

# Copyright Exceptions and the Use of Educational Materials in Universities in Kenya

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## Abstract

Educational communities in Kenya are concerned that copyright exceptions seem hardly adequate and effective to enable them access knowledge and transfer and disseminate information. Conflicts exist between copyright and the right to education arising from the fact that the educational materials, in which authors may have a material interest, are critical to the realization of the right to education. Balancing the educational need for educational materials that may be protected with the right of authors to material interests remains problematic.

This research sought to test the adequacy and effectiveness of the doctrine of fair dealing as regards copyright exceptions for educational purposes. Information was collected through interviews and questionnaires. The study found evidence of widespread copying on campuses. Secondly, respondents mainly use reproductions for research or private study and educational activities. While substantial amounts of the original copyrighted work are copied, there was no evidence of any detrimental impact on the market of the original work. Thirdly, universities under study had no copying policies. Fourthly, universities lack agreements with reproduction rights societies or copyright owners.

The study concluded that, first, copying is an essential part of university education in Kenya. Second, there is uncertainty as to whether the copying taking place is fair dealing or not. Third, the difficulties with the laws of educational copying especially the fair dealing factors have a chilling effect on users of copyright materials. The study recommended that universities should have clear, comprehensive and pragmatic copying policies; and sign up to appropriate licensing systems.

**Key words:** *Copyright exceptions, education, universities, Kenya*

## 1 INTRODUCTION AND OVERVIEW

### 1.0 Introduction

Copyright is one of the major regimes of intellectual property (IP). IP may be loosely defined as creations of the human mind,<sup>383</sup> and intellectual property rights (IPRs) as the bundle of legal rights governing the use of such creations.<sup>384</sup> Generally, copyright protects the expression of the idea rather than the idea itself. Exceptionally, however, copyright might also protect the idea. For instance, in terms of South African copyright law the idea is protected together with the expression of the idea. Put another way, once the ideas which relate to a particular work are reduced to an outwardly perceptible form, it is not only the form but the form together with the ideas that are entitled to copyright protection.<sup>385</sup>

Ordinarily, there are two main requirements for copyright protection. First, the idea must be expressed in material form, for example written down or recorded. Secondly, the work must demonstrate expenditure of sufficient effort which makes the work have an original character.

In reference to the nature of the rights conferred by copyright, there are two main categories of rights. First, there are economic rights (i.e. those rights that allow the owner to derive financial reward from the use of his works, for instance by copying, reproduction or communication of the work to the public, etc). Secondly, the author has moral rights (i.e. those rights that allow the author to take certain actions to preserve the personal link between

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<sup>383</sup> WTO 'TRIPS: What are IPRs' <[http://www.wto.org/english/tratop\\_e/trips\\_e/intell\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/intell_e.htm)> (23 October 20013).

<sup>384</sup> Watal J *Intellectual Property Rights* 1.

<sup>385</sup> eg see *Galago Publishers (Pty) Ltd & another v Erasmus* 1989 (1) SA 276 (A) at 283—285. In *Peter Ross v Ramesar* 2008 JDR 0660 (C) the court held that once ideas are captured in words on paper the ideas are an important part of the work (at 15).

himself and the work, namely the paternity right – the right to have her authorship acknowledged and the integrity right – the right to object to distortion or mutilation of the work or other derogatory action prejudicial to the author’s reputation).

### 1.1 The right to education

The Constitution of Kenya provides that every person has the right to education.<sup>386</sup> Article 53 states that every child has the right to free and compulsory *basic education* (emphasis added).<sup>387</sup>

While the right to education might be connected to the attainment of a number of tangible, material or economic interests, it is also often formulated in terms of intangible non-economic interests. For instance, under the Constitution of Kenya the right to education is protected as an economic and social right. Further, according to the Children Act “education means the giving of intellectual, moral, spiritual instructions or other training to a child”.<sup>388</sup> Instructively, the Children Act acknowledges and applies the principles of a number of international legal instruments.<sup>389</sup> Article 28(c) of the United Nations Convention on the Rights of the Child (UNCRC) provides that state parties are enjoined to make higher education accessible to all on the basis of capacity by every appropriate means. These values and interests have received judicial recognition. For instance, in the case of *Diana Ndele Wambua v Paul Makau Wambua*, Martha Koome J said that:

