

## **Intellectual Property, Education and Access to Knowledge in Southern Africa**

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## Executive Summary

There can be little doubt that education is a cornerstone of social and economic development, or that access to learning materials is a crucial factor in the success of any educational system. In a world which values the production and dissemination of information and knowledge, human capital growth is a serious developmental concern. We live, apparently, in a 'knowledge economy', and if so, two processes seem worth noting. First, societies of the global south are struggling with everyday challenges of education and literacy, while their institutions and governments perform the inevitable balancing act between scarce resources and vast needs. Second, producers of knowledge goods, heretofore located in the north, are increasingly global in scope; exporting, with their expansion, an intellectual property rights (IPR) regime that poses current and potential deterrents to learning.

It is against this backdrop that the global access to knowledge ('a2k') campaign emerged. In the context of economic development in the south, and education work in particular, curricular resources in primary, secondary and tertiary education bear examination. While much of the changes wrought recently in IPR (in the domain of multilateral and bilateral trade negotiations) concern changes to the digital environment, their effects are as yet minimal in the southern African context and usually relegated to the institutional sphere. But while this is currently true on account of the relative lack of affordable and available telecommunications and computing infrastructures, they cannot be overlooked in that they pose a potential threat to the learning environment, and curtail opportunities – now and in the future – to institutions and individuals enabled with adequate infrastructure.

The majority of the world learns from the printed and/or spoken word and associated imagery. In this context, examining the problem of access to learning materials, and understanding its connection to current and future IPR regimes (along with a consideration of potentially offsetting strategies such as open access) provides us with a firmly-rooted perspective of the options and solutions available to societies, institutions and governments in southern Africa.

The simplest lesson, perhaps, comes from exploring the dichotomy evident in the traditional knowledge good and its alternative equivalent. Books are still largely inaccessible in the south – whether on account of high cost, unsuitability of language and format, or, even more simply, plain unavailability. The open access textbook, on the other hand, costs as much as it does to print and can be available wherever necessary. Even a visible scarcity of knowledge goods in the main languages spoken in southern Africa could be alleviated by the permission-free translation choices presented by open access, since access to cultural goods in turn produces *producers* of cultural goods. The point to bear in mind is that access as a strategy is not predicated on the assumption that students of the south are ‘consumers’ (and that professors of the north are ‘producers’), but rather, that a complex, interdependent relationship exists between consumption and production – and furthermore, that access to cultural goods is a necessary and significant factor to stimulate production.

The challenges facing copyright law in relation to access to learning materials need to be prefaced by the international obligations facing the Southern African Customs Union (SACU). SACU countries (including Lesotho, which is classified as a ‘least developed country’) are members of the World Trade Organisation (WTO), are further bound by treaties signed at the World Intellectual Property Organisation (WIPO) when applicable, and face negotiation constraints in bilateral trade agreements with countries and economic blocs, such as the US and the EU. While the a2k movement and its allies hope to present a sound case for national legislations to take full advantage of flexibilities (especially in relation to exceptions and limitations in copyright law) available under obligations to the WTO, the copyright industries are simultaneously calling for the enforcement of another aspect of SACU obligations to the WTO – namely, criminal sanction for certain copyright violations. A significant process currently underway in SACU, for instance, is a free trade agreement (FTA) with the US, where the conditions proposed by the US on copyright and related policy are, in general, beyond conditions imposed by obligations to the WTO, especially in the digital domain.

But a focus on global processes, necessary as it is, must also consider local circumstances. In SACU countries, as elsewhere in the global south, the informal

economy – knowledge and cultural goods included – plays a key role in bridging access gaps that traditional market mechanisms overlook or exclude. As much it may be difficult for policy-making structures to overcome the naturalisation of simplistic polarities such as ‘piracy’ on the one hand, and the ‘formal economy’ on the other, any set of policy solutions that address the problem of access to learning materials in southern Africa will have to consider the informal economy in order to be comprehensive.

It is under such conditions then, local and global, that the importance of making a legitimate claim for access to learning materials becomes important. As past campaigns, such as the loosely federated access to medicines movement have shown, the challenge is not insurmountable. In this case, the current needs and potential benefits of expanding access, combined, present a credible case for serious and urgent intervention.

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## Abbreviations and acronyms

a2k	Access to Knowledge
DoE	Department of Education, Government of South Africa
DRM	Digital Rights Management
FTA	Free Trade Agreement
GATT	General Agreement on Trade and Tariffs
GPI	Global Publishing Information Report
ICT	Information & Communication Technologies
IPR	Intellectual Property Rights
NGO	Non-governmental organisation
North/South	Used to refer collectively to developed/ developing and least developed countries, respectively
PICC	Print Industries Cluster Council, South Africa
SACU	Southern African Customs Union (comprising Botswana, Lesotho, Namibia, Swaziland, South Africa)
TPM	Technological Protection Measures
TRIPs	Agreement on trade-related aspects of Intellectual Property Rights
UNDP	United Nations Development Programme
USTR	(Office of the) United States Trade Representative
VAT	Value Added Tax
WIPO	World Intellectual Property Organisation
WTO	World Trade Organization
ZAR	South African Rand

## 1. Introduction

As a concept, knowledge covers vast ground and has multiple meanings. In the present day, it is frequently encountered through the term 'knowledge economy,' which is usually used to refer to the importance of knowledge as a contemporary commodity – an undeniable fact, even if it puts a big idea in a utilitarian cage. Consequently, it becomes important to acknowledge both the normative and pragmatic foundations of this concept. As Peter Drahos succinctly puts it: 'Knowledge underpins everything, including economies'.<sup>1</sup>

It is therefore appropriately difficult to exhaustively list elements of issues to consider under a campaign for access to knowledge (a2k). To circumscribe 'knowledge' would be a foolhardy exercise; instead, the campaign – as this paper – deals with conventionally identifiable elements of curricular and self-administered learning. 'Access' is a similarly fraught term. One could begin by considering that knowledge is accrued in different ways, by both the structured system of education and cultural encounters at large. One might consider that access to these resources can be by different means: the printed and spoken word, television, the Internet, and many other media. One might also consider that systems of learning must be compliant with learners' needs, in the case of either disabled learners or distance learners, to name but two possible groupings.

*Access to learning materials* is one aspect of access to knowledge. Although, for the purpose of analysis, we might divide access to learning materials into issues of bulk access, format access (such as the availability of works in appropriate formats for sensory disabled persons) such classifications tend to overlook the unique nature of knowledge. Knowledge and or knowledge media are often notionalised as 'commodities' for the purposes of economic analysis, denying the catalytic potential of knowledge for development and economic efficiency. Access to knowledge and to learning materials thus encompasses a multiplicity of routes. Even the issue access to learning materials cannot be simply reduced to 'ownership' of textbooks, but extends to ways in which learners make use of texts, such as the act of copying a library resource.

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<sup>1</sup> Drahos, P. 2005. Time for an A2K Treaty? *Bridges*, 9 (4), April 2005.

The a2k movement<sup>2</sup> grapples with exactly such categorical difficulties while calling for action on two broad fronts: first, to limit the barriers imposed on access to knowledge by current and forthcoming intellectual property policy (in the most part, copyright law) and second, to widen the horizons of access by positively licensing knowledge goods (to protect and populate the public domain).

The a2k movement builds on previous and ongoing development advocacy, connecting intellectual property rights (IPR) law and policy with the broad goals of social and economic development. It analyses the experience of individual countries with exceptions and limitations to copyright law, it involves the free and open source software movement and applies lessons learned to the knowledge industry at large; it learns from the global access to medicines campaign<sup>3</sup>; it builds on the extensive development work around education; and it takes on the politics of publishing. Importantly, an opportunity exists for the a2k movement to capitalise on the education movement's emphasis on the fundamental right to education, constitutionally upheld in several states<sup>4</sup>.

The motivation for investigating industry-led copyright regimes comes from anecdotal observation and empirical documentation of restrictions on access to knowledge, both

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<sup>2</sup> We refer, primarily, to the group of non-governmental organisations, academics and others from Asia, Africa, Latin America, Europe and the United States, who met during 2005 to formulate a proposed a2k treaty, and their loose group of allies and institutional affiliates. For more information, see [www.cptech.org/a2k](http://www.cptech.org/a2k).

<sup>3</sup> We refer, particularly, to the dramatic price reductions in essential antiretroviral medicines used to treat people with HIV/AIDS. The international humanitarian organisation Médecins sans Frontières notes that the annual cost of the ARV medicines package has fallen from \$10,439 in 2000 to \$152 in 2005 – representing a price decline of approximately 99% in a mere 5 years (Médecins sans Frontières. 2005). For one overview of the process by which civil society organisations lobbied for access to medicines, and enabled it – typically by tackling the IPR norms that governed their manufacture and circulation, see Berger, J & Prabhala A. 2005, *Assessing the impact of TRIPs-plus patent rules in the proposed US-SACU Free Trade Agreement*. Oxfam GB, South Africa.

<sup>4</sup> UNESCO, in particular, has done noteworthy work around implementing the right to education. For instance, the Bill of Rights, Constitution of the Republic of South Africa states (emphasis added):

'29. (1) Everyone has the right

- a. to a basic education, including *adult basic education*; and
- b. to *further education*, which the state, through reasonable measures, must make progressively available and *accessible*.

(2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account

- a. *equity*;
- b. *practicability*; and
- c. *the need to redress the results of past racially discriminatory laws and practices.*'



instances of which are examined further in this paper. The motivation for studying access to knowledge lies within the challenge to sustain an environment of learning, creativity and social and economic growth. Thus, it is important to note that neither is this solely a southern issue, nor are concerns around industry induced copyright amendments less legitimate because they occur in the north. Yet, the study of access to knowledge as a *development* goal, in the context of the state, closely relates to the challenges of literacy and education in the global south. For the purposes of this paper, we analyse the issue through a narrower term, namely, access to learning materials.

While most of the world still formally learns through the printed or spoken word, for some time now, copyright industries<sup>5</sup> have been lobbying for increased control of the electronic domain – advocating the implementation of terms which, in many countries, would impose restrictions on users that go further than laid down in national copyright law<sup>6</sup>. Though the accessibility of electronic content is sometimes seen as a developed country problem – due to the widespread lack of affordability of computer hardware and telecommunications infrastructure in the south – any regulation of the electronic domain has broad global significance, in the present, and in the future. The irony is that even while information and communication technology is championed by northern governments as a development tool, regulation proposed by these very entities threatens to limit its potential.

The first section in this paper defines broad issues to consider and examines the barriers to access to learning materials faced in the Southern African Customs Union (SACU), analysing the responsibility of intellectual property legislation within the complex structure of systems that are consequential to consumers and learners. The second section reminds us that the informal economy in knowledge goods is an access mechanism, prompting a conceptual consideration of the phenomenon of piracy, and then, through a case study in Uganda, suggests possible policy lessons. The third section frames the environment described in the first two sections in a survey of

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<sup>5</sup> Content and information technology corporations, primarily based in the north, whose revenue is linked to copyright control.

<sup>6</sup> For an overview of the problems faced by electronic domain content, see pages 8–10 of the draft text of the a2k treaty, available at: <http://www.cptech.org/a2k/consolidatedtext-may9.pdf>.

intellectual property law in SACU member countries, and audits the limitations or exceptions available within the law, in the light of those that may be made use of, as a consequence of access to learning materials.

## 2. Access to knowledge in southern Africa: The problem

Conventional, developmental accounts of human capital theory are based on the idea that education leads to increased productivity, which, in turn, leads to increased wages. That education is a cornerstone of economic development is incontestable. But education in turn relies on the assumption that schooling outputs are directly related to schooling inputs: in other words, it is assumed that the quality and availability of learning materials are crucial for sustaining a student through the various processes and stages in the education system. Noting this significance, the South African Department of Education (DoE) states<sup>7</sup>:

The price of textbooks warrants special attention...partly because textbooks are probably the most important input, at the margin, in producing learning achievement...

Education in southern Africa is characterised by general underperformance, as manifested in standard human development indicators, pointing to a struggle to develop human resource capital:

Table 1: UNDP Education Index Rank

Country	UNDP Education Rank <sup>8</sup> (Out of 177)
South Africa	119
Namibia	126
Botswana	128
Swaziland	137
Lesotho	145

<sup>7</sup> South Africa. Department of Education. 2003. *Report to the Minister: Review of the Financing, Resourcing and Costs of Education in Public Schools*. Pretoria: Government Printers.

<sup>8</sup> UNDP. 2004, *United Nations Development Programme, Human Development Report*. Geneva: UN.

While it is clear that the availability of learning materials is a crucial component of education, some basic questions are important at this stage. Firstly, to what extent is access to learning materials a problem in the region? And secondly, how can we trace the effects of the problem to intellectual property law?

We rely on empirical evidence, qualitative accounts and surveys of access problems as they currently exist, to suggest that there are significant problems regarding access to learning materials in southern Africa, many of which are connected to intellectual property legislation, and others which would benefit from a progressive licensing policy (while acknowledging other, non-intellectual property factors responsible for creating access barriers). We also caution that the quality and range of empirical data with regards to documenting and quantifying the access gap are generally thin, and that structured research is necessary on this question in order to establish a basis for further advocacy.

