

Chapter 8

South Africa

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8.1 Background

South Africa is the world's 25th-largest country by surface area,¹ and 24th-largest by population.² It is located at the southernmost region of Africa and divided into nine provinces: Limpopo, North West, Gauteng, Mpumalanga, KwaZulu-Natal, Free State, Northern Cape, Western Cape and Eastern Cape.³

South Africa's colonial past dates to the 16th century. Slavery was widespread by the 17th century and was not abolished until the mid-19th century.⁴ Racial discrimination was rampant during the apartheid era between 1948-94, when South Africa was governed by the National Party.⁵ After protracted negotiations, the first democratic elections were held under an Interim Constitution in 1994. This negotiated transition from apartheid to democracy has been hailed as both 'one of the most astonishing political achievements of our time' and 'a miracle.'⁶ Since 1994 the government has been led by the African National Congress (ANC), which won democratic elections in 1999, 2004 and 2009. Since 1994 the government has pursued democratisation, socioeconomic change and reconciliation.

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

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

3 Section 103(1) of the South African Constitution.

4 Government Communication and Information System (GCIS) *2006/2007 South Africa yearbook* (2007) at 31.

5 *Ibid* at 31-44.

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

As of July 2008, South Africa's population was estimated to be 48.7 million, with 79.2 per cent of the population being black African, 9 per cent 'coloured', 2.6 per cent Indian and 9.2 per cent white. The country has 11 different official languages.⁷

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

South Africa's national budget for 2008/09 provided for government expenditure of ZAR716 billion,⁸ of which ZAR121.1 billion was set aside for educational purposes.⁹ South Africa spends more than 5 per cent of the country's GDP on education. This educational expenditure (as a proportion of GDP) is roughly at OECD levels¹⁰ but falls short of the 6 per cent figure recommended by UNESCO for developing countries. Almost 17 per cent of total South African government spending is allocated to education. Both aforementioned proportions for educational expenditure in South Africa (percentage of GDP and percentage of total government spending) have been declining in recent years. The absolute amount spent on education has, however, risen significantly in this time. In spite of all these efforts, the performance of South African learners in comparative tests with other countries remains poor.¹¹

South Africa has a single national education system, which is managed by the national Department of Education (DoE) and the nine provincial education departments.¹² The education system is divided into three stages, namely General Education and Training (GET), Further Education and Training (FET) and Higher Education (HE). The GET stage begins with Reception Year (Grade R) and is capped at Grade 9. There is an equivalent Adult Basic Education and Training

7 Section 6 of the Constitution of the Republic of South Africa of 1996.

8 ZAR = South African Rand, which at the time of writing was valued at approximately ZAR7.5 to US\$1.

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

10 In 2005, the Organisation for Economic Cooperation and Development (OECD) average expenditure on educational institutions, as a percentage of GDP, from public and private sources was at 5.8 per cent, see OECD *Education at a glance 2008: OECD indicators* (2008) chapter B indicator B.2. Available at http://www.oecd.org/document/9/0,3343,en_2649_39263238_41266761_1_1_1_1,00.html [Accessed 30 March 2009].

11 OECD *Reviews of national policies for education: South Africa* (2008) at 129.

12 After the initial drafting of this report, the Department of Education was split into the Department of Basic Education and the Department of Higher Education.

(ABET) qualification. The FET stage begins at Grade 10 and is capped at Grade 12. The HE stage consists of a range of degrees, diplomas and certificates up to and including postdoctoral degrees. Only Grades 1 to 9 are compulsory. Learners usually begin Grade 1 at the age of 6. Therefore, if their studies are uninterrupted and they complete a grade each year, they should complete Grade 9 at the age of 14 or 15.

By mid-2007, there were 26 592 public schools in South Africa and 23 HE institutions. Altogether, 12.3 million learners were in South Africa's education system.¹³ The number of children aged between 5 and 14 by mid-2007 was estimated to be 10 088 100.¹⁴ It is said that the gross enrolment rate is at 100 per cent at primary school level and still very high up to Grade 9. The OECD averages are at 98.5 per cent and 81.5 per cent respectively.¹⁵ These figures indicate very high levels of access to the compulsory stage of formal education in South Africa.

However, older members of the population who were of school-going age during the colonial and apartheid eras had much less access to education. And the need to correct the economic distortions due to the education and skills deficit of the majority of the older population remains one of the greatest challenges facing the government today.¹⁶ Largely as a result of past poor access to education, there are high levels of illiteracy. For example, in 2004 it was said that at least 3 million adults were completely illiterate and between '5 to 8 million were functionally illiterate — unable to function adequately in the modern world due to under-developed reading and writing skills.'¹⁷

According to the 'Development Indicators 2008' issued by the South African Government, the Gender Parity Index [GPI] for total school enrolment (Grade 1 to Grade 12) indicates that gender parity has been achieved. The 2007 GPI for secondary education shows a disparity in favour of girl learners, while for primary education the picture is reversed, with more boys in primary schools than girls.¹⁸ The 'Development Indicators' do not provide similar statistics or analysis for

13 Supra note 4.

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

15 Supra note 10.

16 B. Khalima-Phiri supra note 6 at 4.

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

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

tertiary education. The United Nations has however compiled the following data for South Africa:¹⁹

Table 8.1: Gender Parity Index in tertiary level enrolment in South Africa

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

(last updated: 14 July 2008)

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

According to the International Monetary Fund (IMF), South Africa has the world's 25th-largest economy by GDP (PPP).²⁰ This makes South Africa the leading economy in Africa and a leader for developing countries on the world stage.²¹ South Africa's economy has demonstrated sustained growth that recently reached an all-time high.²² The country's tax collection and financial and debt administration are lauded by the World Bank as following 'international best practice'.

That said, a large portion of the population remains steeped in dire poverty. Former President Thabo Mbeki said South Africa has two economies or nations, 'one nation, white and rich and the other, poor and black.'²³ Unemployment in September 2007 stood at 22.7 per cent,²⁴ and still remains very high. Efforts are needed to 'correct the distortions that the apartheid policy created within the economy', such as the 'exclusion from the formal, "first" economy, the education and skills deficit of the majority of the population, the racially biased distribution of wealth, services and infrastructure and worsening poverty amongst the majority of its black population.'²⁵

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

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

21 World Bank *supra* note 6.

22 T. Contogiannis 'Economic growth: constraints and prospects for the South African economy' (2007) 35 *Discourse* at 42; GCIS *supra* note 4 at 157.

23 W.J. Breytenbach 'The Presidencies of Nelson Mandela and Thabo Mbeki compared: implications for the consolidation of democracy in South Africa' (2006) 36 *Africa Insight* at 177.

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

25 B. Khalima-Phiri *supra* note 6 at 4.

8.2 Doctrinal analysis

8.2.1 *Statutes and regulations*

Primary legislation: The Copyright Act 98 of 1978

Historical background

The current Copyright Act 98 of 1978 stems from the British Copyright Act of 1911, which was enacted in South Africa under the title 'Imperial Copyright Act'.

South Africa did not accede to any of the international copyright treaties created from the 1940s onwards, with the exception of the administrative provisions of the Paris text of the Berne Convention adopted in 1971. Specific requirements incorporated from the Berne Convention include:

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

Eligibility for copyright

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

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

Section 2(2) requires works other than broadcasts and programme-carrying signals to be reduced to material format, recorded, represented in digital data or signals or otherwise. A potential broadcast is not eligible for copyright until it is actually broadcast and a programme-carrying signal must be transmitted by satellite in order to qualify for protection.

Save for cinematograph films which may be registered at the copyright-holder's discretion (it is optional), copyright subsists automatically in all other works, provided that the work is eligible for copyright. Registration of copyright in cinematograph films is provided for by the Registration of Copyright in Cinematograph Films Act 62 of 1977.

Exclusive rights

The Copyright Act vests exclusive rights to do or authorise specific acts in respect of a work with its copyright-holder. In the absence of a valid exception to the rights, or permission from the copyright-holder, the exercise of any of the exclusive rights by anyone other than the rights-holder qualifies as copyright infringement. Table 8.2 outlines key exclusive rights in the South African Copyright Act. Whilst any of the works listed may qualify as knowledge, literary works are the most important category for the purposes of this study, in the context of learning materials.