“basic education is more than just learning how to read, write and calculate. It encompasses the broadest possible sense of learning at any stage of life and it is not confined to childhood and formative years. The definition of education varies depending on the social class, personal circumstances, national standards and other reasons. Hence to some people, basic education should include higher education or tertiary which is seen as a foundation for working life and further education. Yet to some other people, education is the first stage of formal schooling and yet to others, it extends to full secondary school.”<sup>390</sup>

She went on to hold that ‘The parents having set high standards for their children have a responsibility to promote their social progress and better standards of life for their children who are willing and who are self-driven.’<sup>391</sup>

### 1.2 The clash between copyright and the right to education

As Professor Foster has put it, ‘the critical problem of the potential conflicts [between copyright and the right to education] arises from the fact that the educational materials, in which authors may have a material interest, are critical to the realization of the human right to education.’<sup>392</sup> One might take judicial notice of the fact that some of the problems in the Kenyan educational system are primarily due to unaffordable access. It is partly because of this that there have been concerted efforts to address this problem through such measures as free and compulsory basic education, free laptops for primary school pupils and, perhaps most importantly, *exacting the balance between copyright and the right to education*, among others. Instructively, studies in developing countries indicate that of all the measures taken to resolve the problem of impediments to the attainment of the right to education, provision of access to instructional materials has the greatest impact.<sup>393</sup>

### 1.3 Statement of the Problem

It is generally accepted that the best way to resolve the conflict between the right to education and copyright is to adapt ‘a balancing test, balancing the educational need for educational materials that may be protected with the right of authors to material interests’.<sup>394</sup> Utilising this balancing test, Kenya has endeavoured to implement

<sup>386</sup> Art 43(1)(f)

<sup>387</sup> Art 53(1)(b)

<sup>388</sup> Children Act 2001s 2

<sup>389</sup> See eg United Nations Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child (ACRWC).

<sup>390</sup> *Diana Ndele Wambua v Paul Makau Wambua* [2004] eKLR p 10.

<sup>391</sup> *Ibid* p11.

<sup>392</sup> SE Foster ‘The Conflict between the Human Right to Education and Copyright’ in PLC Torremans (ed) *Intellectual Property and Human Rights: Enhanced Edition on Copyright and Human Rights* 2008 Kluwer Law International, the Netherlands, 287.

<sup>393</sup> See eg World Bank ‘World Bank Report 2004’ <http://www.econ.worldbank.org/wds/wds 2004>> (15 October 2013).

<sup>394</sup> *Supra* n10 at 289.

domestic copyright laws that are designed to exact the most appropriate balance between the right to education and copyright. In this regard, one piece of pertinent legislation is the Copyright Act.

Toward striking the required balance, the Act says that copyright does not include the doing of any acts by way of *fair dealing*.<sup>395</sup> It might be hoped that Parliament could have clearly explained both the *purposes of copyright* protection and the *meaning of fair dealing*. Surprisingly, however, the task of identifying factors to determine which copyright uses might properly be deemed 'fair dealing' seems to have been largely avoided by Parliament.

The failure of the Act to define the term 'fair dealing' or give any guidelines regarding the relevant factors in determining fair dealing may be a major inadequacy in reference to universities. Both teachers and students use other person's copyright works in different ways for research, criticizing, or reporting news and so on (as long as they think these uses are 'fair'). Often times, disputes arise where what is fair is left to the user to decide and the owner to disagree. This raises uncertainty. While users of copyright material might eliminate the question of fair dealing by obtaining permission from copyright owners before using the work, that is pretty impractical. This may frustrate the lecturer's educational goals and ultimately harm the public's interest in education partly because the lecturer may decide to do without up-to-date information. Alternatively, the lecturer may ignore the copyright laws thus either expose himself to the risk of liability or impede the attainment of the secondary goal of copyright to reward the owner. This is the problem that this research was meant to attempt to preclude.

