

# Chapter 9

## Uganda

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### 9.1 Background

Uganda is located in East Africa, to the northwest of Lake Victoria. The country achieved independence from the British in 1962, but the post-independence experience was marred by political upheavals and internal wars.<sup>1</sup> These conflicts exposed the contradictory relationships and tensions between the state and different ethnic groups that existed long before independence.<sup>2</sup>

For a long time following independence, state corporations produced essential commodities for sale through private businesses mainly owned by the Asian community. Uganda's free market economic reforms started in the early 1980s, ushering in neo-liberal policies that led to the dismantling of state corporations. Since 1986, Uganda has registered fast macroeconomic growth, except in the northern part of the country, which was engaged in civil war until 2008. Uganda has a vibrant information sector, relative to some other African countries, including a small but fast-growing publishing industry. Furthermore, Uganda has a liberalised telecommunications industry, which has contributed to the growth of the country's ICT sector.

In 2007-2008, Uganda was ranked 154<sup>th</sup> out of 177 countries on the Human Development Index.<sup>3</sup> Despite recent economic growth, 31 per cent of the population still lives below the poverty line. A significant proportion of poor Ugandans (34 per cent) live in rural areas. The country's goal is to eliminate poverty by 2035. In 2006, annual income per capita was a dismal US\$300 and it is unlikely to change significantly in the near future. Foreign support by the international donor community constitutes 45 per cent of Uganda's total budget, making the country highly reliant on foreign funds. Literacy remains relatively low with the figure at just

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1 S.R. Karugire *Roots of instability in Uganda* (1996) Fountain Publishers, Kampala.

2 H.B. Hansen and M. Twaddle (eds) *Uganda now: between decay and development* (1995) James Currey, London.

3 United Nations Development Programme (UNDP) *Human development report 2007/2008: fighting climate change: human solidarity in a divided world* (2008) UNDP, Nairobi, Kenya (as quoted in the UN Human Development Index).

69 per cent of the adult population. Computer literacy is even lower and only 0.2 per cent of all literate adults own a computer.<sup>4</sup>

Generally, the Ugandan government is emphasising vocational training and science and technology, with the goal of delivering job creation. It is also seeking to create an informed society by encouraging a 'reading culture' based on 'positive values and ethics.'<sup>5</sup> The government *White Paper on Education* prioritises basic education through the Universal Primary Education (UPE) programme and secondary education through Universal Secondary Education (USE). Both are government-funded and provide free and universal education to all children of school-going age in Uganda. It is reported that UPE led to a dramatic increase in enrolment of over 70 per cent, with the primary school enrolment figures rising from 3.4 million students in 1996 to 6.9 million in 2001.<sup>6</sup> Current primary school enrolment is estimated at close to 7.2 million pupils. While UPE still experiences challenges including low completion rates, the programme has afforded many poor families the opportunity to send children to school. Owing to the large number of students graduating from primary school, the government introduced USE in 2007.

Due to the costs associated with UPE and USE, the government has been left with few resources for the tertiary sector, beyond the 4 000 scholarships in place at public universities. There is an affirmative action initiative that encourages women to attend public universities, which has helped equalise the ratio of male to female students in public universities at almost 50:50. The government also set up the Uganda National Institute of Special Education (UNISE) at Kyambogo University, to accommodate individuals with special education needs. In addition to UNISE, all public institutions provide certain services to individuals with special needs, such as the visually impaired or hearing impaired.

The government's *Vision 2035* document recognises that Uganda must prepare for and take advantage of the Information Age, stating that:

No effort must be spared in the creation of an information-rich Ugandan society. Information and knowledge and their management, therefore, will be cornerstones of national development.<sup>7</sup>

The government identifies ICTs as 'central in the pursuit of productivity-driven growth.'<sup>8</sup> Uganda's vision of the knowledge economy is one that affords equal opportunities to all groups, especially marginalised groups and women.

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4 Government of Uganda *Vision 2035: towards a transformed Ugandan society from a peasant to a modern and prosperous country within 30 years* (2008) unpublished draft document, National Planning Authority.

5 Ibid at 7.

6 Ibid at 4.

7 Ibid at 10.

8 Ibid at 12.

## 9.2 Doctrinal analysis<sup>9</sup>

### 9.2.1 Uganda's copyright law

Copyright is a relatively recent development in Uganda, first introduced by the British, during their colonial regime. Copyright in Uganda was initially designed to protect British authors and publishers within the Ugandan Protectorate.<sup>10</sup> Historically, Uganda's copyright protection is a product of the common law system, owing to the country's British colonial heritage. The Judicature Act (Cap. 13) recognises the application of common law principles by Ugandan courts.<sup>11</sup>

Until August 2007, Uganda operated under the Copyright Act (Cap. 215) of 1964 (the 1964 Copyright Act), which was replaced by the Copyright and Neighbouring Rights Act of 2006 (the 2006 Copyright Act). The 1964 Copyright Act was never revised up until it was repealed, even though the corresponding British law of 1911 from which it was derived had been revised.<sup>12</sup>

Uganda is not party to the Berne Convention, but owing to the fact that many provisions of the Berne Convention are incorporated into the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement), which Uganda is bound by, these Berne provisions nevertheless apply. The Appendix to the Berne Convention provides for statutory licences, primarily for translation and certain kinds of reproductions and while Uganda has not notified use of the Appendix, it has still enacted similar provisions within the 2006 Copyright Act. Section 17 of the 2006 Copyright Act provides for non-exclusive licensing for translation of a work under certain prescribed circumstances – if the work is unavailable in a local language one year after its initial publication or is unavailable in any form after a set period of years from first publication, depending on the nature of the work.

In April 1994, Uganda signed the Marrakech Agreement establishing the World Trade Organisation (WTO), requiring it to comply with, among other things, the

9 The authors gratefully acknowledge the research assistance provided by Mary Namono and Dan Ngabirano in support of the doctrinal analysis outlined in this section and the qualitative analysis outlined in the next section.

10 In colonial times, Uganda was a Protectorate rather than a colony—a system of indirect rule that granted Uganda some degree of autonomy from the British administration; see H.F. Morris 'Sir Philip and "protected rule" in Buganda' (1972) 13 *Journal of African History* 2 at 305-323.

11 Section 14 of the Judicature Act (Cap. 13).

12 J. Akubu 'Balancing features in Uganda's copyright law' in *Copyright and documentary film in the Commonwealth: legal scholar reports from six countries* (2009) Program on Information Justice and Intellectual Property and Center for Social Media, American University, Washington, DC at 65. Available at <http://www.wcl.american.edu/pijip/go/filmmakerpapers> [Accessed 1 April 2010].

TRIPs Agreement. Uganda has undertaken several legal reforms to comply with WTO rules, though significant work remains to be done. Uganda, being a least-developed country (LDC), was not obliged to comply with TRIPs until 2013 with respect to copyright. Yet, the 2006 Copyright Act largely implemented a number of the copyright provisions in TRIPs.

Uganda is not party to the 'WIPO Internet Treaties' (the WIPO Copyright Treaty [WCT] and the WIPO Performances and Phonograms Treaty [WPPT]) and is, therefore, not bound by these two instruments. But Uganda is a member of the East African Community (EAC) alongside Kenya, Tanzania, Rwanda and Burundi, which resolved to update intellectual property laws to protect creative industries in the region. And Uganda is a member of the African Regional Intellectual Property Organisation (ARIPO) and is therefore required to harmonise intellectual property laws with other ARIPO members.<sup>13</sup>

This environment of external pressure, coupled with some internal demands from recording and performing artists, created the particular copyright policymaking environment in Uganda that eventually led to the 2006 Copyright Act. Due to its scant attention to teaching and learning issues, the 2006 Copyright Act will have potentially serious consequences for education and research. In general, the 2006 Copyright Act places great emphasis on copyright protection, which has the potential to limit access to educational and research materials.<sup>14</sup>

### *Scope of copyright protection*

Section 5 of the Copyright Act of 2006 outlines the specific types of protected works in Uganda. These works include literary, scientific and artistic works (including computer programs, illustrations and traditional folklore and knowledge), as well as derivative works such as translations, transformations and collections. The works are defined in Section 2 of the Act. Section 6 of the Act makes it clear that ideas are not protected by copyright and Section 7 excludes from copyright protection 'public benefit works' such as laws and government reports.

