UPE and USE have faced major financial and administrative challenges.

7 Supra note 3 at 106.

8 Republic of Kenya *Sessional paper No. 5, a policy framework on education, training and research: meeting the challenges of the education, training and research in Kenya* (2006) Government Printers, Republic of Kenya.

The high number of students enrolled at these levels of the system will cause more students to seek tertiary/university education,<sup>9</sup> posing major challenges to access and quality. University education was heavily subsidised by the government until the early 1990s when, as a result of International Monetary Fund (IMF) Structural Adjustment, the conditions and government policy changed. Tertiary students were required to meet their own costs, including tuition, accommodation and the purchase of books and other learning materials.<sup>10</sup>

To ensure that university education was not completely out of the reach of those with no means, the Higher Education Loans Board (HELB) was established in 1995. The Board is mandated to, inter alia, give loans, bursaries and scholarships to needy Kenyan students pursuing their education within and outside Kenya. Initially the loans were available only to students attending public universities' regular or day programmes. In 2007, HELB extended the loan facilities to students attending private universities in the country. About 34 per cent of a HELB loan is earmarked for the student's personal expenses, including books, whereas the tuition loan is directed to universities.<sup>11</sup> Many times, however, the HELB loan allocated for a student's personal expenses is insufficient to cater for all necessary books, as the books are usually very expensive. Many tertiary students therefore photocopy — or purchase photocopies of — entire books, book chapters and other reading materials.

The government has enacted policies that aim to facilitate access to materials, including the National Text Book Policy on Publication, Procurement and Supply of June 1998.<sup>12</sup> The government's expenditure on education is equivalent to 7 per cent of the country's GDP.<sup>13</sup> The government fully subsidises primary school books and other primary-level teaching materials, which are sourced via government procurement procedures.

In order to support lifelong education, the Kenya National Library Service (KNLS) was established to provide reference, teaching and learning materials to the public. It is a state corporation established under the Kenya National Library

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9 Ibid.

10 Ibid.

11 S.O. Odebero, et al 'Equity in the distribution of HELB loans in Kenya in relation to student characteristics: an empirical analysis' (2007) *2:8 Educational Research and Review* 209, August 2007. Available at <http://www.academicjournals.org/ERR/PDF/pdf%202007/Aug/Odebero%20et%20al.pdf> [Accessed 26 March 2009].

12 D. Rotich 'Textbook publishing in Kenya under a new policy on school textbook procurement' (2000) *Publishing Research Quarterly* 16, 2 June 2000.

13 Ministry of State for Planning, National Development and Vision 2030 *Kenya vision 2030; a globally competitive and prosperous Kenya* (2007).

Service Board Act.<sup>14</sup> KNLS currently runs public libraries in major towns in Kenya, as well as mobile libraries for remote areas.<sup>15</sup> In addition, entities such as the Nairobi City Council, embassies, high commissions and foundations run libraries in Kenya. There are also 'departmental libraries', which are not professionally run and which are rarely used. A departmental health library, for example, which was started about 17 years ago at Pumwani Hospital, is at present non-operational. There are libraries within educational institutions such as universities, colleges and schools. University libraries, in particular, have remained central to the management of scholarly communication.<sup>16</sup>

As mentioned, the introduction of IMF Structural Adjustment policies in Kenya resulted in limited funding for Kenya's public universities.<sup>17</sup> This has had an impact on the development of library and information services in universities. Public university libraries are not equipped to deal with the rising student enrolment numbers. As a result, academics in Kenya and in particular senior faculty members, have increasingly adopted strategies other than using the university library to obtain information. These strategies include: using personal contacts in the developed world to obtain reports, journal articles and reprints; purchasing books during travel outside the country; and the personal purchase of, or personal subscriptions to, journals. Among the academics at Kenyatta University (KU) and Moi University (MU), 50 per cent and 75 per cent, respectively, reportedly never enter the library.<sup>18</sup> With university students, there is increasing dependence on lecture notes and handouts as well as photocopying of textbooks — methods that are felt to be more reliable than depending on the university library.

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14 Chapter 225, Laws of Kenya

15 The Kenya National Library Service started in 1967. It has only managed to set up libraries in provincial headquarters and in a few districts. This is short of the objective, which was to build libraries in all districts by 1980.

16 K. Shearer and B. Birdsall *The transition of scholarly administration in Canada* (2002). Available at [http://www.carl-abrc.ca/projects/kdstudy/public\\_html/pdf/bgground.pdf](http://www.carl-abrc.ca/projects/kdstudy/public_html/pdf/bgground.pdf) [Accessed 31 March 2009].

17 *Supra* note 3 at 107. See also Government of Kenya *Report of the presidential working party on education and manpower training for the next decade and beyond* (March 1988) (Chairman: James Kamunge). This report recommended the adoption of a cost sharing policy for financing education and for receiving loans.

18 J. Muema *University libraries in Kenya: a study of their practices and performance* (2004) dissertation submitted to the University of Humboldt. Available at <http://edoc.hu-berlin.de/dissertationen/kavulya-joseph-muema-2004-02-19/HTML/front.html#front> [Accessed 26 March 2009].

## 4.2 Doctrinal analysis<sup>19</sup>

In Kenya, copyright law is largely a 19th- and 20th-century phenomenon, beginning with the declaration of Kenya as a British Protectorate on 15 June 1895 and a colony in 1920.<sup>20</sup> Kenya's copyright law evolved from the 1842 United Kingdom (UK) Copyright Act through to the 1911 and 1956 UK Copyright Acts. These statutes were applied together with the English common law by virtue of the reception clause under the English East African-Order-in-Council 1897 (which applied to Kenya the substance of the English common law, the doctrines of equity and the statutes of general application in force in England as at that date).<sup>21</sup> The reception clause was substantially re-enacted as the Kenya Judicature Act of 1967. Kenya enacted its first domestic Copyright Act in 1966. The 1966 Kenyan Act consisted of only 20 sections, the last of which declared that the Act and 'any other written law' are the sole copyright regime. The current Act, the 2001 Kenyan Copyright Act, has 52 sections and the interpretation section of the Act states that the Act is an Act of Parliament designed to make provision for copyright in literary, musical and artistic works, audiovisual works, sound recordings, broadcasts and connected purposes.

Today in Kenya, the applicable copyright laws are found in statutes, the English common law and international treaties.<sup>22</sup> The Constitution does not deal with copyright matters directly and statutes are the main body of copyright law.<sup>23</sup>

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19 This section is adapted from B. Sihanya's *Constructing copyright and creativity in Kenya: cultural politics and the political economy of transnational intellectual property* (2003) doctoral dissertation, Stanford Law School, Stanford, CA.

20 Ibid. 15 June 1895 is the date Kenya was declared a British Protectorate pursuant to, inter alia, the Berlin Conference of 1884 on the Partition of Africa (otherwise called the 'Scramble for Africa'). Ghai and McAuslan have discussed the political, economic and juridical process of annexing, declaring and exercising jurisdiction over the Protectorate and Colony of Kenya. See Y.P. Ghai and J.P.W. McAuslan *Public law and political change in Kenya* (1970) Oxford University Press, Nairobi; J.B. Ojwang *Constitutional development in Kenya: institutional adaptation and social change* (1990) ACTS Press, Nairobi at 29-34; and H.W.O. Okoth-Ogendo *Tenants of the crown: evolution of agrarian law and institutions in Kenya* (1991) ACTS Press, Nairobi.

21 Section 3 of the Judicature Act (Chapter 8, Laws of Kenya) would simply re-enact the clause in the Order-in-Council. See Ghai and McAuslan supra note 20 at 19-25 and Ojwang supra note 20 at 32-33. See especially R. Seidman 'The reception of English law in colonial Anglophone Africa revisited' (1968) *East Africa Law Review* at 1.

22 Local African case law is still limited in quantitative terms. Moreover, qualitatively, the cases have not developed any clear principles or doctrines to capture the experience and nuances in the cultural, educational and publishing industries. This can be attributed to the limited copyright expertise among members of the Bar and the Bench. For a study of these copyright laws in the context of Africa's political economy and cultural politics, see B. Sihanya *Constructing copyright and creativity in Kenya* (2003) supra note 19.

23 Indeed, the development of the Kenyan Copyright Act 12 of 2001 compares to other states: Tanzanian Copyright and Neighbouring Rights Act of 1999; Nigerian Copyright Act of 1988 (as amended); Malawian Copyright Act 9 of 1989; Zimbabwean Copyright Act, Chapter 26:01 and Ghanaian Copyright Law of 1985 (PNDCL 110). See J.O. Asein *The Nigerian Copyright Act with introduction and notes* (1994) S. Bookman, Ibadan; P. Kuruk 'Protecting folklore under modern intellectual property regimes: a reappraisal of the tensions between individual and communal rights in Africa and the United States' (1999) *American University Law Review* at 769.

The discussion of the sources of Kenya's copyright law must be seen in the context of Section 3 of the Judicature Act, which mandates the legal sources to be consulted in Kenya when determining a legal matter. Accordingly, there are five sources that need to be considered:

- The first source, the Constitution,<sup>24</sup> does not make any specific provision on copyright. Some of its provisions may, however, be read as legislation by metaphor, largely providing a broad framework within which copyright is to be constructed. These provisions include the protection of property (Section 75),<sup>25</sup> and freedom of expression and access to information (Section 79).<sup>26</sup>
- The second source of law mandated by the Judicature Act is statute law. As mentioned, since 1966 Kenya has had its own Act on copyright, with the most recent Act being the Copyright Act of 2001. This is the only statute that specifically applies to copyright.
- A number of doctrines developed under UK copyright statutes continue to apply, especially those under the 1956 UK Copyright Act. In addition, the procedural and evidentiary rules regarding copyright administration and litigation (especially in collecting societies and courts), are drawn directly or indirectly from UK legislation or practice, pursuant to the Schedule referred to in Section 3(1)(b) of the Judicature Act. Kenyan laws that further the application of English law and procedure include the Civil Procedure Act,<sup>27</sup> the Evidence Act,<sup>28</sup> the Appellate Jurisdiction Act,<sup>29</sup> rules of court and judicial precedents.
- The applicability of the common law — which is identified as a source of law in Section 3(1)(c) of the Judicature Act — to copyright is seriously contested.<sup>30</sup> Kenya and most African states liberally apply the common law of copyright, despite the provisions found in some copyright statutes that purport to abrogate the common law of copyright. Such statutes seek to limit which laws apply to copyright. Section 51 of the Kenyan Copyright Act of 2001 specifically states:

24 Constitution of Kenya Act 5 of 1969.

25 This extensively protects private property. It provides for relief including compensation in the case of compulsory acquisition.