#### 1.4 Research Objectives

In this study, the main objective was *to test the adequacy and effectiveness of the Kenyan doctrine of fair dealing as regards copyright limitations and exceptions for educational purposes*. The specific objectives were to:

- (a) determine the purpose of the copying and similar reproduction of copyright protected material,
- (b) find out the nature of the copied works,
- (c) assess the amount of the original copyrighted works that is copied, and
- (d) establish the effect of the copying and similar reproduction of copyright protected material on the copyright owner's right to exploit his original work.

#### 1.5 Research Hypothesis

The main research hypothesis in this study was that the copyright exceptions and limitations in Kenya's legal rules are largely inadequate and ineffective in reference to the attainment of the stated copyright objectives as regards educational purposes.

The following specific hypotheses were tested in the study:

- (a) Many, if not most, of the users of copyright works seek at least some measure of commercial gain from their uses.
- (b) Most of the works copied are not textbooks but supplementary material in the form of current articles, case studies, study packs, recent developments, etc.
- (c) The quantity or percentage of the original copyrighted work that is copied is substantial.
- (d) While most uses of copyright works significantly harm the copyright owner's actual market, they are not sufficiently widespread to harm the potential market of the original.

## 2 LITERATURE REVIEW

Generally speaking, this is an area that has not been explored much.<sup>396</sup> Apparently there is no prior study of this nature in this area in Kenya. However, there are claims from outside Kenya, that Kenya's IP rules are not adequate and effective.<sup>397</sup> Nevertheless, these claims are not backed by any empirical evidence. Similarly, there have been an increasing number of articles in local media to the effect that there is a lot of copyright infringement in Kenya.<sup>398</sup> All, in all, there appears to be no previous studies in this area. Besides, the little

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<sup>395</sup>s. 26.

<sup>396</sup>Armstrong, C et al (eds) *Access to Knowledge in Africa: The Role of Copyright* 2010 UCT Press, Cape Town.

<sup>397</sup>Ouma M & Sihanya B 'African Copyright and Access to Knowledge (ACA2K) Project Country Report: Kenya' 2009 International Development Research Centre, Ottawa, Canada.

<sup>398</sup>Daily Nation 'Can't Someone stop this Photocopying Madness?' <<http://www.nation.co.ke/features/DN2/Stop-this-photocopying-madness>> (3 April 2014); CIPIT Law Blog 'To photocopy or not to photocopy: the Role of the Reproduction Rights Society in Kenya' <<http://www.cipit.org>> (10 April 2013).

available discussion does not appear to take seriously the problems of access to knowledge. The scale of the challenges in reference to access to educational materials in Kenya is revealed in its UNDP Education Index rankings where it was ranked 148 out of 177.<sup>399</sup>

Although different countries in Africa display different access to knowledge problems, it is generally clear that national education systems are failing to meet the needs of the vast majority of their constituents largely due to inadequate access to learning materials.<sup>400</sup> However, there is now some emerging research agenda in this area as evidenced by one recent study that aptly notes that:

'The predominant legislative mechanism used to facilitate the creation and dissemination of learning materials is copyright. Paradoxically, copyright law is usually also one of the primary constraints to access to learning materials. Thus, copyright has the capacity to both promote and hinder access to learning materials, as [access to knowledge] in general.'<sup>401</sup>

It is readily apparent that there is substantial activity by students, faculty, and staff on most university campuses in Kenya that could open the door for potential liability. While direct infringement of copyright may be occurring on an a regular basis, there are many other uses that are fair but might be extremely difficult to establish partly due to the modern trends of our courts (eg, the practice of adopting the most conservative approaches to fair dealing). Besides the narrow construction of copyright exceptions, the problem is compounded by the vague and somewhat ambiguous provisions in both the Act and the regulations. The current legal rules on copyright have major implications for higher education in Kenya. Indeed, there are fears that these rules might impede not only access to knowledge but also the transfer and dissemination of information. Therefore studies are required to determine how to resolve the conflict between copyright and the [human] right to education.

