COPYRIGHT AND INSTITUTIONAL REPOSITORIES: THE KENYAN EXPERIENCE

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ABSTRACT

The paper provides a broad view of copyright; and later, explains how it affects the establishment and management of digital repositories in academic institutions. Among other things, it defines intellectual property, copyright, public domain and fair use. It is argued that knowledge of the law and in particular, copyright is crucial in the management of an institutional digital repository. Some materials may be legally sensitive which the resource manager may need to take into consideration before it is made available on open access. It is argued that a policy on institutional digital repository is necessary to guide the management of this resource.

INTRODUCTION

Copyright is a component of intellectual property. Intellectual property relates to people’s creative and inventive activities. Human beings by nature are creative. Because of this, they are able to come up with products arising from their creative activities. These products are often referred to as their intellectual property. Intellectual property rights (IPRs) are rights that the society awards to the individuals or organizations for their creative works (Rikowski, 2005).

Intellectual property is knowledge, experience, skills, that people have accumulated in a particular area. It is often referred to as the creation of the mind. Intellectual property is intangible. It can not be touched, weighed, felt or seen. The things we see such as books, gramophone records, paintings, drawings, etc. are simply products of intellectual property. Intellectual property is in the brain. Intellectual property law protects people’s intellectual efforts. Intellectual property law comprises among others: copyright, patents, trade marks and industrial designs.
Copyright is a legal right that authors, publishers, and other producers of creative works have to protect their work from being reproduced without their permission. It gives producers of creative works monopoly to enjoy the proceeds of their effort for a period of time. After this period has elapsed, the product is placed in the public domain and any person is free to reproduce it without seeking authority from the copyright owner. A study (Harvard University, Berkman Center, 2009) carried out in the US defines copyright as a legal concept that grants authors and artists control over certain uses of their creations for defined periods of time. Copyright limits who may copy, change or share these creations.

What does copyright do?

- Copyright empowers the owners to exclude others from certain uses of their work
- It grants the owner the exclusive right (or monopoly) which cannot be enjoyed by any body else without his/her permission
- It gives the author a say on the issue of reproduction licence. Only the copyright owner or his/her agent can issue reproduction licence.
- It protects the copyright owner from unfair competition, particularly those who have invested a lot of money or effort into the venture.
- It facilitates creativity and innovation. The monopoly the owner obtains motivates him/her to be even more creative. This alone leads to accelerated development.

Works protected by copyright

In Kenya, the following works are eligible for copyright protection:

- Literary works: printed as well as non-printed materials such as books, journals, magazines, newspapers, computer programmes.
- Musical works
- Artistic works; paintings, drawings, engraving, maps, plans, works of sculpture, architectural drawings, etc.
- Audio-visual works
- Sound recording
- Broadcasts

It is important to note that copyright protects only “the expression of an idea” and not the idea itself. It protects the way the information is presented. It does not
protect the idea. Doing so would jeopardize sharing of information and that would have a serious effect on development. Development cannot simply take place in an information vacuum.

**Duration of coverage**

Duration of coverage may vary from one country to another depending on their national laws. In countries that are signatories to major international copyright conventions, including Kenya and the UK, it is 50 years after the death of the author. In the US, it is 70 years. In the case of joint authorship, it is 50 years after the author who dies last. The purpose for this length of protection is to accord the owner enough time to recover his/her investment. It also enables the beneficiaries to benefit sufficiently from the deceased’s estate.

**Types of exclusive rights**

Copyright grants the following rights:

**a) Economic rights.** These are the rights relating to the economic or financial exploitation of the work. They include:

- the right of reproduction. The copyright owner has the right to make or authorize reproduction of his/her work. This right prevents any unauthorized person from reproducing a copyrighted work without the permission of the owner.

- the right of adaptation or translation. Only the copyright owner has the right to adapt or translate his/her work. Any other person must seek authority from the owner. Adaptation includes the right to transform the work into a new format such as a movie, play, music, etc. Translation of a copyrighted work also requires clearance from the owner.

- the right to distribute the work by way of sale, rent, lease, hire, loan, import, export, etc.

- the right to communicate the work to the public.

- the right to perform or dramatize the work to the public.

Any unauthorized exercise of the above rights is infringement of copyright.