26 The few contexts in which constitutional doctrines have been invoked in Kenya include R. Kuloba's reading of the copyright law under the shadow of the Constitution's equal protection clause (Section 82). It is very instructive here. He argues that, although the Constitution does not specifically deal with copyright, its spirit can be taken to prohibit discrimination against illiterate innovators who may not be protected under the doctrine of materiality under the Copyright Act. See R. Kuloba *Principles of injunctions* (1987) Oxford University Press, Nairobi at 124. Under the doctrine of materiality, only original works, which are expressed in tangible, fixed or material form, are protectable and promotable. See B. Sihanya *supra* note 19.

27 Chapter 21 of the Laws of Kenya.

28 Chapter 80 of the Laws of Kenya.

29 Chapter 9 of the Laws of Kenya.

30 No case has actually addressed this 'controversy'.

‘No copyright or right in the nature of copyright shall subsist otherwise than by virtue of this Act or of some enactment in that behalf’. This enactment was first carried out in Kenya as Section 17 of the Copyright Act of 1966, the clause having been copied from the 1911 UK Copyright Act.<sup>31</sup> The marginal note to the section reads, ‘Abrogation of common law rights’.

- The Judicature Act does not specifically mention international law, including treaties and conventions, as a source of law and, therefore, of copyright law in Kenya. This has not arisen as an issue and it is arguable that there was no reason to specifically mention these instruments. Kenya follows the British transformation doctrine, whereby treaties must be ratified and enacted by Parliament to become law.<sup>32</sup> Thus, treaties or agreements like the Berne Convention, the Universal Copyright Convention (UCC), the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement), the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) would, through transformation, constitute part of the written laws of the Kenya Parliament under Section 3 of the Judicature Act.

The development of Kenyan copyright law, beginning with the Copyright Act of 1966, essentially illustrates the (post-) colonial impact on the construction of Kenya’s copyright legal system. This process is discernible in the amendments of 1975, 1982, 1989, 1995 and 2000 and the supersession in 2001. The Copyright Act (Cap. 130) of 1966 marked the declaration of Kenya’s copyright independence to some extent. It repealed and replaced the UK Copyright Act of 1956 and Section 17 of the Act of 1966 sought to abrogate the common law of copyright. This development may be regarded as an attempt to de-link Kenyan from English copyright. The Copyright Act (Cap. 130) as revised in 1975 essentially consolidated national imperatives in an international context, with folklore protected as a literary, artistic or musical work. The intention was to preserve national cultural heritage and economic welfare, especially in the context of an international movement to protect natural and cultural heritage, as well as to promote the then-incipient interest in international trade in cultural products. The copyright amendments of 1982, 1989, 1992 and 1995 mainly introduced new definitions and redefined existing concepts under the Copyright Act, partly as a result of technological changes. These amendments introduced traditional relief for copyright infringement, including judicial remedies

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31 J. Chege *Copyright law and publishing in Kenya* (1976) Kenya Literature Bureau, Nairobi at 98. The 1911 Act sought to abrogate common law copyright in the UK.

32 D.J. Harris, *Cases and materials on international law* (1998) Sweet & Maxwell, London. See also the Vienna Convention on the Law of Treaties, 1969. It came into force, under Article 84, in 1980. Cf. Articles 28, 29 and 29bis of the Berne Convention, noting that as procedural and administrative provisions of Berne, these will not bind members of the World Trade Organisation (WTO), under Article 9 of the WTO TRIPs Agreement.

such as injunctions and damages. Criminal sanctions were also reformed. After Kenya acceded to the Berne Convention in 1993, the Attorney General exercised the rulemaking powers afforded that office under Section 18 of the 1966 Copyright Act and extended the protection of the Act to literary and artistic works belonging to nationals of other Berne member states.<sup>33</sup>

The current Copyright Act of 2001 was drafted mainly to meet the standards established under the TRIPs Agreement of 1994 and the ‘WIPO Internet Treaties’ (WCT and WPPT) of 1996.<sup>34</sup> It received presidential assent on 31 December 2001.

#### **4.2.1 Statutes and regulations**

Following numerous consultations by government with stakeholders and industry players, the new Copyright Act was passed by Parliament in 2001. It came into force in February 2003. In addition to the minimum standards of protection required by international conventions, the new law sets out stronger administrative structures and enforcement mechanisms. The implementing Regulations were passed in 2005.

##### *Works protected by copyright*

Section 22 of the Copyright Act provides for works that are eligible for copyright protection. These are:

- literary works (including computer programs);
- musical works;
- artistic works;
- audiovisual works;
- sound recordings;
- performances; and
- broadcasts.

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33 This had been done in 1966 with respect to nationals of UCC Member States.

34 ‘WIPO Internet Treaties’ is the code expression for the WIPO Copyright Treaty (WCT) of 1996 and WIPO Performances and Phonograms Treaty (WPPT) of 1996. The Bill went through various drafts in 1999, 2000 and 2001. Both of the authors of this chapter participated in these processes. Even after being passed, there were still difficulties regarding the institutional framework, especially the establishment, composition and structure of the ‘competent authority’. This amorphous body is a legacy of the Berne Convention, which proposed its establishment and left specifics to individual states. It is also a legacy of the Act of 1966, which was not specific on this matter. Under the Berne Convention, a competent authority should fix equitable remuneration for the exploitation of broadcasting rights in case this is not agreed between parties (Article 11*bis*). Moreover, that authority has a mandate on translations. See Article II(9) of the Appendix to the Berne Convention (the Appendix is entitled ‘Special Provisions Regarding Developing Countries’), incorporated to Berne under Article 21. See also Article 36 of the Berne Convention.

### *Nature of copyright*

The nature of copyright is clearly laid out in Sections 26 to 29 of the Copyright Act. Section 30 addresses performances, while Section 49(d) deals with folklore. The Act grants both economic and, in Section 32, moral rights.

Before looking at the precise scope of protection for the different kinds of works, it is noteworthy that the Act contains the following definition of ‘copy’:

‘[C]opy’ means a reproduction of a work in any manner or form and includes any sound or visual recording of a work and any permanent or transient storage of a work in any medium, by computer technology or any other electronic means.<sup>35</sup>

This definition covers ‘any [...] transient storage of a work in any medium’. This is intended to cover new reproduction and transmission technologies relating to the production and distribution of literary and other copyrightable works. The Act recognises non-material and non-tangible forms of reproduction as well. This definition is significant in that the protection of non-tangible forms of reproduction may negatively impact access to digital teaching and learning materials.

The owner of a literary, artistic, musical or audiovisual work has the exclusive right to control the reproduction, in any material form, of the work, or its translation, its adaptation, its distribution to the public by way of sale, rental, lease, hire or loan, as well to control the importation or communication to the public and broadcasting of the works.<sup>36</sup> Furthermore, the Act stipulates that the term ‘work’ includes translations, adaptations, arrangements or other transformations of a work and public performance of the work.<sup>37</sup> These exclusive rights are, however, subject to limitations and exceptions, which are discussed below.

The right of making a work available is not yet expressly provided for by the Act, but this is likely to be included in the forthcoming amendments to the law. This right of making available is an extension of the right of communication to the public in the digital environment, which is provided for under the WIPO Copyright Treaty. This right grants the rights-holder greater control of the work when it is distributed over a digital network.

Broadcasting organisations have the right to control the fixation, broadcast and communication to the public of the whole or part of their broadcast.<sup>38</sup> The Act also grants performers exclusive rights to fix and reproduce the fixation of their performances and to broadcast or communicate their fixed performances to the public.<sup>39</sup> The rights-holder in a sound recording has the exclusive right to:

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35 Section 2 of the Copyright Act of 2001. There was clearly a need to capture technological change.

36 Section 26(1) of the Copyright Act.

37 Section 2 of the Copyright Act.

38 Section 29 of the Copyright Act.

39 Section 30 of the Copyright Act.

- reproduce the sound recording in any manner or form;
- distribute it to the public by way of sale, hire, rental, lease or any similar arrangements;
- import it into Kenya; and
- broadcast and communicate the material to the public.<sup>40</sup>

According to Section 33 of the Copyright Act, economic rights are transmissible as movable property by assignment, by licence, by testamentary disposition or by operation of law.

Moral rights apply to authors of literary, artistic and musical works as well as performers. Under Section 32 of the Copyright Act, the moral rights are limited to the right to be named or to claim authorship and the right to object to any mutilation or derogatory treatment that affects the honour or reputation of the author or performer.<sup>41</sup>

Works that are created by employees of the government are deemed to be the copyright of the government.<sup>42</sup> They do not automatically fall into the public domain, except for statutes and judicial decisions.<sup>43</sup>

Other works that automatically fall into the public domain are:

- works whose terms of protection have expired;
- works in respect of which authors have renounced their rights; and
- foreign works which do not enjoy protection in Kenya.<sup>44</sup>

While most government works are protected by copyright, many are accessible to the public for free over the Internet. Some hard-copy government documents, however, have to be purchased from the Government Printer, even though they may be accessed free of charge online.

### *Term of protection*

The term of protection for literary, artistic and musical works in Kenya is 50 years after the end of the year in which the author dies.<sup>45</sup> In the case of audiovisual works and photographs, the term of protection is 50 years from the end of the year in which the work was either first made available to the public or first published, whichever date is the latest.<sup>46</sup> Sound recordings are protected for 50 years after the

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40 Section 28 of the Copyright Act.

41 Compared to Article 66 of the Berne Convention on the Protection of Literary and Artistic Works of 1886, Rome and Geneva, moral rights under the Copyright Act in Kenya are limited as the Act only protects the right of paternity and integration.