### 3 METHODOLOGY

#### 3.0 Method of Research

The questions raised in the study require collecting information by interviews and questionnaires. Therefore, the study used a descriptive survey design to obtain data to answer specific questions. The researcher collected information from respondents on their attitudes, opinions, habits and any other relevant issues in reference to fair dealing of copyrighted material in universities in Kenya.

#### 3.1 Description of the Sample and Sampling Procedures

Respondents were drawn from 10 Universities authorized to operate in Kenya. This number represents a quarter of the universities that had met the set standards for full university accreditation status to operate in Kenya as of 30<sup>th</sup> June 2014.<sup>402</sup> The research was conducted in both public and private universities in Nairobi and Eldoret in order to ensure more diverse and representative information was obtained.<sup>403</sup> The respondents included publishers, authors, lecturers, students, administrators, copy centre owners and librarians. However, this study focused on two categories of users: students and teaching staff [(mainly because most reproduction rights societies and authors tend to focus on these two categories of users (perhaps because they are the most prolific or notorious users!)].

The study used purposive sampling methods. Using information obtained from key informants, the study purposely targeted people believed to know about use of copyright material on campus. This method is appropriate for this study because the issue of fair dealing on campus is a very sensitive one and certain individuals or groups of individuals may refuse to cooperate. Accordingly, the key informants were neither randomly sampled nor sampled by a snowball technique. Rather, the researcher began fieldwork at what the existing literature and university insiders indicated are the key sites of fair dealing issues in universities. Thus the sampling was based on fieldwork at strategic sites such as university copy centres/shops, libraries and cafeterias. This was followed by a theoretically grounded strategy of selecting information rich cases for in-depth analysis.

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<sup>399</sup> UNDP 'UNDP human development index' in Human development report 2007 (2007). <<http://hdrstats.undp.org/indicators/7.html>> (15 September 2014)

<sup>400</sup> Shuttleworth Foundation & University of the Witwatersrand, *African Copyright and Access to Knowledge (ACA2K) Project: Methodology Guide* Shuttleworth Foundation, Johannesburg 2008, p7.

<sup>401</sup> *ibid.*

<sup>402</sup> Commission for University Education, 'Status of Universities: Universities Authorised to Operate in Kenya, 2013' <<http://www.cue.or.ke>> (15 September 2014).

<sup>403</sup> Only universities in Nairobi and Eldoret were used because the two towns have a high concentration of the universities authorised to operate in Kenya and thus they offered a good opportunity to obtain the required information.

### 3.2 Description of Research Instruments

Data was collected using interviews and observation. A semi-structured interview guide with both closed and open-ended questions format was used. This tool is appropriate because it is flexible enough to enable the researcher get a complete and detailed understanding of fair dealing and the copying of copyright works on campus. It is also appropriate in studying sensitive topics such as fair dealing and copyright works.

In reference to observation, the researcher took the position of an onlooker and collected data in the form of descriptive accounts. Through this method, the researcher was able to judge the habits of the users of copyright such as the amount of the work copied (eg whether they copy several pages or the whole book). This tool is appropriate as it provided the researcher with information about actual behaviour of the users of copyright works. Such behaviour as photocopying copyright material in universities involves habitual routines of which people are hardly aware. Thus, direct observation is useful as it enabled the researcher to understand fair dealing issues in their physical and social context.

The validity of this study is face validity. While one might grant that face validity is a relatively weak measure of validity, it remains correct evidence although caution is necessary. It is akin to what is called in law *prima facie* evidence. The effect of such evidence is to shift the burden to the other party to prove otherwise. Secondly, given that this is the first research in this area in Kenya, it provides a good starting ground for further research that might, inter alia, challenge this *prima facie* evidence or use better validity tests. Besides, in the area of socio-legal research, it might be extremely difficult to measure the content validity of a research project. Accordingly, the instruments were designed by the researcher and the items were revised by a subject specialist. To ensure reliability, the instruments were pilot-tested on one campus, which was not involved in the study.<sup>404</sup>

## 4 FINDINGS

### 4.0 Introduction

This section presents the findings generated from data collected using the interview schedules and the key informant guide. A 100 percent response was obtained from the schedules. The data obtained from the research questions was analysed using descriptive statistics, such as frequencies and percentages. The main analytic technique was a quick impressionist summary. This technique involves summarizing key findings, explanation, interpretation and conclusion. Regarding interpretation, a range of approaches that rely on various forms of evidence, including statutory text, legislative intent, agency interpretations, cultural norms, and judicial precedent were used. While these theories may offer competing modes of analysis, they also highlight competition among and between different interests.