In considering access barriers in southern Africa, we devote considerable attention to South Africa, and frequently intend it as a regional metaphor. South Africa accounts for 91% of the SACU regional economy and houses 87% of the regional population. South Africa's regional leadership in manufacturing, and consequently, regional export, extends to the publishing industry – the country manufactures 95% of SACU's net industrial output and is responsible for 88% of the export in the region<sup>9</sup>. South Africa is of similarly considerable economic importance to non-SACU neighbours like Zimbabwe and Zambia.

Among the significant barriers to access to learning materials considered are:

## **2.1 Excessive pricing**

The price of books in South Africa can be considered excessive in two ways: first, by a comparison of absolute prices across several countries; second, in comparison to average incomes within the country. The lowest local price of a textbook for secondary

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<sup>9</sup> UNDP. 2004, *United Nations Development Programme, Human Development Report*. Geneva: UN.

and tertiary education can be some multiples of its counterparts in developed country markets (even, as seen below, when the author originates in South Africa):

Table 2: International Book Price Comparison<sup>10</sup>

	South Africa	USA	UK
J.M. Coetzee's <i>Disgrace</i>	\$ 21.70	\$ 10.15	\$ 10.15
Nelson Mandela's <i>Long Walk to Freedom</i>	\$ 23.70	\$ 11.60	\$ 16.30
Oxford English Dictionary	\$ 44.61	\$ 20.46	\$ 24.00

A comparison of the proportion of income spent on acquiring textbooks across countries provides a sound justification for labelling prices as excessive:

Table 3: International book price comparison by income proportion<sup>11</sup>

Country	GNI/Capita (US\$)	Oxford English Dictionary as a fraction of average income	Local cost of Oxford English Dictionary at current South African proportions (US\$)
South Africa	3630	1.2 %	(Null)
USA	41,400	0.0004 %	\$497
UK	33.940	0.0007%	\$407

South Africa is one of the few countries in the world which levies a Value Added Tax (VAT) on books, currently resulting in a 14% increase in retail price. Imported books face an additional customs tariff of 10%, in addition to freight charges, which a Global Publishing Information (GPI) report from 2004<sup>12</sup> estimates at 10%. A rough calculation of the mark-up due to taxes, tariffs and freight pegs the figure at 35% – which is still insufficient to justify the international pricing disparities observed in Table 2, which place South African book prices at an increase of more than 100% over the foreign counterpart<sup>13</sup>.

<sup>10</sup> Comparative editions priced at: [www.amazon.co.uk](http://www.amazon.co.uk), [www.amazon.com](http://www.amazon.com) and [www.kalahari.net](http://www.kalahari.net). All three books are recommended texts in the South African secondary school system, and in various tertiary courses. To the best of our knowledge, student editions of these books are not widely marketed.

<sup>11</sup> UNDP. 2004, United Nations Development Programme, Human Development Report. Geneva: UN.

<sup>12</sup> Andrew, J. 2004. *Publishing Market Profile: South Africa*. British Council and the Publishers Association, UK.

<sup>13</sup> While this might suggest that a South African student would be better off buying books from a UK/US online retailer, rather than buying books at a local bookstore or from a local online retailer, the

Among the main reasons for the excessive pricing of books in South Africa is a lack of competition in the market, evidenced in several ways across the spectrum of book publishing. In the Academic book publishing market (denoting textbooks and reference material primarily for tertiary education), the GPI report notes that three publishers (LexisNexis Butterworths, Pearson and Juta) have a combined market share of 62%. Academic book distribution is even more consolidated, with two firms – Van Schaik and Juta retail – holding close to a 100% market share. In the schoolbooks market (i.e. primary and secondary education), five publishers (Maskew Miller Longman, Macmillan, Nasou, Oxford University Press and Juta) hold a combined market share of 71%.

The Print Industries Cluster Council (PICC) concluded that South Africa lacked a 'reading culture' based on their estimation<sup>14</sup> that not more than 4% of the country's population were active readers. The broader context that access to learning materials is located in is the historically and currently limited market focus of the book retail industry at large: observable in that an already limited number of bookshops exist only in shopping malls located in affluent parts of urban South Africa. According to the GPI report, There are 'very few bookshops outside the larger cities and virtually no bookshops in rural areas or in the townships' (townships are an apartheid term for urban black settlements), signifying that the majority of the urban and rural population has limited access to book buying and reading, even as a leisure activity. And as the GPI report dryly notes: 'Trade books are bought predominantly by white readers'.

Excessive pricing indicates a lack of affordability, and a cursory glance at the 2004 statistics suggests that the link is strong. The GPI report estimates that the average cost of a single book in South Africa is ZAR 100. It further estimates that the average government outlay on learning materials is ZAR 189 per student. The South African Students Congress estimates that the average annual cost of tertiary education learning

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preconditions for such purchase (access to the internet, ownership of a credit card, a willingness to tolerate the considerable delay in procurement, etc.) render this option meaningless for the greater part.

<sup>14</sup> Noted in a communiqué from the Print Industries Cluster Council: Van der Sandt, E. 2003. *Are Books Expensive?* (23 October 2003). [Online]. Available: [http://www.picc.org.za/pdf/are\\_books\\_expensive.pdf](http://www.picc.org.za/pdf/are_books_expensive.pdf).

materials is ZAR 6000<sup>15</sup>. These costs for learning materials (albeit very partially offset by grants and scholarships) need to be viewed in the context of South Africa's average annual income per capita, ZAR 14,000<sup>16</sup> – which in the case of single earner households is equivalent to the annual sum of money available to the whole family, for *all* basic needs, such as food, clothing, shelter and transport (indicating, for example, for a family earning the average income, that 40% of its annual income would have to go towards supporting one child's curricular book costs at university).

The producer-consumer dynamic in publishing in present day South Africa is reminiscent of the apartheid state. Prior to 1994, the publishing industry only catered for the middle-class, and the majority of the poor did not have access to learning materials since they were excluded from quality education at large. In 2005, the publishing industry catered for a racially and numerically expanded middle-class, but the majority of the poor, while now encouraged to access education by the state, is often excluded from it by the inaccessibility of learning materials.

The broad lack of competition in the publishing industry, coupled with an inability by the industry to attract the majority of learners to its market, suggests a number of intellectual property and competition policy related interventions – following from the premise that copyright and market power are fundamental facets of a publisher's ability to control the market for a given learning material. On the basis of South African competition policy, it is likely that a credible case may be made to investigate excessive pricing, abuse of dominant position and (vertical and horizontal) monopolisation in the publishing industry. It is also likely that a useful research question would be to understand whether licensing terms of non South African publishers operating in the country set the tone for domestic book prices, or whether it is domestic publishers whose policies create the current pricing situation.

Within the domain of copyright law, sanctioning parallel importation, which would allow distributors and booksellers to choose from a range of world markets, could lead to a

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<sup>15</sup> From an unpublished survey conducted in South Africa in 2005 by the South African Students Congress (SASCO), on file with the authors.

<sup>16</sup> UNDP. 2004, United Nations Development Programme, Human Development Report. Geneva: UN.

more equitable pricing structure. The basis for this is the lack of adequate provisions within copyright law to promote access to essential learning materials. Where essential learning materials are inaccessibly priced, compulsory licensing could be used to enable a competitive production framework that meets consumer needs<sup>17</sup>.

## **2.2 Unavailability and unsuitability**

In smaller, less industrialised Southern African economies (such as Zambia<sup>18</sup>), textbooks, particularly for tertiary education, are routinely unavailable. In subjects without politically contextual limits (such as the physical sciences, engineering and medicine – and unlike, for example, history), tertiary institutions in the south often rely on published material from the north. But the book in question will only be available through a publisher, wholesaler or distributor, if it is adequately profitable to supply the market with that book.

Market logic indicates that a business segment is entered only when there exists both the opportunity to make a profit, as well as a rate of return that is attractive in comparison to other possible investments. The low demand for specialised books in higher education (for example in courses that have very few students enrolled) sometimes means that it does not make business sense for a private retailer to stock them.

This is coupled with another deterrent to access: unsuitability. In SACU, the majority population, though multilingual, is primarily fluent in one or more of the indigenous languages. Rural students (approximately 30% of South Africa live in rural areas) in the

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<sup>17</sup> Clear guidelines for compulsory licensing may enable expanded access to intellectual property goods both through actual use and the threat of use. For example, in the access to medicines campaign in South Africa, the AIDS Law Project, acting for the Treatment Action Campaign, wrested multiple voluntary licences from two pharmaceutical companies in a settlement based on a case that hinged upon the threatened use of compulsory licensing. See:

<http://www.alp.org.za/modules.php?op=modload&name=News&file=article&sid=82>.

In most of the jurisdictions there is no explicit enabling provision for compulsory licences, nor are there any explicit legislative barriers. In our opinion it is not a requirement of TRIPs that countries make use of the Berne Appendix to exercise their sovereign flexibilities under TRIPs.

<sup>18</sup> From statements recorded by the authors at a workshop for academics and schoolteachers in Lusaka, March 2005, organised by the Open Society Initiative for Southern Africa ([www.osisa.org](http://www.osisa.org)), and attended by the Access to Learning Materials Project in Southern Africa ([www.access.org.za](http://www.access.org.za)).

large part, receive their primary and secondary education in one of these indigenous languages, depending on the region the student is from, and the options available. Dominant languages (such as English and Afrikaans) are then only encountered upon entering tertiary education – at which point the student is confronted with a near-total lack of learning materials in her preferred language of instruction, thus often having to grapple with learning in an unfamiliar language.

Students with a sensory disability (including blindness and partial sightedness) face similar issues. In 2005, students at the Filadelfia School for the Blind – in a township called Soshanguve outside Pretoria, South Africa – were compelled to go on strike to protest the unavailability of learning materials in Braille<sup>19</sup>. Text-to-audio and text-to-Braille conversion incur significant process costs, but notwithstanding, licensing factors – whether related to a delay in obtaining formal permission, or the cost of obtaining an adaptation licence – remain as barriers. Distance learning institutions, which serve the majority of South Africa's tertiary education students, find that the cost of designing curricula restricts an expansion of their student base, in part, because of copyright licence fees applicable when adapting existing content into suitable formats.

Indigenous language learners, sensory disabled students and distance learners are all groupings generally considered outside the mainstream<sup>20</sup> – in that for educational material to be suitable to their needs, it requires adaptation from its original format (typically, a printed English book).

Compulsory licensing possibilities, including milestone clauses that monitor the use of exclusive rights included under maximal copyright<sup>21</sup> (and, perhaps, transfer specific rights to the public domain when the related copyright good – such as the Braille adaptation, for example – does not enter the market in a reasonable time frame), and/or provisions that make it easily and legally possible to adapt copyright material for non-

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<sup>19</sup> SABC News, 19 May 2005.

<sup>20</sup> It must be noted that the use of the word 'mainstream' is misleading since it has no quantitative basis; we use it to note prevailing social prejudice. The accumulated number of indigenous language learners and/or disabled students and/or distance learners in Southern Africa, combined, would in fact form the vast majority of students in the region as a whole.

<sup>21</sup> The 'bundle' refers to, not exclusively, the right to reproduce, prepare derivative works of, distribute, perform, display and/or make commercial use of copyright works.



profit markets, would serve, in part, to meet the needs of students thus considered. For instance, provisions which allow individuals to make copies should state that others, such as libraries may make copies on the person's behalf. Another example would be a provision which allows minority to language speakers to make their own translations for educational purposes where there is insufficient economic incentive for the copyright holder to do so<sup>22</sup>.

### 2.3 Government resource constraints

In situations where the government is a significant procurer of learning materials for primary and secondary education, as is the case in South Africa<sup>23</sup>, the excessive pricing, limited adaptability and unavailability of suitable learning materials cause a severe resource crunch.

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<sup>22</sup> For one example of a sovereign copyright law that (partially) enables the educational provisions suggested, see Australia - the Copyright Act 1968 (Act No. 63 of June 7, 1968 as amended in 2002): Section 10(1A). Without limiting the meaning of the expression *educational purposes* in this Act, a copy of the whole or a part of a work or other subject matter shall be taken, for the purposes of the provision in which the expression appears, to have been made, used or retained, as the case may be, for the educational purposes of an educational institution if:

(a) it is made or retained for use, or is used, in connection with a particular course of instruction provided by the institution; or

(b) it is made or retained for inclusion, or is included, in the collection of a library of the institution.

[and]

Section 40-(1) A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, for the purpose of research or study does not constitute an infringement of the copyright in the work.

(1A) A fair dealing with a literary work (other than lecture notes) does not constitute an infringement of the copyright in the work if it is for the purpose of, or associated with, an approved course of study or research by an enrolled external student of an educational institution.

(1B) In subsection (1A) the expression *lecture notes* means any literary work produced for the purpose of the course of study or research by a person lecturing or teaching in or in connection with the course of study or research.

(2) For the purposes of this Act, the matters to which regard shall be had, in determining whether a dealing with a literary, dramatic, musical or artistic work or with an adaptation of a literary, dramatic or musical work, being a dealing by way of reproducing the whole or a part of the work or adaptation, constitutes a fair dealing with the work or adaptation for the purpose of research or study include:

(a) the purpose and character of the dealing;

(b) the nature of the work or adaptation;

(c) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;

(d) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and

(e) in a case where part only of the work or adaptation is reproduced—the amount and substantiality of the part copied taken in relation to the whole work or adaptation.

<sup>23</sup> Mirroring a situation generally applicable in the global south, where governments' involvement in curricular development is high in primary and secondary education, and less in tertiary education.