Traditional knowledge and folklore are included as works eligible for copyright protection in Section 5(1)(j). However, the Act does not elaborate on how this knowledge and these resources are to be protected. Moreover, the Copyright and Neighbouring Rights Regulations of 2010 are silent on how traditional knowledge and folklore will be specifically protected. In any case, Section 3(1) of the Regulations sets stringent registration standards requiring proof of ownership of protected

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13 Ibid.

14 A. Mpeirwe 'Sellers of music and video CDs should mind the law' (22 March 2007) *The New Vision*; J. Wasula 'Is it time to rejoice over copyright?' (22 March 2007) *The New Vision*; J. Wasula 'A copyright law was passed in Uganda two years ago' (20 June 2008) *The New Vision* at 19.

materials.<sup>15</sup> Most traditional knowledge and folkloric resources are collectively owned and in some cases considered part of the public domain. Therefore, they cannot pass this standard.

The rights-holders' economic rights are outlined in Section 9 of the Act and include publication, distribution, broadcasting and communication to the public.

Furthermore, the law recognises and protects moral rights under Section 10. These moral rights are non-assignable<sup>16</sup> and include rights to:

- claim authorship of the work;
- have the author's name or pseudonym mentioned or acknowledged each time use is made of the work;
- object to and seek relief in, cases of unauthorised distortion, mutilation, modification or alteration of the work; and
- withdraw the work from circulation if the author so chooses.

Section 13(8) of the 2006 Copyright Act assigns moral rights in perpetuity, enforceable by the author or his or her successors after death.

In general, the duration of copyright in Uganda keeps to the standard requirements laid out in the relevant international instruments such as the Berne Convention and TRIPs. The 2006 Copyright Act affords economic rights protection, in most cases, for 50 years after the death of the author.<sup>17</sup> For audiovisual works, sound recordings and broadcasts, the economic rights of the author are protected until the expiration of 50 years from the date of making the work or from the date the work was made available to the public with the consent of the author.<sup>18</sup> In the case of photographic works and computer programs, the economic rights of the author are protected for 50 years from the date of making the program available to the public.<sup>19</sup>

'Public benefit works' are not entitled to copyright protection.<sup>20</sup> Public benefit works include government works and legal proceedings. Specifically, Section 7 of the 2006 Copyright Act provides that enactments, decrees, orders or decisions by a court of law, as well as reports made by committees or commissions of inquiry appointed by government, are not subject to copyright protection. The works specifically provided for in Section 7 are usually publicly accessible. However,

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15 Section 3(1) of the Copyright and Neighbouring Rights Regulations of 2010.

16 Section 10(3) of the Copyright and Neighbouring Rights Act of 2006.

17 Section 13 of the Copyright and Neighbouring Rights Act of 2006.

18 Section 13(5) of the Copyright and Neighbouring Rights Act of 2006.

19 Section 13(6) and (7) of the Copyright and Neighbouring Rights Act of 2006.

20 Section 7 of the Copyright and Neighbouring Rights Act of 2006.

when a person creates work under the direction or control of the government, unless otherwise agreed, the copyright in respect of that work vests with the government.<sup>21</sup>

Court judgments and transcripts of Parliamentary proceedings are freely available online. But government works that are printed by the Uganda Publishing and Printing Corporation (UPPC), such as the national Gazette, must be purchased. The government's view is that printed materials, as opposed to online materials, cost money to produce and thus cannot be free. Similarly, printed materials from the Uganda Law Reform Commission (ULRC) and Uganda National Examination Board (UNEB) are also available only on a fee-paying basis. And even the free online government material is relatively inaccessible in Uganda, due to poor ICT infrastructure and low levels of Internet penetration.

The 2006 Copyright Act makes no mention of digital rights management (DRM) systems or technological protection measures (TPMs).

Section 46 of the 2006 Copyright Act lays out how and whether parallel importation of copyright-protected works may constitute an infringement of copyright. Section 47 of the Act describes the related offences and penalties in more detail. As per Section 46(1):

Infringement of copyright or neighbouring right occurs where, without a valid transfer, licence, assignment or other authorisation under this Act a person deals with any work or performance contrary to the permitted free use and in particular where that person does or causes or permits another person to —

- (a) reproduce, fix, duplicate, extract, imitate or import into Uganda otherwise than for his or her own private use;...

Thus, parallel importation is not permitted without some form of agreement with the copyright-holder.

### *Copyright flexibilities*

#### **'Fair use'**

'Fair use,' outlined in Section 15 of the Act, exempts the user from seeking the rights-holder's consent for use of a work in the course of research, teaching, criticism and review, news reporting, public library reproduction, judicial proceedings or translation into Braille or sign language. The 2006 Copyright Act does not specify what portion of a work can be used under fair use, but Section 15(2) provides for consideration of 'the purpose and character of the use, including whether the

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21 Section 8(2) of the Copyright and Neighbouring Rights Act of 2006.

use is of a commercial nature or is for non-profit educational purposes', as well as consideration of the 'nature' of the work being used, 'the amount and substantiality of the portion used' and the effect on the 'potential market' for the work when it is decided whether a use falls in the realm of fair use. The discretion therefore lies with the courts in interpreting the provision. And although there is no express provision for protection of digital works, it can be argued that Section 15 applies equally to digital and non-digital works.

Notably, the earlier 1964 Copyright Act contained a 'fair dealing' provision<sup>22</sup> instead of fair use. The old fair dealing provision was concise and stringent; the new fair use provision is arguably more liberal and flexible. The shift from fair dealing to fair use potentially creates a window to widen access, provided that the courts (in case of a dispute) interpret fair use liberally. Much would depend on whether the listed categories are interpreted as illustrative or exhaustive of permitted activities.

### Provisions for teaching and learning

Section 15 of the Act subsumes fair use for teaching purposes in schools, colleges and other educational institutions if it is 'fair'. The Act is, however, silent on distance and e-learning, as well as on the number of copies of works or illustrations permitted to be used in terms of the teaching exception. Moreover, the fair use provision is quite broad, making it difficult to predict how the law regulates specific scenarios.

### Libraries and archives

Libraries and archives are important gateways to accessing knowledge. There is a brief mention, in the Section 15 fair use provision, of reproduction by public libraries and non-commercial documentation centres being allowed under fair use. Thus, in publicly accessible libraries and non-commercial documentation centres, copying of works and limits on the number of copies permitted, depend on interpretation of Section 15 on fair use.

In practice, regardless of the legal provisions in place, it is possible to copy and utilise substantial portions of works from both publicly accessible libraries and commercial libraries. Though the law seeks to limit what may be photocopied, its enforceability is very limited in Uganda. This aids access to knowledge generally, but in the long run, creators of such works might more vigorously enforce their rights, thus curtailing access.

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22 Section 7(2)(a) of the Copyright Act of 1964.

There is no express public lending rights (PLRs) provision under the Act, meaning that there is no provision for libraries to pay fees to rights-holders for the practice of lending out copyright works.

### Disabled people

There are no detailed provisions for people with a disability under the 2006 Copyright Act — only a single mention under Section 15 of the Act in terms of fair use, where reference is made to transcription of a work into Braille or sign language.<sup>23</sup> Thus, for visually impaired people, the fair use provision provides for translations of works into Braille, subject to the fairness test. This provision would mean that the entity doing the transcription would not need to apply for a licence to adapt into Braille, or to remunerate rights-holders for this adaptation. Further, there are no specific restrictions on the sharing of such material and export or import of such material; general copyright rules would apply to such activities.

### Quotation

Quotations are dealt with under fair use in Section 15(1)(b) of the Act, which specifies that as well as the quotation being fair in terms of the criteria outlined in Section 15(2), the quotation must be ‘compatible with fair practice’ and the extent of the quotation should ‘not exceed what is justified for the purpose of the work in which the quotation is used; ...’ In addition, acknowledgement must be given ‘to the work from which the quotation is made’.

### Compulsory and statutory licensing

The 2006 Copyright Act does not explicitly provide for compulsory licensing. However, Section 17 provides for the granting by the government of a non-exclusive licence (statutory licence) to reproduce a work or to translate and make reproductions of a work into English, Kiswahili or any other Ugandan language. Section 18(1)(c) specifies that such a licence must be for teaching, research or scholarship purposes and Sections 18(2) and 18(3) list conditions that must be satisfied before the government issues such a licence and the circumstances under which the licence terminates. The translation provisions enacted into the Act mirror those in the Appendix to the Berne Convention (as previously noted).

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23 Section 15(1)(k) of the Copyright and Neighbouring Rights Act of 2006 states that works ‘transcribed into [B]raille or sign language for [the] educational purpose of persons with disabilities’ can be covered by the fair use exception.