### 4.1 Results

#### 4.1.0 Extent of photocopying or similar reproduction of copyright protected works on campus

To ascertain the extent of copying or similar reproduction of copyright protected material on campus, this study sought to find out whether the users reproduce copyrights works and, if so, how often they copy or otherwise reproduce copyright protected works; who made the copies; and whether those who reproduced the works had reproduction agreements with the universities, reprography societies or authors. The findings are as tabulated below.

**Table 1. Occurrence of photocopying or similar reproduction of copyright protected works**

Occurrence	Frequency	Percent
Frequently	160	80
Occasionally	30	15
Rarely	10	5
Total	200	100

<sup>404</sup>Better reliability tests could not be used in this study due to time and financial constraints.

**Table 2. Reasons for photocopying or similar reproduction**

Reason	Frequency	Percent
The required material comprises such a small portion of a publication that reproduction is the obvious alternative	10	5
The book, journal or other relevant work is sold out from the publisher	0	0
The book, journal is available in the institution's library to an insufficient extent	5	2.5
It is impractical to rely on borrowing the publication from the library	5	2.5
Digital copies are required for archiving	0	0
Because of the prohibitive cost of accessing the material	180	90
Total	200	100

**Table 3. Who makes the copies or similar reproductions**

Maker	Frequency	Percent
lecturers	15	7.5
Other employees of the universities	25	12.5
Students	80	40
copy shop owners/operators	80	40
Total	200	100

**Table 4. Whether the users or their universities have an agreement concerning photocopying or similar reproduction**

Response	Frequency	Percent
Yes	0	0
No	178	89
Non Response	22	11
Total	200	100

#### 4.1.1 Evidence on the four fair dealing factors

To test evidence on the four fair dealing factors in reference to whether the copying and similar reproduction of copyright protected material was fair dealing or not, this study sought to investigate the *purpose and character* of the copying; *nature of the work*; *amount and substantiality*; and *effect of the dealing upon the protected work*: The findings are as tabulated below.

#### 4.1.1.0 Data concerning the purpose and character of the copying

**Table 5. Purpose of the photocopying or similar reproduction**

Purpose	Frequency	Percent
research or private study and related educational activities	181	90.5
sale or similar commercial gain	0	0
For use as substitutes for copies produced by a publisher or for copies of other published material that are commonly available for purchase from sales outlets, publishers or similar parties, and which it would otherwise be natural for you to obtain	11	5.5
administrative tasks	8	4
use at public performances that are not part of educational activities	0	0
use by an entity that is not integrated in the institution's educational activities	0	0
parody; satire	1	
Total	200	100

**Table 6. Character of the photocopying or similar reproduction**

Character (ie the manner in which the work is dealt with)	Frequency	Percent
There is wide distribution/handout to the public	20	10
There is distribution to a limited group of people	52	26
Copies are destroyed after being used	20	10
recover articles and course packs from students for repeated use, lending out, renting out, transfer, future internal use	100	50
reproduction by photographic means	0	0
reproduction by digital means	8	4
Total	200	100

**Table 7. Means of the copying or similar reproduction**

Means	Frequency	Percent
photographic	0	0
digital	8	4
telefax machines	0	0
Digital	32	16
Xerographic	159	79.5
Printers	1	0.5
Total	200	100

**Table 8. Nature of the copying or similar reproduction**

Nature	Frequency	Percent
copying onto paper	183	91.5
copying onto transparencies and slides	8	4
copying onto other material for projection	0	0
copying onto other devices for storage	9	4.5
Total	200	100