In South Africa, textbooks form the single highest component of student costs; simultaneously, government is the single largest procurer of textbooks, accounting for over half the publishing industry's turnover<sup>24</sup>. In 2003, the Director General of the DoE highlighted the book-price crisis in a report to the Minister of Education:

The price of textbooks warrants special attention, partly because textbooks constitute such a large portion of the state's expenditure on education...

Though there has been no proper study into the matter, some views suggest that the textbook industry may not be sufficiently competitive, and that it is characterized by too many sole-supplier situations to ensure competitive prices. Higher prices could allow producers to make abnormally high profits, or might simply sustain inefficient production processes. Thorough research is required on this subject to inform possible responses by Government to improve the competitiveness of the industry. Such a study might include an assessment of the relative costs of production in South Africa compared to those in other countries.<sup>25</sup>

According to the DoE, South Africa, the expenditure outlay on school learning materials in 2003 – 2004 was ZAR 2.2 billion. While government investment in education is generally high<sup>26</sup> (6% of GDP), and total annual education expenditure in 2003 – 04 was ZAR 70 billion, there are compelling – and sometimes competing – infrastructure and human development needs in education that demand more resources. In its 2000 *Register of Needs* survey<sup>27</sup>, the DoE found that:

80% of schools did not have libraries

43% of schools did not have electricity

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<sup>24</sup> Gray, E. and Seeber, M. 2004. *Print Industries Cluster Council (PICC) Report on Intellectual Property Rights in the Print Industries Sector*. Commissioned by the Department of Arts & Culture, Government of South Africa, p. 12.

<sup>25</sup> South Africa. Department of Education. 2003. *Report to the Minister: Review of the Financing, Resourcing and Costs of Education in Public Schools*. Pretoria: Government Printers.

<sup>26</sup> In comparison, the average OECD country spending on education was 5.6% of GDP in 2005: see <http://ocde.p4.siteinternet.com/publications/doifiles/012005061T031.xls>.

<sup>27</sup> See <http://www.education.gov.za/content/documents/295.pdf>.

88% of schools did not have computers for learning; in those that did, the students: computer ratio was 164:1

Table 4: Case Study: Nancecol, Johannesburg

An instructive example of the failure in access to learning materials in secondary school education can be found at Nancecol (formerly, the Nancefield College of Technology), an adult learning centre in South Africa, where 485 students spend half their day completing Grades 9, 10 and 12 of the secondary education system (Grade 11 is conflated into the grade 12 syllabus for adult education). Over the course of field visits conducted by the Access to Learning Materials Project in Southern Africa and the South African Students Congress in 2005, it was observed that not *one* of the students or teachers at the school owned a *single* textbook. The school administration itself only owned two copies of textbooks applicable for one subject (out of 12) for one level (Grade 9).

Teachers at the school taught from old books and handwritten notes, while students relied on their class notes for reference. The distribution of textbooks to Nancecol by the provincial DoE had been disrupted, and conversations with the school administration suggested that there were procedural problems in local bureaucracy that needed urgent attention. The administrator hastened to add that even if distribution were to function efficiently, the local education budget allowed for only something like one in five students to have access to textbooks.

Nancecol is located in Klipspruit, a neighbourhood of Soweto, which is among the largest black townships in South Africa, accounting for a third of the city of Johannesburg's population.

There are many possible interpretations on school learning materials expenditure: it is evident that the government is not obtaining enough books for what it spends (as its own report suggests); simultaneously, it is also likely that increasing expenditure on learning materials would divert resources from other crucial areas – such as infrastructure and human resources – in need of support. In either case, it is clear that a new strategy is necessary in order to fulfil the curricular needs of primary and secondary school students in South Africa.

It is important to note here that open access as a principle, and open content licensing as a strategy, present considerable leverage to stretch tight education budgets. Open access is an enabling mechanism for users that is typically enabled by an open content licence. An open content licence is generally characterised by allowing the right to (freely) reproduce and adapt, with optional considerations for attribution and ‘sharing alike’ – that is, to make any adapted versions available under the same open content licence terms as were available to the adaptor<sup>28</sup>. By actively entering the learning materials market, either through commissions or a revised procurement policy, the DoE could mandate that content procured or recommended by it be open-content licensed. The ensuing open access would create several bridging opportunities, allowing for schools, community structures and non-governmental organisations (NGOs) to cost-effectively support the DoE’s mission. Yet, it is important to note the limits of such an open access strategy, given the limited amount of reference material that might be thus accessible, and the relatively scarce amounts of literary material available under open content licenses.

While the strategy is similar to the logic of government promotion of free and open source software (FOSS) – that is, to procure affordable knowledge goods which can be freely adapted and improved upon going further – the actual consideration of such a strategy, however, would have to be finely calibrated to the market dynamics of the local publishing industry in order not to create disincentives to its sustainability, since even though an altered publishing market would be desirable to promoting access, its absence would be detrimental to the broad goals of education and learning. At the same time, while the potential of FOSS is severely hampered by the average individual’s lack of access to computing infrastructure, the usefulness of open access content is not necessarily contingent on access to a computer or the internet. Given some institutional access to digital content (as exists today in Southern Africa, at NGOs and universities, among others), such intermediaries might serve as ‘proxies’ for individual users; thus, for instance, legally downloading a print-ready textbook, printing hard copies, and distributing them to users whose *direct* access to the digital domain is limited.

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<sup>28</sup> For a comprehensive survey of open content licences see Liang, L. 2005b. *A Guide to Open Content Licences*. [Online]. Available: <http://pzwart.wdka.hro.nl/mdr/pubsfolder/opencontent/>.

A related point is that resource constraints facing governments within the SACU mirror resource constraints facing universities in the region. While government is usually (not directly) involved in the commissioning and funding of tertiary education learning material, universities – which rely in part on government financial support – face the issue of having to sufficiently fund their library systems. The typical situation<sup>29</sup> is this: faced with increasing enrolment and an increasing amount of physical and electronic knowledge goods that need procurement, libraries enter into licensing agreements with collecting societies<sup>30</sup>, but find, in turn, that while they are paying high fees in intellectual property rent, they are yet unable to fully meet their students' cumulative demand. While fair dealing/ fair use regulations protect rights-holder interests to the general detriment of the library's work, paradoxically, library administrators find themselves increasingly required to devote institutional resources towards 'copyright education'<sup>31</sup>.

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<sup>29</sup> See presentations by Pauline Ngimwa and Teresa Hackett at the inaugural meeting of the African Copyright and Access to Information Alliance: <http://www.nlu.go.ug/presentations.htm>. A related example: the University of the Witwatersrand, a leading South African institution, spent ZAR1.3 million in 2005 on copyright rents related to adaptation and electronic dissemination of materials alone, not including other copyright-related expenditure (correspondence via e-mail to the authors, from Nellie Sithole, Accounts Officer, University of the Witwatersrand library, 15 February 2006).

<sup>30</sup> In some cases, collecting societies also perform the function of a reproduction rights organisation, as in South Africa with the Dramatic, Artistic and Literary Rights Organisation, DALRO: [www.dalro.co.za](http://www.dalro.co.za).

<sup>31</sup> See [www.dalro.co.za](http://www.dalro.co.za).

Table 5: Open Access Textbooks

In September 2002, a group of post-graduate students at the University of Cape Town, led by Mark Horner (a student of physics), decided to form a collective of students, professors and researchers who would contribute to the creation of free high school science texts. Today, the project is well recognised and much larger than at inception; and the collective has produced draft versions of textbooks for physics, chemistry, mathematics and biology (see <http://www.nongnu.org/fhsst/>) for use in secondary schooling in South Africa.

Open access textbooks can thus be both freely available and freely adaptable, representing a significant opportunity in accessing affordable, up-to-date texts of quality. In many cases, international open access textbooks have local relevance and applicability. Some noteworthy projects include:

BookPower

<http://www.bookpower.org/>

California Open Source Textbook Project

<http://www.opensourcetext.org/index.htm>

Textbook Revolution

<http://www.textbookrevolution.org/>

Wikibooks

[http://en.wikibooks.org/wiki/Wikibooks\\_portal](http://en.wikibooks.org/wiki/Wikibooks_portal)

Connexions: Rice University

<http://cnx.rice.edu/>

Open Course Ware: MIT

<http://ocw.mit.edu/OcwWeb/index.htm>

## 2.4 Potential trade-related changes to intellectual property

The last decade has seen the scope of copyright protection extended through recent treaties to include both software and compilations of data, and, simultaneously, an increase in prohibitions and related enforcement mechanisms around copyright.

Some of the industry-led changes to the copyright system are effected in international treaties promoted by multilateral bodies like the World Intellectual Property Organisation (WIPO) and the World Trade Organization (WTO) of which SACU countries are

members (though, whose treaties, they are not necessarily signatories to: for a detailed treatment, see Section 3). The progression in international treaties that govern copyright law can be traced from the Berne Convention (beginning in 1886) to the WIPO Convention, (14/07/1967 (28/09/1979) WO\_29) which established WIPO, through the inclusion of IPR on the agenda of the WTO and its consequent agreement on trade-related aspects of intellectual property rights (TRIPs) – which incorporated essential elements of the Berne Convention (1996) – to the WIPO Copyright Treaty (20/12/1996 WO\_33) (WCT) in 2000. TRIPs and the sovereign flexibilities available under TRIPs are most important to this discussion since TRIPs may be enforced by trade sanctions. A detailed discussion of copyright law in SACU, vis-à-vis obligations and flexibilities under international treaties, especially TRIPs, is presented in Section 3 of this paper.

Aside from the multilateral channel, the government of the USA, through the office of the US Trade Representative (USTR), negotiates bilateral trade agreements with countries and regional economic units. Negotiations for a free trade agreement between the USA and SACU (FTA) began in November 2002 and were still awaiting conclusion at the time of writing. Among the significant concerns around potential elements of the FTA are:

#### *Restrictions on the use of digital content*

While the idea of overcoming legal barriers to access to digital content may seem to lack relevance in some developing countries, given the poor availability and high costs of telecommunications and computing infrastructures, it will in fact play an important role in determining the future of access to knowledge everywhere. New information technologies make it feasible to extend access to massive libraries of educational, scientific and cultural works, and as the technological costs of storing and manipulating information fall, even the least resourced learning institutions can potentially have something close to parity in terms of the information resources currently available in wealthier countries. Distance learning, already accounting for a significant portion of learning in the south, will increasingly rely on digital means for reach and delivery. The degree to which such access is obtained, and degree to which the future will hold equality of access, will depend upon a number of issues and tasks, including the legal systems put into place to protect digital content from unauthorised use, which could

threaten the promise and potential of new technologies, and the development of and support for new platforms for the creation of open access knowledge goods.

Of particular concern are proposed legal and technological measures related to digital rights management (DRM) and manifested as technological protection mechanisms (TPMs), which, taken together, impose significant restrictions on the ability to copy or share works without explicit permission from right-owners, anti-circumvention regulation which illegalises the fair use of digital content, and IPR and regulatory measures that undermine free and open access development and publishing platforms. Such legal and technological measures are currently a reality in the USA, for instance, through the Digital Millennium Copyright Act (DMCA) enacted in 1998<sup>32</sup>.

### *Extension of the copyright term*

With reference to printed material, the South African copyright act prescribes a copyright term of 50 years on after the life of the author, as is generally the norm. But through the recently concluded US-Australia FTA<sup>33</sup>, for instance, as a condition of the agreement, the copyright term in Australia was extended to 70 years. The USTR has publicly articulated its logic as being that copyright term extension increases the commercial viability of copyright industries. However, any aspect relating to the extension of market power and/or monopoly rights of the publishing industry has implications for education, especially for the availability of 'classic' literary texts.

### *Impediments to educational licensing and adaptation*

The intellectual property proposals of the FTA, as expressed by the USTR, closely resemble the suggestions of the PICC, a South African industry lobby group<sup>34</sup>. Of some

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<sup>32</sup> The DMCA is considered controversial, even in the US. See, generally, the Electronic Frontier Foundation ([www.eff.org](http://www.eff.org)) and specifically, [http://www.eff.org/IP/DMCA/?f=unintended\\_consequences.html](http://www.eff.org/IP/DMCA/?f=unintended_consequences.html)

<sup>33</sup> For one account of the anti-consumer IPR conditions of US-Australia FTA, see Richardson, D. 2004. *Intellectual Property Rights and the US-Australia FTA*. Department of Parliamentary Services, Economics, Commerce & Industrial Relations Section, 31 May 2004. Available on the Australian Parliament website: [www.aph.gov.au](http://www.aph.gov.au).

<sup>34</sup> The PICC brings together a number of industries in the print sector. Its members are: the Print Federation of South Africa (PIFSA), the Paper Manufacturers Association of South Africa (PAMSA), the Publisher's Association of South Africa (PASA) and the Booksellers' Association of South Africa (BASA).



concern here is the attempt to deter the state from exercising legal licensing options to curb abuse on the part of rights-holders, or institute restrictive limits on the scope of fair dealing that would negatively impact access to learning materials.

*Impediments to parallel trade*

As regards 'piracy', the FTA concluded between the US and Morocco on 15 June 2004<sup>35</sup> provides the following definition:<sup>36</sup>

...pirated copyright goods means any goods that are copies made without the consent of the right holder or person duly authorised by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have instituted an infringement of a copyright or a related right under the law of the country of importation.