Table 8.2 Key exclusive rights in the South African Copyright Act

Section	Work	Exclusive rights
6	Literary or musical works	<ul style="list-style-type: none"> (a) Reproduce; (b) Publish; (c) Perform; (d) Broadcast; (e) Transmit in a diffusion service unless such service transmits a lawful broadcast, including the work, and is operated by the original broadcaster; (f) Make an adaptation of the work; and (g) Do, in relation to an adaptation of the work, any of the acts specified in relation to the work in (a) to (e) above.
7	Artistic works	<ul style="list-style-type: none"> (a) Reproduce; (b) Publish; (c) Include the work in a cinematograph film or a television broadcast; (d) Cause a television or other programme, which includes the work, to be transmitted in a diffusion service, unless such service transmits a lawful television broadcast, including the work, and is operated by the original broadcaster; (e) Make an adaptation of the work; and (f) Do, in relation to an adaptation of the work, any of the acts specified in relation to the work in (a) to (d) above.
8	Cinematograph films	<ul style="list-style-type: none"> (a) Reproduce including making a still photograph; (b) Cause the film, in so far as it consists of images, to be seen in public, or, in so far as it consists of sounds, to be heard in public; (c) Broadcast; (d) Cause the film to be transmitted in a diffusion service, unless such service transmits a lawful television broadcast, including the film, and is operated by the original broadcaster; (e) Make an adaptation of the work; (f) Do, in relation to an adaptation of the work, any of the acts specified in relation to the work in (a) to (d) above; and (g) Let, or offer or expose for hire by way of trade, directly or indirectly, a copy of the film.

Section	Work	Exclusive rights
9	Sound recordings	(a) Make, directly or indirectly, a record embodying the sound recording; (b) Let, or offer, or expose for hire by way of trade, directly or indirectly, a reproduction of the sound recording; (c) Broadcast the sound recording; (d) Cause the sound recording to be transmitted in a diffusion service, unless that diffusion service transmits a lawful broadcast, including the sound recording, and is operated by the original broadcaster; and (e) Communicate the sound recording to the public.
10	Broadcasts	(a) Reproduce; (b) Rebroadcast; and (c) Cause the broadcast to be transmitted in a diffusion service, unless such service is operated by the original broadcaster.
11	Programme-carrying signals	Undertake or authorise, the direct or indirect distribution of such signals by any distributor to the general public or any section thereof in the Republic, or from the Republic.
11A	Published editions	Make or authorise the making of a reproduction of the edition in any manner.
11B	Computer programs	(a) Reproduce; (b) Publish; (c) Perform; (d) Broadcast; (e) Cause the computer program to be transmitted in a diffusion service, unless such service transmits a lawful broadcast, including the computer program, and is operated by the original broadcaster; (f) Make an adaptation of the work; (g) Do, in relation to an adaptation of the work, any of the acts specified in relation to the work in (a) to (e) above; (h) Let, or offer or expose for hire by way of trade, directly or indirectly, a copy of the computer program.

Moral rights

In compliance with the Berne Convention, Section 20 of the Copyright Act provides for the protection of moral rights. This includes the right to claim authorship as well as the right to object to any distortion, mutilation or other modification of the work where such action is or would be prejudicial to the honour or reputation of the creator.

A possible concern with moral rights is that the inability to locate the author (as in the case of orphan works) to attribute the work to the author and the resulting fear of violation of a moral right, may at times result in a decision not to use a

work. There is also ambiguity about the definition and scope of moral rights among copyright stakeholders.

Term of copyright

Pursuant to Section 3 of the Act, copyright in literary, musical and artistic works (other than photographs) subsists for the duration of the life of the author plus 50 years from the end of the year in which the author dies. If before the death of the author no publication, public performance, sale to the public or broadcasting of the work has occurred, the term of copyright is 50 years from the end of the year in which such act takes place. Copyright in other works, such as cinematograph films, photographs, computer programs, sound recordings, broadcasts and others, is also 50 years from some specified date, usually a date relating to first publication or public circulation of the subject matter. The same is true in the case of anonymous or pseudonymous works (which, in the United States, are protected for 120 years from their creation).

The copyright term impacts the date on which a work falls into the public domain and is used freely, ie without authorisation from the copyright-holder or payment of royalties. Although the term of copyright in South Africa is shorter than in the European Union and the United States, it is still very long. Under the Berne Convention, the signatory states (including South Africa) are required to provide copyright protection for a minimum term of the life of the author plus 50 years, but there is no legal reason that registration of copyright could not be made compulsory at some early stage after an initially automatic vesting. Compulsory registration might further access to knowledge, since, in the absence of renewal of registration, works could fall into the public domain.

Orphan works

The long term of protection and lack of registration requirement have created a problem with 'orphan works' — works which are still copyright-protected but whose owner is not identifiable or locatable. While the copyright-holder of an orphan work is entitled to the benefits of copyright, the fact that the owner is unknown prevents any transaction to secure the rights to use the work. In South Africa, the problem of orphan works is not sufficiently discussed at the moment. In other countries and regions where discussions of the issue have begun, however, solutions have been proposed that might also work for South Africa. For instance, the Copyright Act could be amended to permit use of orphan works on reasonable terms when copyright-owners cannot be identified or located to negotiate voluntary licences.

Specific provisions for libraries or archives

The current Copyright Act Regulations contain specific provisions for libraries and archives.²⁶ Any (unreasonable) restriction on libraries and archives can be expected to negatively affect access to learning materials.

Section 3 of the Copyright Regulations stipulates that a library or archives depot (or any of its employees acting within the scope of their employment) may reproduce a work and distribute a copy if:

- the reproduction or distribution is made for non-commercial purposes;
- the collections of the library or archive depot are open to the public or available to researchers; and
- the reproduction of the work incorporates a copyright warning.

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

Section 3 of the Regulations further states the conditions under which an unpublished work may be reproduced and distributed for preservation, for security or for deposit purposes in other libraries and archive depots. In addition, Section 3 of the Regulations generally allows the reproduction of a published work for the purpose of replacement of a copy that is deteriorating or that has been damaged, lost or stolen, if an unused replacement cannot be obtained at a fair price.

Also, Section 3 of the Regulations stipulates that a library or archive depot may make copies for users upon request from the users of another library or archive depot. Such copies are confined to one article or other contribution to a copyrighted collection or periodical issue, or to a copy of a 'reasonable portion' of any other copyrighted work. In addition, the library or archive depot must have a notice that the copy is not going to be used for purposes other than private study or personal or private use.

Lastly, Section 3 of the Copyright Regulations allows, upon request, the copying of an entire work or substantial parts of it by a library or archive depot for their users and other libraries or archive depots if an unused copy of the copyrighted work cannot be obtained at a fair price. Section 3 requires, however, that the copy must become the property of the user and the library or archive depot has not had notice that the copy would be used for purposes other than private study or the personal or private use of the person using the work.

²⁶ Section 3 of the Copyright Regulations, 1978, as published in GN R1211 in GG 9775 of 7 June 1985 as amended by GN 1375 in GG 9807 of 28 June 1985.

The Copyright Regulations regarding libraries and archives can be problematic for a number of reasons. Crucial terms such as ‘reasonable portion’ are not defined and the requirements for specific copyright exceptions and limitations are restrictive. The general usefulness of these provisions has, therefore, been doubted.²⁷ Practically, the adoption of more specific guidelines is necessary, especially for the key issue of multiple copying. Also, under the current Regulations, libraries may not translate, adapt or convert material into other formats. And digitisation issues are not addressed, so libraries lack clarity on whether they may distribute works in a digital format within the allowed ambit of the Regulations.

Specific provisions in respect of sensory disabilities

The Act does not include specific provisions that deal with the needs of sensory-disabled people. This is problematic because people with sensory disabilities face additional barriers accessing learning materials. The law should make accommodations in this respect. Whether or not conversion into Braille, for example, should be allowed without seeking permission from or paying royalties to the copyright-holder is, however, a contentious issue.