#### 4.1.1.1 Data concerning the nature of the work photocopied or similarly reproduced

**Table 9. Nature of the work photocopied or similarly reproduced**

Nature of the work	Frequency	Percent
Literary	180	90
Artistic	10	5
dramatic	0	0
musical	10	5
Total	200	100

**Table 10. Nature of literary works photocopied or similarly reproduced**

Nature of the work	Frequency	Percent
textbooks	9	5
journal articles	26	13
case studies	26	13
study packs	29	14.5
past examinations papers	28	14
lecture notes	40	20
personal notes	27	13.5
court decisions and statutes	15	7.5
Total	200	100

**Table 11. Main considerations regarding whether to copy or not**

Consideration	Frequency	Percent
Whether the work is copyright protected material or not	10	5
whether published or unpublished	2	1
whether the book or similar publication is no longer available commercially or directly from the publisher	0	0
whether the publication cannot be obtained from the publisher within a reasonable time and at an ordinary commercial price	38	19
Whether a non-copyright protected equivalent of the work is available	0	0
Whether the copying is reasonably necessary to achieve the ultimate purpose	0	0
Whether the work is affordable to the user or not inexpensive	150	75
Total	200	100



#### 4.1.1.2 Data concerning amount and substantiality of the work photocopied or similarly reproduced

**Table 12. Amount and substantiality of the copying or similar reproduction**

Percentage of the total number of pages copied from a single work	Frequency	Percent
5%	51	25.5
10%	50	25
15%	18	0
20%	0	0
25%	10	5
30%	0	0
40%	10	5
50%	23	11.5
70%	28	14
100%	10	5
Total	200	100

**Table 13. Whether digital copies are made**

Response	Frequency	Percent
Yes	161	80
No	39	40
Total	200	100

#### 4.1.1.3 Data concerning the effect of the photocopying or similar reproduction upon the value of and the potential market for the original work

**Table 14. Effect of the photocopying or similar reproduction**

Evidence of detrimental impact	Frequency	Percent
the copying substitutes for that of the copied work (ie copies made for use as substitutes for copies available for sale)	79	39.5
the copying competes with the market of the original work	10	5
Unauthorized copying although there is an existing licensing market	88	44
you make the work available by means of an electronic retrieval system	5	2.5
There is wide distribution to the public; non-private use; multiple copying; use other than internal educational activity/research/administration; lending out, renting out, transferring for money etc; public performances (including exhibition, playing, showing/communication of the work to the public) that are not part of educational activities	0	0
You put reproductions in the library and/or you have/use inter-library lending/borrowing services	18	9
Total	200	100

#### 4.1.2 University policies concerning photocopying or similar reproduction of copyright protected works

To determine whether universities' copying policies helped ameliorate the potential defects in law and practice, the study sought to find out whether universities had copying policies and their adequacy and effectiveness. The findings are as tabulated below.

**Table 15. Whether the users' universities have policies concerning photocopying or similar reproduction**

Response	Frequency	Percent
Yes	19	9.5
No	181	90.5
Total	200	100

**Table 16. Permitted amount of copying under university policies**

Amount	Frequency	Percent
Less than 5% of the original material	10	5
Between 5 and 10%	9	4.5
Between 10 and 20%	0	0
Between 20 and 50%	0	0
Over 50%	0	0
Non Response	181	90.5
Total	200	100

#### 4.1.3 Existing licensing systems concerning photocopying or similar reproduction of copyright protected works

To determine whether existing licensing systems helped ameliorate the potential defects in law and practice, the study sought to find out the terms of such systems. The findings are as tabulated below.