It is possible that comments on the enforcement of criminal sanctions for acts of piracy, expressed by the USTR in initial letters to the US Congress in November 2002<sup>37</sup> may be interpreted to mean that the USTR will seek an FTA that mandates the use of the criminal law to prevent the importation of copyrighted material. Yet, the parallel trade of pharmaceuticals, for instance<sup>38</sup>, is explicitly sanctioned within South African law. Even otherwise (and with no restriction on type of commodity), TRIPs mandates that parallel trade is a sovereign right, and that nations may decide (within limits) on how and when to exhaust IPR, though national legislations have not necessarily taken advantage of this flexibility<sup>39</sup>.

A point to consider is that potential provisions of the FTA are not publicly known. Those FTAs which have been concluded impact on exceptions and limitations both directly and indirectly. It is important to bear mind that exceptions and limitations need not be

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<sup>35</sup>The text of the Morocco FTA is available online at:

[http://www.ustr.gov/Trade\\_Agreements/Bilateral/Morocco\\_FTA/Final\\_Text/Section\\_Index.html](http://www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/Final_Text/Section_Index.html).

<sup>36</sup> The definitions are contained in footnote 19 (to Article 15.11.20) of the text of the Morocco FTA.

<sup>37</sup> From the initial expression of the USTR on the SACU FTA: available at [www.ustr.gov](http://www.ustr.gov).

<sup>38</sup> Section 15C(b) of the Medicines and Related Substances Act, 101 of 1965 and Regulation 7 of the General Regulations issued in terms thereof.

<sup>39</sup> It must be noted here that Section 23 (2) of South African Copyright Act of 1978, as amended, prohibits the importation into South Africa of reproductions of works without the authority of the rights holder.

confined to those currently enacted in developed countries. For instance appropriate exceptions and limitations to increase access to knowledge include the possibility of government authorisation of importation of legitimate copies from other jurisdictions without permission. In other words, state action can counter the anti-competitive effects of market segmentation. However provisions in existing FTAs prohibit state authorised parallel importation<sup>40</sup>. Mandatory anti-circumvention legislation, highly controversial in the US but required by FTAs<sup>41</sup> criminalizes the exercise of fair dealing rights since exercising fair dealing requires overcoming technical barriers to fair dealing.

### **3. The informal economy in knowledge goods**

#### **3.1 Copyright in the informal economy context**

Copyright and education in Africa interface in unpredictable ways. While the copyright system is generally premised on creating access to cultural goods (and providing rights-holders with the incentive to produce, since, through exclusivity, they can sell above marginal cost of production), the fact is, the poor are a majority on this continent, and access through private means is not an option for most students and even many faculty. As copyright exceptions and limitations in countries with progressive legal traditions are being eroded through lobbying and undesirable technological regulation, the ensuing barriers to access to learning materials can only exacerbate existing socio-economic divides<sup>42</sup>.

Across continental Africa, it would be true to claim that a wide section of rural and urban consumers, including the educated middle class, are generally unconcerned with the details of the copyright system. Local musicians, publishers, writers and artists form lonely voices as they agitate for stricter copyright laws to protect their output. Such

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<sup>40</sup> For instance US Morocco FTA 15.5–2: ‘Each Party shall provide to authors, performers, and producers of phonograms the right to authorize or prohibit the importation into that Party’s territory of copies of the work, performance, or phonogram that are made without authorization, or made outside that Party’s territory with the authorization of the author, performer, or producer of the phonogram.’

<sup>41</sup> (US Morocco FTA 15.5–8)

<sup>42</sup> Okediji, L.R. 2004. Development in the Information Age: Issues in the Regulation of Intellectual Property Rights, Computer Software and Electronic Commerce. P.11. [Online]. Available: [http://www.iprsonline.org/unctadictsd/docs/CS\\_Okediji.pdf](http://www.iprsonline.org/unctadictsd/docs/CS_Okediji.pdf).

agitation is perhaps understandable in the light of perceived piracy of both local and foreign music, often with state-of-the-art reproduction technology. Contrary to popular belief that northern influence in southern copyright policy and legal environments is *solely* responsible for stricter protection, calls for stricter copyright enforcement are being increasingly articulated by local voices, with – possibly – some help from lobbies in the north. What we might term the ‘pro-copyright’ movement is championed mainly by artists, driven by what they perceive as a violation of their rights. Moreover, the arts (broadly speaking, including music) are apparently where southern countries have the advantage in the global intellectual property system<sup>43</sup>. Consequently, rights owner/rights holder interests dominate the copyright debate in much of Africa.

A key feature of Africa’s broad copyright scenario is the growing informal economy in knowledge and cultural goods; and it is useful to note how such business activities interface with the formal education sector. An analysis, as follows, of the informal economy in knowledge goods among Uganda’s small (but politically significant) middle class is instructive in understanding the relationship between formal and informal copyright-related activities. On the one hand, public discourse tells us that the middle class is agitated by copyright practices involving the sale of substandard or counterfeit knowledge products, but on the other hand, it is middle-class consumption that drives the informal economy in music and film goods.

The complex relationship between formal and informal copyright related activities, and the way in which this impacts different copyright interests, is worth exploring, as is the implied moral economy of the access to knowledge discourse. What is the relationship between formal and informal economies of cultural and knowledge goods? Is the formal-informal conceptualisation varied in practice? Does informality in knowledge goods translate into piracy or illegality in educational settings?

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<sup>43</sup> Broadly discussed (among other texts) in Okediji, L.R. 2004. *Development in the Information Age: Issues in the Regulation of Intellectual Property Rights, Computer Software and Electronic Commerce*. P.34. [Online]. Available: [http://www.iprsonline.org/unctadictsd/docs/CS\\_Okediji.pdf](http://www.iprsonline.org/unctadictsd/docs/CS_Okediji.pdf).

There are no easy answers here. At the national policy level, the tension between private-public interests is evinced in the desire by southern countries to create enabling environments for local artists to exploit their works, on the one hand, and allow for a more flexible copyright regime to enable access to educational material, on the other. In jurisdictions where neighbouring rights exist, the fact that most artists' rights are covered under copyright keeps competing public-private interests interlocked. Consequently, allowing for (or preserving) expansive interpretations of copyright for the purposes of enhancing access to educational material is frequently misread in some quarters as an infringement of creators' rights – a widespread feeling and not just in the south, consequent to the global political economy of IPR.

But the contribution of copyright industries to economic development in the south is often assumed without any real assessment of the empirical evidence. When undertaken, such assessments primarily focus on accumulating the interests of rights holders/owners, without accounting for all the indirect ways in which copyright-dependent public institutions contribute to the economy<sup>44</sup>.

Likewise, the ways in which enterprises ancillary to educational institutions may enhance effective utilisation of the copyright system for educational purposes, is a grey area. Sometimes it is also a grey market, and such is the case with petty photocopying businesses in and around institutions of higher learning. This section explores photocopying enterprises at Uganda's Makerere University, to understand the extent to which its ancillary informal economy contributes to access of learning materials.

### **3.2 The photocopier as an access mechanism**

Photocopying is permissible by the copyright system to the extent that reproduction remains within the confines of fair dealing/fair use. What constitutes fair dealing is contentious. Even when fair dealing is defined, courts continue to assess disputes relating to fair dealing on a case-by-case basis. Large scale (and often illegal) photocopying is not unique to African institutions of higher learning – it is widely

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<sup>44</sup> For one example, see Okiy, B.R. 2005. Photocopying and the awareness of copyright in tertiary institutions in Nigeria. *Interlending & Document Supply*, 33(1).

prevalent in the south, and to a lesser extent, even in the north. The difference lies in the extent to which educational institutions (meaning both students and faculty) rely on the activity as a means of access.

Studies of the informal economy of knowledge and cultural goods are generally scarce<sup>45</sup>. Assessments of the role of photocopying in African educational institutions that appropriately handle the socio-economic context are, if anything, scarcer. A recent study on photocopying and copyright in Nigeria's tertiary institutions took a legalistic normative approach, exploring the extent to which photocopying at such institutions conforms to Nigeria's copyright law. Missing entirely in this study, as with similarly motivated investigations, is the extent to which photocopying businesses support access to learning materials. Consequently, its findings – that petty photocopying businesses are grossly infringing copyright law, and that students “find easy allies in operators of photocopiers who are out to make a quick profit”<sup>46</sup> – were not surprising. Essentially, this study illegalises photocopying without considering what might be permissible for education. As noted earlier, even where fair use is somewhat defined by the law for educational purposes, it cannot prescribe what amount is legitimate or not because not all conceivable situation can be predicted by the law.

More interestingly, the study attributed the widespread violation of copyright law to the limited education of photocopying business owners and operators. Missing from the study was any conclusive insight into the demand side of this equation, which would be likely to present compelling reasons for the existence of such operations, even if students and businesses were aware of the law. Indeed, while the study found that a little over 50% of the student respondents were aware of the law, an equal proportion of students cited economic reasons for the compulsion to photocopy. The study noted that a sizable amount of the resources photocopied came from libraries (51.5%). The

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<sup>45</sup> With some exceptions, see Liang, L. 2004b. *A Guide to Open Content Licences*. Piet Zwart Institute, Rotterdam. [Online] Available: [http://pzwart.wdka.hro.nl/mdr/research/liang/open\\_content\\_guide](http://pzwart.wdka.hro.nl/mdr/research/liang/open_content_guide). Also: Sundaram, R. *Recycling modernity: Pirate electronic cultures in India*. Sarai Reader 01. [Online]. Available: [www.sarai.net](http://www.sarai.net); and Kawooya, D. Unpublished manuscripts towards a doctoral dissertation at the School of Information Sciences, University of Tennessee.

<sup>46</sup> Okiy, B.R. 2005. Photocopying and the awareness of copyright in tertiary institutions in Nigeria. *Interlending & Document Supply*, 33(1) 49–52, p. 50.

significance of this finding is that it recasts the role of libraries as important sources of learning materials. Whether or not academic libraries are in a position to, or capable of enforcing copyright (given the general resource deprivations that characterise southern educational institution settings), is open to investigation. Notwithstanding its feasibility and suitability to this situation, stringent norms for detecting and punishing copyright violation are yet strongly endorsed by the study – and this approach is supported by other commentaries on the subject<sup>47</sup>.

Missing entirely in this study (as with similarly motivated investigations) is the extent to which photocopying businesses support access to learning materials.

To the extent that petty photocopying businesses employ only a few people and require minimal set-up cost, they are often outside the net of state registration and taxation – displaying the classic characteristics of an informal enterprise<sup>48</sup>. The relationship between photocopying businesses and educational institutions is one of mutual dependence. Informal sector researchers characterise this relationship as a ‘continuum from the informal to the formal ends of the economy and thus the interdependence between the two sides’<sup>49</sup>.

But beyond the strictly economic benefits accrued to society (such as employment), petty photocopying businesses complement the work of higher education in that they serve as a mechanism for increasing access to learning materials. Following from the earlier discussions of affordability and excessive pricing, and contrary to the mainstream market logic underlying the copyright system, a vast number of faculty and students in southern educational institutions cannot afford the material they need to read and study. At the institutional level, financial resource constraints deter libraries from adequately updating or expanding their collections. Whereas the use of electronic domain content is often discussed as a potential means to overcome rent collection problems in the

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<sup>47</sup> Okiy, B.R. 2005. Photocopying and the awareness of copyright in tertiary institutions in Nigeria. *Interlending & Document Supply*, 33(1) 49–52, p. 37; and Ajidahun, C. 1998. Book piracy and Nigerian copyright law. *Library Management*, 19 (1) 22–25.

<sup>48</sup> This is especially so in relatively less-prosperous African economies, such as Uganda, as compared to relatively efficient tax collection systems in countries like South Africa.

<sup>49</sup> Becker, K. 2004. *The Informal Economy*. Manuscript for Swedish International Development Cooperation Agency. P. 8.

copyright industry, in fact, poor infrastructure and low bandwidth, prohibitive subscription costs, legally endorsed technological constraints (such as TPMs) and the relative absence of open content licences combine to render digital content inaccessible or unfeasible. Photocopying, then, fills a crucial gap: it facilitates access in an environment where there are limited options to do so – though it must be noted that as a practice, it is neither limited to poor students alone, nor solely evident in southern countries. . There is need to understand the workings of informal enterprises in educational settings and their contributions to the institutions in widening access to content. The case study in this paper is an initial step in understanding informal enterprises in knowledge resources located educational settings. It also demonstrates the fluid nature of piracy deconstructing the notion that any copying constitutes illegal activities since there are clear links between formal and informal institutions in operating under the copyright system.

Ordinarily, the term piracy applies to the unauthorised reproduction of copyrighted material<sup>50</sup>, but its strict legal application is more complicated than mere infringement of a copyright'. An extended discussion of piracy and its moral and legal underpinnings are well beyond the scope of this paper, but it might suffice to note that the monopolies granted by the copyright system (and access gaps created as a result), pose a moral challenge for the basis for blanket dismissals of piracy as an illegitimate practice.

Moving away from the moral economy of access to learning materials and education, an examination of the informal economy in music goods reveals important complexities. On the surface, there is rampant piracy in music goods, both on the ground and in the electronic domain. A close examination, however, reveals a well-structured and mutually-dependent relationship between local musicians in the south and the pirate economies. From the early stages of the liberalisation of India's economy, Lawrence Liang relates an instance of collusion around the music of a popular Hindi film:<sup>51</sup>

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<sup>50</sup> Ajidahun, C. 1998. Book piracy and Nigerian copyright law. *Library Management*, 19 (1) 22–25.