‘Fair dealing’ and specific provisions for educational purposes

When trying to make use of copyright-protected material without the permission of the rights-holder, learners and researchers alike will most likely invoke the general ‘fair dealing’ provision contained in Section 12(1) of the Act.²⁸ Section 12(1)(a) stipulates that ‘copyright shall not be infringed by any fair dealing with a literary or musical work [...] for the purposes of research or private study by, or the personal or private use of, the person using the work’.

There are various more specific provisions available for educational uses. It goes without saying that specific provisions for educational uses are relevant for access to learning materials. First, Section 12(4) of the Act provides that a work may be used ‘to the extent justified by the purpose, by way of illustration in any publication, broadcast or sound or visual record for teaching: Provided that such use shall be compatible with fair practice and that the source shall be mentioned, as well as the name of the author if it appears on the work’. Section 12(11) of the Act deals with translation and states that translation of works for the purposes of educational use is allowed.

27 D.J. Pienaar *Statutory defences against actions for infringement of copyright* (1988) LLM thesis University of South Africa at 95-7.

28 The concept of fair dealing must, however, not be confused with the much broader ‘fair use’ doctrine as utilised, for instance, by the US Copyright Act (Copyright Act of 1976, 17 U.S.C. § 107).

The Copyright Regulations linked to Section 13 of the Act also contain specific exceptions for educational purposes. The Regulations permit the making of multiple copies for classroom use, not exceeding one copy per pupil per course.²⁹ Furthermore, Regulation 8 allows the making of a single copy by or for a teacher for the purpose of research, teaching or preparation for teaching in a class. Both the ‘multiple copies’ exception in Regulation 7 and the ‘copies for teachers’ exception in Regulation 8 are subject to the provisions of Regulation 2. Hence, reproductions are permitted only if not more than one copy of a reasonable portion of the work is made and ‘if the cumulative effect of the reproductions does not conflict with the normal exploitation of the work to the unreasonable prejudice of the legal interest and residuary rights of the author’.³⁰

The educational exceptions provided for in the Regulations present a few challenges. First, it is unclear what constitutes a ‘reasonable portion’. As a result, students would often be unsure of how much they could lawfully photocopy. Furthermore, copies may not be made for purposes other than classroom use. This, of course, prevents productive distance learning, where learners are not in possession of the original copy in order to exercise the right granted under the Regulations.

Media freedom and freedom of expression

Several provisions of the Copyright Act have a bearing on media freedom and freedom of expression.

Section 12(1)(b) of the Act allows ‘fair dealing’ reproduction for review and criticism of literary and musical works and is applied to other works: artistic works, cinematograph films, sound recordings, broadcasts, published editions and computer programs.

Section 12(8)(a) provides that ‘[n]o copyright shall subsist in [...] speeches of a political nature’. Section 12(6)(a) provides that ‘copyright in a lecture, address or other work of a similar nature which is delivered in public shall not be infringed by reproducing it in the press or by broadcasting it, if such reproduction or broadcast is for an informatory purpose’.

Section 12(3) permits quotation of literary and musical works and the provisions of Section 12(3) are applied to other works: cinematograph films, sound recordings, broadcasts and computer programs.

Section 12(1)(c) provides that copyright shall not be infringed by any ‘fair dealing’ with a literary or musical work for the purpose of reporting current events in a newspaper, magazine or similar periodical; or by means of broadcasting or in a cinematograph film. The provisions of Section 12(1)(c) are applied to other

²⁹ Regulation 7 of the Copyright Regulations.

³⁰ Regulation 2(b) of the Copyright Regulations.

works: artistic works, cinematograph films, sound recordings, broadcasts, published editions and computer programs. Section 19 provides that copyright in programme-carrying signals shall not be infringed by the distribution of short excerpts of the programme so carried that consist of reports of current events; or as are compatible with fair practice and to the extent justified by the informatory purpose of such excerpts. These provisions do not apply to programmes that consist of sporting events.

Other relevant exceptions and limitations

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

- uses related to judicial proceedings;³¹
- uses relating to official texts of a legislative, administrative or legal nature and political and legal speeches;³² and
- back-up copies of computer programs.³³

Anti-circumvention provisions

The South African Copyright Act does not contain any provisions prohibiting the circumvention of technological protection measures (TPMs). South Africa is not obliged to introduce such provisions since it has not yet ratified (though it has signed) the 'WIPO Internet Treaties'. However, the Electronic Communications and Transactions (ECT) Act of 2002 contains a provision that can be interpreted as an anti-circumvention provision (see p. 245).

Parallel importation

A parallel import refers to a copyright-protected product placed on the market in one country, which is subsequently imported into a second country, without the permission of the copyright-holder in the second country, to compete with the copyright-holder or licensees in that second country.³⁴ These imported or 'grey goods' are often cheaper than the authorised goods.³⁵ The relationship between parallel import and access to knowledge lies in the extent to which parallel import of, say, a mathematics textbook, can make such a textbook affordable in a country where it is otherwise not. The WTO TRIPs Agreement permits countries to allow parallel importing. But in South Africa, Section 28 of the Copyright Act provides

31 Section 12(2) of the Copyright Act 98 of 1978.

32 Section 12(8)(a) of the Copyright Act.

33 Section 19B(2) of the Copyright Act.

34 O.H. Dean 'Parallel importation infringement of copyright' (1983) 100 *SALJ* 258.

35 O.H. Dean 'Copyright v grey goods in South Africa, Australia and Singapore' (1994) 111 *SALJ* 746.

that the owner of any published work or the exclusive licensee of a published work (who has the licensed right to import such work into South Africa) may request the Commissioner of Customs and Excise to declare any other importation of the work prohibited. This provision effectively blocks parallel importing.

Non-voluntary (compulsory and statutory) licences

South Africa's Copyright Act addresses non-voluntary licensing in only a very few instances. Copyright is not infringed if an act is conducted in compliance with a licence granted by the South African Copyright Tribunal, thus providing the Tribunal with some scope to issue non-voluntary licences. Pursuant to Sections 29-36 of the Act, a function of the Tribunal is to resolve disputes between licensors and licensees.³⁶ And the Tribunal may grant a licence where the refusal to do so by the copyright-holder is unreasonable. In addition, Section 45 of the Copyright Act could form the basis for future non-voluntary licence schemes, as it allows regulations by the Minister in respect of circulation, presentation or exhibition of any work or production. The copyright-owner, however, must not be deprived of his or her right to reasonable remuneration, determined in accordance with the agreement applicable (failing which, by arbitration).

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

Legislation was prepared in 2008 intended to facilitate better use of intellectual property emanating from publicly financed research and development and to establish a National Intellectual Property Management Office (NIPMO), an Intellectual Property Fund and technology transfer offices at relevant institutions. These institutions include universities and public research institutes such as the Medical Research Council, the Human Sciences Research Council, the South African Bureau of Standards and the Water Research Commission. At the time of writing of this chapter, the Act and Regulations have not been put in force.

Salient points under the Act are:

- a recipient has a choice regarding retention of ownership of intellectual property emanating from publicly financed research and development. If electing not to retain ownership, subject to certain conditions, it will fall into the hands either of NIPMO, or a private organisation that provided funding, or the creator;

36 Section 30 of the Copyright Act.

- a recipient has specific obligations and disclosure duties including ensuring that intellectual property emanating from the aforementioned funds is appropriately protected before the results of such research and development are published or publicly disclosed by other means as per Section 5(b);
- a recipient must assess the intellectual property to determine whether it merits statutory protection and, where appropriate, apply for and use best efforts to obtain statutory protection;
- a recipient has the duty to license and otherwise transfer rights in respect of the pertinent intellectual property, as well as manage commercialisation of the intellectual property;
- affected institutions must establish technology transfer offices;
- creators and their heirs are granted specific rights to portions of revenues accrued to the institution;
- there is a preference for non-exclusive licensing and licensing to Broad-Based Black Economic Empowerment (BBBEE) entities;
- for intellectual property relevant to the health, security and emergency needs of South Africa, the state must be granted an irrevocable and royalty-free licence authorising the state to use the intellectual property anywhere in the world; and
- for offshore transactions, NIPMO must be satisfied that there is insufficient capacity in South Africa to develop or commercialise the intellectual property locally and South Africa will benefit from such offshore transaction.