42 Section 31 of the Copyright Act.

43 Section 25 of the Copyright Act and Section 2 of the Act under definition of 'literary work'.

44 Section 45 of the Copyright Act.

45 Section 23(2) of the Copyright Act.

46 Ibid.

end of the year in which the recording was made.<sup>47</sup> Broadcasts are protected for 50 years after the end of the year in which the broadcast took place.<sup>48</sup> Section 23(3) and (4) contain special provisions for anonymous or pseudonymous works, as well as works of joint authorship. Thus, Kenyan copyright law essentially affords the standard term of protection required by the most relevant international copyright treaties and agreements such as the Berne Convention and TRIPs.

### *Exceptions and limitations*

The Copyright Act contains several general exceptions and limitations to the exclusive rights granted. In particular, in an attempt to balance rights-holders' rights with the interests of users, Section 26(1) of the Copyright Act provides, inter alia, that copyright in literary, musical, artistic works or audiovisual works does not include the right to control:

- 'fair dealing' for purposes of criticism, review, scientific research, private use and reporting of current events for as long as the author is acknowledged as such;<sup>49</sup>
- the inclusion of not more than two short passages of a copyright-protected work in a collection of literary or musical works that is for use by an educational institution;<sup>50</sup>
- the broadcasting of a work, or reproduction of a broadcast, for educational purposes in an educational institution;<sup>51</sup> or
- reproduction under the direction or control of the government, or by public libraries, non-commercial documentation centres and research institutions, 'in the public interest' and where no income is derived from the reproduction.<sup>52</sup>

The Kenyan doctrine of fair dealing is problematic, particularly because no definition exists for the requirement of fairness.

Furthermore, for teachers and learners generally, the law does not permit the reproduction of whole works for teaching purposes. Rather, permitted reproductions are limited to the inclusion of only two short passages in collections to be used for instructional purposes. If enforced, this provision would affect the preparation of course packs for use by educational institutions. Any use beyond the two short passages allowed by law requires users to obtain express authority from the right-holders.

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47 Ibid.

48 Ibid.

49 Section 26(1)(a) of the Copyright Act.

50 Section 26(1)(d) of the Copyright Act.

51 Section 26(1)(e) and (f) of the Copyright Act.

52 Section 26(1)(h) of the Copyright Act.

The only entire works that are available for teaching purposes under the exceptions are broadcasts. This provides access to teaching and learning materials by way of broadcasts.

There are no specific provisions for exceptions in relation to distance learning and e-learning.<sup>53</sup>

Regarding the exception listed above for public libraries and archives, the two main issues to be considered are how one defines the 'public interest' and how one defines non-commercial institutions. Private libraries, research institutions and documentation centres would not benefit from this exception as they are normally deemed to be commercial. The issue of public interest can also be subjective.

The exceptions and limitations contained in the Kenyan Copyright Act also do not specifically address people with disabilities, including the visually impaired. Instead, the law makes it clear that the right to control the adaptation and translation of any work vests in the right-holders. This means that before any person translates a work into Braille format, for instance, such a person must obtain permission to do so from the right-holders.

The use of copyright works for purposes of reporting by the media is allowed under fair dealing. Public lectures and speeches can therefore be quoted freely by the media and included in news reports.

The exceptions and limitations as drafted under the current law are vague and, at the same time, quite narrowly construed. This gives the rights-holder more control over the use of their works and at the same time limits the dissemination of information without the rights-holder's authority. The law, however, makes provision for licensing agreements under Section 33 of the Copyright Act. This licensing may also be through collective management organisations (CMOs) such as the reprographic rights organisations (RROs). Libraries and educational institutions are expected to take out licences in order to reproduce copyright-protected works if the use is not covered by the exceptions and limitations. Some licenceors, however, seek royalties and related payments for works already in the public domain or works in which copyright never subsisted in the first place.<sup>54</sup> Other licences simply provide what is already permitted by the Act through copyright exceptions and limitations. KOPIKEN, a reprographic rights organisation, has been developing standard licence templates for the relevant users.

As this chapter is being prepared in mid-2010, the Copyright Act is being reviewed for amendment so as to include improved exceptions and limitations in relation to the visually impaired, libraries and educational purposes. This is an ongoing process

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53 B. Sihanya 'Intellectual property, quality assurance and ISO in Kenyan universities' (2008) 4:1 *Law Society of Kenya Journal* at 35.

54 *Supra* note 19.

that is expected to be completed in 2010. By virtue of their academic work and work for the Kenya Copyright Board, ACA2K researchers Marisella Ouma and Ben Sihanya, the authors of this chapter, are already deeply involved in this Copyright Act review process.

### *Parallel importation*

Importation of any copyright work into Kenya remains under the control of the rights-holder. As a result, save in the case of sound recordings, without the express authority of the rights-holder, a third party may not, without the express authority of the rights-holder, import copyright-protected works into Kenya which have been legitimately released in other countries.<sup>55</sup> This, for instance, affects access to learning materials that are produced outside Kenya but are being sold at higher prices in Kenya than elsewhere.

### *Compulsory licensing*

There is no specific provision on compulsory licensing. However, Section 26(1)(h) permits:

the reproduction of a work by or under the direction or control of the Government, or by such public libraries, non-commercial documentation centres and scientific institutions as may be prescribed, where the reproduction is in the public interest and no revenue is derived there from.

From the above, it is clear that the government or a public library may order the reproduction of a work in the case of the public interest being served. However, the Act does not define what constitutes the public interest.

### *Digital rights management (DRM) and technological protection measures (TPMs)*

Although the Act recognises copyright in computer software, the law does not include specific provisions in relation to exploitation of copyright works in the digital environment. Rather, the provisions contained in the law are presumably seen to apply to the digital environment as well. The relevant provisions include those covering communication to the public, rental and distribution of copyright-protected works.

However, having said this, there is one important set of provisions directly targeting the digital environment in Section 35(3) of the Copyright Act, which states that copyright is infringed by anyone who:

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55 Section 26(1) of the Copyright Act.

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- (a) circumvents any effective technical measure designed to protect works; or
  - (b) manufactures or distributes devices which are primarily designed or produced for the purpose of circumventing technical measures designed to protect works protected under this Act; or
  - (c) removes or alters any electronic rights management information; or
  - (d) distributes, imports, broadcasts or makes available to the public, protected works, records or copies from which electronic rights management information has been removed or has been altered without the authority of the right holder.

This legal protection of technological protection measures (TPMs) is problematic. TPMs have serious consequences for access. TPMs are already limiting access to e-books, articles, databases, newspapers and other educational materials that would otherwise have been accessible. The ongoing discussions to amend the Kenya Copyright Act are unlikely to repeal the protection of TPMs, but reforms could be enacted to limit the scope of TPMs and reduce their adverse impact on access to educational materials. There was no clear or reasoned justification for the aforementioned legal protection of TPMs in the Kenyan context at the time of enactment of the 2001 Copyright Act. It may be that the main intention of the legislators was to bring Kenya's law in line with international standards, especially the WIPO Internet Treaties (the WCT and WPPT of 1996, which, however, Kenya has not ratified).

A case can be made to review the legal protection of TPMs because they jeopardise existing statutory limitations and exceptions. While TPMs enhance enforcement of rights in the digital environment, they also have the potential to limit access to works that would, in the non-digital sphere, be available to users under exceptions and limitations. TPMs, in effect, negate the purpose of exceptions and limitations, as the law makes it illegal to circumvent any technical devices that have been installed by right-holders to prevent use by third parties. Users are thus expected to seek the permission of right-holders in order to access the information, even if the intended use falls under the exceptions and limitations recognised by law.<sup>56</sup>

Protection of TPMs will become an even bigger issue if and when the exceptions and limitations accorded by the law in Kenya are expanded. At the moment the

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56 Debate in the United States led to the proposed 'Cohen Doctrine' (named after Prof J.E. Cohen), which states that one has a right to hack copyright systems in order to secure fair use, to the effect that the US Digital Millennium Copyright Act should not criminalise measures that circumvent DRM or TPMs to facilitate access to non-copyright materials. See J.E. Cohen 'Some reflections on copyright management systems and laws designed to protect them'; L. Lessig *The future of ideas: the fate of commons in a connected world* (2001) Random House, New York at 163; and P. Goldstein *Copyright's highway: from Gutenberg to the celestial jukebox* (2003) Stanford University Press, Stanford, California, esp. Chapter 6 'The answer to the machine is the machine'.

exceptions and limitations are very narrow, allowing the rights-holder to have firm control over the use of copyright-protected works.

### *Traditional cultural expressions (TCEs) and other works*

The provisions for the protection of traditional cultural expressions (TCEs) under the Act are limited. TCEs are governed by Section 2 and Section 49(d). Section 49(d) provides that if one wishes to make use of TCEs for commercial purposes, the person has to seek authority from the Attorney General. Therefore, the use of TCEs for educational purposes is not subject to any restrictions as long as the usage is non-commercial.

### *International obligations*

Foreign works are granted the same protection as local works by extension of the provisions of the Copyright Act under Section 49. These provisions are implemented through the Copyright Regulations of 2005. However, this extension of protection is restricted to copyright-protected works from countries that are party to international conventions to which Kenya is also a party. Kenya is party to several international treaties and conventions dealing with copyright and related rights, most importantly:

- The Berne Convention; and
- The WTO TRIPs Agreement

### **Berne Convention of 1886 (Paris Act 1971)**

Kenya is a member of the Berne Convention for the Protection of Literary and Artistic Works of 1886 (Paris Act 1971). The Copyright Act of 2001 incorporates provisions of the Berne Convention which provide for a minimum standard of copyright protection in Berne member states. However, the Kenyan Copyright Act contains no specific provisions in relation to the Berne Appendix. The Berne Appendix provides for a compulsory licensing regime for translation and reproduction of texts — a regime available only to developing countries. Under Section 26, the Act grants the exclusive right of creating adaptations and translations to the rights-holder, subject to the aforementioned copyright limitations and exceptions. One reason for the non-use of the Berne Convention Appendix in Kenya is, arguably, that the medium of instruction in educational institutions in Kenya is English. The compulsory licensing provisions of the Berne Appendix are useful only where the works are to be translated into a local language other than widely spoken languages such as English, Spanish and French.