<sup>51</sup> Liang, L. 2004b. *A Guide to Open Content Licences*. Piet Zwart Institute, Rotterdam. [Online] Available: [http://pzwart.wdka.hro.nl/mdr/research/liang/open\\_content\\_guide](http://pzwart.wdka.hro.nl/mdr/research/liang/open_content_guide). P. 36.

....even major players like HMV in the past dealt with the pirates. For instance when HMV found that they could not meet the demand for one of their biggest hits, *Maine Pyaar Kiya*, they are reported to have entered into an agreement with the pirates whereby the pirates would raise their price from Rs. 11 to Rs. 13 and pay HMV half a rupee for every unit that they sold, on the condition that HMV did not sue them or raid their businesses. Other producers are also known to have colluded with pirates in production and marketing so that they can minimize their cost, the taxes payable and royalties by hiding the extent of their sales...

And, as Peter Manuel recounts<sup>52</sup>, in this interview with an executive from a maverick start-up music company in India, the dependent relationship could exist between artists of popular musical genres and pirates as well:

...I tell you that back then, the big Ghazal singers would come to us and ask us to market pirate versions of their own cassettes, for their own publicity, since HMV wasn't really able to keep up with the demand...

Petty photocopying businesses in Africa's tertiary education institutions, as examined at Makerere University, demonstrate a similarly complex, interconnected and mutually dependent relationship between formal and informal sectors of the economy – in this case, the producers and consumers of learning material – though in a different way. The informal economy in photocopying supports education; by supplying texts to students and bridging both distribution and price gaps left in the formal publishing economy, aids the environment for the creation of authors, apart from growing the class of people who will become consumers of the formal publishing industry.

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<sup>52</sup> Manuel, P. 2001. *Cassette Culture: Popular Music and technology in North India*. New Delhi: Oxford University Press.



### 3.3 Petty photocopying businesses at Makerere University: a case study

Makerere University is, in many ways, a typical educational institution in Sub-Saharan Africa: it balances soaring student enrolment with limited facilities and financial resources. Started in 1922 as a technical school, Makerere became an affiliate of the University College of London in 1949, later becoming the University of East Africa in 1963. In 1970, Makerere became an independent institution and took on the name that it bears today.

Through the political instabilities that characterised Uganda in the 1960s, up to the 1980s, Makerere struggled to retain its consequential role in the country. Now, with a student population of approximately 30,000, the institution's facilities, and libraries in particular, are not fully equipped to meet all learning needs. Simultaneously, faculties at the university find that any desired use of published (often northern) scholarship is fraught with access problems, such as high cost and lack of availability, thus rarely resulting in adequate local readership through traditional means. The tendency is therefore to make publications available through photocopying.

The following analysis is an exercise in understanding the role of the informal economy in facilitating access to learning materials in Uganda<sup>53</sup>. Though the site of this case study is located outside the SACU, it aids a continental understanding of the problem at hand. The focus is on enumerating petty photocopying businesses and, where possible, engaging operators to recount their concerns.<sup>54</sup>

An initial observation is that the volume of photocopies transacted at Makerere is considerable:

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<sup>53</sup> Data collection took place in the summer of 2005 over a period of two weeks.

<sup>54</sup> This study did not attempt to be quantitatively conclusive, but aimed to be indicative.

Table 6: Photocopying at Makerere University

*(Number of pages photocopied/ day)*

<b>Lecturers</b>	<b>Students</b>	<b>Others</b>	<b>Total</b>
5700	34750	2950	43400

A total of 76 photocopying machines churn out an average of 43,400 copies every day. From the figures, it is evident that both faculty and students are equally dependent on the informal economy for access to knowledge goods. A spatial analysis of photocopiers revealed a heavy presence in places with high student density (see Appendix A).

It must also be noted that the figures here are conservative estimates since some operators questioned were concerned about implications on their internal rental costs (of the photocopying machines) in instances where the owner was not the operator. Like other informal economy entrepreneurs, photocopying operators were concerned by research questions as posed here, with suspicions that this was a tax collection exercise, and as a result, in many cases, answers to volume queries were reticently provided.

More importantly, it was evident that copyright was not a concern. Most operators approached by the enumerator were concerned with 'security of tenure' and the escalating rents at their locations. Copyright questions were deliberately left out by the enumerator to observe if any of the operators would spontaneously flag it as a concern. None of the 76 operators did. Since copyright is private property, such entrepreneurs seemed not to see its enforcement as their responsibility, leave alone engage in widespread awareness campaigns. Similar (but formal) enterprises in the north might display copyright notices out of concern for averting possible law suits, or, where applicable, pay the necessary royalties to collecting societies.

Underlying these demands for better fee regimes for operating locations was a perception that the service rendered by photocopying businesses to Makerere's

academic community went largely unacknowledged<sup>55</sup>, at least at the institutional level. Yet, the locations which photocopying operators rent are often owned by university departments. Photocopying businesses, in that regard, support not only access to learning material, but also contribute to institutional budgets through rent.

The term ‘informal sector’ was first used to describe a section of the economy by British anthropologist Keith Hart<sup>56</sup> in a study on Ghana in 1971. Since that time, considerable attention has been paid to the role of the informal economy in development studies, often with much contention. But regardless of competing recommendations concerning the informal economy, the subject itself has become an indispensable part of policy debates on a wide range of issues, from finance and housing to public health. The attention signifies an acknowledgement that the informal economy – for better or worse, and often the former – is an integral feature of economies of the south.

This analysis of petty photocopying businesses suggests that the informal economy in knowledge goods poses several useful questions to the copyright discourse, questions which have received scant attention thus far, in a discourse dominated by simplistic positions regarding piracy, creator rights and consumer rights. In an environment dominated by industry-led calls for stricter enforcement of copyright regulations, we suggest that it is time to enrich and complicate this perspective with frank views from the ground.

Why is an understanding of the informal economy so crucial to a larger campaign for a2k? Firstly, because the dominant notion of copyright reform is, in fact, to strengthen enforcement measures related to copyright violation<sup>57</sup>. For academics and activists concerned with a2k, piracy is, unfortunately, the elephant in the room<sup>58</sup>. But it cannot

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<sup>55</sup> Interestingly, the same perception was reported in the Nigerian study: Okiy, B.R. 2005. Photocopying and the awareness of copyright in tertiary institutions in Nigeria. *Interlending & Document Supply*, 33(1) 49–52, p. 37.

<sup>56</sup> Referenced in numerous essays and books, also at [www.thememorybank.co.uk/members/keith](http://www.thememorybank.co.uk/members/keith).

<sup>57</sup> For one instance among numerous policy submissions, by one of many organisations representing the interests of rights-holders, see the IIPA’s filing with the US Government on the enforcement of sanctions against piracy, as part of Africa’s commitments to the US under the African Growth and Opportunities Act: <http://www.iipa.com/pdf/IIPA%20AGOA%20filing%20to%20USTR%20FINAL%2010132005.pdf>.

<sup>58</sup> Draft text of the a2k treaty (available at: <http://www.cptech.org/a2k/consolidatedtext-may9.pdf>), for instance, makes no mention of the words piracy or informal economy.

afford to be. In 2004, an influential study in South Africa authored by the PICC, a report on intellectual property and the print industries,<sup>59</sup> commissioned by government (Ministry of Arts and Culture), reported that:

Copyright infringement in South Africa is not a matter – at least not yet -- of the mass piracy of trade books, like the pirated editions of Harry Potter titles that have appeared internationally, but of systematic copying of various kinds in the educational sector, public sector and businesses. While piracy of this kind of is causing concern to international rights holders like the IIPA [International Intellectual Property Alliance], popular books have not been the targets of similar piracy...

With regards to curbing educational material piracy, the PICC report recommended for:

Urgent attention to the legislative amendments to remove ambiguity on the limits of photocopying for personal use and in the educational context; the strengthening of enforcement measures; the provision of a stable basis for policy-making on copyright for digital media...[and]

Education and awareness programmes among students and lecturers on the value of intellectual property.

Secondly, it is important to integrate an understanding and acknowledgement of the informal economy in knowledge goods, because, as our case study from Uganda suggests, traditional production and distribution mechanisms of the copyright industries might be inadequately geared to meet access needs, particularly in the context of the global south.

Thirdly, the discourse on piracy provides an opportune moment to inform policy of a system of reproduction and dissemination of knowledge goods that is both prevalent and functional, and furthermore, is accessible to people from a range of economic

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<sup>59</sup> Gray, E. and Seeber, M. 2004. *Print Industries Cluster Council (PICC) Report on Intellectual Property Rights in the Print Industries Sector*. Commissioned by the Department of Arts & Culture, Government of South Africa, on file with the authors, p. 20.

classes, right down to near the bottom of the pyramid. At a time when there is concern for education and literacy in the south, coupled with crippling resource constraints within the state, and in an environment starved of fresh entrepreneurial ideas, we suggest that policy structures should treat this phenomenon as a matter of some significance.

How this significance may be *resolved* is undoubtedly a difficult question. Any resolution on the scope and continuance of the informal economy in copyright goods is in turn contingent on significant political actions. Since any such actions will bear implications for the economy at large, it is likely that a resolution – in the short term – will yet remain elusive. Thus, our discussion of piracy in the context of access to learning materials is less to suggest explicit policy solutions than to flag it as a possible solution itself; to remind policy structures of a complex socio-legal context that both necessitates and (often) illegalises the act, an especially significant point to consider when implementing the ‘remedy’.

#### **4. A review of Copyright Law in southern Africa**

Reviewing copyright laws in SACU involves comparing a broad range of economies – from South Africa, with its relatively large formal sector, which has attempted to emulate the regimes of developed countries, to Swaziland, which has copyright regulations but legislation of dubious validity.

The objective here is to consider a broad framework constituted (not exclusively) by Articles 7, 8, 9, 13 and 40 in TRIPs.

##### **4.1 International Trade Rules**

As briefly discussed earlier, the most critical international instrument dealing with copyright is not administered by WIPO but by the WTO. This is the agreement on trade related aspects of intellectual property, TRIPs, an annex (1C) to the Global Agreement on Trade and Tariffs (GATT). TRIPs is perhaps the most critical instrument of all, because it is subject to enforcement by the WTO. Members can make complaints and, if

an adverse finding is made against a member, trade sanctions might be imposed. Thus, it has greater coercive power than the other copyright treaties.

TRIPs sets out what it describes as minimum standards of copyright protection, which it requires members to implement in national legal systems (Article 1).

In Article 7 the objective of both TRIPs and intellectual property generally is set out:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Article 8 sets out the principles which members, and the WTO itself, should follow in giving effect to the provisions of the agreement.

1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

It has been argued that Articles 7 and 8 operate as constitutional provisions for TRIPs; if this is so, then there is considerable space for state action in response to abusive or restrictive practices.<sup>60</sup>

Article 9 requires members to comply with the substantive provisions (Articles 1 through 21) of the Berne Convention (Paris Act 1971) and the Berne Appendix. As a result the provisions of Berne are 'grandfathered' into TRIPs. It is suggested that as a result, any exceptions and limitations under Berne must be regarded as implicitly authorised by TRIPs and therefore those limitations and exceptions are not required to pass the exceptions and limitations test of Article 13.

Article 13 on Limitations and Exception provides that:

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

This provision uses the language of the (historically much older) exception provision of the Berne Treaty, Article 9 (2)

"It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."

This should not be confused with the provisions of Article 10 of Berne which sets out a few specific exceptions<sup>61</sup>:

[Certain Free Uses of Works: 1. Quotations; 2. Illustrations for teaching; 3. Indication of source and author]

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<sup>60</sup> Borges Barbosa, D. *TRIPs art. 7 and 8, FTAs and Trademarks*. March 9, 2006 [Online] Available: SSRN: <http://ssrn.com/abstract=889107>

<sup>61</sup> These exceptions resemble fair dealing as it was conceived in the colonial antecedents of current SACU legislation.

(1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

(2) It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.

(3) Where use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author if it appears thereon.<sup>62</sup>

Article 13 provides considerable scope for exceptions and limitations in favour of learning. Adaptation for sensory disabled persons and translation to marginalized languages are readily identifiable special cases, while others can be discerned with appropriate analysis.

In Article 40 the TRIPs agreement sets up a consultation mechanism in terms of which members whose nationals are either involved in, or subject to an alleged violation of the protections created by the agreement, shall consult with a view to a mutually satisfying agreement. One possible use of this article is an agreement by countries to counter the anti-competitive effects of market segmentation, through measures such as state mandated parallel importation of critical supplies, whether of medicines or learning materials.

In summary therefore, there are at least four separate grounds in the TRIPs Agreement on which a member country may circumscribe copyright. Article 8 (2) mandates a government measure to counter abuse of intellectual property rights which 'unreasonably restrain trade or adversely affect the international transfer of technology'.

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<sup>62</sup> There is apparently some disagreement on the impact of TRIPs on Article 10 of the Berne Convention.



Article 9 requires countries to comply with the substantive provisions of the Berne Convention, including Article 10. Article 10 (1) requires an exception for quotation. Article 10 (2) permits an exceptional use: illustration for teaching. Article 40 authorises member countries to adopt ‘appropriate measures to prevent or control’ abusive ‘licensing practices or conditions’ which adversely affect competition. In addition to their individual impact, these four provisions may operate cumulatively to authorise mitigation of the obligatory copyright requirements of the TRIPs agreement.