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

The legislation impacts access to knowledge in several ways. Significantly, it does not support publicly funded research falling into the public domain. It also establishes a regime that may not be endorsed by research partners in other countries, which may frustrate international research collaborations. Although the Act excludes many kinds of copyright-protected works by excluding these works from the definition of ‘intellectual property’ in Section 1, the Act defines intellectual

property in such a way that it could be read to prohibit granting access to databases, software and medical diagnostic methods. It also prohibits the disclosure of research while the research is scrutinised for patentability by bureaucrats who are unlikely to be experts in the research field in question. This may result in significant delays in local knowledge becoming available.

Some commentators suggest that the Intellectual Property Rights from Publicly Financed Research and Development Act, together with its Regulations, may even be unconstitutional.³⁷ This is because the Constitution of South Africa provides in its Section 16(1) that '[e]veryone has the right to freedom of expression, which includes — [...] (d) academic freedom and freedom of scientific research'. This freedom may be compromised if South Africans, as a result of the Act and its Regulations, can no longer participate in important international research consortia. Having said this, the Act and its Regulations do not directly proscribe access to copyright-protected works in South Africa as the Act expressly excludes scholarly copyright-protected works from its scope.

Yet, if it turns out to be true — as feared by some — that the introduction of the Act and its Regulations will result in less research being generated in South Africa, then, inevitably, less research-related writing will be published in the country, which is problematic from an access to knowledge perspective. More generally, by merely focusing on the potential financial rewards from intellectual property creation, the new legislation seemingly disregards the many other advantages that intellectual property creation brings about for society as a whole. And by reinforcing a protectionist culture in relation to intellectual property, the Act certainly conflicts with the principles of openness and access that are investigated in this report.

Electronic Communications and Transactions Act 25 of 2002

The Electronic Communications and Transactions Act 25 of 2002 ('ECT Act') may have the effect of overriding certain copyright exceptions and limitations, including the fair dealing provisions, contained in the Copyright Act,³⁸ and may attach criminal liability for use of a work that is legitimated by the Copyright Act.

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

a person who unlawfully produces, sells, offers to sell, procures for use, designs, adapts for use, distributes or possesses any device, including a computer program

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

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

or a component, which is designed primarily to overcome security measures for the protection of data, or performs any of those acts with regard to a password, access code or any other similar kind of data with the intent to unlawfully utilise such item to contravene this section, is guilty of an offence.

Section 86(4) states: 'A person who utilises any device or computer program mentioned in subsection (3) in order to unlawfully overcome security measures designed to protect such data or access thereto, is guilty of an offence.' By way of protecting data, Section 86 of the ECT Act essentially prohibits the circumvention of technological protection measures (TPMs) designed to protect material (copyrighted *and* non-copyrighted material) in digital form.

This protection of TPMs exceeds the requirements of the WIPO Internet Treaties and the protection granted in most other countries. Effectively, such blanket protection of rights-holder TPMs can have the effect of undermining existing and well-established copyright exceptions and limitations — if such permitted uses are blocked through TPMs.

Counterfeit Goods Act 37 of 1997

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

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

Free and Open Source Software (FOSS) Policy

On 22 February 2007 the South African Cabinet approved a policy and strategy for the adoption in government of free and open source software (FOSS). All new software developed for or by the government will be based on open standards and government will migrate all current software to FOSS. While the Policy refers specifically to the adoption of FOSS in government, this decision will impact on the use of FOSS in South Africa, as it will encourage all entities engaging with

government to use compatible software. The FOSS Policy of South Africa has positive implications for access to knowledge. By endorsing open source software and open standards, the intention is to lower barriers for accessing information and communication technologies.³⁹

Promotion of Access to Information Act (PAIA) 2 of 2000

The Preamble of the PAIA states that the purpose of enactment of the Act is to foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information; and to actively promote a society in which the people of South Africa have effective access to information to enable them to more fully exercise and protect all of their rights. While the concept of access to information is not synonymous with access to knowledge, the importance of information to enabling the meaningful exercise of rights is akin to the importance of knowledge in relation to the right to education.

National Archives and Records Service Act 43 of 1996

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

Legal Deposit Act 54 of 1997

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

South African Library for the Blind Act 91 of 1998

In view of the responsibilities of the South African Library for the Blind, as stipulated in Section 4(1) of the South African Library for the Blind Act 91 of 1998, the Library for the Blind is an important promoter of access to knowledge for sensory-disabled people. The ability to produce documents for blind people in Braille and audio formats may, however, be inhibited by the lack of corresponding legislative provision for such reformatting in the Copyright Act.

39 Policy on Free and Open Source Software Use for South African Government. Available at <http://www.info.gov.za/view/DownloadFileAction?id=94490> [Accessed 1 June 2010].

The Constitution

The South African Constitution of 1996 supersedes all other laws in the Republic. In respect of the supremacy of the Constitution, Section 2 of the 'Founding Provisions' states that the 'Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled'. Section 39(2) provides as follows: 'When interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.' It is therefore required that any and every piece of legislation be interpreted in accordance with the intentions of the Bill of Rights (Chapter 2 of the Constitution, containing Sections 7 to 39), rather than against it. This makes the rights detailed below important interpretative guides. Moreover, the Bill of Rights binds the legislature, the executive, the judiciary and all organs of state,⁴⁰ and any natural or legal person if and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.⁴¹

The right to equality in the Bill of Rights is particularly relevant in the context of legislative exceptions that could be introduced into the Copyright Act and other acts to fulfil equal rights of access to education for disabled people, as well as equal rights of access to education for men and women. Section 9 of the Constitution (in the Bill of Rights) provides that 'everyone is equal before the law and has the rights to equal protection and benefit of the law' and that 'equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken'. Further, the Section provides that 'the State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth'.

Under Section 16 and of importance to access to knowledge specifically, everyone has the right to freedom of expression, which includes the freedom to receive or impart information or ideas, academic freedom and freedom of scientific research.⁴²

Section 29 provides that everyone has the right to a basic education, including adult education and further education which the state through reasonable measures must make progressively available and accessible. An important aspect of the right to education is the right to access learning materials, a necessary condition required

40 Section 8(1) of the South African Constitution.

41 Section 8(2) of the South African Constitution.

42 Section 16(1) of the South African Constitution.

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

8.2.2 *International and regional treaties and agreements*

In 1928, South Africa became a signatory of the Berne Convention for the Protection of Literary and Artistic Works. But there is no evidence of South Africa availing itself of the Berne Convention's Appendix, which allows compulsory licensing of certain translations.⁴³

As a WTO member, South Africa is a party to the Agreement on Trade-Related Aspects of Intellectual Property (TRIPs Agreement) of 1994.

South Africa is signatory to, but has not yet ratified, the 'WIPO Internet Treaties' of 1996: the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). International treaties are not binding locally unless they have been ratified and incorporated into domestic legislation.

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

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

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

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

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

8.2.3 *Judicial and administrative decisions*

There are many reported cases on copyright in South Africa. However, there is a dearth of case law on copyright infringement related to learning materials. This is surprising in the light of publishing industry estimates of a significant extent of copyright infringement in relation to learning materials. For example, in 2002, it was estimated by the then-President of the Publishers' Association of South Africa (PASA) that 'approximately 40-50 per cent of the potential ZAR400-million market [wa]s lost to piracy and illegal photocopying'.⁴⁵ This was said to affect mostly international works and the copyright infringers were identified as students, educational institutions which issue course packs with infringing material and copyshop owners.⁴⁶

The copyright subject matter in cases ranges from blank audio cassettes⁴⁷ to computer programs⁴⁸ to academic texts.⁴⁹ The cases relate to legal standing,⁵⁰ parallel importation,⁵¹ ownership,⁵² authorship⁵³ and plagiarism.⁵⁴ Despite some challenges in relating general copyright cases to the specific issue of access to learning materials, there are some cases that are clearly relevant.

A particularly significant case is *Frank & Hirsch v Roopanand Brothers (Pty) Ltd*,⁵⁵ which dealt with parallel importation of blank audio cassettes. The court held that such importation amounted to indirect copyright infringement, because the production of those cassettes in South Africa would have amounted to direct copyright infringement. Therefore, it appears that importing learning materials would be considered indirect copyright infringement if the production of those books in South Africa (by the importer or other person) would have been direct copyright infringement.

