

GLOBAL INFORMATION SOCIETY WATCH 2009

*Focus on access to online information and knowledge
– advancing human rights and democracy*



ASSOCIATION FOR PROGRESSIVE COMMUNICATIONS (APC)
AND HUMANIST INSTITUTE FOR COOPERATION WITH DEVELOPING COUNTRIES (Hivos)

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

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Introduction

The year 2009 is a turning point for Kenya and the development and opportunities offered by information and communications technologies (ICTs). Three submarine cables are expected to land during the year. The first, The East African Marine System (TEAMS), landed in June and will be operational by September. The second, Seacom, is expected to land by the end of the summer,¹ and the third, the Eastern Africa Submarine Cable System (EASSy), by the end of the year or early 2010. These fibre-optic cables will bring massive changes in bandwidth availability, and are expected to lower prices as international connectivity shifts from relying only on satellite to almost four terabits over fibre. Lower prices and greater availability are expected to increase access to the internet as well as promote the continued spread of sophisticated mobile applications and services,² and consequently improve opportunities for the creation of and access to information and knowledge.

The advent of the internet and ICTs in general in Kenya has already created significant opportunities for greater access to information and knowledge. While internet use has grown modestly (about three million Kenyans – approximately 8% of the population – have access to the internet), the use of mobile phones has grown exponentially and is currently estimated at 13 million subscribers, over one third of the population. With no restrictions on the types of applications providers can offer, the availability of internet access via mobile phones continues to increase with users enjoying more sophisticated mobile services.

In addition, the lack of restrictions on the types of internet applications and information services, and lack of government control and regulation of internet infrastructure, has helped increase the widespread use of ICTs to access and produce knowledge and information via blogs, short message service (SMS), instant messaging services, chat rooms, social networking sites, etc. The internet now plays a major role not only in education, but also political expression and debate. For example, during the post-election conflict from December 2007 to February 2008, the internet became an important medium for political debate among residents and Kenyans living in the diaspora. SMS, blogs and websites were an essential source of information, opinions and images. Innovative ways of capturing news and events as they

unfolded – for instance, by using mobile phone cameras and uploading images onto the internet – increased access to information during those critical months. The downside of this increased access to information, however, was the use of the same media to spread messages of ethnic hatred, intimidation and calls to violence.

It is important to note that while the government did place some controls on live reporting by the traditional media, it did not attempt to restrict the use of online services to access or disseminate information during that period. The government also used the SMS services of two major mobile providers, Safaricom and Zain, to urge Kenyans to desist from using SMS to send messages of violence and hatred. The government's access to mobile subscriber databases suggested that the government had the potential to monitor mobile phone usage and control the content mobile networks carried. More recently, the president directed the minister of information and communication to put in place a system that would ensure that all mobile subscribers are registered within six months, while expressing concern that there was an increase in crime perpetrated through mobile telephony.³

Policy and legislative environment

The convergence enabled by digital technologies has made it possible for any given medium to deliver any type of content online. This potential is reflected in recent amendments to Kenya's communications legislation, as well as regulatory reforms in the ICT sector, that have led to a new licensing framework that is technology neutral. Legislative reforms have introduced and encouraged competition, which has resulted in reduced costs, improved access to infrastructure and better quality of service.

Kenya's key policies and legislation impacting on access to online information include the following:

- The Public Archives and Documentation Service Act (1966) created the Kenya National Archives and Documentation Service (KNADS) and made provisions for the preservation of public records and archives. The Government Printer and all heads of government ministries, agencies and departments are obliged to provide the director of KNADS with two copies of any published or generally circulated document or report produced by their offices. The Act does not, however, expressly recognise the rights of citizens to access these public archives, nor does it require the information to be made available in electronic format.