As discussed earlier in Section 1 of this paper, the other important treaties in this area are the WIPO Convention, (14/07/1967 (28/09/1979) WO\_29) which established the WIPO, and the WIPO Copyright Treaty (20/12/1996 WO\_33) which imposes further obligations on signatories in respect of some aspects of copyright.

#### **4.2 Multilateral agreements and SACU**

All SACU members have entered into the WTO agreements, and the Berne Convention – details are set out more specifically in the table below.

It is important to note that Lesotho is classified as a least developed country. According to the Uruguay Round Agreement (GATT/WTO) Decision on Measures in Favour of Least-Developed Countries, “the least-developed countries, and for so long as they remain in that category, while complying with the general rules set out in the aforesaid instruments, will only be required to undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs, or their administrative and institutional capabilities”.

Lesotho is currently exempt from applying most of the TRIPs Agreement, including Article 63.2, until 2013<sup>63</sup> (see Article 66), with the possibility of further extension of the transition period. From the available records it does not seem that any of the SACU countries have attempted to use the cumbersome procedures of the Berne Appendix,

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<sup>63</sup> The time period of exemption for least developed countries was extended until July 2013 at the Hong Kong Ministerial Conference. The extension was the subject of heated debate.

which is intended to assist developing countries in facilitating access to educational material but widely considered a failure.

Table 7: International Copyright Agreements

COUNTRY	Berne Convention	Berne Appendix	WIPO Convention	WIPO Copyright Treaty	WTO	TRIPs (WTO administered)
Botswana	15 April 1998	No WIPO record of use	15 April 1998	27 January 2005	31 May 1995	Acceded 1 January 1995 Copyright apparently compliant
Lesotho	28 September 1989	No WIPO record of use, declaration of availment of facilities 28 September, 1989	18 November 1986	Not a party as of 20 July 2005	31 May 1995	No Information from WTO, least developed country
Namibia	21 March 1990	No WIPO record of use	23 December 1991	Signature 20 December 1996	1 January 1995.	1 January 1995 Copyright apparently compliant
South Africa	3 October 1928	No WIPO record of use	23 March 1975	Signature 12 December 1997	1 January 1995	1 January 1995 Not clear if fully compliant
Swaziland	14 December 1998	No WIPO record of use	18 August 1988	Not a party as of 20 July 2005	1 January 1995	No information from WTO

*Note:* A simple date means that the instrument is in force; any other status is specifically indicated.

### 4.3 Copyright law review

To what extent do the primary and secondary copyright laws of SACU countries utilise the flexibilities of the TRIPs agreement?

The legislative history of the five SACU countries is interwoven with the fact that they are all former British colonies, although Namibia (then South West Africa) was never administered directly by Britain, but only through South Africa. They share a common legal system: Roman Dutch common law with English common and commercial law influences. Indigenous (customary law) plays a role in all systems, however a much greater role in Botswana, Lesotho and Swaziland. These latter three, known as

Bechuanaland, Basutoland and Swaziland respectively, were known as the High Commission Territories, and shared common law reports, legislative imports from Britain and parallel administrative structures prior to independence. The regional economy, still partially based on migrant labour in mining and agriculture, is largely regionally integrated, and the political boundaries are somewhat artificial, due to accidents of colonial history.

The copyright laws in SACU all ultimately derive from the British 1911 Copyright Act. Far less attention has been paid to copyright in the former High Commission Territories, while in South Africa, and Namibia (which was administered as an integral part of South Africa) there have been successive copyright acts. These, however, have largely catered for the interests of the small local publishing industry and the international publishing industry. Namibia's legislation is based on the current South African legislation, while Botswana passed new legislation in 2000, with the intent to comply with all of its international obligations.

Botswana, Lesotho and Namibia all have constitutions that protect first generation rights, and give some limited constitutional reference to a right to education. South Africa has what may be the first truly third generation constitution in which socio-economic rights are fully justiciable. A justiciable right to education requires the state to take steps for the progressive realisation of the right, depending on available resources. This may ultimately form the basis for a legal obligation to compel the state to issue a compulsory licence for learning material.

The legislative survey which follows identifies fair dealing, and similar provisions as the primary exceptions and limitations which affect access to knowledge, especially learning materials, found in current SACU legislation. This serve to highlight both the deficiencies of fair dealing, as presently formulated, but more significantly the failure of legislative schemes to properly utilise the sovereign flexibilities afforded under international law, particularly TRIPs,

Table 8: Comparison of legislation impacting on access to learning materials

COUNTRY	Constitutional Right	Copyright Statute	Copyright Regulations	Other legislation
Botswana	12. Protection of freedom of expression	Copyright and Neighbouring Rights Act No. 8 of 2000		
Lesotho	Section 14 Freedom of Expression Principle of State Policy, Section 28, Provision for Education	Copyright Order No. 13 of 1989		Printing and Publishing Act 10 of 1967 (Gazette 13, 10 May 1967)
Namibia	Article 20 Education Article 21 (a) freedom of expression Article 21 (b) academic freedom	Copyright and Neighbouring Rights Protection Act 6 of 1994		
South Africa	S 9 (3) discrimination on disability not allowed S 16, Freedom of Expression 1 (b) receive information 1 (c) freedom of creativity 1 (d) academic and scientific S 32 Right to Information S 29 Right to Education	1976 Copyright Act	RGN50/16930/20,19Jan96 (corrected by: RGN368/17008/10,1Mar96)	Counterfeit Goods Act 37 Of 1997  Electronic Communications and Transactions Act [No. 25 of 2002]
Swaziland	Draft 99 Constitution	1912 Copyright Act.		

#### 4.4 Copyright regimes at a glance

##### *Botswana*

Botswana has passed the most recent legislation in SACU: the Copyright and Neighbouring Rights Act No. 8 of 2000, intended to comply with Botswana's obligations under the TRIPs agreement. The Act was drafted with WIPO technical assistance.

### *Lesotho*

As a High Commission Territory, Lesotho acquired the 1912 Copyright Amendment Act, Proclamation 33. During 1989, while Lesotho was under military rule, Copyright Order No. 13 of 1989 was passed. This Order is based on and similar to the UNESCO sponsored 1976 Tunis Model Law on Copyright for Developing Countries, which focuses on indigenous copyright. Most of the protection in this law is extended only to lawfully published works; lawful publication is decided by reference to the Printing and Publishing Act 10 of 1967.

### *Namibia*

The Copyright And Neighbouring Rights Protection Act 6 Of 1994 is based on the 1978 South African Act, and is thus up to date with the 1971 Statute of the Berne Convention. The WIPO assisted Namibia in updating the 1994 Copyright Act. The Act was amended in 2000, apparently to make it TRIPs compliant<sup>64</sup>.

### *South Africa*

The Copyright Act 98 of 1978 has been amended fairly frequently to bring it up to date with international treaties and to protect the interests of commercial publishers, although there is still some doubt as to whether it complies with TRIPs in all particulars. Despite the amendments it is often criticised as “outdated”, a criticism apparently originating from international software lobbyists, due to the lack of criminal penalties on infringing software end-users.

The Act is, unfortunately, unconscious of development imperatives, and little use has been made of the flexibilities offered under TRIPs. This enables the current market structure in South Africa (in which most cultural goods are priced for the affluent, largely white minority, and are unaffordable to the majority), even though equivalent products

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<sup>64</sup> See the statement by Ministry of Foreign Affairs, [http://www.op.gov.na/Decade\\_peace/mfa.htm](http://www.op.gov.na/Decade_peace/mfa.htm), last accessed 4 April 2006

may be affordably priced in other markets, for example, India. A project to draft new copyright legislation has been mooted.

### *Swaziland*

There is some confusion on the legal position in Swaziland, the Copyright (International Conventions) Act 1911 of the United Kingdom, was applied to Swaziland by an Order-in-Council and the Copyright Act 1912 (containing the substantive provisions), similarly applied by an Order in Council, as was the 1933 Copyright (Rome Convention) Act. The latter was essentially an amendment of the terms of treatment of foreign (non-British Commonwealth) works of Rome Convention signatories.

However, according to the Registrar General for the Ministry of Justice, the acts have never in fact been implemented<sup>65</sup>.

According to Swaziland's Notification to the World Trade Organization, *Of Laws and Regulations Under Article 63.2 of the Agreement*, the following laws are in place in Swaziland:

- The Copyright Act No. 36 of 1912.
- Copyright (Prohibited Importation) Act No. 35 of 1918.2. The Act makes provision for the operation within Swaziland of Section 14 of the Copyright Act 1911 of the United Kingdom.
- The Copyright (Rome Convention) Act No. 1 of 1933. This is an act to implement the Rome Convention in Swaziland.

The Ministry of Justice began drafting a Copyright Act, based on the World Intellectual Property Rights Organisation (WIPO) model in 1999.

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<sup>65</sup> We are of the opinion that as a matter of law, the 1912 Copyright Act is in force in Swaziland, never having been repealed. There does not seem to be a basis for implied repeal as there is no competing legislation; it may have become derogated through disuse. Furthermore, Swaziland has entered into all the major Copyright Treaties with the result that a legislative or executive policy to have no copyright law is a difficult inference. As there are no reported cases on copyright in the Swaziland Law Reports, the status of the law has not been tested by the courts.

## *Assessment*

The history of copyright regimes in SACU reveals that these legislative instruments have been formed primarily through attempts to comply with a succession of international instruments. Although some 'limited use' of international schemes to assist developing countries has taken place, in the large part, these schemes have not had any noticeable positive impact.

Three of the five SACU countries, including the largest, will probably pass new copyright legislation within the next few years. The legislative process will, however, be subject to intervention by technical assistance which will in all likelihood reify the current multinational corporate agenda as the standard to emulate, and is likely to ignore development imperatives unless there is a concerted policy effort to ensure that these issues are placed on the agenda.

### **4.5 Legislative provisions which impact on access to learning materials**

The primary provisions in SACU copyright legislation which impact on access to learning materials are specific limitations and exceptions clauses (especially fair dealing), import provisions, and provisions concerning digitisation.

Exceptions and limitations need not be confined to existing exceptions, such as the fair use and fair dealing provisions currently enacted in developed countries. Developing country contexts and challenges require innovative exceptions and limitations.

While exceptions and limitations are not necessarily confined to fair dealing provisions the survey of SACU legislation shows that most of the exceptions and limitations currently in force are fair dealing provisions. While fair dealing has historically, in Anglophone jurisdictions, focused largely on private use and study, this seems to be a consequence of colonial history and thus of Western individualism. No conceptual basis has been advanced allowing historical accident to define fair dealing. Indeed the related US tradition's formulation of fair use formulates exceptions differently to fair dealing.

Appropriate exceptions and limitations could include allowing sensory disabled persons to make appropriate adaptations of works themselves, without permission, to allow libraries to make copies of works in their holdings for the purposes of providing access, to allow minority language speakers to translate works without requiring the author's permission.

Table 9: Current Copyright legislative provisions which impact on access to learning materials (Reference is to primary legislation unless stated otherwise)

COUNTRY	Exceptions	Limitations	Import	Other Relevant Provisions
Botswana <sup>66</sup>	s12 Exceptions s13 Private Reproduction s14 Quotation s16 Teaching s16 Libraries	s28 Non application of s24, 25, 26, 27 to certain uses	s32 Powers of Customs Officials	
Lesotho <sup>67</sup>	s9 Free Use	s10 Limitation of right of Translation (Schedule 1) 11.Limitation of the Right of Reproduction (Schedule 2) s30 Limitation of Protection of Neighbouring Rights	s 30 Ministers General Regulation Power	s18 Use of works in public domain requiring authorisation s19-22 Utilization of folklore requiring authorisation
Namibia <sup>68</sup>	s15 Fair Dealing s16 Prescribed Exemptions		s29 (2) unauthorised import s34 prohibition of import	s81 General Regulation powers
South Africa <sup>69</sup>	s12 General Exceptions music and literary works s13 Prescribed Exceptions s15-19B application of general exceptions to other types of works 23 (2) (a) import for personal use allowed			
Swaziland <sup>70</sup>	s 4(1) (a) (d) (f) of the 1912 Act? s6 Compulsory licence			s26 bis Deposit of 1912 Act

<sup>66</sup> Unless otherwise stated, sections referred to in this row are in the Botswana Copyright and Neighbouring Rights Act No. 8 of 2000.

<sup>67</sup> Unless otherwise stated, sections referred to in this row are in Lesotho Copyright Order No. 13 of 1989.

<sup>68</sup> Unless otherwise stated, sections referred to in this row are the Namibia Copyright and Neighbouring Rights Protection Act 6 Of 1994.

<sup>69</sup> Unless otherwise stated, sections referred to in this row are in the South African Copyright Act 98 of 1978.



#### **4.6 Limitations and exceptions including fair dealing/free use**

The difference between exceptions and limitations is somewhat arcane in practice. This report classifies rights that are introduced with language such as “notwithstanding the [exclusive rights of copyright holders] provisions the following shall be permitted” or similar phrases as exceptions. Where legislation has words to the effect of “copyright shall not extend to”, it might be classified as a limitation. Both might appear under the subheading of exceptions.