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

46 Ibid.

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

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

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

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

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

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

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

54 *Juta v De Koker* supra note 49.

55 Supra note 47. It is important to note that this case was decided on an earlier version of the Copyright Act. However, the amendment does not change the essence of the relevant provision (Section 23) and the ruling would have been the same had the case been decided under the current Act.

There was a much-lauded successful prosecution in 2001. However, it is not reported in the law reports. The facts pertaining to this matter have therefore been gleaned from interviews and publications.⁵⁶ A 'pirate photocopying shop' operating in Empangeni, KwaZulu-Natal was engaged in large-scale infringing reproduction of copyright-protected works. A group of publishers pooled financial resources and worked together to obtain evidence, lay criminal charges and meet with the prosecutor assigned to the case. A conviction was obtained, with the infringer being sentenced to three years' imprisonment or a fine of ZAR30 000 (of which only half was payable).

Another publicised incident occurred in 2003 in the Western Cape. This matter did not result in criminal prosecution or a civil claim for damages. Like the case discussed above, the facts outlined here are gleaned from publications⁵⁷ and interviews. The Dramatic, Artistic and Literary Rights Organisation (DALRO) collecting society requested a police raid of two shipping containers located near tertiary education institutions from which a large-scale illegal photocopying business was being run. Infringing copies, master copies and the copying equipment were confiscated by the police. However, neither criminal nor civil action was taken thereafter.

Unlike in some other African countries, perhaps, it cannot be said that the dearth of case law regarding copyright in learning materials is due to a general lack of confidence in the courts. It has been suggested instead that there are several difficulties that learning materials rights-holders encounter in pursuing remedies for infringement.⁵⁸ For one, the complexity of copyright and evidence laws makes it difficult for rights-holders to litigate. And infringement remedies are inadequate, in that fines imposed after convictions have historically been low and proving civil damages is an almost insurmountable task due to the lack of statistical data. Moreover, the views and attitudes of police, customs officials and prosecutors, who feel that copyright infringement in learning materials (as opposed to entertainment products such as videos and music) is not a serious offence, mean that rights-holders do not have meaningful support in pursuing criminal copyright infringement. Some educational institutions take a similar view and are thus unwilling to assist rights-holders to enforce their rights.

It appears, therefore, that many copyright infringement matters related to learning materials are disposed of by settlement or the abandonment of claims by rights-holders. The resultant lack of case law means that there are no authoritative judicial findings in relation to copyright in learning materials.

56 *Frank & Hirsch supra note 47; E. Gray and M. Seeber PICC report on intellectual property rights in the print industries sector (2004) at 57. Available at http://www.publishsa.co.za/docs/Intellectual_Copyright_Report.pdf [Accessed 30 March 2009].*

57 *Ibid* Gray and Seeber at 56.

58 *Ibid*.

8.3 Qualitative analysis

8.3.1 *Secondary literature*

Although emphasis in this literature review is placed on South African and southern African materials, it must be noted that international materials and materials from outside Africa, referenced at various points throughout this book, significantly influence the current debate regarding the relationship between copyright laws and access to learning materials. In South Africa, as with many developing countries, copyright law is only beginning to be recognised as an important aspect of development policy. As a result, copyright law in general and, more specifically, the correlation between copyright law and access to knowledge/learning materials, are under-explored in South Africa's (legal) secondary literature.

Very few books are entirely devoted to South African copyright law. Notable exceptions are OH Dean's continuously updated loose-leaf *Handbook of South African copyright law*, A Smith's *Copyright companion* of 1995 and AJC Copeling's rather outdated *Copyright and the Act of 1978*. Naturally, these books address copyright law from a fairly broad perspective. Emphasis is placed on general issues such as requirements for copyright protection, nature and scope of copyright protection, ownership and transfer of copyright, duration of copyright and infringement of copyright. This is not to say, however, that the subject of access to learning materials is ignored. On the contrary, achieving a fair balance between the interests of rights-holders and users is singled out as a major objective of copyright law.⁵⁹ Moreover, copyright exceptions and limitations as the main access-enabling tools for users are dealt with in detail.⁶⁰

Apart from the above books, copyright law is often briefly discussed in single chapters in textbooks dealing with commercial law.⁶¹ Access to learning materials is usually not specifically addressed in these chapters. Mention is, however, typically made of the legitimate interests of users safeguarded by copyright exceptions and limitations.⁶²

In recent years, copyright law in general and the issue of access to learning materials in particular have started to attract more academic attention in South Africa. One spur for this increased interest was the Access to Learning Materials (A2LM) Southern Africa project in 2004-05. The Johannesburg-based project was run through the Consumer Institute South Africa, supported by the Open Society

59 See, for instance, O.H. Dean *Handbook of South African copyright law* (1987) at 1-2.

60 Ibid at chapter 9.

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

62 See, for instance, J.T.R. Gibson *supra* note 64 at 723.

Institute and included an international conference in Johannesburg in January 2005. Outputs from the project included two research papers:

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

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

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

Also in 2005, the Commons-Sense Conference was convened by the LINK Centre, Graduate School of Public and Development Management (P&DM), Wits University, Johannesburg — the same institutional host as for this ACA2K research project. The conference drew together African stakeholders concerned with finding alternative approaches to copyright and digital knowledge resources. As well as numerous conference papers, the conference resulted in the publishing of *The digital information commons: an African participant's guide*.⁶³ The guide, among other things, deals with important global players, processes, issues and projects in this field, such as WIPO, the WTO, UN agencies, activists, exceptions, compulsory licensing, parallel importation and open access. The guide also identifies and briefly summarises a number of African players, processes, issues and projects.

63 C. Armstrong et al *The digital information commons: an African participant's guide* (2005). Available at <http://www.sivulile.org/workshops/commons-sense/Digital%20Commons%20Guide-19-May-05.doc> [Accessed 30 March 2009].

In connection with the Commons-Sense Project, a special 'African digital information commons' edition of the Wits LINK Centre's *Southern African Journal of Information and Communication (SAJIC)* was published in 2006.⁶⁴ This edition included the following access to knowledge-related contributions:

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

Other relevant law journal articles were, for instance, published by V van Coppenhagen ('Copyright and the WIPO Copyright Treaty'), with specific reference to the rights applicable in a digital environment and the protection of technological measures⁶⁵ and T Pistorius ('Developing countries and copyright in the information age — the functional equivalent implementation of the WCT'⁶⁶ and 'Copyright in the information age: the catch-22 of digital technology.'⁶⁷)

Of particular importance for the purposes of this research is a report penned by Rufus in 2005. In her report titled *Sub-Saharan Africa, education and the knowledge divide: copyright law a barrier to information*,⁶⁸ Rufus addresses some of the barriers that the current copyright regime creates for education and research in developing countries, particularly in South Africa. The author first discusses selected problems for the lack of access to knowledge in Sub-Saharan Africa, such as the lack of translation rights and the absence of provisions for the benefit of the disabled. Thereafter, Rufus points out that while the advent of digital technologies has, on

64 (2006) 7 *SAJIC*. Available at <http://link.wits.ac.za/journal/journal-07.html> [Accessed 1 April 2010].

65 (2002) 119:2 *SALJ* 442.

66 T. Pistorius *supra* note 41.

67 (2006) 1 *Critical Arts* 47. Professor Pistorius also delivered a related paper at the South African Commercial Law in a Globalised Environment Workshop 2006, titled 'Digital copyright law: the impact on access to information'.