### TRIPs Agreement of 1994

Kenya is a member of the World Trade Organisation (WTO) and was therefore required to comply with the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) by January 2000. It did, however, not meet the deadline in most aspects of IP. The Copyright Act of 2001 was passed and assented to in December 2001 to ensure that the copyright law was in line with existing international laws on copyright and related rights.

### WIPO Internet Treaties (WCT and WPPT) of 1996

Although Kenya participated in the WIPO Diplomatic Conference of 1996, which adopted the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), the country has not yet ratified these treaties. The Copyright Act has, however, made provisions to incorporate some sections of the treaties into Kenya's copyright law. For instance, Section 35 already contains far-reaching protection of TPMs which, as mentioned above, have the potential to become a major barrier to accessing digitised educational material.

### *Laws outside copyright*

Apart from the Copyright Act of 2001, there are several other laws that potentially have an impact on access to teaching and learning materials in Kenya. Such laws can be categorised as follows: education and training laws; library and archival laws; communication laws; and laws on museums.

### Education and training laws

Kenya's education and training laws affect access to knowledge directly and indirectly, in so far as they regulate access to education, which, by and large, guides individuals as to where and how to acquire knowledge and what knowledge to acquire. The relevant laws include, but are not limited to, the Education Act (Cap. 211), the Universities Act (Cap. 210B), the Board of Adult Education Act (Cap. 233) and the Council of Legal Education Act (Cap. 16A).

### Library and archival laws

Public libraries play a vital and unique role in assisting the independent learner and are key deliverers of literacy from the earliest age. The legislation in Kenya that governs libraries includes the Kenya National Library Service Board Act (Cap. 225) and the McMillan Memorial Library Act (Cap. 217).

### *Kenya National Library Service Board Act, Chapter 225 of the Laws of Kenya*

This legislation establishes the Kenya National Library Service Board, whose functions, among others, are to promote, establish, equip, maintain and develop

libraries in Kenya as a national library service. The Board further acquires books produced in and outside Kenya and such other materials and sources of knowledge necessary for a comprehensive national library. It also publishes the national bibliography of Kenya to provide bibliographical and reference services.

#### *McMillan Memorial Library Act, Chapter 217 of the Laws of Kenya*

This Act establishes the McMillan Memorial Library, the objectives and scope of which include the establishment, maintenance and development of a reference library, a reading room and a lending library in Nairobi. Furthermore, the library is mandated to circulate books.

#### **Communication laws**

The media play an important role as a source of information and education and entertainment. The following acts are relevant in this context:

#### *Kenya Communications Act 2 of 1998, as amended in 2008*

The controversial Kenya Communications Act has been widely criticised because it is generally seen as limiting access to knowledge. The Act gives the government the power not only to seize telecommunications equipment, but also to remove radio and television stations from the air at will. The law authorises the state-funded regulator, the Communication Commission of Kenya (CCK), to control all aspects of programming, from content to scheduling. It further gives sweeping powers to the Minister of Internal Security to seize broadcasting equipment as and when the Minister feels public tranquillity is threatened. Thus, this Act inhibits access to knowledge because it curtails journalists' freedom of expression and the independence of the media. The Kenya Communications (Amendment) Act of 2008 is being debated because of the foregoing and related issues.

#### *Media Act 3 of 2007*

This is an Act of Parliament for the establishment of the Media Council of Kenya. It also addresses the conduct and discipline of journalists and the media, as well as self-regulation of the media. The Media Council was established to promote and protect freedom and independence of the media and to promote professional standards among journalists. The Act's objectives of promoting freedom and independence of the media have the potential to play a key role in ensuring access to knowledge.

#### *Books and Newspapers Act, Chapter 111 of the Laws of Kenya*

This Act provides for the registration and deposit of books and newspapers, the printing of books and newspapers and the execution of bonds by printers and

publishers of newspapers. Significantly, the Act requires authors to deposit their works with the Registrar of Books and Newspapers, copies of which are sent to the National Archives and libraries.

#### Laws on museums

##### *National Museums and Heritage Act 6 of 2006*

This Act provides for the establishment of National Museums of Kenya whose functions, among others, are: to serve as national repositories for things of scientific, cultural, technological and human interest; to serve as places where research and dissemination of knowledge may be undertaken; and to protect and transmit the cultural and natural heritage of Kenya. It is quite clear from the foregoing that museums are seen as playing a key role in the preservation and dissemination of knowledge.

#### **4.2.2 Judicial and administrative decisions**

There are several copyright cases that have been decided by the Kenyan courts. Some of these cases could, however, not be accessed by the researchers as they are unreported in the relevant law reports and are not documented elsewhere.<sup>57</sup>

##### *Alternative Media Ltd v Safaricom, Civil Case 263 of 2004*

In this case, the plaintiff asserted ownership of copyright in an artistic work. The plaintiff, a media communication and advertising company, brought a suit against Safaricom, a mobile phone network in Kenya that dispenses mobile phone airtime to its customers through the sale of scratch cards. The plaintiff's case was that the defendant had used the plaintiff's artwork on scratch cards without the plaintiff's authority. The plaintiff claimed that the defendant had infringed the plaintiff's copyright and asked the court for compensation and to permanently restrain the defendant from committing further infringement.

The court held that the plaintiff had proved it was the owner of the copyright in the artistic works in issue and that the defendant had infringed this copyright. The court therefore granted an injunction to restrain the defendant from infringing the plaintiff's copyright. The defendant was ordered to destroy all infringing copies of the scratch cards. The court in this case addressed the issue of ownership of copyright and decided that the rights-holder has the exclusive right of reproduction of copyrighted works.

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57 Most of the cases, many of which are unreported or not officially published, are reported and analysed in B. Sihanya supra note 19. Cf. B. Sihanya 'Copyright law in Kenya' (in press, June 2010) *International Review of Intellectual Property and Competition Law*, Journal of the Max Planck Institute for Intellectual Property, Competition and Tax Law, Germany.

*Jiwani, Nevin v Going Out Magazine & Another, Civil Suit 336 of 2003*

The plaintiff in this case was the author and owner of the copyright in *Go Places Magazine*, *Go Places Restaurant Guide* and *Having Fun Magazine*. The plaintiff complained that the defendant infringed the plaintiff's copyright in *Go Places Magazine* and *Go Places Restaurant Guide* by reproducing and authorising the reproduction of artistic works and text without obtaining permission or licence. The artistic works in question were photographs, a logo, design and text from the plaintiff's magazine. The second complaint was that the defendant was passing off its magazine as being that of the plaintiff, thereby injuring and causing loss to the plaintiff.<sup>58</sup>

The defendant's case was that it had not infringed the plaintiff's copyright, as claimed, because: the plaintiff did not have copyright in the photographs, logo and textual script in question; and that even if the copyright was vested in the plaintiff, this did not preclude the defendant from creating similar works, provided the defendant had done so by working independently.

The defendant argued that for one to have copyright it was necessary for one to show that knowledge, judgment, labour and skill had been brought to bear and sufficient originality had been bestowed thereon. Furthermore, the defendant argued that: copyright does not confer monopoly in the authors and it was permissible for another person to reproduce the same work by independent endeavour; and that there was no offence in photographing an object that had been photographed previously by someone else. The defendant argued that the photographs belonged to Pavement Café, where it had acquired the photographs; the wording in dispute had been received from the client restaurant itself and did not belong to the plaintiff.

The court was persuaded that the plaintiff's works were copyrightable as sufficient labour and skill had gone into them by way of design, formatting, collection, photography and development. The court thus held for the plaintiff, saying that the defendant's work was a case of 'plain copying and reproduction of the plaintiff's work, including the errors therein'. It therefore refuted the defendant's argument that the work had been done by an independent mind. The court granted the plaintiff's application for an interim prohibitive injunction.

Most importantly for purposes of this report, the court addressed the issue of ownership and infringement. From this and other cases, it is clear that course packs consisting of copyrightable materials cannot be compiled by simply copying and packaging another person's works without permission. The compilation may be done only if the course pack contains material that was utilised in accordance with the aforementioned copyright exception, which allows two short passages of a

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58 Ibid.

copyright-protected work to be used without the permission of the rights-holder. In the case at hand, the plaintiff's actions did not fall within the scope of any copyright exception and limitation under the Copyright Act. Therefore, these actions would have required express authority from the rights-holder.

*Paul Odalo Abuor v Colourprint Ltd & Text Book Centre Ltd (2002)*  
(unreported)<sup>59</sup>

In this case, the High Court in Nairobi issued an ex parte order restraining Colourprint Ltd and Text Book Centre Ltd from printing, selling or distributing a book entitled *White highlands no more — a modern political history of Kenya*. Search and seizure orders were also granted. The plaintiff was permitted to enter the premises and inspect and photograph all documents and equipment relating to the printing, sale or supply of the book.

This case illustrates that courts in Kenya uphold the rights of copyright-holders as provided for under the Copyright Act. Once it is proved that a person has copyright in the work, the court may grant an order that will stop the distribution of the copyright works. The case also shows that infringement or piracy is institutionalised in Kenya and is not merely the work of streetwise actors or gangs. There is a market and huge demand for pirated products, especially where educational materials are concerned. The high demand for education, as discussed above, partly explains the high incidence of infringement and piracy.

*Margaret Ogola & 3 Others v David Aduda and Another (unreported)*<sup>60</sup>

Margaret Ogola, a medical practitioner, wrote a novel entitled *The river and the source*. It was, at one time, a literature set book for secondary school students in Kenya. The defendant authored a students' guide book to the novel and used, inter alia, the picture of a child from the cover of the original novel. Ogola and her publisher sued Aduda and his publisher for copyright infringement. In the interlocutory proceedings, the defendants pleaded fair dealing on the grounds of criticism and review. The court declined to grant an interlocutory injunction, arguing that there were triable facts. This case is significant, especially in relation to education, entertainment and cultural development: the defendant had used the plaintiff's work for purposes of review through a guide book for students, which is allowed under Section 26(1) of the Copyright Act in terms of fair dealing.