**Table 17. Adequacy of the terms of agreements concerning photocopying or similar reproduction**

Amount of permitted copying	Frequency	Percent
Less than 5% of the original material	0	0
Between 5 and 10%	0	0
Between 10 and 20%	19	9.5
Between 20 and 50%	0	0
Over 50%	0	0
Non Response	181	90.5
Total	200	100

## 4.2 Discussion

First, this study found evidence of widespread copying on campuses. Indeed, 80% of respondents not only use but also frequently photocopy or otherwise reproduce copyright protected works. As one respondent put it, 'copying is the lifeline of research and teaching at Kenyan universities. It is a necessity – there is no alternative.' Another respondent said, 'In a country with as much poverty as Kenya, copying is an intrinsic part of the educational system. Even if you banned copying most users would not be able to buy the books.' A third one, said, 'This was the only required material that I obtained in order to fulfil the requirements of my course. Though I reproduced it, I duly acknowledged the author.' However, on some campuses, such as law schools, about half of the copied materials were not copyright protected (eg international agreements, conventions, treaties, legal statutes, regulations and court decisions). By and large, asked why they copy or otherwise reproduce copyright protected works, 90% of the respondents said that they do so due to the prohibitive cost of access to the original material. To be sure, not only are these copies made by university staff or students, but also by copy shop owners, most of whom have no reproduction agreements with the universities at issue.

Secondly, as regards testing evidence on the four fair dealing factors, the study found that:

- 1 Over 90% of the respondents use reproductions for research or private study and related educational activities. Xerographic copying accounts for 80% of the means of copying while digital copying accounts for 15%. Regarding the nature of the copying, over 90% is copying onto paper. 50% of the

respondents were of the view that there is a general practice or custom in Kenyan universities that course packs are reproduced for repeated use.

- 2 90% of the reproduced materials are copyright protected literary works that were relatively expensive in price. For instance, one respondent cited a highly acclaimed law textbook that is offered in local bookshops at KShs 50,000/= as one of the most reproduced materials. However, 95% of the respondents said that most of the works copied are not textbooks but supplementary material in the form of current articles, case studies, study packs, recent developments, etc. Surprisingly, all the respondents said that they were not sure what a reasonable amount of copying is! It is also worth noting that from the in-depth interviews it emerged that many respondents were not sure whether the copied work was copyright protected or not. Although a great majority of the respondents (75%) knew considered whether the book or similar publication was no longer available commercially or directly from the publisher or whether the publication could not be obtained from the publisher within a reasonable time and at an ordinary commercial price, their main consideration was whether the educational material at issue was affordable or not in terms of cost of access.
- 3 Concerning assessment of the quantity or percentage of the original copyrighted works that is copied, undoubtedly, the quality or quantity of the original copyrighted work that is copied is substantial. Over 80% of the respondents say they make digital copies. While over 90% of the respondents frequently copied trivial amounts (eg less than 5% of the total number of pages), they occasionally copied 100% of the work. Peculiarly, while one standard form reproduction rights agreement offered to universities in Kenya permits copying ranging from 15% to 30% of the original material, some university copying policies permit limits of less than 10%. Perhaps most surprising, only one of the universities under study appears to have a somewhat concrete mechanism of monitoring and controlling the extent and manner of reproduction (e.g. in the form of documentation of nature of the work copied, purpose & character, amount & substantiality, etc).
- 4 Regarding the effect of the users' dealing upon the work, there was hardly any evidence of use other than internal educational use. While there was an existing licensing market and the copying substituted for the copied work, there was no evidence of any detrimental impact on the market of the original work. This is partly due to the fact that even if there was no copying most of the users would not be able to buy the copyright protected materials. Furthermore there was no evidence of distribution to the public, or use other than internal educational activity/research/administration etc.

Thirdly, over 90% of the universities under study had no copying policies whatsoever. The few copying policies that were in existence suffered major defects. For instance, some were too sketchy (eg one was only 81 words long), vague and poorly developed. Others provided greater protection than that provided for under the law of educational copying.

Fourthly, although all of the universities under study had been engaged by a reproduction rights society or authors with a view to signing up to a license system, over 90% of them had no agreement with a reproduction rights society or copyright owners concerning copying and similar reproduction of copyright protected material on campus.

