

Global Information Society Watch 2009

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Humanist Institute for Cooperation with Developing Countries (Hivos)
Swedish International Cooperation Agency (Sida)
Swiss Agency for Development and Cooperation (SDC)

Printed by

MONOCROMO

Printed in Uruguay

Edición hecha al amparo del Art. 79 de la Ley 13.349
Dep. Legal 350401

Global Information Society Watch

Published by APC and Hivos

2009

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ISBN 92-95049-73-X

APC-200911-CIPP-R-EN-P-0065

*Dedicated to A.K. Mahan - an activist who valued
intellectual rigour and concrete outcomes.*

APC and Hivos would like to thank the Swedish International Cooperation Agency (Sida) and the Swiss Agency for Development and Cooperation (SDC) for their support for Global Information Society Watch 2009. SDC is contributing to building participation in Latin America and the Caribbean and Sida in Africa.



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Africa

Tobias Schonwetter and Chris Armstrong

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

Knowledge is essential to human development, as it plays a role in economic progress, cultural growth and individual fulfilment. Because of this, access to knowledge (A2K) in any form must be seen as an essential human right.

A2K and Africa

For the countries of Africa, this right of access to knowledge is particularly important because of African governments' developmental needs and goals. The policy objective of unhindered and affordable access to knowledge material can be seen as essential to the fulfilment of a country's other economic, social and political developmental objectives. This is because many of the areas where developing countries face developmental challenges are in some way or another associated with capacity deficiencies that can be ameliorated to some extent by greater knowledge/education diffusion.

Although printed and other hard-copy materials arguably still form the main sources for information and knowledge on the African continent, the advent and use of digital technologies to access/share information and knowledge present some of the most promising emerging opportunities for African countries to tackle and eventually overcome the most pressing problems that have consolidated their social and economic underdevelopment. One author has rightly noted that "[c]reating digital opportunities is not something that happens after addressing the 'core' development challenges; it is a key component of addressing those challenges in the 21st century."¹

Currently, however, many countries in Africa lack sufficient information and communications technology (ICT) network infrastructures, including landlines, wireless services and high-speed fibre-optic cable connections. In addition, the cost of internet access² in Africa is often prohibitively high: the poorest continent in the world has the highest internet access costs, and data suggest that countries with the lowest income per capita have some of the highest costs for internet access.³ Africa, the second most-populous con-

continent on earth with almost one billion people, accounted in 2008 for more than 14% of the world's population. At the same time, with roughly 54 million internet users, it only accounted for about 3.4% of the world's internet usage.⁴

Internet penetration in Africa is less than 6% of the continent's population, while the world's average internet penetration is at almost 24%. Internet penetration is just under 49% in Europe, 60.4% in Oceania/Australia and 74.4% in North America.⁵ In several countries in Africa – such as Burkina Faso, Burundi, Chad, the Democratic Republic of Congo (DRC), Ethiopia, Mali, Niger and Sierra Leone – internet penetration is still well below 1%.⁶ A clear link exists between the wealth of a country (the per capita income of its inhabitants) on the one hand and the internet penetration in the country on the other.⁷

Having said this, there is little doubt that the situation in Africa is going to improve in the mid term as far as network infrastructure and, consequently, internet access costs and internet penetration are concerned. Notably, for instance, a number of additional underwater fibre-optic network cables are currently being laid in both East and West Africa, which will significantly increase broadband capacities.⁸ The potential of a cable like Seacom, which has already landed on the East African coast, has created much anticipation and excitement in countries such as Tanzania, Kenya and South Africa.

A2K and copyright in Africa

Network infrastructure, however, is only one of the relevant factors when it comes to online knowledge and information access opportunities in Africa. An enabling telecommunications policy/legal/regulatory environment is also required to ensure fair and affordable access to the infrastructure. Similarly, other legal frameworks can have an impact on the state of access to knowledge materials. In particular, access-enabling national copyright regimes appear to be crucial, because vast amounts of information and knowledge materials are copyright-protected. At the same time, there is a huge gap in knowledge material production between developing countries and developed countries, which causes an immense copyright royalty flow from developing countries into the developed world.

1 G8 Digital Opportunity Task Force (DOT Force) (2001) *Digital Opportunities for All: Meeting the Challenge*, p. 7. www.icdevilibrary.org/downloads/G8_DOT_Force_Report_V_5.pdf

2 Internet access costs comprise both telecommunication costs and internet service provider (ISP) costs. Telecommunication costs often account for more than 60% of the total internet access costs.