Many of the regulatory provisions refer to “fair practice”. The concept of fair practice is a contested one, with rights-holders urging a narrow interpretation. In this respect, it is particularly pertinent to note that rights-holders from developed countries insist that fair practice is a universal norm, rather than one which takes into account local circumstances in developing countries, such as relative price, scarcity and even unavailability of material, especially in translation or a form suitable for use by sensory disabled persons.

As explained earlier, the relative strength of SACU currencies compared to those of developed countries results in most knowledge goods carrying a relatively higher price in SACU countries. This results in smaller markets for knowledge goods, which in turn reduces the incentive to produce local editions within SACU, and instead to source editions from outside SACU, thus raising prices further. One consequence of this is that while there may be considerable demand (locally speaking) for an educational work, the potential profit may be deemed insufficient by international publishing business models.

##### *Botswana*

Botswana has the most extensive provisions on exceptions to copyright. Part III of the *Copyright and Neighbouring Rights Act 2000*, Section 12 of the Act provides that certain ‘dealings’ shall be permitted without authorisation. A number of ‘dealings’ are listed in each case subject to the relevant section setting out the circumstances.

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<sup>70</sup> Unless otherwise stated, section referred to in this row are in the Copyright Act No. 36 of 1912.

12. Notwithstanding the provisions of section 7, the following dealings with a work shall be permitted without the authorisation of the author or other owner of copyright –

- (i) private reproduction for personal purposes subject to section 13;
- (ii) quotations subject to section 14;
- (iii) reproduction for teaching subject to section 15;
- (iv) reprographic reproduction by libraries and archives, subject to section 16;
- (v) reproduction and adaptation of computer programmes subject to section 17;
- (vi) reproduction, broadcasting and other communications to the public for information purposes, subject to section 18;
- (vii) temporary reproduction, subject to section 19;
- (viii) importation for personal purposes subject to section 20; and
- (ix) display of works, subject to section 21.

Section 13 is pertinent to education (broadly defined) since it suggests that personal use includes individual study and research.

13. (1) Subject to subsection (2) the private reproduction of a published work in a single copy shall be permitted without the authorisation of the author or owner of copyright, where the reproduction is made by any person exclusively for his own personal purposes.

(2) The permission granted under subsection (1) shall not extend to reproduction –

- (a) of a work of architecture in the form of a building or other construction;
- (b) in the form of reprography of the whole or a substantial part of a book or of a musical work in the form of notation;
- (c) of the whole or a substantial part of a data base;
- (d) of a computer, except as provided in section 17; and
- (e) of any work in cases where reproduction would conflict with a normal exploitation of the work or would otherwise unreasonably prejudice the legitimate interests of the author or other owner of the copyright.

The formula set out in (e) is analysed below.

Section 14 provides for quotation provided there is attribution. This section on its own is useful for the provision of educational materials as it allows the use of quotations. It refers to fair practice, which introduces a flexible standard.

Section 15 deals with the use of works for teaching:

15. (1) The following acts effected for the purposes of teaching shall be permitted without authorisation of the author, or other owner of copyright-

(a) the reproduction of a short part of a published work for teaching purposes by way of illustration, in writings or sound or visual recordings, provided that reproduction is compatible with fair practice and does not exceed the extent justified;

(b) the reprographic reproduction, for face-to-face teaching in education institutions the activities of which do not serve direct or indirect commercial gain, of published articles, other short works or short extracts of works, to the extent justified by the purpose, provided that-

(i) the act of reproduction is an isolated one occurring, of repeated, on separate and unrelated occasions, and

(ii) there is no collective licence available, offered by a collective administration organisation of which the educational institution is or should be aware, under which such reproduction can be made.

(2) The source of the work reproduced and the name of the author shall be indicated as far as practicable on all copies made under subsection (1).

This section sets out in detail the circumstances in which reproduction for educational purposes may take place. The section carefully limits the exceptions (apparently to comply with the requirements of Article 13 of TRIPs) to confining these provisions to 'certain special cases' and attempting to ensure that these 'do not conflict with a normal exploitation of the work'. The latter objective is pursued by attempting to ensure that the exceptions will not allow reproduction where there is a market for the reproduction in

question. However, the section fails to make provision for situations where works would be more widely used than envisaged in s15 (1) (b) (i), but when there is nevertheless insufficient demand for the publisher to set up or engage in a collective licensing scheme. A teacher/lecturer may annually require the reproduction of a substantial portion of a textbook, but a publisher may choose (for economic reasons) to refuse to establish a collective licensing scheme to cover that work. Thus, the work could be unavailable from the publisher, while reproduction of that work for educational purposes, to the extent necessary, is illegal.

Further, the section fails to address the issues of translation and adaptation for sensory disabled persons, and reproduction of extracts, digital reproduction or works in distance education. It is unfortunate that the most up-to-date copyright legislation in SACU fails to address these rudimentary barriers to access to learning materials.

Section 16 is also relevant to education since it regulates non-profit libraries, including educational libraries:

16. Any library or archive whose activities do not serve direct or indirect gain may, without the authorisation of the author or other owner of copyright, make a single copy of the work by repro-graphic reproduction-

(a) where the work reproduced is a published article, other short work or a short extract of a work, and where the purpose of the reproduction is to satisfy the request of a person provided that-

(i) the library is satisfied that the copy will be used solely for the purposes of study, scholarship or private research;

(ii) the act of reproduction is an isolated case occurring if repeated, on separate and unrelated occasions; and

(iii) there is no collective licence available, offered by a collective administration organisation of which the library or archive is or should be aware, under which such copies can be made; or

(b) where the copy is made in order to preserve and, and if necessary replace a copy, or to replace a copy which has been lost, destroyed or rendered unusable in the permanent collection of another similar library or

archive, provided that it is impossible to obtain such a copy under reasonable conditions, and provided further that the act of reprographic reproduction is an isolated case occurring, if repeated, on separate and unrelated occasions.

Like section 15, this section grants considerable power to copyright collection societies. Where non-profit libraries may have an interpretation of the legislation that is different from that of well-resourced collection agencies, libraries are already at a disadvantage. This section puts the onus of proof on the library. It is unlikely that a non-profit library will choose to contest almost any interpretation of the exception by a collection agency, however narrow it may be.

### *Lesotho*

Section 9 of the *Copyright Order 1989* sets out general exceptions.

#### Free Use

9. Notwithstanding section 7, the following uses of a protected work, either in the original language or in translation, shall be permissible [sic] without the author's consent and without the obligation to pay remuneration for the use of the work,

(a) in the case of any work that has been made whether or not that work has been lawfully published;

(i) the reproduction, translation, adaptation, arrangement or other transformation of such work exclusively for the user's personal and private use;

(ii) the inclusion, subject to mention of the source and the name of the author, of quotations from such work in another work:

Provided that such quotations are compatible with fair practice and their extent does not exceed that justified by the purpose, including quotations

from newspaper articles and periodicals in the form of press summaries;  
and

(iii) the utilization of the work by way of illustration in publications, broadcasts, distribution by cable, sound or visual recordings for teaching, to the extent justified by the purpose, or the communication for teaching purposes of the work broadcast or distributed by cable for use in schools, education, universities and professional training:

Provided that such use is compatible with fair practice and that the source and the name of the author are mentioned in the publication, the broadcast, the programme distributed by cable or the recording;

(f) the reproduction by photography, sound or video- recording of electronic storage, by public museums, non-commercial documentation centres, scientific institutions and educational establishments of literary, artistic or scientific works which have already been lawfully made available to the public:

Provided that such reproduction, the number of copies made, and the use thereof are limited to the needs of the regular activities of the entity reproducing the work, and neither conflict with the normal exploitation of the work nor unreasonably prejudice the legitimate interest of the author;

Subsection 9 (a) (iii) allows the use of works by way of illustration in teaching. Unlike the Botswana legislation, it allows the use not only in face-to-face teaching but also via information and communication technologies (ICTs). The use is subject to fair practice. The phrase 'fair practice' suffers from the same problems of definition as the phrases 'fair use' and 'fair dealing', all of which are the subject of contesting interpretations by copyright holders and users. If 'fair practice' can be construed as 'providing access to learning materials', this is a useful provision.

Section 10, together with the First Schedule to the Order, allows a person other than the rights holder (once certain time periods have elapsed, and no translation of a work into English or Sesotho has been made) to apply to the Minister for a licence to make a translation.

## 10. Limitation of right of Translation

Notwithstanding section 7, it is lawful, even without the author's authorisation, to translate a work into English or Sesotho and publish the translation in Lesotho under a licence accorded by the Minister by regulations and under the conditions specified in the First Schedule.

The statutory scheme allows licensing only for purposes of teaching, scholarship and research (First Schedule, 4 (a)) and reproduction only by means of printing. This provision is intended to allow translation of works, especially into Sesotho, where the rights holders cannot be traced after reasonable efforts; or in cases where permission has been refused by the rights holders, but the rights holders themselves do not translate the work in question. Detailed procedural steps are set out. The provision, as it stands, could be subject to attack as failing to comply with Article 13 of TRIPs, because the Minister's discretion to grant licences is too wide. Since Lesotho, as a least developed country, is currently exempt from applying the provisions of TRIPs, this does not currently pose a problem.

The provision could be retained if amended so that the Minister could only exercise his discretion in accordance with the international obligations of Lesotho, or alternatively, if the specific circumstances in which such licences would be granted, were set out.

Section 11 and Schedule 2 set up a similar scheme for the reproduction of printed works, in situations where the rights holders cannot be traced after reasonable efforts, or in cases where permission has been refused by the rights holders, but the works themselves are not generally available for systematic instruction.

## 11. Limitation of the Right of Reproduction

Notwithstanding section 7, it is lawful, even without the author's authorisation, to reproduce a work and publish a particular edition thereof in Lesotho under a licence accorded by the Minister by regulations and under the conditions specified in the Second Schedule.

Licensing is only for “systematic instructional activities”, for reproduction by printing. This scheme could be subject to attack as insufficiently specific to comply with TRIPs. Like the Section 10 translation scheme, however, it could be retained.

Sections 10 and 11 together with Schedules 1 and 2, are designed to take advantage of the Appendix to the Berne Convention, which sets out Special Provisions regarding Developing Countries.

Section 18 contains a surprising provision:

#### Use of works in the public domain

18. (1) In the case of works in the public domain, only the Registrar, or a person duly authorised by him has the right to authorise the acts mentioned in section 7, with the restrictions referred to in sections 9 and 12.

(2) For the purposes of subsection (1) the following works shall be considered to be in the public domain,

- (a) works whose term of protection has expired;
- (b) works whose authors have no successors in title;
- (c) works whose owners have renounced copyright protection.

This section is contrary to the right to freedom of expression set out in Section 14 of the Constitution of Lesotho. It is also difficult to see a valid legal basis for the provision, since the works (at least those listed in (2) (a) and (c)) are, by definition, works in which no copyright subsists, and hence there is no protection granted by the Act. A purely negative prohibition such as 18 (1) cannot be construed as granting a positive right or even expressing a legitimate legal interest. The provision is of dubious legal validity. If valid, it is an unnecessary barrier to access to learning materials in Lesotho. There is also no question of prejudice to rights holders, since the provision deals only with works where there are no rights holders.



*Namibia*

Section 15 of the *Copyright and Neighbouring Rights Protection Act 6 of 1994* sets out general exceptions:

15 General exceptions regarding protection of literary and musical works

(1) Copyright shall not be infringed by a fair dealing in the use of a literary or musical work-

(a) for the purpose of research or private study by, or the personal or private use of, the person using the work;

(b) for the purpose of criticism or review of the work or of another work; or

(c) for the purpose of reporting on a current event-

(i) in a newspaper, magazine or similar periodical; or

(ii) by means of broadcasting or in a cinematograph film,

provided, in the case of paragraphs (b) and (c) (i), the source and the name of the author, if that name appears on the work, are mentioned.

(3) The copyright in a literary or musical work which is lawfully available to the public shall not be infringed by a quotation therefrom, including a quotation from an article in a newspaper, magazine or similar periodical that is in the form of a summary of that work, provided-

(a) the quotation is compatible with fair practice;

(b) the extent of the quotation does not exceed that justified by the purpose; and

(c) the source and the name of the author, if that name appears on the work, are mentioned.

(4) The copyright in a literary or musical work shall not be infringed by the use of such work by way of illustration in a publication, broadcast or sound or visual recording for teaching purposes, provided-

(a) such use is compatible with fair practice;

(b) the extent of such use does not exceed that justified by the purpose; and

(c) the source and the name of the author, if that name appears on the work, are mentioned.

(6) The copyright in a lecture, address or other work of a similar nature delivered in public shall not be infringed by its reproduction in the press or its communication in a broadcast, if such reproduction or communication is made for an informatory purpose, but the author thereof shall have the exclusive right of making or publishing a collection of such works.

9) Subsections (1) to (7) shall apply also with reference to the making or use of an adaptation of a work.

(11) Subsections (1), (2), (3), (4), (6), (7) and (10) shall be construed as including the right to use the work in question either in its original language or to make a translation thereof in a different language, and, in the latter case, the right of translation of the author shall be deemed not to have been infringed.

Although 15 (1) (a) provides for reproduction for study, this provision is too narrow, since it does not encompass the full range of activities necessary for teaching. Meaningful access to learning materials requires (at minimum), exceptions or limitations for the following: use by way of example, reproduction of extracts in educational materials, use in evaluation, translation and adaptation for sensory disabled persons, and use in distance education.