**b) Moral rights.** These rights accrue to the owner even if the copyright ownership is transferred to another person. These rights cannot be transferred at all. The rights are non-monetary. The owner has a moral or inherent right to the work at all times which can not be negotiated.
c) **Related or neighbouring rights.**

These comprise the rights of the people who assist the copyright owner, but do not qualify to own the copyright. They include the rights of the broadcasters and broadcasting organizations in their transmission of programmes as opposed to the ownership of programmes themselves. The people who contributed in way or another to work are normally recognized here. These rights are to a greater extent, economic rights since the contributors are equally rewarded.

**Public Domain**

Public domain comprises works that are no longer protected by copyright. Such materials can be freely copied without seeking permission from the copyright owner. They include materials that have outlived copyright protection. Among the most notable materials falling under this category is the bible, the Koran, Shakespeare’s books, etc. Public domain may also include materials produced for non-commercial purposes. Much of government publications such as annual reports, research reports, general awareness materials, etc are not copyrighted. Materials published by NGOs for distribution to the public are also not copyrighted. Such NGOs would be too happy to see their materials copied for wider circulation!

Public domain may also comprise materials whose authors or publishers are either not known, or can not be traced.

**International conventions**

A number of international conventions are involved in copyright protection. The conventions ensure that signatory states provide reciprocal protection for works from member states. They also ensure standardization in enacting copyright legislations in member states. The 50 year copyright duration adopted in legislations in many countries is a product of one of these conventions. Among these are:

a) **Berne Copyright Convention, 1886**

The Berne Convention for the Protection of Literary and Artistic Works was first signed in the town of Berne in Switzerland in 1886. It was later revised in Paris, France in 1971. It has a membership of 164 states. Signatories to this convention are required to observe three important conditions. The first condition requires each member state to give to the residents of other states the same rights under their national copyright laws that they give to their citizens. The second condition requires member states to give foreign works the same protection they give to works produced in their country. The third
condition is “automatic protection.” This forbids member states from requiring registration formalities as a prerequisite for copyright protection. This enables a work to enjoy instant protection immediately it is published. The Berne Convention requires member states to observe a minimum copyright protection period of 50 years which must be incorporated in the national laws. The states must also make allowance for exceptions and limitations in their laws to allow for minimum copying of copyrighted works by users without seeking permission from the copyright owner.

Among the signatory states to this convention is UK, US, Russia and recently China. Unfortunately, this convention does not have an enforcement mechanism. It relies entirely on trust.

b) **Universal Copyright Convention (UCC), 1952.**

This convention is also referred to as the Geneva Copyright Convention. It was signed in Geneva, Switzerland in 1952 under the sponsorship of Unesco. It was created as an alternative to the Berne Convention. Among the first states to sign this treaty was the US and the former Soviet Union. The UCC offered more flexible conditions compared to the more rigid conditions prescribed by Berne. It is also more accommodating to the developing states which on account of their weak publishing industry found the Bern conditions rather harsher.

Unfortunately, the UCC has recently decreased in importance as many countries have since moved to the Berne Convention.

c) **Rome Convention, 1961**

This convention was signed in Rome, Italy in 1961. It attempted to address the new technologies which were emerging in the information arena. The two earlier conventions were only concerned with printed literature. Some inventions such as tape recorders which had appeared on the scene, had made it easier to copy recorded works and this worried the owners. The Rome Convention protects the works of performers, producers of phonograms and broadcasting organizations. In addition, it requires them to provide exceptions for these materials in their laws. This convention has since been extended to cover audio-cassettes, CDs and DVDs. A total of 86 countries are signatories to this convention.

d) **WIPO Performances and Phonograms Treaty (WPPT), 1996**
This treaty was signed by member states of WIPO on 20th December 1996. It protects the rights of performers and producers of phonograms. Phonograms include vinyl records, tapes, MP3s and other media for storing sound recordings. It grants performers economic as well as moral rights while producers are only entitled to economic rights.

About 68 countries are signatories to this treaty.

e) WIPO Copyright Treaty (WCT), 2002

The above treaty was signed on March 6, 2002 sponsored by the World Intellectual Property organization (WIPO). It provides copyright protection for information in the electronic format circulated via the Internet and compiled in databases.

Concerned about the effects of these new technologies, developed countries secured two treaties:

- The WIPO Copyright Treaty
- The WIPO Performance and Phonograms Treaty
- WCT requires countries to provide copyright protection to computer programmes and databases.