3 Learning Information Networking Knowledge (LINK) Centre and Mike Jensen Consulting (2004) *Fair Access to Internet Report (FAIR)*, study for the Open Society Initiative and International Development Research Centre (IDRC), p. 13. www.ictportal.org.za/documents/d00016/FAIR.pdf

4 As of March 2009; see Internet World Stats website, *Internet Usage Statistics – The Internet Big Picture: World Internet Users and Population Stats*: www.internetworldstats.com/stats.htm

5 Ibid.

6 Internet World Stats website, *Internet Usage Statistics for Africa*: www.internetworldstats.com/stats1.htm

7 Organisation for Economic Co-operation and Development (OECD) (2000) *Understanding the Digital Divide*, p. 18. www.oecd.org/dataoecd/38/57/1888451.pdf

8 At present, many African countries still rely heavily on congested and slower satellite connections for internet access.

It is widely believed that a more balanced copyright system – balancing the rights of rights holders with the rights of users – can promote access to knowledge and support critical public policies such as educational policies in developing countries of Africa. In 2002, the United Kingdom Commission on Intellectual Property Rights aptly summarised the relevance for developing countries of striking a fair balance between enabling copyright protection and enabling access to knowledge material:⁹

The crucial issue for developing countries is getting the right balance between protecting copyright and ensuring adequate access to knowledge and knowledge-based products. It is the cost of access, and the interpretation of “fair use” or “fair dealing” exemptions that are particularly critical for developing countries, made more so by the extension of copyright to software and to digital material. These issues need to be addressed to ensure developing countries have access to important knowledge-based products as they seek to bring education to all, facilitate research, improve competitiveness, protect their cultural expressions and reduce poverty.

Unsurprisingly, therefore, the Development Agenda adopted by the World Intellectual Property Organization (WIPO) in 2007, which is aimed at ensuring that development considerations form an integral part of WIPO’s work, also specifically refers to A2K issues.

The ACA2K research network

Since the beginning of 2008, the pioneering African Copyright and Access to Knowledge (ACA2K) Project¹⁰ has been undertaking research on the continent aimed at furthering the understanding of the relationship between national copyright environments and access to knowledge, specifically access to learning materials. The project engages a network of more than 25 independent experts from law, economics, information sciences and gender studies, based almost exclusively in Africa. The ACA2K project is supported by Canada’s International Development Research Centre (IDRC) and South Africa’s Shuttleworth Foundation and is managed by the LINK Centre at the University of the Witwatersrand’s Graduate School of Public & Development Management (P&DM) in Johannesburg. The ACA2K research nodes are in eight African countries: Egypt, Ghana, Kenya, Morocco, Mozambique, Senegal, South Africa and Uganda. ACA2K study

countries were selected to represent a diversity of socioeconomic, political, cultural and linguistic contexts.

The work of the ACA2K network is based on the premise that one of the predominant legislative/regulatory mechanisms that can and should be used to facilitate the creation and dissemination of learning materials is copyright. Paradoxically, however, copyright law can often be a constraint on access to learning materials. As a result, in a given country, copyright has the capacity to both promote and hinder access to learning materials, and access to knowledge in general.

Of course, copyright law on its own does not determine the relationship between copyright and access to learning materials. Also relevant are perceptions of the copyright legal framework; interpretations of and practices in relation to the framework; and norms, social conditions and market dynamics that affect how people access and use learning materials. Because of this, the ACA2K network of researchers is seeking to understand the overall copyright “environment” (law and practice) in relation to access to learning materials, through combining the analysis of policies, legislation and case law with the qualitative review of existing literature and impact assessment interviews with stakeholders (state actors, user groups and copyright holders).

In general, ACA2K research indicates that the state of access to knowledge (and learning materials in particular) in Africa is precarious. Creative works are strongly protected by national copyright laws in all the African countries studied. Notably, the duration of copyright protection in Ghana, Mozambique and Morocco significantly exceeds the standard term of protection of 50 years after the death of the author for most creative works – the standard term provided for under the relevant international treaties and agreements such as the Berne Convention, the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the WIPO Copyright Treaty (WCT).

