

RESEARCH ARTICLE

The Role of Copyright Law in the Attainment of Inclusive and Equitable Quality Education in English-Speaking West African Countries

Ifeoluwa Ayokunle Olubiyi*  and Allahmagani Khali**

College of Law, Afe Babalola University, Ado-Ekiti, Nigeria and Babcock University, Ilisan-Remo, Nigeria

Corresponding author: Ifeoluwa Ayokunle Olubiyi; Email: olubiyia@abuad.edu.ng

(Accepted 29 November 2023; first published online 16 May 2024)

Abstract

Education is a prerequisite for the attainment of sustainable development, with multiplier effects on society. This study examines the possibility of achieving inclusive and equitable education under the UN Sustainable Development Goal (SDG) 4, AU Agenda 2063 and ECOWAS Vision 2050. Copyright plays an essential role in either encouraging or barring access to educational materials, which are necessary for the attainment of SDG 4. Through a desk study using the laws and policies of English-speaking West African countries (Gambia, Ghana, Liberia, Nigeria and Sierra Leone), the article examines the copyright laws of these jurisdictions in order to determine how they facilitate or stop access to knowledge. It finds that most of the jurisdictions (except Nigeria) have not maximized the flexibilities available for access to knowledge through copyright limitations and exceptions, thereby barring access to educational materials. It recommends a review of national copyright legislations in line with a developmental perspective.

Keywords: access to knowledge; copyright; sustainable development; AU Agenda 2063; ECOWAS Vision 2050; education; West Africa

Introduction

The UN Sustainable Development Goals (SDGs) are blueprints or goals that nations have agreed to pursue in order to make the world an inclusive, safe and better place to live in. The target date for the goals is 2030. Education is an essential ingredient in the attainment of sustainable development, hence it is one of the Sustainable Development Goals (SDG 4). This goal has been further accepted, incorporated and pursued at the regional level through the African Union (AU) Agenda 2063 and at sub-regional level through the Economic Community of West Africa (ECOWAS) Vision 2050. In order for all to attain inclusive and equitable quality education, access to knowledge (A2K) or educational materials is key.

Copyright is a bundle of rights granted to copyright owners, including authors and creators of literary, artistic and creative works that make up educational materials. Copyright law therefore plays an essential role either in encouraging or barring access to educational materials, which are a key component of the education system. Hence it is essential to view the copyright legal regime from a developmental perspective to examine whether it is facilitating or stopping access to

* BL, LLB (OAU, Nigeria), LLM (Maastricht, Netherlands), PhD (Unilorin, Nigeria). Reader and Assistant Professor, Department of Private and Business Law, College of Law, Afe Babalola University, Ado-Ekiti (ABUAD), Ekiti State, Nigeria. Corresponding author.

** BLIS (UI, Nigeria), MARM (UI, Nigeria), PhD (Babcock, Nigeria). Senior Librarian, Kaduna State University Library, Nigeria.

knowledge. This study therefore examines copyright legislations in English-speaking West African countries: Gambia, Ghana, Liberia, Nigeria and Sierra Leone. It then examines SDG 4 on inclusive and equitable quality education at the level of the UN SDGs, AU Agenda 2063 and ECOWAS Vision 2050, before looking at the copyright paradox, which makes it both a tool for the promotion of educational materials and a barrier to accessing such materials. It then analyses the copyright laws of the selected countries, before providing recommendations.

Inclusive and quality education for all: The UN SDGs, AU Agenda 2063 and ECOWAS Vision 2050

Education is an important skill set for life. It is essential for the wholesome development and dignity of the individual, their psychological and emotional well-being and an important prerequisite for meaningful participation in society.¹ It is also essential for the socio-economic and technological development of society. In recognition of this, Goal 4 of the UN SDGs focuses on the provision of quality and inclusive education for all. Article 26 of the Universal Declaration of Human Rights recognizes the universal right to education, which has a “multiplier effect” on a society and on all other human rights.² Without a person having the prerequisite education, their rights to work, freedom of speech and many other rights cannot be meaningfully actualized. Article 13 of the International Covenant on Economic, Social and Cultural Rights reiterates this by stating that “education shall enable all persons to participate effectively in a free society, [and] promote understanding, tolerance and friendship among all nations”.³ Education is also key to the attainment of the SDGs, as a well-informed and educated people is indispensable to the development process.⁴ Developing countries need well-educated people, including professionals in various fields, and education increases their capacity to absorb new technologies, generate innovation and compete in the global economy.⁵ For education to have a multiplier effect, quality is important, and a basic element of functional education is the availability of quality reading and teaching materials.⁶

The term “inclusive” appears in the UN SDGs about 40 times, yet it is undefined. Nevertheless, it generally means “all”, that is, “all people who have the right to access the opportunities outlined in the goals”.⁷ Inclusive education therefore focuses on two essential characteristics: one is that of plural rights, which means that by “all”, it is acknowledged that certain groups of people have been excluded historically and therefore need special attention.⁸ Secondly, it implies the removal of systemic barriers that may have denied some from access to education due to various factors, including disabilities or poverty, among others.