About 70 countries are signatories to WCT.


TRIPS was signed in 1994. It is administered by the World Trade Organization. It establishes minimum standards for many forms of intellectual property protection in member states of WTO including copyright.

TRIPS does not differ very significantly from the Berne Convention. The major difference is that it requires member states to grant copyright protection to computer programmes and data compilations. It does not require protection of authors’ moral rights which the Berne Convention enforces.

TRIPS requires members to provide effective sanctions for violations of copyright. In addition, it creates a dispute resolution mechanism by which WTO member states can force other members to comply with their treaty obligations. TRIPS appear to have the teeth which are missing in the Berne and UCC treaties.

TRIPS allows for flexibility in its implementation. This flexibility is particularly crucial to developing countries to be able to fit in their development agenda.
The Three Step Test

The “Three Step Test” was first created in the 1967 revision of the Berne Convention. It defines the freedom of the member states to create “exceptions and limitations” to copyright. It provides for reproduction of copyrighted works:

a) In certain special cases, provided that,

b) Such reproduction does not conflict with normal exploitation of the work and,

c) Does not unreasonably prejudice the legitimate interests of the author.

The Three Step Test has been incorporated in many bilateral treaties as well as national copyright laws of countries such as France, Portugal, China and Australia.

DOCTRINE OF FAIR USE

Copyright law in many countries, provides exceptions for certain uses of copyrighted works. This is in line with international conventions and in particular, the Berne Convention. These exemptions are known in the UK and most Commonwealth states as “fair dealing” while in the US, it is “fair use.” According to the fair use doctrine, reproduction of copyrighted works should be done in such a way that it does not economically or monetarily disadvantage the copyright owner. Pember (2001) observes that in determining whether the use of a particular work is a fair use, it is important to consider the following issues:

- the purpose and character of the use
- the nature of copyrighted work
- the amount and substantiality of the portion used in relation to the copyrighted work
- the effect of the use on the potential market

The purpose of fair use is to balance the copyright owner’s right to compensation, against the public’s interest to make information widely accessible. In many countries, fair use is permitted for the following purposes:

- Scientific research
- Private use
- Criticism or review
- Educational use
- Use by libraries and archives
- Reporting of current events subject to acknowledgement of the source.
- Use of works by the government or courts of law

**Computer Programmes**

In a number of countries including Kenya, copying of computer programmes is not allowed except for the following purposes:

- to correct errors
- to make back up copies
- to test the usability of a programme.

Once the objective has been achieved, the extra copies should be destroyed (and not donated or sold).

The law in many countries does not state the amount of copyrighted work that can be reproduced under fair use. It only indicates the purpose for which a work can be reproduced. Thus a user is totally free to decide what amount of reproduction is fair use. In most cases, acknowledgement of the source must be made. Failure to acknowledge the source amounts to plagiarism.

**Importance of fair use**

Sihanya (2008) identifies the following reasons in support of fair use:

- without fair use copyright holders would have exclusive rights over all their work
- libraries collect, organize, preserve, and make available the world’s culture and scientific heritage. Without these exceptions, libraries would not be able to realize this objective.
- without exceptions and limitations every reproduction and every communication would require payment
- the core functioning of libraries would thus be threatened as creators would themselves always need a permission to use the work of others when creating new works
- the creation of new works would also be impeded

In addition to the above, fair use doctrine increases the use of information resource, supports research needs of users and enhances education. It is particularly important to libraries, and particular, libraries in developing
countries where countries are seeking to widen access to tertiary and higher education through e-learning.

Libraries globally spend enormous amount of money purchasing published materials and subscribing to electronic information databases from the meager funds made available by their sponsors. Libraries have for long, played an intermediary role between publishers and information users. In this regard, fair use appears to be the only way libraries can realize their objective of providing information support to the growing population.

**THE ROLE OF COLLECTIVE MANAGEMENT SOCIETIES**

If a work is not covered by fair use, then a user must obtain permission or licence from the copyright owner or his agent to reproduce it. In many cases, the copyright owner may be too busy or unavailable to respond to requests for copying licences. In this regard, the owner may opt to delegate this responsibility to a licensing agent or organization. In many countries, these organizations exist as collective management societies or Reprographic Rights Organizations (RROs). The organizations collect reproduction fee from clients, deduct their commission and pass on the rest to the copyright owners. The role of RROs has been bitterly criticized by librarians in developing countries. In an attempt to collect more fees for the copyright owners, they appear to ignore the doctrine of fair use that exempts libraries from paying copying fee.