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59 Ibid.

60 Ibid.

*Music Copyright Society of Kenya v Parklands Shade Hotel t/a Klub House, Civil Suit 1458 of 2000*

The plaintiff in this case filed a suit against the defendant seeking an injunction restraining it from playing or broadcasting any music, either recorded or performed by a live band, which is the subject of an agreement between the plaintiff and its members. The application was based on the grounds that the defendant had continued to publicly perform music without obtaining the required licence from the Music Copyright Society of Kenya (MCSK). It further sought damages for infringement of copyright and conversion, together with costs and interest. The plaintiff simultaneously filed an application seeking a temporary restraining order pending the hearing and determination of the suit.

The defendant opposed the applications on the basis that the MCSK was not the sole licensing body of copyright in all musical works in Kenya and, further, that MCSK could enforce only the rights of members who had assigned their rights to MCSK. The defendant also argued that they had continually paid satellite broadcast provider MultiChoice Africa the requisite copyright fees and that a collection of royalties would amount to double taxation.

The court held that the plaintiff was not the sole licensing authority that enforces copyright in all musical works. According to the court, only the owner of copyright has the right to enforce compliance. The court did not grant the plaintiff the injunction sought on the basis that the plaintiff had not established a prima facie case with a probability of success and the defendant would suffer irreparable damage should the order sought be granted.

Collective management is recognised by copyright law, especially in areas where the individual rights-owner cannot collect royalties from users individually. The court, in this case, failed to address the copyright issues enshrined in the law and the judgment in this case is bound to have far-reaching effects on collective management in all areas of copyright, including reprographic rights.

As discussed above, the exceptions and limitations in the Copyright Act of 2001 are narrowly crafted. Users must usually obtain a licence to access the copyright-protected work to ensure they do not violate copyright law. It is not clear from the record, however, whether the defendant claimed to have obtained such a licence from another CMO.

Essentially, this case points to the problem of proliferation of CMOs or RROs. The existence of too many CMOs is detrimental to institutional practices and the ability to exploit licences. It defeats the purpose of having a one-stop centre for rights clearance if it is not clear who manages which rights.

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*Macmillan Kenya (Publishers) Ltd v Mount Kenya Sundries Ltd, Civil Suit 2503 of 1995*

The plaintiff brought a case against the defendant seeking judgment for, first, an injunction stopping the defendant from selling or offering for sale the Kenya Pictorial Tourist Map. Second, the plaintiff sought an order for delivery up of such maps or any map based on the Kenya Pictorial Tourist Map. Third, an inquiry was sought as to damages or alternatively an account of profits and payment of all such sums found and due upon completing such inquiry. Fourth, the plaintiff requested interest and the costs of the suit.

The plaintiff alleged that the defendant's map, Kenya Pictorial Tourist Map, infringed on its copyright in maps named the Kenya Tourist Map and Kenya Traveller's Map. The court, in granting the plaintiff's request, held that: infringement of copyright arises not because a person's work resembles another but because one has copied all or a substantial part of another's work.

The judgment in this case affirms that authors have exclusive rights of reproduction and that anyone who copies a substantial part of a copyright-protected work or the whole work will be liable to legal action. As a result of the limited scope of existing copyright exceptions and limitations, educational institutions and libraries may not reproduce all or substantial parts of a work for use by students if they have not obtained a licence.

#### **4.2.3 Summary of doctrinal analysis**

The copyright law in Kenya grants exclusive rights to the right-holders, subject to specific exceptions and limitations. In general, any third party who wishes to use the works has to obtain permission from the right-holders, which would be in the form of a licence or an assignment. Licences for reprography have to be taken out by educational institutions and libraries through a reprographic rights organisation, in this case KOPIKEN. The scope of protection is very broad and use of a copyright-protected work, even where the use is to facilitate access to teaching and learning materials, will therefore usually constitute copyright infringement.

The following factors, in conjunction with this strict copyright protection regime, further impede access to learning materials in Kenya:

- the current copyright law has narrow exceptions and limitations;
- access to digital learning materials via circumvention of TPMs and devices to facilitate access, are prohibited;
- the law has no clear provisions on incentives for building the commons (or the public domain);
- parallel importation is not allowed under Kenyan copyright law; and

- although the law has provisions for licensing through KOPIKEN, the provisions are narrow and have not been invoked to deal with the issue of access to learning materials and no records of decided cases on compulsory licensing are available.

The Kenyan copyright law complies with Kenya's obligations under the Berne Convention and TRIPs. It is noteworthy, however, that in some instances the protection awarded by Kenya's Copyright Act goes beyond what is required by the treaties and agreements. The legal protection of TPMs under Section 35(3) of the Copyright Act is arguably the most relevant example for the purposes of this report. This is because the legal protection of TPMs by means of anti-circumvention provisions further marginalises the already insufficient body of copyright exceptions and limitations, as TPMs do not usually distinguish between uses that require authorisation and uses that fall under one of the statutory copyright exceptions and limitations.

Judicial decisions in the area of copyright are scarce. One of the reasons advanced is the unwillingness of rights-holders to pursue copyright infringement through the court system. Lack of, or limited, knowledge on copyright and related rights is also a contributory factor. The courts, as discussed above, rarely address copyright issues. If they do, they either fail to apply the law as required or merely repeat, in a non-interpretive manner, what the law states. So far, there have been no decided cases on access to teaching and learning materials. The closest is the inconclusive case of *Margaret Ogola & 3 Others v David Aduda and Another*.

From the case of *Music Copyright Society of Kenya v Parklands Shade Hotel t/a Klub House*, it is clear that the courts recognise that users have to seek authority from rights-holders to use their works. Educational institutions and libraries are required to obtain a licence from the right-holders where possible, through the CMOs, in order to reproduce educational material, when reproduction does not fall under the exceptions and limitations in Section 26(1) of the Copyright Act.

It should be noted that the decisions of the higher court are binding on subsequent cases. So, where the court fails to properly address the legal issues at hand, such decision, unless overruled by the highest court, will affect subsequent cases.

### 4.3 Qualitative analysis

In order to assess the practical impact of copyright law and other laws on access to learning materials in Kenya, it was necessary to examine secondary materials on the subject in Kenya. This secondary literature review was then augmented by qualitative impact assessment interviews with selected subjects.

### 4.3.1 Secondary literature

The secondary literature we gathered covers various copyright issues, such as copyright protection, licensing and enforcement. It is notable, however, that some of the books are written by book publishers who look at copyright from the publisher's point of view and thus a (generally) protectionist perspective.

Henry Chakava, in his book *Publishing in Africa: one man's perspective*,<sup>61</sup> addresses book publishing in diverse works and fora, including the dependence of Kenya's book publishing industry on UK publishing houses. Chakava is an author, leading publisher and chairman of East African Educational Publishers (EAEP), the successor of the British Heinemann Educational Books. Chakava looks at the role of private publishing ventures, Africa's losses arising from the skewed international copyright regime, obstacles to the reading culture in Africa and book marketing, distribution and pricing. With regard to copyright, the author analyses African and international copyright noting that copyright laws in Kenya and Africa are generally not administered equitably. He argues that Africa has 'very little or nothing to sell to the outside world'.<sup>62</sup> According to the author, textbooks, which constitute nearly 90 per cent of Kenya's total publishing output, can barely travel within national boundaries, let alone outside Africa. Chakava observes that a large proportion of textbooks and fiction works are published by European publishers or their African branches, which means that copyright is essentially held by publishers in the North.

Chakava argues that rights-holders in the global North cling to their rights. Those who grant rights to their African counterparts limit these rights to a particular territory, so that works cannot be circulated or reprinted in other areas. Meanwhile, African authors do not have the capacity or experience to defend their copyright. However, NGOs such as the African Publishers Network have become more involved in the publishing industry and enforcement of copyright laws.

The author states that compulsory licensing is regarded by some as a tool that can be used to protect Kenya's economic, educational and cultural interests. Chakava is of the opinion that compulsory licensing should be applied where foreign (especially British) publishers have declined to publish textbooks locally or to issue licences for major textbooks.<sup>63</sup>

Relatedly, in *Copyright law and publishing in Kenya*,<sup>64</sup> John Chege discusses the evolution of copyright law in Kenya in the context of developments in printing technology and Anglo-American economic, political and cultural imperialism.

61 H. Chakava *Publishing in Africa: one man's perspective* (1996) East African Educational Publishers, Nairobi.

62 Ibid.

63 Supra note 63 at 75-94.

64 J. Chege *Copyright law and publishing in Kenya* (1976) Kenya Literature Bureau, Nairobi.

The author argues that the country's copyright regime has prevented the rise of indigenous publishing, which is outdone by foreign competition. He states that Kenya suffers from the 'illusory reciprocity' represented in the Berne and Geneva Conventions.<sup>65</sup> He is of the opinion that an abrogation of international copyright treaties, such as the Berne Convention and the Geneva Convention and a subsequent nationalisation of foreign publishing interests, might encourage growth of the local publishing industry.

In their book *Publishing and book trade in Kenya*,<sup>66</sup> Ruth Makotsi and Lily Nyariki expound on the difficulties experienced by Kenyan publishers in marketing, promoting and distributing books. The authors point to the fact that copyright law does not protect unpublished works from infringement. Compared to publishers, most authors are not in a financial position to institute lawsuits against those involved in plagiarism of unpublished manuscripts. The book also states that some university lecturers exploit students by asking them to carry out research and later the lecturers convert the manuscripts into their own publications. The authors contend that copyright law in Kenya does not safeguard the interests of such authors.