Quality and inclusive education is quite wide-ranging and requires a comprehensive approach, which can be seen in the targets of the SDG. Specific targets under this goal include the provision

1 K Heyer “What is a human right to inclusive education? The promises and limitations of the CRPD’s inclusion mandate” in A Kopfer, JW Powell and R Zahnd (eds) *International Handbook of Inclusive Education* (2021, Verlag Barbara Budrich) 47.

2 SI Strba “A model for access to educational resources and innovation in the developing world” in D Gervais (ed) *Intellectual Property, Trade and Development* (2nd ed, 2014, Oxford) 287.

3 International Covenant on Economic, Social and Cultural Rights, available at: <<https://www.ohchr.org/sites/default/files/cescr.pdf>> (last accessed 11 April 2024).

4 RL Okediji *The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries* (2006, International Centre for Trade and Sustainable Development) at 2.

5 Id at 288.

6 Strba “A model”, above at note 2.

7 CJ Johnstone, MJ Schuelka and G Swadek “Quality education for all? The promises and limitations of the SDG framework for inclusive education and students with disabilities” in A Wulff (ed) *Grading Goal Four: Tensions, Threats, and Opportunities in the Sustainable Development Goal on Quality Education* (2020, Brill Sense) 96.

8 Id at 99.

of free, equitable and quality primary and secondary education for both boys and girls.⁹ Prior to this, they must have had access to quality early-childhood care and pre-primary education in order to prepare them adequately for primary education.¹⁰ Equal access to quality technical, vocational and tertiary education generally, including universities, is also important.¹¹ The goal entails elimination of gender disparities in education, as well as equal and inclusive access for persons with disabilities, indigenous people and those in vulnerable situations.¹² The attainment of SDG 4 will also not be achievable unless there is an upgrade in educational facilities that are “child, disability and gender sensitive and provide safe, non-violent, inclusive and effective learning environments for all”.¹³ There also needs to be an increased supply of qualified teachers and increased availability of scholarships to people from developing countries.

At the regional level, AU Agenda 2063 recognizes the quintessential role played by education in attaining a “prosperous Africa based on inclusive growth and sustainable development” by the year 2063.¹⁴ Education in its various forms is seen as the way to develop Africa’s human capital, which is its “most precious resource”.¹⁵ This is to be achieved through “sustained investments” in universal early-childhood development and basic education, higher education, science, technology, research and innovation, and elimination of gender disparities at all levels of education. Education also lies at the foundation of other aspirations, such as peace education for the attainment of a peaceful and secure Africa and the removal of barriers to education for women, girls and young people in order to have an Africa whose development is people-driven.¹⁶ In order to achieve these aspirations for education, the Continental Education Strategy for Africa (CESA) was developed for a ten-year period (2016–25), along with a Technical and Vocational Education and Training (TVET) strategy. The TVET strategy focuses on transforming young people to become job creators rather than job seekers and aligning training programmes to meet market demands.¹⁷ CESA has 12 objectives which align with SDG 4 targets, as seen in Table 1. With respect to access to learning materials, CESA identifies a dire lack of learning materials as one of the factors responsible for low-quality education in Africa, which needs to be addressed along with other factors such as a lack of quality teaching and infrastructure.¹⁸ Therefore, if Africa is to achieve its aspirations, access to learning materials, which are the foundation of and tools for education, is important; without them, there can be no meaningful education.

At the sub-regional level, education forms an integral part of the attainment of pillar 4 of ECOWAS Vision 2050, “Transformation, Inclusive and Sustainable Development”.¹⁹ Education is at the foundation of Strategic Objective 4 (“Create the conditions for economic transformation and sustainable well-being of the people”) and Strategic Orientation (SOR) 1 (“Promote human and social development”). SOR 1 includes access to basic services, which includes education.

9 UN “Transforming our world: The 2030 Agenda for Sustainable Development”, target 4.1, available at: <<https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf>> (last accessed 11 April 2024).

10 Id, target 4.2.

11 Id, target 4.3.

12 Id, target 4.5.

13 Id, target 4.a.

14 AU Agenda 2063, aspiration 1, available at: <https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf> (last accessed 11 April 2024).

15 Id, aspiration 1, para 14.

16 Id, aspiration 4, para 32 and aspiration 6, paras 51 and 57.

17 UNESCO and AU “Summary report of Africa regional technical consultations on regional benchmarks for SDG 4 and CESA 16–25” (2021), available at: <https://tcg.uis.unesco.org/wp-content/uploads/sites/4/2021/08/Final-Outcomes-Report_-Regional-benchmarks_Africa_20210729.pdf> (last accessed 3 April 2024).

18 Id at 14–15.

19 ECOWAS Vision 2050, available at: <https://ecowas.int/wp-content/uploads/2022/09/Vision2050_EN_Web.pdf> (last accessed 11 April 2024).