### 9.2.2 *Other laws and policies connected to copyright*

#### *The 1995 Constitution of the Republic of Uganda*

The Constitution is the supreme law of the land and all other laws, including copyright law, must adhere to it. The Constitution guarantees several rights and freedoms that have significance for copyright, either by enhancing access to knowledge or by concretising the protection afforded to rights-holders. Some of the relevant provisions for the purpose of this study are:

- Article 30 guaranteeing the right to education;
- Article 41 on the right of access to information;
- Article 29 guaranteeing freedom of expression; and
- Article 26 on the right to property.

#### *The Access to Information Act of 2005*

Pursuant to Article 41 of the Constitution, Parliament enacted the Access to Information Act, which essentially provides for the public's right of access to information when such information is in possession of the state or any state agencies, so long as such information does not prejudice national security, the sovereignty of the state or the right of privacy of any other person.<sup>24</sup> The Act calls for accessibility of information to the public, prescribes forms of access and puts in place procedures, institutions and mechanisms to enable access to information.

The Act does, however, protect the rights of copyright-holders, in cases where the information record requested is not a copyright-free 'public benefit work' or when the copyright is not owned by the state or the public body from which the information record is being sought.<sup>25</sup> The Act states that when information is requested in a particular form, access in that form may be denied if it amounts to an infringement of copyright.<sup>26</sup> Similarly, when a record is made available to any person under the Act, that person may make copies of or transcribe the record using his or her equipment unless doing so amounts to an infringement of copyright.

#### *Copyright and Neighbouring Rights Regulations of 2010*

The 2010 Regulations for the 2006 Copyright Act primarily serve to provide a process for the registration of copyright and neighbouring rights, or any assignment, licensing or transfer of a copyright or neighbouring right. It is important to note that registration is optional under Section 43 of the 2006 Copyright Act. However, under Section 43(6) of the Act it is mandated that the Registrar must issue a certificate

<sup>24</sup> Section 5 of the Access to Information Act of 2005.

<sup>25</sup> Section 20(8)(c) of the Access to Information Act of 2005.

<sup>26</sup> Section 20(3) of the Access to Information Act of 2005.

as proof of registration. This certificate acts as an incentive to register copyright and neighbouring rights, since such a certificate can be taken as conclusive proof of ownership of the right. The Regulations also streamline the registration and regulation of collecting societies.

### 9.2.3 *Judicial and administrative decisions*

The law in Uganda obliges parties to a dispute to settle the matter out of court as the first option. Only after such efforts have failed may a hearing be fixed to try the matter in court. This has led to many copyright cases being settled out of court and in such cases there is no record of the negotiations and terms of settlement. The law responsible in this case is the Arbitration and Conciliation Act.<sup>27</sup>

Litigation in relation to cases involving copyright infringement has until recently been very limited. But the trend now is that the Commercial Court — a branch of the High Court of Uganda — is registering intellectual property cases. Several have been registered, a majority of which are still ongoing. There are three decided cases from the Commercial Court that are relevant to Uganda's copyright environment. Of these, the *John Murray* case has the most direct bearing on access to learning materials.

#### *Attorney General v Sanyu Television*<sup>28</sup>

The Attorney General, as a representative of Uganda Television, a public television station, filed a suit against the respondent/defendant for infringement of broadcasting rights. It was the plaintiff/applicant's case that by means of an agreement with the Union of National Radio and Television Organisations of Africa (URTNA) and Canal France International (CFI), Uganda Television was granted exclusive rights to broadcast live coverage of the 1998 World Cup football series and that the respondent had infringed these rights by screening the matches on its television station, Sanyu TV. The applicant made the present application for an injunction restraining the respondent from further broadcasting the matches pending disposal of the main suit. Counsel for the respondent challenged the application arguing that the suit and application had been made against the wrong party, which was a non-legal entity.

James Ogoola, J., held that the respondent infringed the plaintiff's copyright. The respondent admitted having infringed the copyright and apologised for the act. As a result, the application was allowed and an injunction granted.

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27 Arbitration and Conciliation Act of 2000 (Cap. 4).

28 High Court Civil Suit No. 614 of 1998, reported in *Uganda Commercial Law Reports 1997-2001* (2005) 184-190 at 185, Blackhall Publishing, Dublin, Ireland.

*Uganda Performing Rights Society Limited v Fred Mukubira*<sup>29</sup>

The applicant, Uganda Performing Rights Society, as the assignee of copyright in the musical works of various local artists in Uganda, filed a suit against the respondent for alleged copyright infringement. The applicant sought a permanent injunction and damages for infringement. Further to the suit, the applicant applied ex parte for a temporary injunction to restrain the respondent from further infringement of copyright. The applicant also sought orders to search the respondent's premises and seize all material relating to the copyright infringement. The main issues at the hearing of the application were whether the Court had authority to grant the temporary injunction, whether the applicant satisfied the conditions for grant of an order and whether the suit was properly brought under Section 13 of the 1964 Copyright Act.

Geoffrey Kiryabwire, J., held that:

- Section 13 of the Copyright Act provides a remedy of direct statutory prohibitory injunction in cases of copyright infringement;
- In the instant case, where the application was made ex parte for a temporary injunction, pending disposal of the main suit based on Sections 38 and 39(2) of the Judicature Act alone, the Court did not have sufficient legal authority to grant the order;
- The three conditions for grant of search and seizure orders are that: there must be an extremely strong prima facie case, the potential or actual damage to the applicant must be serious and there must be clear evidence that the respondents have in their possession incriminating materials which they may destroy before any application inter parties can be made; and
- The Application satisfied all the conditions for grant of the order.

As a result, the application was granted.

*John Murray (Publishers) Ltd and Others v George William Senkindu and Another*<sup>30</sup>

In 1997 the plaintiffs brought an action against the defendants for infringement of copyright in the book *Introduction to biology* alleging, among other things, that the first defendant was selling counterfeit copies of the book in his Kampala Newstyles bookshop, thus causing a decline in the plaintiff's sales.

29 Misc. Application 818 of 2003 (Arising from High Court Civil Suit 842 of 2003), reported in *Uganda Commercial Law Reports 2002-2004* (2005) at 476, Zebra Graphics Ltd, Kampala, Uganda.

30 HCCS 1018 of 1997 (unreported).

Ntagoba, J., found that the books sold by the first defendant were counterfeit. Relying on Section 2(a) of the 1964 Copyright Act, it was found that the plaintiffs had copyright protection in Uganda and the judge went to great length to explain the significance of the Universal Copyright Convention of 1952 (as amended). Further it was stated that under Section 11(1) of the Copyright Act, the plaintiff did not have to prove 'knowledge' of the infringement by the defendant and hence, under that Section, strict liability was imposed on the defendant with no burden on the plaintiff to prove the knowledge of infringement on the part of the defendant.

Accordingly, the plaintiffs were awarded UGX10 710 000 (Uganda shillings) in lieu of actual loss incurred by the plaintiffs, considering that each of the 765 copies sold had been sold at UGX14 000. In addition, they were awarded UGX6 000 000 as further damages. Finally, the court granted the plaintiffs a permanent injunction restraining the defendant, his/her agents or servants from committing further infringements against the plaintiff's copyright.

Kampala Newstyles, which was at the time one of the biggest bookshops in Uganda, collapsed as a result of this case. This demonstrates the significant, practical effect that copyright can have, if and when it is enforced.

#### **9.2.4 Summary of doctrinal analysis**

While the 2006 Copyright Act addresses many requirements of the relevant international instruments to which Uganda is a signatory, much can be done to improve access to learning materials. As it stands, the Act includes a fair use clause that does not define clearly what is permissible and what is not. While Uganda's fair use doctrine seems to be an improvement on the more restrictive fair dealing provisions in the 1964 Act, it alone is not reliable enough to guarantee adequate access to learning materials, given the vague nature of the four factors that must be considered when determining fairness.

Also, considering the increasing use of digital technologies and the Internet, it can be argued that there is a constraining lack of provisions in the 2006 Copyright Act to regulate the digital medium. The current law, for example, makes no attempt to enable distance learning. However, at the same time the absence of provisions protecting DRM in general and TPMs specifically, provides a window for accessing electronic resources under fair use, for example by those at tertiary institutions with good access to ICTs.