1 Kinyanjui, K. (2009) Seacom link promises new telecoms era, *Business Daily*, 23 July. www.businessdailyafrica.com/Company%20Industry/-/539550/628294/-/u8x1cvz/-/index.html

2 The Mobile Broadband Wireless Access (MBWA) Working Group (www.ieee802.org/20) notes that the demand from developing countries has been fuelling huge growth in mobile broadband. These countries have leapfrogged from fixed-line infrastructure to using mobile broadband technologies to deliver internet access to the mass market.

3 KBC (2009) Kibaki orders registration of mobile subscribers, *Kenya Broadcasting Corporation*, 21 July. www.kbc.co.ke/story.asp?ID=58728

- The Official Secrets Act (1968) permits the concealment of information assumed to be exempt from public disclosure for the preservation of state secrets and state security. A new proposed Freedom of Information Bill, to be put before the Kenyan Parliament later this year, proposes to repeal the Official Secrets Act. The Bill seeks to provide all persons in Kenya with the right to access information held by public authorities and private bodies performing a public function. The main objectives of the Bill, as outlined in the preamble, are the general right of access to information in the government's possession, the proactive dissemination of information, and the right for persons to correct their personal data held in government records, as well as introducing the principle of maximum disclosure.
- The Statistics Act (2006) established the Kenya National Bureau of Statistics for the collection, compilation, analysis, publication and dissemination of statistical information and the coordination of the National Statistical System. The Act is not clear on making this information accessible online, and its provisions might be limited by some conditions of the Official Secrets Act.
- The Kenya Communications Act (1998), which mainly addresses the progression from a market monopoly to a liberalised telecommunication sector, unbundled the Kenya post and telecommunications sectors, allowing more service providers to enter the telecommunications market and, as a result, increasing access to various ICT services, including the internet.
- The Copyright Act (2001), which provides copyright protection, was initiated mainly to comply with World Trade Organisation (WTO) obligations, and restricts access to information. There is little awareness of more flexible copyright concepts, particularly for educational material, that could prove productive in a developing country like Kenya. The Kenyan government has, however, taken steps to make educational materials more accessible, evidenced by the subsidies it provides for a range of books and teaching materials and the current initiatives to encourage the uptake of e-learning.⁴
- The National ICT Policy of Kenya, approved by the cabinet in March 2006, aims to introduce e-commerce, e-government services, e-learning and the utilisation of ICTs in health delivery.
- The Kenya Communications (Amendment) Act (2009), currently being implemented, aims to streamline and converge the regulatory framework governing the communications sector. It includes provisions concerning electronic transactions, broadcasting, and the country's domain name system, and introduces content regulation. However, the Amendment Act is not specific on the issue of online content; the current interpretation is that the Act refers to all forms of content, whether offline or online.

Key issues regarding online access to information and knowledge in Kenya

- *Affordability and infrastructure:* The extent of access to online information and knowledge remains low nationally and disproportionately low in rural areas, due to poor telecommunications infrastructure and a lack of electricity. Where there is electricity, the grid is unreliable and poorly managed. While costs are expected to drop with increased access to broadband, access to online information and knowledge may remain low due to competing economic and social priorities, both at the macro level and the micro or household level. Accessing broadband will still cost too much for the average Kenyan.
- *Vulnerability of the media:* Access to and expression of information in Kenya is generally free. However, the online portals of mainstream media outlets continue to practise some level of self-censorship for various reasons, including the still-existing defamation laws. These media organisations own substantial physical infrastructure that could be subject to state interference, and are also vulnerable to other forms of disruption and sabotage. For example, this was the case of the Standard Media group, which had its office premises raided by the former National Alliance of Rainbow Coalition (NARC) government and its communication equipment confiscated in the name of national security.
- *No policy protecting or promoting online content:* There is no clear national policy on electronic access to information and knowledge, and while the constitution protects freedom of expression as well as freedom to communicate ideas and information, it also provides the government with the power to place restrictions on "privileged" information, and act against defamation in the interests of public order, safety, morality, health and defence. Furthermore, legislation such as the Public Archives and Documentation Act and Statistics Act do not explicitly address issues of online access to the information they help collect.
- *Punitive legislative framework:* Punitive criminal defamation laws remain and restrict access to information and knowledge. For example, most local media houses will not publish content either on paper or online that would be subject to the defamation law that has in the past been used very punitively.