While there are several aspects of national copyright law that are crucial to access to knowledge, the role of copyright limitations and exceptions, including “fair use” and “fair dealing” clauses, is particularly noteworthy. The ACA2K research indicates that in all eight study countries, existing copyright limitations and exceptions are too narrowly and/or vaguely defined to facilitate learning materials access in a balanced and effective manner. For instance, the precise scope of South Africa’s crucial fair dealing provisions in the country’s Copyright Act are obscure, and no clarifying case law exists on this issue. This is problematic since fair dealing in the Act pertains, among other things, to the reproduction of copyright-protected works, without payment to or

9 Commission on Intellectual Property Rights (2002) *Integrating Intellectual Property Rights and Development Policy*, p. 96. www.iprcommission.org/graphic/documents/final_report.htm

10 www.aca2k.org

permission from the rights holder, for important activities such as private research and study. Meanwhile, Egypt and Uganda, among other countries in the study circle, do not have any copyright exceptions and limitations dealing specifically either with distance learning or access for disabled learners. And in spite of a clear need for better support for libraries and archives to facilitate access to knowledge, it was also found that the provisions for libraries and archives in the copyright laws of most ACA2K study countries are inadequate in that they do not facilitate meaningful access to learning materials.

It appears that there is little awareness or use of copyright flexibilities that could be introduced to facilitate access to knowledge in the countries studied. In Morocco, for instance, no government department outside that which directly deals with copyright showed any awareness of the relationship between copyright and knowledge.

However, ACA2K research also indicates that in all the study countries except South Africa, the effects of copyright law on the ground – however restrictive the law may be – are minimal, due to weak enforcement. Egypt's ACA2K country team, for example, found that in their country there is currently no direct and tangible effect of the current copyright law on access to knowledge. In practical terms, this means that unpunished copyright infringement (with regard to learning materials) is the main channel for access to information and knowledge in the ACA2K study countries. This situation is, however, changing. Copyright holders are systematically beginning to enforce sanctions against (real or perceived) copyright violation and infringement. Because of this, it can be expected that national copyright laws as they are currently formulated, when increasingly enforced, will create significant barriers to learning materials in the ACA2K countries. ACA2K researchers therefore conclude that pro-access copyright laws would go a long way in facilitating/protecting access to knowledge.

In some cases, however, the full effects of a pro-access copyright law might be truly visible only in the near future, particularly in terms of the online sphere. Applied judiciously, copyright law has the potential to further learning through ICTs, but applied over-zealously, copyright law has the potential to restrict access to knowledge. Of particular concern are anti-circumvention provisions in the laws of some African countries: that is, clauses that make it illegal to circumvent technological protection measures (TPMs). The effect of such provisions is that users seeking to exercise their rights under existing copyright exceptions and limitations such as fair dealing could be prevented from exercising these rights where the learning item in question is protected by TPMs. This may, for instance, prevent a visually

disabled person from circumventing TPMs on a written work for the purpose of using technical means to hear the written work read aloud – even if format adaptation for the benefit of disabled people is generally permitted under a country's copyright law. Countries such as Morocco, Egypt and Kenya have included TPM anti-circumvention provisions in their copyright laws, and although South Africa has not included such provisions in its Copyright Act, similar provisions can be found in the country's Electronic Communications and Transactions Act of 2002. In Egypt, Kenya and South Africa, no provision has been made to allow circumvention when exercising fair dealing and other copyright exceptions and limitations, in this way jeopardising a whole set of copyright exceptions and limitations in these countries. Moroccan law, on the other hand, allows circumvention in some cases related to educational institutions, archives and libraries, but not generally for private and fair-dealing use. ■

GLOBAL INFORMATION SOCIETY WATCH (GISWatch) 2009 is the third in a series of yearly reports critically covering the state of the information society *from the perspectives of civil society organisations across the world.*

GISWatch has three interrelated goals:

- **Surveying** the state of the field of information and communications technology (ICT) policy at the local and global levels
- **Encouraging** critical debate
- **Strengthening** networking and advocacy for a just, inclusive information society.

Each year the report focuses on a particular theme. **GISWatch 2009** focuses on *access to online information and knowledge – advancing human rights and democracy*. It includes several thematic reports dealing with key issues in the field, as well as an institutional overview and a reflection on indicators that track access to information and knowledge. There is also an innovative section on visual mapping of global rights and political crises.

In addition, 48 country reports analyse the status of access to online information and knowledge in countries as diverse as the Democratic Republic of Congo, Mexico, Switzerland and Kazakhstan, while six regional overviews offer a bird's eye perspective on regional trends.

GISWatch is a joint initiative of the Association for Progressive Communications (APC) and the Humanist Institute for Cooperation with Developing Countries (Hivos).

GLOBAL INFORMATION SOCIETY WATCH

2009 Report

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