Meanwhile, from the available case law, it would seem that judges are strictly interpreting and enforcing the law in the limited numbers of disputes that have been litigated. In particular, the *John Murray* case has serious implications for access to learning materials. Not only did a key node in the book distribution chain disappear as a result of the case, the high damages awarded sent a strong message to infringers and non-infringers alike.

## 9.3 Qualitative analysis

### 9.3.1 *Secondary literature*

There is a small but growing body of literature on copyright in the Ugandan context. However, literature on the intersection of copyright and access to knowledge is thin. We attribute that to two factors. First, there is a lack of a copyright culture, given the short history of the copyright system in Uganda. Second, there is a general lack of awareness of copyright both in the academia and the Ugandan society at large.

A study of the Ugandan copyright law was undertaken in 2001 (eventually published in 2004) by the Uganda Law Reform Commission (ULRC). According to this study, the review of the Copyright Act of 1964 was to further constitutional and international laws that require regular reviews of national legislation. Among the major reasons for the review revealed by the study was the desire to improve access to materials created by educators.<sup>31</sup> Another compelling justification for reform was the changing technological scenario in Uganda and elsewhere in the world. The area of works that were to be protected by copyright had to be widened to cover other areas in light of international technological developments.<sup>32</sup> Thus, the educational possibilities that might have been opened by technological developments were weighed against an emphasis on other issues, including stopping Ugandan and foreign rights-holders from being ‘robbed’ of their property.<sup>33</sup>

ULRC drafted a Bill based on the assumption that the law would be used in accordance with Article 26 of the Constitution, which guarantees protection from deprivation of property, while also furthering access to information, legal recognition of traditional and group rights and development goals such as those in the Poverty Eradication Action Plan (PEAP).<sup>34</sup> Unfortunately, findings and recommendations of this ULRC study were not fully integrated into the Private Member’s Bill that led to the 2006 Copyright Act.

A study by Edgar Tabaro, which is, essentially, a critique of the first draft Bill released in 2004, is useful in analysing the form of the eventual 2006 Copyright Act.<sup>35</sup> Tabaro analyses the concepts and principles adopted by the Bill in the context of Uganda’s national development objectives and policy instruments. He argues that the Bill principally sought to update the 1964 Copyright Act and bring it to international standards at the expense of domestic objectives. According to Tabaro, comprehensive copyright legislation should be based on a more meaningful purpose

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31 Uganda Law Reform Commission (ULRC) *A study report on copyright and neighbouring rights law* (2004) ULRC Publication 9, at 18-19.

32 *Ibid* at 14.

33 *Ibid* at xviii-xix.

34 *Ibid* at xx.

35 E. Tabaro ‘Copyright law reform in Uganda: addressing international standards at the expense of domestic objectives’ (2005) ACODE Policy Briefing Paper.

in the national development process. His primary objective is to show that copyright should primarily serve the instrumentalist function of satisfying social goals and values, namely the creation, spreading and sharing of knowledge and further, that it should facilitate public use and access.

Joseph Kakooza's study is an illuminating one on copyright law in Uganda prior to the enactment of the 2006 Copyright Act.<sup>36</sup> The study was aimed at analysing the state of copyright law in Uganda at the year 2000, from the perspectives of what ought to be and what was. One unique weakness with the copyright law at the time, according to Kakooza, was the failure of the law to protect the moral rights of the author. Studies like Kakooza's greatly influenced the amendment of copyright law in Uganda to eventually provide for the protection of moral rights.

Ronald Kakungulu-Mayambala's study<sup>37</sup> focuses on rights-holders, users and publishers, noting the world's changing technologies and the growing problem of piracy. New technologies, he concludes, present a great challenge to rights-holders, as digital technology permits the storage, transmission, manipulation of and access to an author's work in ways unforeseen. With new technologies, infringement of copyright is made easy and the usurping of the exclusive rights held by rights-holders is also made easy. He identifies a core area of conflict between the rights-holders and copyright users:

Intellectual property is based on the fundamental principle of balance—the balance between the interests and needs of the public and those of creators. This extrapolates to a balance between consumers versus innovators; public versus proprietary rights; *socialism versus capitalism*. When the legal systems that underpin intellectual property no longer maintain the correct balance or, even worse, neglect it, then respect for those systems and intellectual property erodes ... we should address this substitution of the foundations and principles of copyright by rules imposed by mere technical facts ... failing to give an adequate and balanced answer to it would be stealing copyright from the public and giving it to the industry. The public is becoming more and more contemptuous of copyright. This leads to an increasing tendency to infringe copyright....<sup>38</sup>

A study by Amir Bakidde-Mubiru examines Uganda's growing problem of copyright infringement.<sup>39</sup> The purpose of the study is to establish how Uganda is dealing with the problem of infringement, while noting that this is an African problem. He notes that following the introduction of copyright law in Uganda,

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36 J. Kakooza 'Note on the "is" and the "ought" of the law of copyright in Uganda' (2001) 112 *Makerere Law Journal*.

37 R. Kakungulu-Mayambala *The impact of new technologies on the protection, exercise and enforcement of copyrights and related rights* (2006) unpublished LLM dissertation, Lund University.

38 Ibid at 11-12.

39 A. Bakidde-Mubiru *Copyright infringement, defenses and remedies: the case of Uganda* (1998) unpublished dissertation for the award of a Bachelor of Laws, Makerere University.

many changes have taken place in environments regulated by the law. He argues that Uganda's legal infrastructure is insufficient to address the growing problem of copyright infringement. He observes that the problem is not simply the lack of legal infrastructure, but also a lack of awareness of the law by both users and owners of copyrighted materials.<sup>40</sup> Bakidde-Mubiru finds that illegal photocopying is rampant, as is music copying. He also takes note of ICTs used in sharing copyrighted resources. Academic institutions such as Makerere University allow extensive access to email and the Internet. The author argues that infringement is possible in such a technologically enabled environment. Infringement is also common in newspapers where some lift other papers' articles without acknowledgement or attribution. Bakidde-Mubiru observes that it is common for drama groups in Uganda to stage plays that belong to other groups, attributing this to the weaknesses in the law.

A study by Moses Kamoga-Matovu focuses on counteracting copyright and patent infringement in Uganda.<sup>41</sup> Writing about the 1964 Copyright Act, Kamoga-Matovu asserts that Uganda's weak IPR enforcement mechanism was likely to dissuade foreign direct investment since most investors want an environment with a strong IP regime. Kamoga-Matovu fears that without legal reform, development in general will be affected. His primary objective is to establish the importance of copyright and patent law in Uganda. He examines the framework for technology transfer in the context of copyright and its suitability to Uganda's development. In his study, Kamoga-Matovu finds glaring evidence of copyright violation.

A study by Anthony Wabwire Musana addresses copyright and development.<sup>42</sup> The study is aimed at 'assessing the utility of intellectual property protection in LDCs and Uganda in particular, as a means of stimulating the development process.'<sup>43</sup> He finds that the consideration of IP 'assets' in the trade arena has engendered an impression of confrontation between developed and developing countries. Moreover, Uganda's copyright regime is inconsistent with the needs and aspirations of the people and the economy and the incentive to create is lost at the hands of lax protection systems.<sup>44</sup> Against that background, Musana argues that, for Uganda to attain 'meaningful development', it has to adopt an 'efficient, relevant and stricter IP protection system.'<sup>45</sup> He carries out qualitative interviews with individuals across

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40 A point that was reiterated by interview participants for this study.

41 M. Kamoga-Matovu *Counteracting copyrights and patents infringement in Uganda* (2000) unpublished dissertation for the award of a Bachelor of Laws, Makerere University.

42 A.W. Musana *Intellectual property: the case for copyright law in the economic development process in Uganda* (1998) unpublished dissertation for the award of a Bachelor of Laws, Makerere University.

43 Ibid at 6.

44 Ibid at 10.

45 Ibid at 11.

the spectrum of the creative arts in Uganda but relies primarily on a critical legal analysis of Uganda's copyright law vis-à-vis protection of local content.