## 5 CONCLUSION AND RECOMMENDATIONS

### 5.0 Conclusion

The findings in this study show that the Kenyan doctrine of fair dealing as regards copyright limitations and exceptions for educational purposes seems hardly adequate and effective to enable users access knowledge as well as transfer and disseminate information. The following are the major specific conclusions derived from the study:

First, copying is an essential part of university education in Kenya. Against the backdrop of high costs of access and given the evidence of widespread copying on campuses and the large number of users who copy for educational purposes, it is easy to see why copying is the lifeline of research and teaching at Kenyan universities. Inevitably most users on campuses look as if they find themselves in a photocopying trance and as such one might be right to say that copying is an intrinsic part of the educational system.

Second, there is uncertainty as to whether the copying taking place on campuses is fair dealing or not. To address that problem, this study sought to test evidence on the four fair dealing factors. This was extremely difficult largely because of the complexity of the application of the factors to individual cases and the lack of proper

guidelines. For instance, while one standard form reproduction rights agreement offered to universities permits copying ranging from 15% to 30%, some university copying policies permit limits of less than 10%.

- In reference to *purpose and character*: Overall, the use of copyright works in universities in Kenya helps to fulfill the intention of copyright to stimulate creativity for the enrichment of the general public, and it does not aim to only ‘supersede the objects’ of the original for reasons of, say, personal profit.
- Regarding the *nature of the work* copied: While most of the works copied are not textbooks but supplementary material in the form of current articles, case studies, study packs, recent developments, etc, it appears that the main consideration is the cost of access. That is, the more expensive the material the more likely it will be copied. Secondly, that none of the respondents was sure of what a reasonably necessary amount of copying suggests that the fair dealing factor at issue could be extremely difficult to understand without proper guidelines.
- Pertaining to *amount and substantiality*: The main consideration is the cost of access. That is, the more expensive the material the more likely a large and/or substantial amount will be copied.
- On the subject of *effect of the dealing upon the protected work*: This is perhaps the most difficult factor to test. Although the economic effect of the use might be repeatedly identified as the most significant factor in determining fair dealing, it is likely to be the most difficult to overcome in proving fair dealing especially in the Internet environment. The findings show that copying is largely due to access costs. While this might suggest that authors might suffer losses, it is more probable (as the respondents indicated) that even if there was no unauthorised copying authors’ income streams would not increase given that most users of educational materials may be people of meagre means. In other words, even if you banned copying most users would not be able to buy the essential works.

Third, the difficulties with the law of educational copying especially the fair dealing factors have a chilling effect on users of copyright protected material in universities. That is the main reason why hardly any university has copying policies or agreements with a reproduction rights society or copyright owners concerning copying and similar reproduction of copyright protected material on campus. This in turn impedes the attainment of the stated object and purpose of copyright in reference to striking an appropriate balance.

## 5.1 Recommendations

Following the research results and conclusions, the following recommendations are made:

First, universities should develop and implement clear, comprehensive and pragmatic copying policies. The policies should use the balancing test approach. Utilizing such an approach, universities may strike a balance that better reflects Kenya’s socio-economic condition and priorities. It is an open secret that Kenya is lagging in education. There is therefore need to properly balance the importance of the interests or values that both copyright and the right to education seek to protect. Given the social, economic and political ramifications of an educated public, it is very likely that the *importance of interest in education* would be ranked higher than that in copyright (at least from a Kenyan perspective). There is no doubt that *access to educational materials contributes greatly to education*. As the findings of this study show, the most Kenyan users of copyright protected educational materials *do not have the ability to pay* for them. Therefore, the proposed measure of ranking the importance of the interest in education higher than that in copyright is likely to have a relatively very *slight trade impact*.

Second, universities should seriously consider the possibility of negotiating and signing up to licensing systems. However, they should be very savvy in such arrangements. For instance, they should ensure that the agreements set rates that are appropriate eg in terms of affordability, the extent to which they promote and protect the range of copyright exceptions and flexibilities, etc.

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***List of statutes and related instruments***

Constitution of Kenya 2010  
The Copyright Act, 2001 (No. 12 of 2001)  
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***List of cases and related instruments***

*Galago Publishers (Pty) Ltd & Another v Erasmus* 1989 (1) SA 276 (A)  
*Peter Ross v Ramesar* 2008 JDR 0660 (C)  
*Diana Wambua v Paul Wambua* [2004] eKLR

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