#### 16 General exceptions in respect of reproduction of works

In addition to reproductions permitted in terms of this Act reproduction of a work shall also be permitted in such circumstances as are prescribed, but in such a manner that the reproduction is not in conflict with a normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the owner of the copyright.

Although section 16 does allow other exceptions to be created by regulation, it is largely unsatisfactory. Without clear, stable statutory boundaries, it is difficult to establish efficient educational practice.

## *South Africa*

Section 12 sets out the general exceptions to copyright:

### 12. General exceptions from protection of literary and musical works

(1) Copyright shall not be infringed by any fair dealing with a literary or musical work-

(a) for the purposes of research or private study by, or the personal or private use of, the person using the work;

(b) for the purposes of criticism or review of that work or of another work; or

(c) for the purpose of reporting current events-

(i) in a newspaper, magazine or similar periodical; or

(ii) by means of broadcasting or in a cinematograph film;

Provided that, in the case of paragraphs (b) and (c) (i), the source shall be mentioned, as well as the name of the author if it appears on the work.

S 12(1) (a) which allows private study and 12 (1) (b) which allows criticism, are both useful to access to learning materials, but insufficient. Section 12 (1) (a) seems to permit the copying of an entire text by a learner. However this reading, although it is submitted that it is correct, is strongly contested by the publishing industry. Given the massive disparity in power between individual learners and the publishing industry, any provision which does not grant an unequivocal right to a learner does not grant sufficient access. Even if it is accepted, the difficult issue of agency – that is, who may make the copy – is not resolved.

(3) The copyright in a literary or musical work which is lawfully available to the public shall not be infringed by any quotation therefrom, including any quotation from articles in newspapers or periodicals that are in the form of summaries of any such work: Provided that the quotation shall be compatible with fair practice, that the extent thereof shall not exceed the extent justified by the purpose and that the source shall be mentioned, as well as the name of the author if it appears on the work.

(4) The copyright in a literary or musical work shall not be infringed by using such work, 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.

Subsection (4) allows use of work via publication or ICTs for teaching. However, this leaves unclear the use of works in face-to-face teaching, and for teaching, other than for illustration. As previously noted, meaningful access to learning materials requires, at minimum, exceptions or limitations for the following: use by way of example, reproduction of extracts in educational materials, use in evaluation, translation and adaptation for sensory disabled persons, and use in distance education.

(9) The provisions of subsections (1) to (7) inclusive shall apply also with reference to the making or use of an adaptation of a work.

(11) The provisions of subsections (1) to (4) inclusive and (6), (7) and (10) shall be construed as embracing the right to use the work in question either in its original language or in a different language, and the right of translation of the author shall, in the latter event, be deemed not to have been infringed.

Subsection 11 allows translation for the purposes of the exceptions. However, since the exceptions themselves do not encompass the full range of activities necessary for meaningful access to learning materials, this is insufficient. Subsection 9 similarly allows the adaptation of works for sensory disabled persons, but only to the inadequate extent of the current exceptions.

### 13. General exceptions in respect of reproduction of works

In addition to reproductions permitted in terms of this Act reproduction of a work shall also be permitted as prescribed by regulation, but in such a manner that the reproduction is not in conflict with a normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the owner of the copyright.

Regulations have been promulgated under section 13. However, in the absence of guiding principles, a general regulation making power is insufficient to guarantee meaningful access to learning materials.

Sections 15 – 19B apply some of the exceptions set out in Section 12 to artistic works, cinematographic films, sound recordings, broadcasts, published editions, programme-carrying signals and computer programs.

### *Swaziland*

The 1912 Act reproduces the 'fair dealing' provision of the 1911 UK Copyright Act, the first fair dealing provision in Anglophile copyright systems. It is not a separate provision but a proviso incorporated into section 4 on infringement of copyright.

The relevant portions of section 4 (1) state the following:

Provided that the following acts shall not constitute an infringement of copyright:

(a) any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary;

(d) the publication in a collection, mainly composed of non-copyright matter, bona-fide intended for the use of schools, and so described in the title and in any advertisements issued by the publisher, or short passages from published literary works not themselves published for the use of schools in which copyright subsists:

Provided that not more than two of such passages from works by the same author are published within five years and that the source from which such passages are taken is acknowledged.

Evidently, these provisions are inadequate for meaningful access to learning materials. It is not clear to what extent proposed draft legislation provides for access to learning materials.

#### **4.7 Important legislative provisions: importation**

##### *Namibia*

Section 34 of the Act provides for the restriction of importing of infringing copies. In terms of this section, the owner of copyright for any published work may give notice to the Commissioner of Customs and Excise informing the latter that he/she is the owner of the copyright in that work, and request that the Commissioner treat as prohibited goods, during a period specified in the notice, any copies of that work. The Commissioner is then empowered to prohibit the import of the works, at the behest of the copyright holder, even if the works could otherwise be legitimately imported into Namibia.

This creates a barrier to access to learning materials since the Commissioner is not obliged to consider the necessity for importation of learning materials in exercising his/her discretion and such consideration might be *ultra vires* (beyond legal power). Further the Commissioner may only react to complaints and may not on his/her own initiative, classify certain imports of learning materials as permitted.

This provision allows the prohibition of legitimate parallel imports of educational materials into Namibia, and consequently constrains the flexibility which Namibia might exercise under TRIPs.

##### *Botswana*

Section 20 permits the importation of a copy of a work by any person for personal purposes. This is a model provision for an exception which allows an individual to import works for personal purposes.

## *South Africa*

Section 23 (2) prohibits the importation into South Africa of reproductions of works without the authority of the rights holder. This constitutes a barrier to access to learning materials, which is particularly acute because of the structure of the publishing industry, as examined in Section 1, which is currently geared towards selling a lower number of works to a small minority. These provisions also limit the ability of the Minister to pass regulations which allow parallel importation of alternative (and legitimate) copies of works from other markets.

### **4.8 Important legislative provisions: digitisation**

This paper cannot do full justice to the challenges and opportunities of digitisation for copyright generally, and with respect to development and education in particular. As noted previously, relatively unaffordable access to digital content means that copyright issues around digitisation pose both a current opportunity and a potential problem. As a potential problem, it is of some regional importance to note possible clauses embedded in the US FTA, also discussed previously. Currently, of the effects of legislative provisions for digitisation, the impact on distance education is of the most concern since it is a significant system of education in the region. Only South Africa and Botswana have legislation dealing with the issues of digitisation and copyright law. These are scanned briefly, if only to point out the difficulty of addressing issues raised by digitisation in an isolated manner.

## *South Africa*

### Section 2(2)

(2) A work, except a broadcast or programme-carrying signal, shall not be eligible for copyright unless the work has been written down, recorded, represented in digital data or signals or otherwise reduced to a material form.

In South Africa, as in most but not all jurisdictions, copyright is confined to works reduced to a material form. This section seeks to reduce any uncertainty as to whether

digital works enjoy copyright protection. It does not, however, deal with the issues raised by imposing a copyright regime developed for an analogue environment onto a digital environment. Foremost amongst these issues is that of the liability of key parties (such as telecommunications providers and Internet service providers) for making copies, usually through automatic processes, while providing Internet and other communications services. Persons who serve as conduits for information may be liable for indirect infringement of copyright. Historically, this liability attached to publishers who had the resources and responsibility to ensure that they did not publish infringing material. Imposing such liability on communications service providers leads to the increased cost of communication, which could in turn impact on its viability and availability. A possible consequence of imposing liability on communication service providers is that the continuation of such services to large populations in Africa might be threatened.

In South Africa, the liability of electronic communication service providers is dealt with by Chapter XI of the South African Electronic Communication and Transactions Act 25 of 2002, which is discussed below in comparison with Botswana.

*Botswana:*

Section 19.

19. the temporary reproduction of a work shall be permitted if all of the following conditions are met -

- (a) the reproduction is made in the process of a transmission of the work or an act of making the work perceptible;
- (b) it is caused by a person or entity that, by virtue of authorisation by the owner of the copyright or of operation of law, is entitled to make that transmission or make the work perceptible;
- (c) it is an accessory to the transmission or making perceptible that occurs during the normal operation of the equipment used and entails the automatic deletion of the copy without enabling the retrieval of the work for any other purpose than those referred to in paragraphs (a) and (b).



Like the DMCA in the United States, this provision seeks to deal with the liability of electronic service providers. Unlike the provisions of Chapter XI of the *South African Electronic Communication and Transactions Act 25 of 2002*, which also seeks to insulate service providers from liability, this section provides protection only from copyright liability. It is suggested that the cumulative requirement of the section (that all the subsections be met) is unduly burdensome, and that it would be more efficient to provide that if an act falls into any one of the categories, it should then be authorised by the section.

## **5. Conclusion**

Our scan of the learning environment in southern Africa suggests a serious problem in respect of access to knowledge goods. While there are several factors complicit in producing this access gap, several of the identified problems (excessive pricing, unavailability and unsuitability of material, and government/ institutional resource constraints) can be traced, in significant part, to intellectual property law.

While noting that progressive copyright licensing movements in the region are yet nascent, we suggest that open content licensing policies can offer significant benefits to access to learning materials. However, our analysis of another market phenomenon, namely piracy, suggests that important policy lessons may be learnt from a closer understanding of the contributions of the informal economy in knowledge goods to societies of the south.

A comprehensive review of copyright law and regulation within SACU suggests that in the interests of access to learning materials, it is necessary to develop guidelines for fair practice which take into account the specific circumstances prevailing in developing countries, and which acknowledge disparities between member countries in a regional economic unit, differentiating relatively industrialised countries (in the context of SACU, Botswana, Namibia, South Africa) from the less industrialised, such as Lesotho and Swaziland.

The survey findings suggest that fair dealing as a means of access to knowledge could be considerably enhanced by the introduction of clear, detailed, progressive provisions. However fair dealing provisions are by their nature limited in their impact, and it is other exceptions and limitations such as state sponsored parallel importation which require proactive steps by SACU governments.

It is also important that civil society organisations, universities, library associations, student associations and teachers unions organise themselves on a regional basis. Most the organisations and institutions asserting rights to use materials in a manner that is contrary to the desires of publishing industries, lack both capacity and information. There is an urgent need for collective action in defining an appropriate, detailed uniform list of the exceptions and limitations appropriate to southern African conditions.

We conclude that currently, 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. Ironically, it is precisely in this disabling legal environment that the SACU countries are being asked – by domestic and international publishing industry lobbies – to strengthen the enforcement of criminal sanctions for certain copyright violations, even as they constitute an access mechanism in a context that offers few alternatives.

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## Appendix A: Data from petty photocopying businesses, Makerere University

(All figures represent daily averages in number of pages photocopied)

Lecturers	Students	Others	Total	Department
0	0		0	Law
150	100		250	MISR
			600	IACE
			200	CCE
0	300		300	Psychology A
			250	B
100	500		600	Science & Technology
			2300	Education A
2	500		502	B
75	350		425	C
	500	100	600	D
200	500	50	750	Library School (EASLIS)
	600	300	900	Main Library
			850	Mary Stuart*
			250	Lumumba**
			150	St. Francis <sup>+</sup>
250	600		850	Institute Languages
500	1000		1500	Food Sciences
	300		300	Technology
500	1000	100	1600	Arts (Faculty)
500	1500		2000	Arts
	700		700	Arts
	2000		2000	Arts
	500		500	Arts
100	500	50	650	Nature and Forestry
	450	50	500	St. Augustine <sup>+</sup>
200	600		800	Agriculture
	300	50	350	Agriculture
	200	50	250	Agriculture
300	500		800	Science
	400	100	500	Science
200	400		600	Chemistry
100	200		300	Math
100	200	50	350	Botany
	150	50	200	Botany
			200	Physics
100	300		400	Physics
			200	Languages
			500	Languages
	700		700	Main Library
			500	Main Library
		100	100	Main Library
	200	150	350	Building Unit
200	500		700	Economics
100	1000		1100	Gender
				Gender
500	1500	100	2100	Gender
200	500		700	Music Dance and Drama

2000	2000	500	4500	Social Sciences
				Social Sciences
500	1500		2000	Social Sciences
				Computer Science
	100	50	150	Statistics
				Senate <sup>++</sup>
	550	100	650	Senate <sup>++</sup>
	800	100	900	Senate <sup>++</sup>
	500	150	650	Mitchel <sup>**</sup>
	750	50	800	Mitchel <sup>**</sup>
	1500		1500	Mitchel <sup>**</sup>
				Mitchel <sup>**</sup>
	200	100	300	Swimming Pool
	1000		1000	Nkrumah <sup>**</sup>
				Nkrumah <sup>**</sup>
	800	50	850	Nkrumah <sup>**</sup>
				Nsibirwa <sup>**</sup>
			500	Nsibirwa <sup>**</sup>
			800	Livingstone <sup>**</sup>
			500	Veterinary Medicine
500	700		1200	Veterinary Medicine
			750	Statistics
200	1000	50	1250	Statistics
			800	Statistics
200	500		700	Environment & Natural Resources
	800		800	Nkrumah <sup>**</sup>
	1000	200	1200	Nsibirwa <sup>**</sup>
			650	Africa <sup>*</sup>
	1000	300	1300	Senate <sup>++</sup>

\*Female student residential apartment block

\*\*Male student residential apartment block

+Student community centre

++Academic Registrar's block