Musana's approach to education and copyright is one that focuses on creative individuals whose resources are used in the education process. He argues that the education system can thrive only if locally generated resources are protected in order to attract creative individuals into the development of local resources. Musana observes that 'in recent times, due to the vigorous efforts of publishers such as Femrite Publishers [a local organisation promoting female writers], there has been a slight incentive to Ugandan authors to publish locally'.<sup>46</sup> He further notes that 'the legal regime remains the most villainous constraint to authors' incentive to publish their works'.<sup>47</sup>

Agatha Ainebyona's study<sup>48</sup> on the impact of copyright law on the publishing industry in Uganda is a relatively recent report. It focuses on a defined target audience: publishers. The study takes note of Uganda's growing publishing industry and also decries the growing problem of piracy. The latter is attributed to a number of factors including lack of awareness of the law, weaknesses in the law and low literacy rates. The author further identifies the foreign nature of copyright as another dimension of the copyright problem in Uganda. She argues that:

It must be observed, therefore, that this law was ill-conceived from the onset because it did not account [for] Ugandan circumstances. It was not fitting in time and space.<sup>49</sup>

Quoting Henry Chakava, a prominent East African publisher,<sup>50</sup> she notes that copyright has been used by publishers in the North (multinational publishing entities) to deter their counterparts in Africa from meeting local demand. Consequently, African publishers remain heavily dependant on foreign publishers, with copyright acting as a stick.

Ainebyona's study seeks to examine copyright in the publishing industry and its relationship to the growth of the publishing market. She gathered evidence from publishers and authors in the Ugandan book sector through a quantitative survey that featured questions on awareness of the law, availability of information on copyright, copyright-related problems and utilisation or implementation of the law. Her study reveals that the vast majority of publishers are aware of the law, although many have never read the fine print. Consequently, ignorance of the law is as high among publishers as it is in the general public. Publishers also observed that there

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46 Ibid at 161.

47 Ibid at 161-2.

48 A. Ainebyona *The impact of the copyright law on the publishing industry in Uganda: a case study of various publishing houses in Uganda* (2006) unpublished dissertation for the award of a Bachelor of Library and Information Science, Makerere University.

49 Ibid at 5.

50 Ibid.

is a lack of government machinery in charge of copyright. On the ever-present issue of piracy, publishers overwhelmingly agreed that piracy was an enigma seriously undercutting their profitability. Some respondents argued, however, that piracy provided low-income groups with affordable textbooks which would otherwise be priced out of range. This affirms the intuitive assertion that piracy fills a gap left by the formal industries.

*A review of copyright law in Uganda* by Ruth Nassolo<sup>51</sup> is not significantly different from the study by Ainebyona. Nassolo cites the lack of effective administration of the law, weak enforcement and lack of awareness among stakeholders (primarily referring to rights-holders) as a recipe for a problematic copyright environment.

Elizabeth Lumu's study<sup>52</sup> of piracy focuses on the *John Murray* case. Based on the facts of the case, she frames the piracy problem as stemming not just from the users' quest for cheap copies but also bookshops as their accomplices. Lumu's study is partly a critical analysis of the wider implications of the *John Murray* case as well as a survey of publishers and book distributors on issues relating to piracy.

Lumu notes that piracy is driven in part by the fact that school textbooks for primary and secondary schools dominate the book market. The market for textbooks is ever-growing, outstripping all other publishing segments. Additionally, foreign textbooks dominate the curriculum due to the British influence. Today, their dominant position remains but also creates a favourable environment for piracy, since the pirates do not feel the presence of the owner.<sup>53</sup> In the survey part of her study, Lumu interviews stakeholders (publishers, booksellers) about awareness, the impact of piracy, the availability of copyright information, challenges and problems faced by publishers and possible remedies. The responses are largely predictable: a majority are aware of the law and piracy and illiteracy are their main problems.

Lumu concludes that 'information hungry students, therefore, have no choice but to reproduce any material that will be of use to them for their studies. In any case there is nothing illegal about it'.<sup>54</sup>

Makerere University's Research and Intellectual Property Management (IPM) Policy was also reviewed in the context of relevant literature. Of the more than

51 R. Nassolo *A review of copyright law in Uganda* (2001) unpublished dissertation for the award of a Bachelor of Library and Information Science, Makerere University.

52 E. Lumu *The impact of piracy on Uganda's publishing industry: a case study of Kampala New Styles Bookshop Ltd versus John Murray* (1999) unpublished dissertation for the award of a Master of Science in Information Science, Makerere University.

53 The only presence for most is a local agency, mostly book distributors (bookshops), some unreliable as the *John Murray* case revealed.

54 Ibid.

20 universities in Uganda, it is only Makerere — the biggest and oldest public university in the country and even the region — that had an Intellectual Property Management Policy at the time of this study.<sup>55</sup> This policy is relatively new, having been passed in March 2008. The aim of the policy is to stimulate and support innovative thinking among students and staff and to enable ownership and efficient management of intellectual assets and innovations produced at Makerere University. In addition, implementation of the IPM Policy is designed to increase potential income from research activity.<sup>56</sup> The policy also provides for ways of sharing the benefits that accrue from intellectual property. The policy is a response to the call by the Inter-University Council for East Africa (IUCEA), which recommended that universities and research institutions in Eastern Africa should develop institutional policies and build capacity to manage IP. The IUCEA argues that without an institutional IP policy and the capacity required to implement such policies, it is impossible to manage IP, regardless of existing national IP laws.<sup>57</sup>

### **9.3.2 Impact assessment interviews**

Interviews were conducted with judges, IP/copyright lawyers, a musician, a librarian who deals with digital material, a representative of publishers and university students.

The largest number of interviews, four, were conducted with judges in the administrators, enforcement agencies or professionals category. The choice of judges as interviewees underscored the importance of the judicial system in Uganda's copyright environment. The few copyright-related cases in Uganda were handled by at least one of the judges interviewed, making their input invaluable to the understanding of the current thinking of the Commercial Court on a wide range of copyright and access issues. The judges represent a significant body of knowledge of copyright in Uganda. Two of the judges specialise in copyright in the digital environment, including copyright on the Internet and technological protection measures (TPMs). Another interviewee, a retired judge, has worked extensively with the World Intellectual Property Organisation (WIPO) and related international and regional organisations.

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55 The policy was approved by the University Council — the top governing body of the university — at its 112th meeting held on Thursday 13 March 2008.

56 Regulation 2.0 of the policy.

57 For a more detailed discussion of this topic see the East African Regional Programme and Research Network for Biotechnology, Biosafety and Biotechnology Policy Development (BIO-EARN), Policy Brief 1, of January 2008. Available at <http://www.bio-earn.org> [Accessed 25 November 2008].

Two interviews were conducted with copyright/intellectual property lawyers — one in the administration, enforcement and professional category and another in the government category. One of these lawyers has represented a number of parties in copyright cases. He is also a faculty member at Makerere University, teaching and researching in intellectual property. The second lawyer was instrumental in the drafting of the Bill leading to the 2006 Copyright Act.

Also in the enforcement category, an informal interview was conducted with an official from the Uganda Registration Services Bureau, an agency in the Ministry of Justice and Constitutional Affairs. The Bureau houses the Intellectual Property desk, which administers a wide range of intellectual property matters including copyright, trademark and patent registrations.

For the educational and user communities, interviews were conducted with students (one group interview and one individual interview), a digital librarian and a university official responsible for research. The group interview with students was conducted with three female students focusing primarily on the nexus of copyright, access and gender. The second student interview was conducted with a male law student specialising in intellectual property rights.

The rights-holders group was represented by an official of the National Book Trust of Uganda (NABOTU). NABOTU represents different actors in the book sector, including writers, publishers, distributors and printers. The second rights-holder interview was conducted with a prominent local musician and award-winning songwriter. This musician is one of the most vocal on copyright matters. He was part of the core group of musicians that lobbied government to amend the 1964 Act, leading to the 2006 Act.

### *Government perspectives*

The one formal interview in this category was conducted with a lawyer who was associated with the amendment of the 1964 Copyright Act. The bulk of findings in this category represent our interaction with this individual. We also share anecdotes from the informal interview with the official from the Uganda Registration Services Bureau.

The key interviewee is not formally part of the government now, but worked closely with the Member of Parliament (the Hon. Jacob Oulanyah) who authored the Private Member's Bill (Copyright Bill of 2004) that led to the 2006 Copyright Act. When asked why they embarked on the review of the 1964 Copyright Act, he cited major inadequacies and weaknesses in the old Act as the reason. He noted that:

It [the 1964 Act] had been overtaken by modern developments, which rendered the law hapless. The need to eradicate this problem became more urgent with new technologies.

This coupled with the fact that the Ministry of Justice was taking an inordinately long time to reform the law, challenged us to work hand in hand with Hon. Oulanyah to cause a reformation of the law.

While this interviewee did not elaborate as to what caused the delay, one can attribute it to institutional inadequacies. The Ministry of Justice and the Uganda Law Reform Commission (ULRC), had commissioned the study of the copyright environment early in 2001, but technical and administrative problems delayed the study and issuing of the report until 2004.