68 T. Rufus *Sub-Saharan Africa, education and the knowledge divide: copyright law a barrier to information* (2005). Available at http://afro-ip.googlegroups.com/web/rufus.pdf?gda=4pDtEDsAAADTaftu43V1xrklMoxl309csEP-hbXGfaQ6AHs74euGNgpFILAnNI1PbA8jWbuU_owGRdr3QrylPkw2aRbXD_gF&hl=en [Accessed 1 June 2010].

the one hand, increased access possibilities, 'these advances have also stemmed new possibilities for the control and increase of knowledge gaps within societies'.⁶⁹ Subsequently, Rufus argues that 'the international knowledge system is a highly imbalanced state of affairs, which prioritise[s] the economic rights of information providers, by monopolising societies' need to gain access to knowledge'.⁷⁰ In her conclusion, Rufus essentially states that (a) suppressing knowledge into the straitjacket of a Western world intellectual property system is a wrongdoing of developed nations and that (b) the profit-oriented approach currently followed with regard to intellectual property needs to be modified.⁷¹

Apart from the above-mentioned efforts and publications, a growing number of theses on both LLM and PhD/LL.D levels address copyright-related issues such as copyright exceptions and limitations and technological protection measures. D.J. Pienaar's LLM thesis entitled *Statutory defences against actions for infringement of copyright* (1988) and M. Conroy's LLD thesis entitled *A comparative study of technological protection measures in copyright law* (2006) are but two examples. Masters and doctoral theses related to copyright can best be found in institutional digital repositories such as UCT's lawspace (<http://lawspace2.lib.uct.ac.za/>) or the UnisaETD (<http://www.unisa.ac.za/Default.asp?Cmd=ViewContent&ContentID=15350>). In addition, there are various other electronic resources for theses, some of which are subscription based.

The majority of secondary literature in South Africa dealing with copyright law and access to learning material issues originates from, or is contained in, a relatively large number of independent reports and articles published in media other than law journals.

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

- the *PICC report on intellectual property rights in the print industries sector* (2004)⁷² by E. Gray and M. Seeber;
- the *Intellectual property, education and access to knowledge in Southern Africa* report (2006)⁷³ by A. Rens, A. Prabhala and D. Kawooya; and
- the recent 'South African open copyright review' (2008).

69 Ibid at 12.

70 Ibid at 16.

71 Ibid at 20.

72 Available at http://www.publishsa.co.za/docs/Intellectual_Copyright_Report.pdf [Accessed 30 March 2009].

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

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

The *Intellectual property, education and access to knowledge in Southern Africa* report examines the responsibility of intellectual property legislation for hurdles to access to learning materials in countries of the Southern African Customs Union (Botswana, Lesotho, Namibia, Swaziland and South Africa). Furthermore, the report audits domestic copyright exceptions and limitations which are relevant in the context of access to learning materials. The report concludes that ‘neither does copyright legislation in SACU countries make significantly positive provisions for access to learning materials, nor does it take full advantage of the flexibilities provided by TRIPs.’⁷⁴

The ‘*South African open copyright review*’ report provides a section-by-section review of the provisions of the South African Copyright Act of 1978, with emphasis on sections impacting access to knowledge. The following recommendations are contained in the review report:

- do not extend the term or scope of exclusive rights granted under copyright beyond what is required by the international treaties by which South Africa is bound;
- expand and adapt the current set of exceptions and limitations to better enable access to knowledge. State exceptions and limitations clearly. Exceptions and limitations should address new technologies;
- protect the public domain;
- address the problem of orphan works;
- explicitly permit circumvention of technologies that jeopardise the balance of copyright by preventing users from exercising their rights under exceptions and limitations;
- permit parallel importation of copyright-protected material;
- provide that all government-funded works which do not immediately fall into the public domain are freely available on equal terms to all South Africans;
- define licence so as to explicitly allow for free copyright licences;
- commence a government inquiry into a provision that authors can reclaim title to works which subsequent rights-holders fail to use over long periods of time, eg five years; and

74 Ibid.

- commence a government inquiry into the feasibility of making use of the Berne Appendix special provisions for developing countries.⁷⁵

Relevant material in South Africa has also been produced for or by different advocacy groups, especially library associations such as IFLA and publishers/authors associations such as the Publishers' Association of South Africa (PASA) and the Academic and Non-Fiction Authors' Association of South Africa (ANFASA).

In addition, numerous reports and papers have been created by PASA and others to describe the South African publishing market. Of particular interest is the Genesis. 'Factors influencing the cost of books in South Africa' report of 2007, commissioned by the South African Department of Arts and Culture through PICC.⁷⁶ The Genesis report makes mention of copyright protection in two instances. First, it states that obtaining permission to use copyright-protected material is part of the origination costs for a publisher, ie costs that a publisher has to incur to create a book.⁷⁷ Second, it suggests that part of the failure of academic books to adequately sell is due to illegal photocopying which diminishes their deserved market.⁷⁸

Another significant contribution to the literature occurred in May 2005, when the Commonwealth of Learning (CoL) convened a group of copyright experts in Johannesburg to develop a guideline document on copyright limitations and exceptions.⁷⁹ Later, CoL also commissioned a 'copyright audit' document,⁸⁰ which provides an explanatory checklist for researchers seeking to examine their country's national copyright environments in terms of provisions that support education.

In January 2008, the Cape Town Open Education Declaration was launched.⁸¹ The declaration (1) urges governments and publishers to make publicly funded educational materials available freely over the Internet and (2) encourages teachers and students around the world to use the Internet to share, remix and translate classroom materials to make education more accessible, effective and flexible.

Cape Town is also home to a pioneering open content initiative called Free High School Science Texts (FHSST), through which volunteers from around the

75 Draft Review (in possession of the authors of this report).

76 Available at http://www.sabookcouncil.co.za/pdf/PICC_Cost%20of%20books%20studyFinal.pdf [Accessed 30 March 2009].

77 Ibid at 19.

78 Ibid at 71.

79 J. Hofman et al *Document for Commonwealth countries on copyright matters in education* (2005). Available at <http://www.col.org/SiteCollectionDocuments/Copyright%20Document.pdf> [Accessed 30 March 2009].

80 A. Prabhala and T. Schonwetter *Commonwealth of Learning copyright audit* (2006). Available at <http://www.col.org/resources/knownServices/copyright/Pages/lawEduc.aspx> [Accessed 30 March 2009].

81 Cape Town Open Education Declaration (2008). Available at <http://www.capetowndeclaration.org/read-the-declaration> [Accessed 30 March 2009].

world, working online, are developing a set of complete textbooks for Mathematics, Physics and Chemistry for Grades 10-12. The use of the GNU Free Documentation Licence will allow the materials to be both freely available and legally modifiable by anyone, ensuring that the information they contain is kept up to date and that the texts can be translated or modified according to the needs of particular groups of learners. The textbooks will also be available online for teachers and pupils who can download and print them.

Meanwhile, a 2009 book chapter paper by Andrew Rens of South Africa's Shuttleworth Foundation addresses the potential role of the WIPO Development Agenda in improving copyright exceptions and limitations for education. Rens argues that 'the [WIPO] Development Agenda presents the right opportunity to create globally applicable minimum exceptions to copyrights for educational purposes. Absent such harmonisation, educators and educational institutions around the world will face unnecessary hurdles to facilitating development'.⁸²

A Haupt, in his recent book *Stealing empire*,⁸³ examines, among other things, Creative Commons and open source licences in South Africa. Haupt notes that on the one hand, '[t]he adoption of Creative Commons licences in South Africa could go a long way towards reducing the costs of publishing and distributing works as well as simplifying legal processes, provided that the digital divide is narrowed significantly over the next few years'.⁸⁴ On the other hand, however, he argues that the success of Creative Commons eventually depends on the ability of American advocates of Creative Commons to enter into partnerships with activists in the developing world: 'These partnerships would be most successful when some of the basic premises from which Creative Commons operates are interrogated in order to create room for alternative perspectives from poorer countries of the southern hemisphere'.⁸⁵

Lastly, the findings of the PALM Africa project can be expected to be a valuable contribution to the literature on copyright in relation to access to learning materials. The PALM project, closely connected with ACA2K's research work, is examining how open content approaches employing flexible licensing can work in conjunction with local publishing in developing countries to improve access to learning materials.⁸⁶

82 A. Rens 'Implementing WIPO's Development Agenda: treaty provisions on minimum exceptions and limitations for education' (2009) in J. de Beer (ed) *Implementing the World Intellectual Property Organization's Development Agenda* IDRC, CIGI, WLU Press. Available at http://www.idrc.ca/en/ev-141335-201-1-DO_TOPIC.html [Accessed 7 April 2010].

83 A. Haupt *Stealing empire* (2008). Available at <http://www.hsrcpress.ac.za/product.php?productid=2219> [Accessed 30 March 2009].