Ben Sihanya, in his article 'Copyright law, teaching and research in Kenya',<sup>67</sup> looks at the role of copyright in technological, economic and cultural innovation and in creativity and development, in Kenya. The author focuses on the development of copyright law, the implementation of the Copyright Act of 2001 and teaching and research on copyright in Kenya. He argues that Kenya's copyright law is largely Western-oriented as a result of colonialism, neo-colonialism and the fact that many of Kenya's economic and legal actors, who have shaped Kenya's copyright law, have internalised values and interests embodied in Western and international copyright law. According to the article, copyright-owners are losing millions of shillings due to infringement, piracy and counterfeiting. This he attributes to the fact that Kenya does not have a way of monitoring copyright transactions and the role of identifying infringers is largely left to the copyright-owners. Sihanya further argues that the penalties provided for copyright infringement are not sufficient to control infringement. He urges African governments to pursue copyright issues with the same vigour they show towards issues of IP and access to public health.

Marisella Ouma gives an overview of copyright law in Kenya in light of the enactment of the Copyright Act of 2001. She briefly analyses the impact of the then-

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65 See the Geneva Convention 1971.

66 R. Makotsi and L. Nyariki *Publishing and book trade in Kenya* (1997) East African Educational Publishers, Nairobi and Kampala.

67 B. Sihanya 'Copyright law, teaching and research in Kenya' (2005) *East African Law Journal* 2.

new law on rights-holders as well as on users.<sup>68</sup> In her article, 'Optimal enforcement of music copyright in Sub-Saharan Africa, reality or myth', the author gives an in-depth analysis of copyright protection and enforcement in the music industry in Africa.<sup>69</sup>

Sihanya, in *Constructing copyright and creativity in Kenya: cultural politics and the political economy of transnational intellectual property*, evaluates copyright and the infrastructure for literary creativity in Kenya.<sup>70</sup> In his research, the author finds that the public, private and non-profit sectors do not efficiently support training of authors, writing, publishing, distribution and access to literature. He also notes that the construction of literary copyright denies (budding) authors, composers and performers efficient and equitable recognition, compensation or protection. Free-riders exploit creativity and investment of skill, judgment, time, money and labour. Access by readers, authors and researchers is also constrained through technologies and laws such as the digital anti-circumvention laws enacted under the WIPO Copyright Treaty of 1996 (which Kenya has signed, but not yet ratified) and the Kenya Copyright Act of 2001. The author argues that the textured nature of copyright, creativity and sociocultural development require inter-disciplinary approaches among creative writers, cultural historians, political economists, IP lawyers and constitutionalists. Other proposals from the same author for reconstructing copyright and the infrastructure include conducting a cost-benefit analysis of the industry for efficient investment; strengthening community and mobile libraries; encouraging authors through training, prizes and commissions; facilitating international co-publishing arrangements; registering and documenting Kenyan creativity and copyright; and ensuring the Kenya Copyright Board operates efficiently and with integrity.

Nancy Karimi, the Chair of the Kenya Publishers Association (KPA), notes in her paper that the majority of people are ignorant about the existence of copyright relating to books, music and films and that the high level of piracy has become a barrier to the publishing industry in Kenya.<sup>71</sup> Karimi stresses the importance of copyright protection in the development of the publishing industry. A strong protection of copyright would be an important way of fostering the growth of knowledge, while contributing to the expansion of creative industries and protecting cultural diversity in developing countries. She argues that copyright

68 M. Ouma 'The Copyright Act 2001: a new era for copyright protection In Kenya' (2004) *UNESCO Copyright Bulletin*, July-September 2004.

69 M. Ouma 'Optimal enforcement of music copyright in Sub-Saharan Africa, reality or myth' (2006) 9:5 *Journal of World Intellectual Property Law* 592.

70 *Supra* note 19.

71 N. Karimi 'Copying exceptions and their impact on publishers in less developed countries' (2008) paper presented at the International Publishers Association 2008 Congress in Seoul, Korea.

exceptions should serve the needs of both users and creators in a fairly balanced manner. According to the author, the Kenya Copyright Act is long overdue for review in line with changes at the international level.

The idea that copyright law affects access to knowledge is captured by Marisella Ouma in a paper presented at the 3<sup>rd</sup> Annual Access to Knowledge Conference in 2008.<sup>72</sup> In this paper, Ouma argues that copyright laws and policies that only protect and promote the proprietary right of the copyright owner, without recognising the need to facilitate access to knowledge, can be detrimental.

As a result of the rampant piracy in the country, particularly of entertainment products (music and software), as well the alleged unwillingness of the government to deal with the problem, Kenya was mentioned in the International Intellectual Property Alliance Report in 2006.<sup>73</sup> The Alliance identified the following priority actions for Kenya in 2006: activating the Kenyan Copyright Board and providing dedicated staff for the Board; shutting down street vendors and exhibition halls selling pirated goods; banning importation of copyright goods except from rights-holders; seizing and destroying all pirated products within the country; copyright enforcement against duplicating facilities and Internet cafés using unlicensed products or providing piracy services; introducing, passing and aggressively implementing a new Counterfeit Goods Act; and, finally, combining offences in criminal charges.

Newspaper articles on copyright in Kenya mainly concentrate on the music industry or stories that are more appealing to the media houses than learning materials. One exception was a piece by Mwenda Micheni, a journalist. He wrote an article on licensing by CMOs — including KOPIKEN — that collect and distribute royalties from users such as libraries and, generally, educational institutions.<sup>74</sup> In another article, Mark Okuttah highlights the anti-piracy actions against cyber cafés in Kenya.<sup>75</sup> Okuttah notes that most cyber cafés in Kenya use Microsoft software without valid licences. The raids on the cyber cafés came after the expiry of a deadline set by the Kenya Copyright Board. During the raid, computers containing unlicensed Microsoft software were confiscated. Cyber café operators, Okuttah reports, are torn between legalising their Microsoft operating system, shifting to open source, or closing shop altogether following the crackdown on illegal software. The Microsoft initiative on fighting software piracy

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72 M. Ouma 'Law, technology and access to educational material' (2008) paper presented at the 3rd Annual Access to Knowledge Conference, 10-12 September 2008, Geneva.

73 International Intellectual Property Alliance '2006 Special 301: Kenya' 13 February 2006 at 467-468.

74 M. wa Micheni 'Copyright Board appoints team to collect royalties' (2008) *Business Daily*, Nairobi, 8 October 2008.

75 M. Okuttah 'Copyright Board takes piracy war to cyber cafes' (2007) *Business Daily*, Nairobi, 27 November 2007.

and counterfeiting of its products in Kenya has been widespread but discreet. A Nairobi businesswoman mentioned in the article attributed the use of pirated software to ignorance.<sup>76</sup>

### **4.3.2 Impact assessment interviews**

To gain qualitative insights into the Kenyan copyright environment in relation to access to learning materials, representatives of the following organisations were interviewed: government policymakers, including enforcement entities; educational communities; and copyright-holders.

#### *Policymaking/government/enforcement entities*

- the Kenya Copyright Board (policymaker and enforcement body)
- the Ministry of Higher Education, Science and Technology

#### *Educational communities*

- Strathmore University (private university)
- University of Nairobi (public university)
- Kenya National Library Service (KNLS)
- university libraries

#### *Copyright-holders*

- Kenya Publishers Association (KPA)
- Mountain Top Publishers
- Jomo Kenyatta Foundation
- Writers' Association of Kenya (WAK)
- KOPIKEN (collective management organisation)
- National Book Development Council (NBDC)

#### *Policymaking/government/enforcement*

The Kenya Copyright Board is a state corporation with a mandate to administer and enforce copyright in Kenya and act as a focal point within the copyright industry. The Board is mandated to review and propose changes to copyright law and it thus has a central role in policymaking. The respondents interviewed at the Kenya Copyright Board were lawyers specialising in copyright and related rights. One respondent was the Executive Director of the Board (and also one of the authors of this study) and the other was the head of the enforcement unit within the Board. (It

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76 Ibid.

was not possible to secure interviews with other law enforcement agencies, such as the police, lawyers or judicial officers.)

The other interviewee in this category was from the Ministry of Higher Education, Science and Technology, which has an oversight role regarding institutions such as the University of Nairobi. The Ministry is responsible for formulating education policies that have an impact on access to teaching and learning materials. The respondent was a senior education officer.

The Kenya Copyright Board interviewees said the Board does not have any empirical data on the effect of copyright on learning materials. The administration and enforcement of copyright have to date not been carried out effectively in Kenya, but the Board argues that once the law is effectively enforced copyright will become an issue in relation to access to teaching and learning materials. This is because the exceptions and limitations granted under the Copyright Act of 2001 are narrow and do not sufficiently allow for reproduction of materials for teaching and learning purposes. The current regime does, however, provide for licensing schemes to allow for access by universities and other institutions of learning. At the time of the interviews in late 2008 and early 2009, the Board was reviewing the law. One of the amendments the Board proposed was the expansion of exceptions and limitations, especially for educational and library use. The formulation of copyright law and policy is done by the Kenya Copyright Board, through the State Law Office and in consultation with the relevant government ministries and stakeholders.

The respondents in this category said that while there was no copyright policy in place, there was a draft Intellectual Property Policy awaiting adoption. The policy seeks to provide guidelines for optimum utilisation of intellectual property rights (IPRs) in Kenya to ensure that IPRs significantly contribute to national growth by improving the technological, industrial, social and economic development of Kenya. The policy would establish the procedures for effective facilitation of intellectual creation, protection, commercialisation and enforcement of IPRs in the best interests of the public, the creator and the research sponsor.

Although no survey has been carried out by the Kenya Copyright Board on the impact of the existing copyright law on access to teaching and learning materials, one of the Board interviewees said there is a correlation between the Copyright Act and access to teaching and learning materials, because the right to reproduce for teaching and learning purposes is limited under the Act.

Meanwhile, one of the interviewees in this category argued that copyright enforcement is not satisfactory, as there are very few convictions, despite the many cases prosecuted. On the other hand, the respondent was of the opinion that access to learning materials should be enhanced, via the following measures:

- wider and better-defined provisions within the Copyright Act on limitations and exceptions;

- more efficient licensing schemes; and
- changing the government's tax policies to promote the book trade within the country.