Asked whether access to learning materials was of particular concern, the interviewee said that they did not look at specifics but approached the law in general. (The provisions of the 2004 Bill and eventual 2006 Act show that clearly learning materials were a marginal or non-factor in consideration of amendments.)

When asked about the copyright environment in relation to access to learning materials, he described the relationship as 'dysfunctional' because users do not understand copyright and this has led to unabated copying with no regard to the law. He characterised the situation as dire because the practice of copying entire texts 'has come to be accepted and it is widely in use especially in our higher institutions of learning'. This has led to a situation where 'there are more pirated learning materials copies in the market as opposed to the actual copies'. This participant preferred the copyright environment to be stricter. Relying on the vaguely defined fair use doctrine, the interviewee argued that at the doctrinal level, the current law provides for the balance between 'protecting copyright and access to learning material'. This balance, he argued, would eventually lead to a profitable publishing industry, enticing more authors to write and eventually to a thriving learning materials environment.

According to this interviewee, the current law devoted a significant amount of time to collective rights management. The lawyer took note of these organisations as presenting major problems and unintended consequences, for the current law: 'the more established collecting societies are suppressing upcoming societies'. Notwithstanding the shortfalls identified in the doctrinal section, the participant insisted that the law should be 'implemented in totality'. that is, no amendment is necessary at the moment.

Another seemingly unintended consequence of the new Act is the dynamic created by bringing copyright matters into the ambit of the Uganda Registration Services Bureau, under the Ministry of Justice and Constitutional Affairs. The informal interview with the Uganda Registration Services Bureau representative revealed that copyright matters are competing with other IP areas, many of which are more lucrative to the agency. According to the official, the poorly staffed desk finds itself attending to registration of trademarks and patents more than copyright because these two areas bring in more revenue. Personnel are generally not keen to

handle copyright, which is the reason why the Bureau has not carried out sufficient awareness efforts beyond musicians and artists. The official was of the view that the Act should have created a separate entity to handle copyright matters. A copyright board or commission is needed in the fast-growing Ugandan environment. Due to the workload with other IP areas, the best the desk has done is draft Copyright Regulations. These have taken time to finalise due to shortage of manpower and competing interests.

This interviewee did not feel there was a gender dimension to copyright. Copyright law was perceived by the participant as gender-neutral. He suggested that there is insufficient evidence beyond anecdotes to suggest a gender bias.

### *Educational/user community*

Interviewees in this category stated that a significant section of the Ugandan educational population is ignorant of the law. Several participants in this and other categories identified lack of awareness as the cause of the rampant infringement. They strongly encouraged awareness campaigns as a mechanism for curbing infringement. For instance, Makerere's new Policy on Research and Intellectual Property Rights Management calls for sensitisation of the university community in intellectual property matters, including copyright. Makerere's initial efforts targeted Deans and Directors across campus with the hope that the message would filter through to students and other members of the university community. The librarian interviewed was cautious, pointing to lack of human resources to undertake such awareness and enforcement activities.

Students decried the worsening access situations due to rising costs of essential learning materials in specialised areas. The same students pointed to the increased ease of access to electronic resources. But the digital or online resources remain restricted to campus environments, making it difficult for off-campus students to access resources available to on-campus students. The librarian noted that: 'In terms of textbooks and other articles in the library, only students with valid IDs are allowed in. As for the work online, we restrict it geographically in that only students on campus can access the work. Long distance students cannot access the work unless they come to campus.'

The librarian informed us that these restrictions were contractual requirements from the database providers. Generally, there is more lax copyright enforcement with respect to print resources. Copyshops have sprung up, often creating businesses around campus. The university library even runs some. Asked whether copyright impacted access to learning materials, a student participant mentioned that it did, but only to the extent that the resources are local, notably dissertations and theses. Copying of dissertations and theses is generally prohibited or restricted to a few pages at a time. However, other options are available for copying of entire documents.

The student participant attributed that to a relaxed copyright environment, where the law is not followed to the letter. According to him, in countries where the law is followed, copyright indeed impacts on access to learning materials. In Uganda, however, copyright law is either not known or not followed. There is:

totally a different scenario ... there is no one who will outrightly refuse it [copying] as a wrong thing. I mean the photocopyist will receive me with wide arms, I am bringing him business, no one can limit access to learning materials.

According to the librarian interviewed, while the library has instituted restrictions on copying of dissertations, theses and entire books, students find a way of copying sections of the resource until they have the entire text. The library, wanting to operate within the law, strategically places notices: 'photocopying machines to partly aid in fair use incidents of reasonable copying'. However, 'sometimes the commercial motive [of photocopy operators] overrides fair use in copyright law'. A student participant attributed the situation to lack of awareness, noting that people were generally unaware of the law because they do not access official documents (like the Gazette) and national laws. Associating such activities with lack of awareness, while true, is a simplistic correlation that does not fully explain the situation. For instance, the student participant had earlier noted the prohibitive cost of law textbooks that rendered photocopying the only option for a student with modest means. He noted that:

Unlike in the United States where almost every student can afford, it is not the case here; for example to access the text book of Wade on Administrative Law, if you go to one of the prominent bookshop like Aristoc the cheapest it is running at in most bookshops is UGX130 000 [US\$75]. Tell me if you do not find that out of way for a student?

Poor students struggling to pay tuition fees are unlikely to be able to afford such textbooks.

An important dimension to access addressed by both the librarian and the university official is access to internally generated scholarship by faculty and staff at universities. At the moment, significant barriers hinder access to such scholarship. For institutions like Makerere, the biggest public institution currently implementing access initiatives like institutional repositories, copyright presents legal barriers to such initiatives. The librarian noted that 'most owners of copyright are not willing to release their work. They believe copyright belongs to them and hence restricting public access impacts on the Makerere access environment. Our repository has a problem'. Along these lines, we questioned the director of research about electronic open access to scholarly resources, internal or external. This is particularly important in light of the limited access to internally generated research output. He noted that open access, while debated by faculty, had little support due to the negative

perceptions of open access resources as not peer-reviewed. The official was keen to learn more about open access given the problems currently caused by traditional print avenues. Most of the print journals delay faculty publication and consequently promotions.

ICTs were cited as important for accessing content. The librarian indicated that ICTs had made access and use of electronic resources 'less cumbersome' and that attracted a significant student user base. More and more resources, observed the librarian, are used by the 'click' of the button. Electronic resources, just like the print resources, are affected by copyright to the extent that ICTs make it easier to 'effectively regulate this access to the work'. The library can effectively restrict access, fulfilling contractual obligations with database providers. Nevertheless, ICTs have had a positive impact on access for they have extended library services to those who prefer to access outside the physical walls of the library.

A key consideration for institutions highlighted by the university official is the likelihood of losing control of intellectual property that might be disseminated through research findings before institutions have had opportunities to formally register for protection with relevant government authorities. Although universities would wish to disseminate research findings, they want to do so with care 'because of our weaknesses like abuse of intellectual property by the public'. Makerere has just adopted a policy calling for publications with potential IP information to be made available only after five years, in order to avoid being cheated of IP.

Female students in particular were asked to address the gender dimensions of copyright and access to learning materials. Three law students at different stages of their programmes were interviewed. Save for the rising costs of photocopying, the three female students did not think copyright affected them simply because they are females. However, these students noted that parts of the university campus were insecure, making it difficult for them to use the library at night. And strict library regulations on copyright make it difficult for them to copy in the library and then make use of the materials away from the library. Such situations adversely affect one gender more than the other. Other anecdotal evidence came from the male student and librarian. Both admitted that females were less likely to engage in infringing activities than were males. In all cases, the participants made it a point to qualify their statements and assessments on gender as being unscientific with no firm basis besides casual observations and perceptions.

Other themes that emerged from interviews in this category include: institutional policy, innovation and enforcement. At the time of the interview with the university official, Makerere had just adopted its policy on research and IPR management. The policy heavily promotes patenting Makerere's research output with potential industrial application. The motives and justification for Makerere's policy were summed up by the university official:

Of course for long there had been a lot of members of staff particularly concerned by matters of intellectual property and this affected innovation. Some people had innovated certain things and felt that they were not protected and we believe that they were one of the obstacles to people to innovate, because you innovate and you are not assisted. If there is a protection mechanism, it encourages innovation like for music, drama and many other things.