⁴ Section 26(a) of Copyright Act No. 12 of 2001 "excludes the collection of literary works of not more than two passages from a single work if the collection is designed for use by an educational institution. If an educational institution is to make course packs or a compilation of material for teaching purposes, it would have to seek the authority of the rights holders. Reproducing or downloading material without the rights holder's authority would amount to infringement of copyright." Ouma, M. (2008) Law, Technology and Access to Educational Material, paper presented at the Third Annual Access to Knowledge (A2K3) Conference, Geneva, Switzerland, 8-10 September. www.aca2k.org/.../180_Yale%20A2K3%20Geneva-September%202008.doc

- **Restrictive copyright laws:** Restrictive copyright laws infringe on access to information and knowledge. While Kenya's 2001 Copyright Act has some general exceptions and limitations meant to provide balance between access by users and rights of owners, these are limited. For example, there are exemptions related to digital rights management in the case of computer programmes where copies are required for interoperability. However, the act also makes it illegal for anyone to circumvent technological protection measures. Furthermore, the way in which the law (Section 26(a) of Copyright Act No. 12 of 2001) describes such technological protection measures seriously limits access to e-books, articles, databases, and other educational material.

New trends

Access

Digital villages⁵ are being established to speed up and increase the availability of online access for Kenyans all over the country. These initiatives are being implemented by various stakeholders, from the private sector's ICT villages, to civil society projects such as those by the Arid Lands Information Network, to the government's *Pasha* e-Centres, which are being initiated by the Ministry of Information and Communications and the Kenya ICT Board. These projects will have far-reaching effects for broad-based online activities in agriculture, health, education and commerce, among others. For example, the *Pasha* e-Centres are set up in each of the country's 210 constituencies. The centres are intended to bring the benefits of affordable broadband bandwidth, made available by the TEAMS international submarine cable and the national terrestrial cable (the National Optic Fibre Backbone Infrastructure, NOFBI), to rural Kenya. NOFBI is connecting major towns, cities and district headquarters and will connect to the international TEAMS cable. Both the international and national fibre initiatives are being established through public-private partnerships involving local entrepreneurs.

Legislation

The Kenya Copyright Board, together with other stakeholders, is currently reviewing the Copyright Act with the aim of revising exceptions and limitations to ensure a balance between copyright protection and access to knowledge. Examples of flexibilities under consideration are the inclusion of specific exceptions for the visually impaired, more flexibility for non-commercial library and educational use, and a limitation on the use of technological protection measures, especially on educational material.

A Freedom of Information Bill will be put before the Kenyan Parliament during its current (2009) term. The Bill proposes to create a citizen's right to public information and to foster the proactive provision of information by public bodies. It also imposes obligations on private bodies to release information to a citizen where the information is necessary for the enforcement of a citizen's rights.

Action steps

- There is a need for various policies and regulatory frameworks to be put in place, among them a freedom of information law and cyber crime and consumer and data protection legislation.
- There is also a need to speed up the review and amendments of the Copyright Act, to ensure that exceptions are defined in a way that will facilitate access to knowledge and information, among others.
- The implementation of a universal access strategy is a priority for increasing affordable access to the internet and online information and knowledge.
- There is a need for public awareness on the right to access online information and knowledge, the right to access public information, the right to privacy and protection of personal data, and the right to change personal data held by the government, among others.
- There is a need to find practical solutions to problems associated with the (mis)management of records and information in the public sector, and access to and use of public information. ■

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⁵ Digital villages are e-centres providing a suite of services to the public via computers connected to the internet, digital cameras, printers, fax machines and other communication infrastructure.

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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