With regard to the introduction of licensing schemes by KOPIKEN, one of the Kenya Copyright Board respondents noted that there were many universities that contacted the Board's office to determine the basis of the licensing regime and who were apparently unaware of the licensing provisions in the Copyright Act. Universities even admitted to photocopying material without consideration of the amount of photocopying that might be allowed by law and providing the copies to their students. Since they were not aware of the legal provisions under the Act, they assumed that it was within the law. The cost of these photocopies was covered by institutions as well as students. This reinforces the earlier assertion that the impact of copyright on access to teaching and learning materials will be felt only once the law is properly enforced.

The respondents in this group also pointed out that there are many socioeconomic factors that have an impact on access to knowledge. Some of these factors are perhaps linked to copyright law (eg, price-related issues) and others are clearly not. For instance, due to high levels of poverty and the high cost of books, there are instances where users have to prioritise their needs and access to learning materials is considered less important than health, food and other basic necessities.

### *Educational communities*

The interviews in this category uncovered the fact that the public University of Nairobi produces some of the materials used by its students and lecturers. However, its students rely heavily on foreign literature, especially in specialised courses such as engineering, law and business studies. Strathmore University, a private institution, mainly uses publications from outside the university and prepares course packs for students.

The university respondents noted that the institutions now offer teaching and learning materials in hard and soft copies, which may be accessed on and off campus. The universities have introduced e-learning to accommodate users who do not have direct access to libraries. There are, however, certain challenges in terms of access, such as cost and limited availability, especially at the University of Nairobi. Certain interviewees, especially students who have some knowledge of copyright law, attribute these challenges to the current law. Some said that copyright law does not promote access in any way. Others said that while the law facilitates access through limitations and exceptions to some extent, the limitations and exceptions in relation to the use of educational materials are too narrow.

Most of the respondents had a general idea as to what copyright is and attempted to describe the nexus between copyright and access.

Few respondents were aware of the existence of university intellectual property policies, although both Nairobi and Strathmore Universities have such policies. None of the interviewees was involved in the process of formulating the policies. The policies primarily seek to protect and promote the interests of creators, as well as the relevant universities and are not framed to promote access.

It is worth mentioning in this context that the University of Nairobi has developed policies that ensure the provision of low-priced editions of various books at the university's UNES Bookstore in order to provide access to otherwise expensive texts. However, even the reduced prices are apparently still prohibitive for many students.

In general, respondents in this educational communities category recommended the following to enhance access to teaching and learning materials:

- review copyright law in order to balance the interests of rights-holders and access by users in educational institutions;
- expand the educational limitations and exceptions under the Copyright Act;
- increase the volume of teaching and learning materials within educational institutions;
- expand the use of ICTs for access to learning materials;
- reduce the cost of educational books and ICT equipment; and
- provide government subsidies for the production of educational materials at tertiary level.

### *Copyright-holders*

From the interviews in this category, it was clear that rights-holders expect users of their materials to pay for the use of their works. Consequently, KOPIKEN, the collective management organisation, is currently negotiating licences with various universities and other institutions of higher learning to enable these institutions to use the works, on a royalty-paying basis, within the confines of the copyright law.

Rights-holders argue that copyright is not strictly enforced and, unlike the educational communities, rights-holders are of the opinion that the existing copyright exceptions and limitations are sufficient. One interviewee even suggested that the scope of exceptions and limitations should be reduced. Rights-holders decry the lenient penalties for copyright infringement and argue that copyright law in Kenya does not confer adequate protection to rights-holders. To show the extent of the problem, they point to the high levels of unauthorised use of their work. They feel copyright does not impede access to teaching and learning materials.

Very few of the interviewees could concretely relate copyright law to access to teaching and learning materials. This may be one of the reasons why rights-holders are of the opinion that copyright does not hamper access to teaching and learning materials.

Lack of, or limited, knowledge of copyright by rights-holders was also evidenced by the absence of copyright litigation initiated by the interviewees' entities.<sup>77</sup> One interviewee mentioned that his organisation had been involved in such litigation, in relation to HIV drugs — meaning that the interviewee was ostensibly confusing copyright with patents.

The general perception among copyright-holders is that, despite the existence of copyright law, protection is still under-achieved because of poor implementation. Rights-holders interviewed recommended the following:

- strict law enforcement, copyright community policing and the fostering of a responsible public;
- mitigation or subsidisation of the cost of production to encourage the generation of teaching and learning materials;
- CMOs, including RROs, issuing licences to learning institutions that would allow them to photocopy in return for royalties;
- various forms of incentives — eg, awards — to encourage the creation of learning materials; and
- review of the Copyright Act to better provide for digital works.

### 4.3.3 *Summary of qualitative analysis*

It became apparent in the secondary literature review component of the qualitative analysis that most of the literature on copyright in Kenya addresses copyright matters from a rights-holder's perspective and focuses on the enforcement of rights. The literature makes only limited reference to permitted uses under copyright exceptions and limitations contained in the Copyright Act.

The impact assessment interviews found that for some stakeholders, copyright in Kenya is an impediment to access to teaching and learning materials due to its narrow educational limitations and exceptions. Others do not see copyright as an impediment to access because, they say, it provides for access without infringement through exceptions and limitations and through licensing schemes.

According to rights-holders, copyright infringement is a major problem, in that it affects rights-holders who publish books for the local market and has an impact on creativity, as authors may not be motivated to produce relevant materials.

<sup>77</sup> It is notable that the slow process of litigation could also be a contributory factor leading to the dearth of copyright cases in Kenyan courts.

Generally, it was observed from the interviews that knowledge of copyright and its impact on teaching and learning materials is limited. Several interviewees were not familiar with copyright law and the flexibilities it offers in relation to access.

The interviews also uncovered the view that there are other factors, not necessarily primarily attributable to copyright, that are limiting access to teaching and learning materials in Kenya. These factors include the cost of learning and teaching materials, a poor reading culture and attendant socioeconomic factors. Additional access-limiting factors include the high student population and the scarcity of authors writing educational materials. Although local books are often fairly priced — while foreign works are unaffordable — the majority of the population still cannot afford to purchase books.

From the interviews, it was evident that ICTs could make a major contribution to enhancing direct access to teaching and learning materials. The Internet and other electronic resources are used for research and teaching. Lecturers in public and private universities use electronic resources such as the Internet to access electronic journals and related materials.

However, this ICT-based access is limited, especially in public universities, due to limited (or lack of) connectivity, slow Internet speed and limited equipment. Private universities, however, have Internet hotspots where any student can connect a laptop and access educational materials from the institution's website.

ICT innovations within the universities and other institutions of learning could improve access further by lowering the cost of teaching and learning materials and widening the scope, thus making materials accessible to more students within and outside the institutions of higher learning. However, as mentioned earlier, the use of digital resources is potentially undermined at present by the Copyright Act's protection, without clear exceptions, of technological protection measures (TPMs) and by the lack of provision for distance learning or e-learning.

#### **4.4 Gender-specific findings**

Among the interviewees, there were those who understood gender to mean biological differences between men and women. Others defined gender as the differences between men and women in terms of the social construct of roles assigned to them based on their sex. It was found that, to some extent, social and income disparities between males and females have an impact on creativity and on access to learning materials in Kenya. It was found that the superior positions and resources of males often give them more opportunities than females. And it was found that the ratio of men to women in most public institutions was between 1:1 and 3:1. In most cases, however, not much attention had been given by the interviewees to gender disparities.

With respect to the copyright law itself, respondents felt that there were no gender issues to be addressed in framing legislation, because copyright law is seen to be gender-neutral. And interviewees were unable to cite examples of how the implementation of copyright law, or practices in relation to it, revealed or perpetuated gender differences.

However, gender issues have been central in the formulation of education policy. For instance, admission rules at some universities allow for female students to be admitted with one percentage point lower than the set cut-off mark for admission. This is meant to encourage more female students to register at the public universities in Kenya. In addition, the Ministry of Education has a policy governing the generation of school textbooks, in line with the government's overarching Gender Policy, whereby authors are proscribed from entrenching gender stereotypes in the content of their works. The Ministry also collaborates with other partners to reduce impediments that may hinder girl-child education. Tuition fees are provided for girls who obtain placement within national secondary schools.

Several other steps have been taken by government to ensure that gender disparities are addressed, particularly with regard to education policies. Some of these are: the Re-entry Policy that permits the resumption of school by girls who become pregnant; the government provision of sanitary towels to girl students; and the Affirmative Action in Arid and Semi-Arid Regions programme to promote the welfare of the girl-child. These policies ensure enrolment, retention, completion of studies and the proliferation of the principle of equality.

Given that the initial interviews conducted for this report failed to generate significant inputs on the possible intersection between copyright, gender and access to learning materials, a round of follow-up interviews with a specific gender focus was undertaken, with specialised consultative assistance from a gender expert.<sup>78</sup>

The team decided upon a participatory interview approach for the gender follow-up interviews. (The initial interviews had been conventional question-and-answer, semi-structured qualitative interviews.) The participatory approach aims to achieve an element of transformation in the interviewee and requires the interviewer to employ elements of devil's advocacy and information sharing.<sup>79</sup> The Kenyan team updated its interview guide and the revised guide contained general gender-related

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78 The authors gratefully acknowledge inputs into the gender follow-up interview process from Salome Omamo, research associate with Own and Associates in Nairobi, who served as the ACA2K project's gender consultant.

79 The participatory interview also involves the use of questions aimed at getting explanations and clarifications. The interviewer is also required to use reflective summaries during the interviews; to give suggestions, indicate agreement, provide reassurance and guide the respondent.

questions for policymakers, educational communities, copyright-holders and enforcement agencies.

This follow-up interview phase presented various challenges. It was found that even with the restructuring of the interview questions and modification of the approach used to interview the respondents, it was difficult to get information on gender. Gender seemed to be a concept that was hardly understood. The respondents gave short answers and not much could be done in terms of the follow-up questions and generating a participatory interview.

There are several possible explanations for the challenges the Kenyan researchers faced. Some interviewees may have been confused by and perhaps uncomfortable with, the need for subsequent interviews. In fact, some respondents who had already been interviewed in the first round of the Kenyan research declined a second interview, as they were of the opinion that they were unlikely to have anything to add beyond what they had given during the first interview.