Innovation and rewarding innovation are the overriding goals of the Makerere policy. It also takes note of the dwindling research funds. Tapping and commercialising the university's IP output are seen as generating income to support and further faculty research and motivate staff to do more research. However, Makerere's policy has implications for access. According to the university official and as mentioned above, the policy calls for delaying by up to five years the dissemination of certain research findings until formal registration with government is complete. Students interviewed were unaware of the policy, which is understandable because it was relatively new.

Students did not feel it was the university's responsibility to enforce copyright. Similar sentiments were shared by the librarian as far as the library was concerned and the university in general. Interviewees emphasised awareness as a factor that institutions should encourage in order to avoid litigation and liability. One student pointed out that the photocopying going on unabated was likely to attract a lawsuit because the university was seen as 'aiding abuse of copyright'.

#### *Administrators, enforcement agencies or professionals*

The judges interviewed were asked to generally discuss cases, some of which have already been analysed in the doctrinal analysis of this chapter. For these cases, the interview focused on the rationale for the judgments. Also, the interviews touched on a few out-of-court settlements that were not discussed in the previous section. One such case, according to one of the participating judges, involved a local publishing company and some writers (primary school teachers). The publisher hired local writers to write books for primary schools. The publisher used the materials for a tender to supply primary school textbooks under a textbook project of the Ministry of Education and Sports. The project involved the review of titles approved as appropriate for the curriculum. Schools across the country were required to purchase these titles, with funding from the government. Publishers that manage to get their books on the curriculum stand to gain a lot, given the huge market across the country. The writers objected, insisting that mass circulation of their work under the project was not part of the agreement with the publisher. They accused the publisher of infringing on their copyright. The judge believed that as part of the out-of-court settlement, the publisher made additional payments for the books.

According to the judge, rights-owners, especially those in literary areas, take action only if they feel economic loss. According to him, this explains why despite the seemingly rampant infringement in Uganda via photocopying, only a handful of cases have appeared in courts. As an example, he cited a hypothetical instance where a publisher produces 1000 copies of a text. If the rights-holder recoups production fees and makes a profit on the sale of the 1000 copies, that individual or entity is unlikely to oppose infringing activities because they do not impact the market or undercut profits. That said, in reference to photocopying, another judge pointed out that ‘there is still a problem of copyright in light of learning materials’. According to him, there were lots of actionable activities that did not make it to court due to ignorance, or the burden of prosecuting infringing individuals that falls squarely on the rights-owner. He anticipated that copyright-related problems affecting learning would increase as people become aware of the law and the book sector becomes more profitable.

When the judges interviewed commented on learning materials, invariably the perception was that photocopying of protected materials was out of control. Often calling it piracy, the judges suggested that something had to be done at all levels. They suggested remedial actions ranging from raising awareness to strict interpretation of the law. One judge was of the view that infringing activities involving learning materials need not receive special treatment simply because they are learning materials. One judge spoke about a case he handled relating to textbooks, the *John Murray* case. The judge awarded heavy damages in order to send out a clear signal to all sectors that copyright was alive in Uganda. Another judge argued that ‘unless we [the courts] stopped it [piracy], there was a risk of wider pirating; yes it needed to be put to an end’.

On related matters, the IP lawyer was of the view that photocopying, especially in education settings, is rampant not because students and faculty cannot afford the materials, but because purchasing personal copies is not a priority. According to him, many students prefer spending money on luxury items or entertainment rather than academic resources. He feared that someone will likely bring a lawsuit against one of the institutions if only to send a signal that current photocopying practices and levels in that environment are not permissible.

Other issues discussed by the judges and the lawyer included access, awareness, ICT and gender. All four are interrelated. One judge noted that the poor reporting systems make it difficult for law students and practising lawyers to keep up with rulings on relevant cases. Obviously, if the legal fraternity has problems accessing such crucial information, it is likely to be even more problematic for the rest of the population.

One judge spoke of the tension caused by technology between access and protection of content. He noted that the computer ‘can let loose all the copyrighted

work, hence creating a big loss to the authors of the work'. Another judge expressed the same concern for ICTs, noting that the 'Internet is like an international notice board'. This judge feared that the Internet was killing aspects of copyright. However, the same judge expressed concerns about TPMs. He noted that the technology that permits access has been used to limit access.

According to another judge, the main problem at the moment is a lack of awareness. He observed that small businesses using different types of technologies for copying music and literary works always plead ignorance. He genuinely believes that some individuals are indeed unaware of the law. Even many artists whose works had been copied for many years were unaware of the law. Interestingly, this judge added that 'in our traditional law we had no copyright, everything was shared. Awareness has to be brought about by law. I think the awareness is minimal, but that is our society'.

The research team also wanted to know whether judges and the lawyer encountered more cases involving one gender group than another and we wanted to know whether the interviewees felt the law was gender-biased in any way. On the latter, the unanimous response was that copyright law is not gender-biased.

One judge was very surprised by the insertion of gender issues into a copyright discussion and said he had never given thought to the idea of the impact of copyright on gender groups. On further probing, however, he offered what he clearly indicated to be anecdotes, but anecdotes that hinted at a gender dimension to copyright in Uganda. He mentioned that there were more women plaintiffs in copyright cases he had handled than men and more men as alleged offenders. He cited two cases, one of a female musician (Chance Nalubega) whose songs had been misappropriated by a recording studio and another (ongoing) where a female fine artist (Annabel Kiruta) brought a lawsuit against a male artist for appropriation of her designs. The second case had been ongoing for one and a half years, demonstrating the problem of lengthy copyright-related litigations for poor institutions without resources to fight prolonged legal battles. That said, this judge dismissed the gender dimension to access to learning materials, arguing that 'I think it is neutral so I do not even expect such a question to ever arise. I don't think copyright affects women or men in any special way'. Another judge concurred with his colleague, but added that: 'you cannot deny the fact that men are more vigilant [business minded] in many activities and as a result, therefore, [men] are found ... in most violations ... . Most ladies have exhibited signs of compliance with the law'.

Consistent with the judges, the IP lawyer was reluctant to make a case for a gender dimension to copyright. But like the judges, he cited anecdotal evidence that men are more risk-taking than women and more inclined to break the law in order to make money. Most of the cases he has handled involved men. He noted that: 'Even at the selling end of CDs there are more men than women. For instance, at

the petrol stations there are always some people selling CDs and I have never seen a woman do that.’

Finally, for this group of interviewees, amending the laws was not generally felt to be urgent or necessary, especially not in order to facilitate access. There was a sense that as it stands now, access is well facilitated through the fair use provisions. Moreover, evidence of massive photocopying means that access is not a problem at the moment. The judges were of the view that the current law should be tested, otherwise one ends up with frequent amendments with no impact on realities.

### *Copyright-holders*

Among copyright-holders, the musician was the most sceptical. He offered a bleak assessment of the industry. According to the musician:

Based on research carried out, pirates make UGX280 million [Uganda shillings] per month [US\$147 500] on pirated music. Duplication has made music so hard to sell. An empty CD is now selling at only UGX500. With the easy computer access everyone almost owns a computer and it is no doubt that someone can duplicate over a hundred songs in a day. We need discipline to end such behaviour.... Stealing music has become a culture; nobody feels guilty that they are stealing music.... What happens here, I mean in Uganda, the only way artists can raise money is through stage performances. That is why you keep seeing musicians soliciting for cheap popularity in order to keep surviving. If I told you that in my latest album of ‘Olunaku Luno’ I wasn’t paid a penny... believe me because you’re getting it from the horse’s mouth.

What is notable about the above assessment is that it is made by one of the more established, respected and legally informed musicians. His sense of helplessness goes to show the extent of illegal copying of music. This assessment is striking in light of the musician’s personal efforts in the lobbying for and the passing of, the 2006 Act which ‘makes it more criminal [to engage in illegal activities]’. Two years after the new Act came into existence, the musician was describing a situation far different from what was expected of the new strong piece of legislation. According to the musician, some artists:

encourage pirates to sell around their music so that they can acquire cheap popularity, all this is done so as to attract fans to their [concerts]. It takes, or will rather take, a lot of training for the artists to appreciate the need to respect copyright law.

The publishers’ representative, on the other hand, offered a sober yet access-sensitive assessment. When asked about the copyright environment in relation to access, he blamed monopoly rights as responsible for failing to stem illiteracy and failing to improve the poor reading culture in Uganda:

Most of the reading materials are available under exclusive rights making it impossible for wider distribution of works and my organisation cannot easily achieve its goal of

universal reading culture without this. Secondly, the prices of books, especially for secondary schools and general readers, are high. Most students and parents cannot afford these books. The price could be lowered if, say, the IP cost was lowered. NABOTU would like many people to read books but this has not been possible.