84 Ibid at 122.

85 Ibid at 126.

86 PALM Africa blog, entry of 12 June 2008 by E. Gray. Available at <http://blogs.uct.ac.za/blog/palm-africa> [Accessed 30 March 2009].

8.3.2 *Impact assessment interviews*

Interviewees were selected from the following stakeholder groupings:

- government — represented by the Department of Arts and Culture (DAC) and the Department of Trade and Industry (dti);⁸⁷
- education community — represented by employees of the University of Cape Town (UCT)⁸⁸ who are responsible for copyright-related matters; and
- copyright-holders — represented by the Publishers' Association of South Africa (PASA) and an authors' association (ANFASA).

In accordance with ACA2K's cognisance of diversity issues, efforts were made to select interviewees representing gender, racial and ethnic diversity. The interviewees all came from roughly the same socioeconomic background, however, as they were high-ranking university, government or publishing industry employees.

Government

The two government interviewees — one from the Department of Trade and Industry (dti), one from the Department of Arts and Culture (DAC) — both had legal training and a detailed understanding of copyright. The dti is the lead department on copyright law and policy, whilst the DAC plays a supportive role by providing feedback on particular issues when requested to do so by the dti and where appropriate to bring certain issues to the attention of the dti.

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

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

87 An interview with employees from the Department of Education (DoE) never materialised despite several attempts to arrange for such an interview.

88 UCT is not representative of South African universities generally, therefore case studies of a university with a different socioeconomic profile from UCT and a distance education university are included in the SA country report on the ACA2K website, <http://www.aca2k.org>. UCT was chosen for inclusion in this chapter because the examination of such a well-resourced and highly acclaimed African university provides additional and valuable insights regarding the actual effects of the copyright environment on access to learning materials.

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

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

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

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

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

Educational community

Interviews were conducted with employees at the University of Cape Town (UCT) main library, the UCT Research Contracts and IP Services office, the UCT Research and Innovation office and the UCT Centre for Educational Technology.

The respective UCT interviewees approached the issue of copyright protection and access to learning materials from very different angles. Overall, this group of interviewees demonstrated an appreciation of the relationship between the

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

Copyright plays a significant part in university curriculum development and learning support. This is evidenced by the care that needs to be taken with respect to the compilation of course-packs, so that they comply with the voluntarily negotiated blanket licence agreement UCT concluded with DALRO, South Africa's collecting society (reprographic rights organisation) for literary works. There are also concerns about the dissemination of learning materials electronically via the university's online course system, Vula.

Whether or not the blanket licence agreement with DALRO improves or hampers access to learning materials could not be answered by the interviewees. The reason for this is that although the DALRO licence factors in existing statutory copyright exceptions and limitations when setting the rates by containing a fair dealing component, it is impossible to say if and to what extent this fair dealing component is indeed fair because it is unclear what the law in South Africa really allows in terms of the reproduction of learning materials. As one interviewee put it:

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

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

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

The university has also created wide structures for copyright administration, as shown by the selected interviewees who came from three different bodies in the university. However, it was evident from the three separate interviews that the coordination of the roles played by the various structures could perhaps be improved.

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

It is also noteworthy that in 2008, UCT committed to building a repository of open educational resources (OER). The purpose of the project, funded by the Shuttleworth Foundation, is to create 'a new culture of sharing at UCT and the availability of high quality, open access learning materials organised on a UCT-branded OER website'.⁸⁹

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

When asked about the importance of digital technology and ICTs, all interviewees stressed the growing significance of such tools. They pointed to UCT's Educational Technology Policy Document. This document refers to both staff and students at UCT and makes explicit UCT's position on educational technology within the institution. In addition, the document suggests how the expressed principles may be put into practice.⁹⁰

Copyright-holders

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

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

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

90 University of Cape Town Educational Technology Policy Document (n.d.). Available at <http://www.cet.uct.ac.za/policy> [Accessed 30 March 2009].

material in South Africa. The ANFASA interviewee linked the choice of learning materials to the materials prescribed by the Department of Education and indicated an increase in use of learning materials originating in South Africa.

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

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

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

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

The ANFASA interviewee was, however, displeased with the implementation of the Copyright Act. According to the ANFASA interviewee, when he was still practising law, his (previous) firm acted on behalf of DALRO and represented four academic publishers whose textbooks were being photocopied by a copyshop at a university campus. The case was based on the Counterfeit Goods Act and test purchases were made and used as evidence. The law firm approached the dti to undertake a search-and-seizure operation, whereby they would have confiscated the machinery in the copyshop because it was being used to produce counterfeit goods. The main objective was to get publicity for the whole operation. However,

according to the ANFASA interviewee, the dti's immediate reaction was that the matter was emotive because it had to do with education and the dti went on to say that it usually deals with trademark infringement where factories make fake goods and the warrant is to go and seize the fake products and machinery. In this case, however, the photocopying was happening on an ad hoc basis and they were not likely to find quantities of photocopied books in the copyshop. According to the ANFASA interviewee, it almost seemed as if the dti had reservations about taking up a case of copyright infringement regarding educational material.

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

The PASA representative frequently emphasised the importance of a balanced approach to copyright, which takes into account both the rights of the owners of copyright-protected works and those of users. Among other things, copyright laws should therefore describe ways in which users can get access to copyright-protected material. If the industry followed this balanced approach, they could better run their own businesses 'because it might mean that they would constantly investigate better ways of providing access to the user while making money through this access.' However, the interviewee noted that this was not a universally held view among publishers and that others in the industry may well have a different view.

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

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

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

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

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

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

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

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

Meanwhile, the PASA interviewee said publishing houses appear to have been impacted differently by the advent of ICT dissemination channels and the possibility of the production of electronic learning materials. Some houses were able to include these easily in their business models while others are battling to do so. Generally, the PASA representative expressed his excitement about new access possibilities

brought about by digital technologies, especially by way of using cellphones. Finally, he also agreed with other interviewees from the educational community and government departments that race, gender and socioeconomic issues tend to be conflated in South Africa.

The ANFASA representative concurred that ICTs have indeed made knowledge more accessible, but regarding online publishing, the ANFASA interviewee expressed the reluctance of some authors concerned about copyright infringement of their works in the online environment.

Information and communication technology (ICT)

South Africa has the largest Internet community on the African continent and it is laudable that all South African tertiary educational institutions (and a growing number of schools) have some form of ICT access. It is also important to acknowledge that South Africa has various ICT-related policies in place, such as the policy on e-education. The government appears determined to establish South Africa as an information society. The strategies and plans suggest that schools and other educational institutions in South Africa are set to improve ICT access and usage in the future, a fact which is going to positively influence access to learning material in the country.⁹¹

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

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

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

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

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

Gender

Essentially, the researchers understand gender as referring to the sociocultural construction of roles and relationships between men and women.⁹²

The South African research team, which consists of two female researchers and one male researcher, acknowledges the fact that even seemingly gender-neutral laws may in practice uphold existing gender discriminations. The research team also took note of the assertion made by some legal scholars that copyright laws contribute to sustaining inequalities between men and women since they were ultimately written and enforced to help men retain control over copyright-protected material.⁹³

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

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

- gender-related matters and problems form arguably part of a much broader socioeconomic discourse which in South Africa currently centres on race inequities;
- knowledge tends to centre on male-dominated subject matter;
- the whole area of intellectual knowledge is male-dominated;
- from a cultural point of view, the classic idea behind and the concept of, copyright protection is male;
- black women are particularly disadvantaged when it comes to receiving knowledge;

92 IDRC *Gender analysis as a development research tool* (1998) International Development Research Centre (IDRC) Gender and Sustainable Development Unit. Available at <http://archive.idrc.ca/gender/tool.html> [Accessed 30 March 2009].

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

- a race and gender stereotype exists according to which a publisher in South Africa is a white male;
- the vast majority of publishers in South Africa are male but most of the larger educational publishing houses in South Africa are run by women; and
- South African authors are perceived to be mostly male.

8.4 Conclusions and recommendations

It is evident that the issues of access to knowledge in general and access to learning materials in particular, have started to attract more attention in recent years in the South African copyright arena. And it is notable that most copyright stakeholders in South Africa appear to have a balanced view, in that they acknowledge the validity of positions of stakeholders with differing views. This surely is a promising point of departure for future discussions in this area.