**INFRINGEMENT OF COPYRIGHT**

Copyright is infringed when a copyrighted work is reproduced without obtaining permission from the owner. This does however not include cases falling under fair use where permission is not required or works falling under public domain. In many countries, copyright infringement falls under civil law. In civil law, the onus is on the copyright owner to take the trouble of taking the offender to court. This would include meeting court expenses in addition those of the witness. In a civil court, the owner would request the court to award compensation for the damage the offender has caused to his work or business. On account high cost of civil cases, some owners may be reluctant to take this option, opting instead to settle the issue out of court. Since copyright law is civil, it has proved increasingly difficult to enforce it without the participation of the state machinery.

**Arguments for and against copyright**

It is argued that governments should upgrade and harmonize copyright law globally because it promotes the art and rewards creators. They argue that granting an exclusive right in creative expression provides a necessary incentive for copyright
holders to invest in the creation and distribution of creative works. This in turn leads
to positive development of the intellectual property industry.

On the other hand, it can be argued that applying the same copyright law in
discriminately in developed and developing countries can have a disproportionate
and negative effect on developing countries. Most developed countries have
powerful and lucrative entertainment, educational and research industries that
export copyrighted works. Such countries need a strong copyright law to exist.
Developing countries, on the other hand, typically import copyrighted materials.
Thus, it is argued, the residents of developing countries have to pay more royalties
and fees as a result of enhanced copyright protection. It is also argued that
restrictive copyright law prevent many governments from addressing important
social needs such as providing their citizens with good education because critical
information is locked up by the law.

In view of the foregoing, there is a need to create a better balance providing
incentives to creators and rewarding their creative activities; and promoting access
to knowledge and research in order to spur economic growth and foster innovation
in developing countries.

**DIGITAL REPOSITORIES**

In academic institutions, digital repositories could comprise:

- a) Works which are produced in digital form. These are normally referred to as
  “born digital.”

- b) Works which were initially in print form but converted into digital form later
  through eg. Scanning.

  a) **Born Digital Materials.** Copyright laws in many countries cover both
  print and electronic materials. A number of countries in the third world still
  use archaic copyright laws. These laws need to be reviewed to bring on
  board new record formats such as the electronic media, computer audio-
  visual materials, etc.

  Librarians need to take care when handling electronic materials. Care also
  needs to be taken when allowing clients to use the collection since the
  materials are likely to be on open access. Some materials may be for
  limited circulation. It is important that the librarian seeks advice of the
  donor on the issue of circulation.

  b) **Converted Digital Materials**

  Most materials donated or availed by staff and students in many
  institutions in developing countries are in print form. Therefore, to make
  these materials widely accessible, they have to be digitized. This will no
doubt, require the consent of the copyright owner. It is important to have this consent obtained in writing to pre-empt any future problems.

It is important to inform the owners whenever you need to include their materials in the digital repository. In addition, it is important the owners are informed on the importance of depositing their materials in the repository. This is so because of resistance to change. The contributors may initially not be agreeable to the idea. There may be fear of their work being extensively plagiarized.

It is also important to note that not all materials produced locally at the university are copyrighted. Some unpublished materials such as annual reports, research reports, circulars, policy documents, conference papers are by nature, not copyrighted. This is so because unpublished materials are not produced for sale. Therefore, there is no monetary incentive in these materials.

To develop institutional digital repositories, librarians may need to advise their university to come up with a policy requiring all staff and students to deposit copies of all academic materials produced at the university or with institutional support. For instance, both masters and PhD students should be requested to deposit both print and digital copies of their theses with the university librarian.

CONCLUSION

Institutional repository is an important concept in the present digital age. No institution worth its salt can survive without this facility. However to make this idea a reality, it is important that librarians or information managers understand the legal implications of managing this crucial resource. Copyright should be one among many legislations that should be in the mind of the resource managers.

BIBLIOGRAPHY


IFLA (2010). IFLA position on the anti-counterfeiting trade agreement. Hague, IFLA.


Ouma, Marisella and Ben Sihanya (2009). African copyright and access to knowledge (ACA2K) project. CapeTown, Shuttleworth Foundation.