As a representative of publishers, it is significant that the NABOTU official considers copyright a stumbling block to access and distribution of copyrighted works. It is also interesting that he makes an explicit connection between book prices and intellectual property, noting that lowering IP-related costs will likely lead to lower prices. Of course that connection is more anecdotal than empirical. However, by explaining the hurdles in terms of NABOTU's work, it means that these are based on real organisational experiences rather than personal views. Indeed, his additional comments reflect that position in the context of school textbooks:

The exclusivity of rights generally means that each school can only use the books that they are able to buy. Given the high enrolment rate and the high pupil-to-book ratio, even the state is limited in terms of interventions to reproduce the materials for learners without paying for IP.

It is appropriate to end our impact assessment interview findings with the NABOTU official's thoughts on the state of learning materials in Uganda. Consistent with studies in the literature reviewed, he observes that textbooks dominate the book industry:

There has been tremendous growth in this publishing segment following the adoption of policies that facilitate fair competition amongst publishers. One of the policy provisions being that for each subject, government allows ... five titles to compete in the schools. Also it is the responsibility of the schools to make selections of textbooks to use in their schools. As a result of the open policies in textbook procurements, there has been a number of new publishers entering and extending their market shares in a market, which traditionally was dominated by multinational publishers.

### **9.3.3 *Summary and conclusions: secondary literature and impact assessment interviews***

In the literature reviewed, studies conducted prior to the amendment of the 1964 Copyright Act consistently blame the massive infringements on weaknesses in the old law. Today the blame seems to be shifting to users' ignorance. However, some studies rightly focus on poverty and people's inability to afford certain learning materials because they are priced out of their range.

While the interviews, conducted to investigate the practices, generally confirmed the sentiments expressed in the literature, they also further revealed the motives behind infringing activities. We learnt that students simply cannot afford to purchase

their own learning materials and from the publishers' representative, that to some extent copyright is responsible for the high cost of learning materials in Uganda.

### *Information and Communication Technology (ICT)-specific findings*

Whilst one of the ACA2K study research questions raised the role of ICTs in furthering or hindering access in the copyright environments of study countries, in the Ugandan context ICTs were not found to play a significant role as far as copyright and access are concerned. This was attributed to the high cost of digital technologies and resources in environments where poverty is very high. ICTs play only a marginal role in terms of learning materials access. Typically, students and faculty find print as the preferred means of access. However, ICTs are increasingly part of the access infrastructure, as evidenced in Uganda's small but thriving ICT industry.

Additionally, ICTs are increasingly used in certain contexts such as libraries of major public institutions like Makerere University. The study revealed that the increasing use of ICTs is slowly shaping copyright discourse. For instance, one participant noted that recent advances in technology motivated the desire to amend the 1964 Act. It was also noted that database restrictions have been instituted in recognition of the increasing use of ICTs and electronic resources, rendering such resources inaccessible to distance education students; yet they are available to their on-campus counterparts.

### *Gender-specific findings*

A direct link between gender, copyright and access to learning materials was difficult to establish, but potentially significant anecdotal evidence emerged. For instance, institutional restrictions on amounts of copying mean that female students who cannot use libraries at night find it difficult to enjoy the same level of access as their male counterparts.

Meanwhile, outside academic or scholarly settings, it appears that men commit more copyright-related offences than women, a fact attributed by one interviewee to the risk-taking nature of men. However, beyond these anecdotes, we were unable to establish concrete evidence to make informed conclusions on the intersection of gender, access to knowledge and copyright. This was after taking significant steps to ensure equitable representation of interviewees and a balanced research team in Uganda, which had two male and two female members.

## **9.4 Conclusions and recommendations**

Findings from the Ugandan study clearly indicate that Uganda's copyright tradition is fairly recent, leading to an environment where copyright is hardly a concern

for most Ugandans, save for a handful of scholars, policymakers, artists and administrators.

Findings also point to stark contrasts between the law and practice. For a long time the law was considered weak and outdated. Most scholars attributed piracy and the rampant infringements to that weak law. In 2006, however, Uganda repealed the 1964 Copyright Act, paving the way for the 2006 Copyright Act, which moved the country closer to meeting international obligations and standards and included measures aimed at stricter enforcement. However, even under the new law, infringing activities appear to be continuing unabated, much to the consternation of rights-holders.

This study has found that poverty and the high price of learning materials in both electronic and print forms, are to a large degree responsible for the practices that disregard the law. This sentiment was shared by interviewees from the educational community (ie students and the librarian), as well as the publishing rights-holder representative interviewed. Some of the literature reviewed also seemed to suggest that there is sufficient evidence to directly link piracy and other infringing activities to poverty and high prices.

It was also found that infringing practices are not the sole preserve of users. The users have found accomplices in distributors as evidenced by the *John Murray* case and the Lumu study. Increasingly, distributors find a very high demand for reasonably priced learning materials, thereby finding it tempting to work with unscrupulous printers. It is clear that photocopy operators are also doing good business through provision of cheap and, in some cases, infringing materials.

Rights-holders interviewed called for more crackdowns on illegal activities, as did the judges who participated in the study. And while the judges showed awareness of the needs of learning environments, they felt the main priority ought to be enforcement — in order to send clear signals that copyright in Uganda is working.

The quest by some stakeholders to show, via stricter enforcement, that copyright is functional, has the potential to undermine some of the current primary modes of learning materials access in the country — because, as has already been pointed out, many of the current access practices are illegal.

In addition to the sharp disparities between the law and practice, we also found important gaps in the law itself that could hinder learning materials access. For instance, the law is silent on access for distance learners. The copyright law must not be seen to discriminate based on the remoteness of the learner from the primary learning site. The Copyright Act is also silent on digital technologies, which are critical to access in tertiary environments. Meanwhile, the vagueness of Uganda's fair use provision creates uncertainty as to how reliable this defence is for libraries, archives and teaching and learning purposes.

Thus, this study has confirmed the two hypotheses it tested: that the copyright environment in Uganda does not allow maximal access to learning materials; and that the copyright environment in Uganda can be changed to maximise effective access to learning materials.

While the current practices in Uganda allow a fair amount of learning materials access, many of the practices are illegal and thus the copyright environment — as broadly defined in this study to include laws, regulations, policies and practices — remains fragile and unfavourable to access to learning materials.

It is our opinion that there is room in the Ugandan copyright environment, specifically the law, to further access. The law can do more to advance access for certain interest groups, to accommodate distance learning and to enable use of digital formats for lending and archiving. Additionally, the fair use provision can be clarified, particularly for users in the education and research contexts.

Based on the findings of the study, the Ugandan ACA2K team makes the following legal recommendations:

- specific provisions for certain user groups and institutions should be included in the law, notably people with disabilities and distance learning;
- broadly, any provisions for these groups must take into account digital formats of knowledge material;
- the provision on fair use should be clarified to ease access to knowledge in the environments of education, research and the media. Fair use should be sensitive and accommodative of a wide range of on-campus copying aimed at furthering knowledge consumption and production; and
- the law should allow parallel importation of learning materials. Allowing parallel importation could open up access to reasonably priced learning materials produced outside the country.

Based on the findings of the study, the Ugandan team makes the following policy recommendations:

- Makerere University recently adopted an Intellectual Property Management Policy. We recommend that specific guidelines be established to facilitate the implementation of Makerere's policy. We further recommend that other universities in Uganda, public and private, adopt institutional IPR policies. Such policies should be sensitive to the access needs of students, faculty and researchers.
- We further recommend that Uganda puts in place a comprehensive IP policy and strategy that addresses, not just protection of the interests of rights-holders, but also the needs of users of copyright-protected resources. The process for

devising such policy and strategy should include input from all stakeholders, including the affected public, especially learners and their facilitators.

NABOTU represents a wide range of stakeholders including rights-holders. We recommend that:

- NABOTU be mandated to sensitise publishers and other stakeholders in the book chain to promote flexible mechanisms for access to learning materials in order to increase consumption of books by students in Uganda.

ULRC is the government agency responsible for legal reform. Part of ULRC's mandate is the development of legislative proposals for the relevant government ministry to introduce in Parliament. We recommend that:

- ULRC facilitates the development of a legislative proposal for the review of Uganda's 2006 Copyright Law to address some of the recommendations highlighted above.

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