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

This study found that the existing legislation is inadequate in a number of ways. The key pieces of legislation/regulation in the area of copyright law, the Copyright Act 98 of 1978 and its Regulations, do not make use of many of the flexibilities contained in TRIPs and other international copyright treaties and agreements, particularly in relation to copyright exceptions and limitations.

The Copyright Act does not properly address the digital environment and its challenges.

The ability to promote access to learning materials by, for instance, creating adaptations of copyright-protected works for the sensory-disabled, is hindered by the threat of copyright infringement.

Many existing copyright exceptions and limitations in the South African Act and Regulations—especially the provisions on fair dealing—are generally considered to be too vague by both rights-holders and users. The failure to provide clarity for fair dealing in digitised works, for instance, hinders the distribution of knowledge through the efficient distribution mechanisms of ICTs. In addition, despite progress in electronic communications access in South Africa, the ECT Act, through its protection of TPMs, may attach criminal liability to materials usage that is legitimated by the Copyright Act.

A positive observation from the legislative analysis is that there is legislative and policy activity to promote the access to and use of ICTs, as evidenced by the ECT Act and the FOSS Policy. Notwithstanding these notable developments to promote

access to ICTs, it was found that such legislation and policy is to some extent either in conflict with, or insufficiently supported by, the Copyright Act.

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

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

It would appear, from the interviews conducted with government officials, that more prominence is likely to be given to access to learning materials in any future copyright policy or legislation amendment process.

Also, initiatives such as the Free High School Science Texts project show willingness by some sectors of society to take effective action to step outside traditional copyright structures to improve access to learning materials in South Africa.

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

It is suggested by the South African research team that the lack of debate on copyright and access to knowledge may be blamed on the currently unclear and incomplete legislative framework. A law cannot be subjected to substantial criticism if it is unclear as to what it allows and prohibits. Furthermore, such ambiguity often discourages people from reverting to the courts, since the outcome of costly court

proceedings is uncertain. The lack of case law, in turn, aggravates the current legal ambiguity. It appears that as a result, most people just do whatever they think is allowed under the current South African copyright regime — regardless of whether their assumptions are correct or not.

Thus, both of the ACA2K research project hypotheses tested are accurate in describing the current situation in South Africa: the copyright environment in South Africa does not maximise effective access to learning materials; and the environment can be changed in order to maximise effective access to learning materials. The South African ACA2K research team proposes the following legal and regulatory changes to maximise access to learning materials in South Africa.

South Africa has, for the most part, implemented the standard protection terms required by the Berne Convention and other relevant international treaties and agreements. Some countries, including some other ACA2K study countries, have extended the term of protection beyond international standard requirements. To preserve access to learning materials, South Africa should not extend the term of copyright protection.

The Copyright Act is silent in respect of orphan works. Our recommendation is for an amendment to the South African Copyright Act that permits use of orphan works on reasonable terms when copyright-owners cannot be identified or located to negotiate voluntary licences.

The government's FOSS Policy, if implemented successfully, may address and lower barriers to schools' and libraries' access to ICTs. It is recommended that, in order to fully realise the benefits of FOSS, legislative amendments promoting access to the learning materials carried via ICTs should be considered. The government will need to ensure that the FOSS Policy is compatible with the policies embedded in related legislation, such as the Copyright Act.

Currently, the South African Copyright Act does not permit the scanning, translation, adaptation or conversion of works for the sensory-disabled without permission from the copyright-holder. However, the Constitution of South Africa expressly provides for the right to education, which arguably places a duty on the state to facilitate access to learning materials required to exercise the right to education. The South African Copyright Act should be amended to remove barriers to access to learning materials faced by people with disabilities by, for instance, allowing the permission-free conversion of learning material into Braille or into audio format.

The ECT Act of 2002 arguably prohibits the circumvention of TPMs, even if such circumvention aims at enabling uses of copyright-protected materials that are expressly permitted under the Copyright Act (eg, fair dealing or accessing works in the public domain). It is recommended that this conflict between the Copyright Act

and the ECT Act is addressed, for instance, by declaring the copyright exceptions and limitations contained in the Copyright Act as valid defences to anti-circumvention claims based upon the ECT Act.

The current set of copyright exceptions and limitations, particularly in relation to educational uses of copyright-protected materials, are vague, fragmentary and in many instances outdated. The use of modern technologies for educational purposes, for example in distance education, remains largely unconsidered. Exceptions and limitations contained in the South African Copyright Act must be reformed to, among other things, address technological advancements that could facilitate access to knowledge. Detailed and clear provisions for uses by libraries, archives, educators and learners should be introduced. One particular issue that requires further clarification is if and to what extent the creation of course-packs for learners is and ought to be allowed, under South African law.

While for reasons of legal certainty it seems best to adopt a detailed list of specific copyright exceptions and limitations (for which the recently amended copyright laws of other countries such as Australia could serve as an example), it should also be considered by the South African lawmaker to introduce an additional and subordinate catch-all clause modelled after the 'fair use' doctrine in the United States. Such a provision would (in the future) prevent numerous unanticipated uses being deemed illegal simply because the law cannot keep up with the pace of technological change.

Of course, national copyright exceptions and limitations must fulfil the requirements for copyright exceptions and limitations as set out by the relevant international copyright treaties and agreements, particularly those contained in the 'three-step test'.

In light of South Africa's developmental needs, especially in the educational sphere, copyright protection in South Africa should not exceed the standard scope of copyright protection required under the relevant international copyright treaties and agreements. To the extent that the current law exceeds the standards set out in those treaties and agreements, legislative change is required.

For the educational communities, the existing policies and practices at the University of Cape Town may provide a starting point for developing appropriate copyright-related policies and practices. Of particular importance are UCT's blanket licence agreement with DALRO and UCT's institutional Intellectual Property Policy. However, the UCT-DALRO blanket licence agreement may not adequately reflect authorisation-free and often remuneration-free uses for educational purposes permitted under the Copyright Act. UCT, like most educational institutions in South Africa, currently does not have a copyright policy to guide its students and staff with regard to their entitlement to copying works for educational purposes beyond what is covered by the blanket licence

agreement. UCT's institutional Intellectual Property Policy does not address this issue. Arguably, UCT students and researchers are therefore photocopying much less than they are entitled to because they are unsure of the legal implications. It is thus recommended that a policy on what can be lawfully copied be drafted in simple and succinct terms and that it be effectively communicated to the university's educational community.

The South African government's FOSS Policy has positive implications for access to knowledge. By endorsing open source software and open standards, the intention of FOSS is to lower barriers for accessing information and communication technologies. Unfortunately, no policies exist for areas other than open source software and open standards. The South African ACA2K research team recommends that more far-reaching legislative guidelines on copyright and access to learning materials be adopted, with the aim to enable rather than hamper access. Such guidelines should be jointly drafted by the relevant government departments, ie the dti, DoE and DAC, in consultation with representatives from the educational community and rights-holders, to ensure a comprehensive and holistic approach. Every future piece of legislation with implications for education in South Africa should then be drafted under consideration of these copyright guidelines. More generally, there seems to be room for improvement towards facilitating a broader range of participation in copyright policymaking in South Africa.

Copyright-holders collectively, through fora such as PASA and ANFASA, would be well advised to formulate policies, or update their current policies, with regard to enhancing access to copyright-protected materials for learners in South Africa. The South African research team is well aware that many copyright-holders, especially publishers, have a business to run — which makes it impossible to give away their material free. As far as education in South Africa is concerned, however, this factor alone does not unburden copyright-holders from a responsibility towards society as a whole to enable access to the greatest extent possible rather than constantly trying to achieve stricter copyright-protection regimes. Even from a business perspective, it appears counterproductive to impede the development of a reading culture which in the long run will heighten the demand for their works. Moreover, before pushing for stronger and longer copyright protection, copyright-holders should consider that laws that are too removed from the needs and beliefs of the majority are often ignored and difficult to enforce. Eventually, such laws often become ineffective. Particular attention should be paid to the needs of learners who face additional barriers to access to learning materials such as the sensory-disabled.

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