Moreover, conducting gender research through interviews is very difficult and inherently complex. Extensive training and fieldwork experience (beyond the scope and human resource capacity of the ACA2K project) are necessary for fully effective research using participatory interviews. It is also often necessary to build longer-term relationships between researchers and stakeholders for this kind of research to yield dividends.

Another challenge was the dearth of women in copyright policymaking positions in Kenya. It is a matter for speculation whether and how copyright and access policies might be different if there were more women occupying positions of influence over policymaking. Ideally, to get a meaningful gender perspective on the research project, it would have been advisable to mostly interview women, as they are the ones presumed to be disadvantaged in relation to access to learning materials. But for the policymaking/government/enforcement interview category, this was not possible in Kenya.<sup>80</sup> The fact that women do not typically occupy positions of influence over copyright and access to learning materials in Kenya is, however, itself an interesting and important observation about the gender dynamics affecting the issues under investigation. There are, however, important exceptions to this general observation, including the fact that the current Executive Director of the Kenya Copyright Board is a woman. She is currently involved in this research project and is a co-author of this chapter. Her experience could offer insights into possible strategies for increasing the proportion of women in positions of influence over copyright policymaking and concrete steps that may be taken toward empowerment and sustainable change.

Some of the findings from the Kenyan follow-up interviews were as follows.

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80 S. Omamo and M. Ouma *ACA2K and gender guidelines* (2009) unpublished document, ACA2K project, March 2009.

#### **4.4.1 Policymaking entities**

Kenyan policymakers consulted in the follow-up interviews reaffirmed their statements from the first round of interviews that, to some extent, income disparities between men and women have an impact on creativity and access to learning material.

It was said that, at the institutional level, merit overrides gender in terms of training opportunities and that, in theory, access to education is equal to both men and women. However, in relation to learning materials, interview respondents opined that women have less access due to ingrained cultural denigration.

#### **4.4.2 Educational communities**

Interview respondents reaffirmed their earlier view that they did not see any link between gender and copyright, but that there are gender issues at play in terms of access to learning materials and that these issues are primarily social and economic. For instance, it was noted that most communities favour the education of the male child even at the expense of the female child, for various (unacceptable) social, cultural and economic reasons. This creates disparities in access to education, which is carried over from the lower levels of education to the universities. Furthermore, in Kenya men generally have more resources, which can translate into better access to education.

However, it was pointed out that the Higher Education Loans Board (HELB), which grants educational loans, is helping to increase women's access to university education, as the HELB loans are disbursed on merit. Interviewees also pointed to policies to improve gender balance within universities, such as the public University of Nairobi's policy that provides for the admission of women students with grades 1 per cent lower than the admission requirement.

Access to university libraries, computers and Internet resources was said to be open to all who have access to the university. The respondents said that these facilities are used equally by men and women as the environment is seen to be non-discriminatory. They also noted that there was no difference in availability of teaching and learning material between the male and female students. Significant questions remain unanswered, however, suggesting the need for follow-up research. For instance, what are the societal obligations on women that might affect their ability to access teaching and learning materials on campus? And to what extent are household responsibilities that are typically borne by women, such as childcare and housekeeping, starting to be shared by men? How are these societal and access issues different for married women and mothers, compared to single women without children?

It was said by some interviewees that gender roles have an impact on choices of subjects for academic study, which in turn is likely to have an impact on access to different kinds of learning materials. For instance, women are expected to take the 'soft' courses, such as arts and nursing, while the 'hard' courses that are typically more financially rewarding, such as engineering and medicine, have more male students. And it was speculated that access to learning materials may be more readily available in courses such as engineering and medicine than in the female-dominated courses.

Interviewees reported that photocopying of educational material was done by students as well as lecturers, regardless of gender. However, at Strathmore University some said that the female students do more photocopying than the male students, but the reason for this was not clear. One (untested) hypothesis may be that male students are more financially able to purchase learning materials and female students' generally poorer economic circumstances require more reliance on the lower-cost access channel provided by photocopying. Further research into such a hypothesis would be beneficial.

#### **4.4.3 *Copyright-holders***

It was said that there are more male than female authors in Kenya and consequently, more male than female holders of copyright in learning materials. Some felt this might just be a cyclical reality. But other interviewees said that because there was poorer access to learning material for female children (due to negative cultural biases and practices) it could be assumed that this inferior access (as readers) to learning materials would result in more limited production as authors of learning materials.

#### **4.4.4 *Conclusion from follow-up interviews***

As with the first round of interviews, the responses did not establish very much in the way of clear intersections between gender, access and copyright in Kenya. However, it was found that gender differences do almost certainly generate differences in access to learning materials and that, accordingly, there are elements of the intersection between gender and materials access and between gender and copyright, that would benefit from further research.

### **4.5 *Conclusions and recommendations***

The research found that copyright is indeed one of the factors that can affect access to teaching and learning material in Kenya. The rights of copyright-holders are very broad in the law and the legal exceptions and limitations are very narrowly constructed. This does not facilitate maximum access to teaching and learning

material. In addition, while ICT potentially enhances the dissemination of teaching and learning material, it is hampered by economic and technical constraints — and is potentially undermined by legal protection of anti-circumvention activities in the Copyright Act. Also, the possible intersection of gender dynamics, learning materials access and copyright-related practices is not currently on the agenda of Kenyan copyright stakeholders.

The copyright law in Kenya has so far not been strictly enforced, allowing users a reasonable degree of access through photocopying, which in most cases amounts to infringement under the current copyright law. However, as the existing legal rights of copyright-holders become more effectively enforced, they could significantly impede access to teaching and learning material. Already, with the establishment of CMOs, educational institutions and libraries are starting to have to obtain licences to reproduce work for educational purposes — an indication of increased enforcement by right-holders. The ongoing legal reforms provide a window for redefining statutory exceptions and limitations in favour of access to learning materials.

Based on the empirical evidence presented in the previous sections, the Kenyan team makes the following recommendations focusing on regulatory and legal reforms as well as recommendations that are not of a regulatory or legal nature.

Section 26 of the Copyright Act provides limitations and exceptions to the exercise of exclusive rights by the copyright-owner, including a ‘fair dealing’ provision in Section 26(1)(a). However, the fair dealing provision — for purposes of criticism, review, scientific research, private use and reporting of current events — is uncertain at present due to lack of formal interpretation. Meanwhile, the other exceptions are quite limited and narrowly drafted, especially in relation to access to teaching and learning material.

The Section could be revised to cover the following:

- the Section could include provisions for people with disabilities, such as exceptions to allow for access by the visually impaired;
- Section 26(1)(d) provides for the exclusion from protection of work consisting of not more than two passages of a work for educational purposes. It is appropriate to review this provision to allow for the use of increased amounts of works for educational purposes, such as in course packs, instead of limiting this to two short passages;
- the Section could better specify the provisions relating to non-commercial library and educational use. Section 26(1)(h) currently provides for reproduction of copyright-protected works, under the direction of the government or non-commercial libraries and documentation centres, where reproduction is deemed

to be in the public interest. This has the potential for narrow interpretation, locking out users where there is deemed to be no public interest;

- exceptions and limitations are needed in relation to non-commercial digitisation of copyright-protected works for archival purposes and library use; and
- the exceptions and limitations could include all educational institutions and libraries and not be limited to those established under the Education Act.

Section 35(3) makes it an infringement to circumvent TPMs. The law should be reviewed to ensure that it does not negate teaching, learning and fair dealing exceptions and limitations. Amendments to this Section could include the following:

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

Both the University of Nairobi and Strathmore University have intellectual property policies, but the policies are silent on copyright and access to knowledge and only acknowledge the rights of the rights-holder. The policies could be re-examined to ensure that, among other things:

- copyright awareness creation is included in the policies formulated and in the policy formulation process, so members of the university community become increasingly aware of the copyright exceptions and limitations that are relevant to them as users in an educational setting; and
- students and faculty have increased access to digital content generated by their respective institutions.

Policymakers such as the Kenya Copyright Board and the Ministry of Higher Education, Science and Technology could formulate clear policies on copyright and access to teaching and learning material, appropriately bolstered by further empirical studies. There is a need to ensure that the copyright law and other laws do not impede the right of access to knowledge, but rather facilitate it. Every learner in Kenya — male or female, able-bodied or visually impaired, on-campus or learning from a distance — should have equal access to education and tools such as books, libraries, journals and digital content. These policies may be used to guide and inform the amendment of the Copyright Act and other laws. Among other things, the ongoing debate on the National Intellectual Property Policy provides

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an opportunity to address access to educational materials across many sectors via various legal and regulatory means. As mentioned above, the Copyright Act of 2001 provides for the criminalisation, without exception, of circumvention of TPMs, even in cases of fair dealing and use by people with disabilities. The Ministry of Higher Education, Science and Technology, as well as the Kenya Copyright Board (in the State Law Office), could ensure that there is a policy that provides access for all, including the visually impaired. This will thus help to drive the push for legal exceptions to the current provisions prohibiting circumvention of TPMs.

The Ministry of Higher Education, Science and Technology could also formulate policies that ensure government provides the necessary teaching and learning materials at tertiary level. The provision of universal primary and secondary education is a step in the right direction, but needs to be complemented with the provision of books and other relevant learning material at tertiary institutions. Although affirmative action raises the number of women enrolled in higher education institutions, it is important to put policies in place that ensure the girl-child is not disadvantaged at any level within the education system. A policy change could ensure that once students enter tertiary institutions they have maximum access to learning materials without any impediment. This would include the provision of affordable books locally, especially for highly specialised areas where books are not available locally. Also, ICT forms an integral part of access to teaching and learning materials. It is not enough to create general policies for the incorporation of ICT; a targeted policy could make it mandatory for institutions to provide tools such as computers and Internet access.

The National Book Development Council (NBDC) recognises that the information base in a country is crucial for self-identity and cultural preservation. The Council further recognises that the country does not have a strong reading culture, as research indicates the majority of Kenyans rarely read beyond their formal education. In order to foster personal and national development, the NBDC, in conjunction with the Ministry of Higher Education, Science and Technology, could create a policy that promotes a book-reading culture within the country. Also, the local publication of books should be encouraged through government-subsidised printing services where publishers have their own printing presses.

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