Table 1. CESA 2016–25 Strategic Objectives

CESA Strategic Objectives	SDG 4
SO 1: Revitalize the teaching profession to ensure quality and relevance at all levels of education	4.c
SO 2: Build, rehabilitate, preserve education infrastructure and develop policies that ensure a permanent, healthy and conducive learning environment in all sub-sectors and for all, so as to expand access to quality education	4.a
SO 3: Harness the capacity of ICT to improve access, quality and management of education and training systems	4.a
SO 4: Ensure acquisition of requisite knowledge and skills as well as improved completion rates at all levels and groups through harmonization processes across all levels for national and regional integration	4.1; 4.3; 4.6
SO 5: Accelerate processes leading to gender parity and equity	4.5
SO 6: Launch comprehensive and effective literacy programmes across the continent to eradicate the scourge of illiteracy	4.6
SO 7: Strengthen the science and math curricula in youth training and disseminate scientific knowledge and culture in society	
SO 8: Expand TVET opportunities at both secondary and tertiary levels and strengthen linkages between the world of work and education and training systems	4.3; 4.4
SO 9: Revitalize and expand tertiary education, research and innovation to address continental challenges and promote global competitiveness	4.3
SO 10: Promote peace education and conflict prevention and resolution at all levels of education and for all age groups	4.7
SO 11: Improve management of education system as well [as] build and enhance capacity for data collection, management, analysis, communication and use	SDG 17
SO 12: Set up a coalition of stakeholders to facilitate and support activities resulting from the implementation of CESA 16–25	SDG 17

Source: UNESCO and AU “Summary report of Africa regional technical consultations on regional benchmarks for SDG 4 and CESA 16–25” (2021)

SOR 2 (“Leverage human capital and skill development”) also emphasizes the promotion of education. Women can be more easily empowered when educated, therefore inequalities in access to education based on gender should be removed. Youth employment is another area tackled under the Vision, through capacity development of young people as they are trained in various sectors and skills, not only to be job seekers but also job creators.

Furthermore, the ECOWAS Youth Policy and Strategic Plan of Action recognizes access to proper education and training (including opportunities for lifelong learning) as one of the rights of young people.²⁰ Education is described as “the single most important factor contributing to the chances of young people to live productive and responsible lives”.²¹ It prepares individuals for a better life and has a direct link to personal and societal development. The government also has obligations to provide adequate funding for “equal educational opportunities”.²² The goal for young people is to “provide equal access to quality education, training institutions and programmes for all young women and men in the ECOWAS region”.²³ Special efforts and attention must be given to those in distressed circumstances, such as “indigenous, migrant and refugee youths, displaced persons, street children and poor youths in urban and rural areas, as well as to special

20 ECOWAS Youth Policy and Strategic Plan of Action, para 2.1, available at: <<https://www.ecowas.int/wp-content/uploads/2022/09/Youth-Policy.pdf>> (last accessed 11 April 2024).

21 Id, para 4.1.

22 Id, para 2.3.

23 Id, para 4.1.

problems, including literacy problems, for blind youths and youths with other disabilities”.²⁴ Efforts must also be geared to ensuring gender equality in the educational system.

While these plans and visions at both regional and sub-regional levels are lofty, few of the strategic documents have considered the question of A2K or learning materials, a key component in ensuring quality and inclusive education, or the role of copyright legislation in the region. Thus this study considers the perspective of copyright on A2K for the attainment of sustainable development in education in Africa. This is also pertinent when one considers that West Africa has been set back by the COVID-19 pandemic in terms of educational achievements and the exacerbation of inequalities in access to quality education. Schools all over the world were closed for 41 weeks on average, and in 2020 and 2021, 147 million children missed over half of their in-person instruction; about 24 million learners may never return to school.²⁵ This could be due to lack of finances, increased responsibilities such as being made to earn a living to support the family, or early or forced marriage. Although some children were able to continue their education online through distance learning, many children in West Africa had inadequate access to education because of the absence of the information and communication technologies needed for digital learning. In addition, there is an inadequate or no effective support infrastructure for distance learning to take place, such as having computers or smartphones, electricity and fast internet speed.²⁶ Some may also not have had a conducive environment for learning.

An OECD study revealed that only 29% of higher education institutions in Africa could move teaching and learning online, compared to 85% in European institutions, which had online repositories for educational materials and where digitally enhanced learning and teaching was already embraced.²⁷ West Africa lags behind in terms of technological and educational infrastructure, which reiterates the need for member states to invest massively in this area. The pandemic made it more apparent that access to educational materials is not only required for offline learning, but must also be available digitally and online if meaningful and progressive learning or education is to be attained in West Africa in the 21st century. While many copyright legislations in the region may have made provisions for access to educational materials offline, they have not adapted or updated their copyright laws to ensure similar access to such materials in the online or digital environment, as shall be seen below.

The copyright paradox in the attainment of quality education

Copyright is an exclusive right granted to authors of literary, artistic and creative works generally. This right enables them to prevent others from doing certain things with respect to their protected works, such as reproduction, translation, adaptation, distribution and communication to the public, among others.²⁸ In the history of copyright, copyright was granted to authors for a limited period at the time of the Statute of Anne 1710, in order to encourage them to make more books and resources available to the realm. The aim of copyright law was stated as being to encourage authors to write

24 Id.

25 UN “The Sustainable Development Goals report 2022” at 34, available at: <<https://unstats.un.org/sdgs/report/2022/>> (last accessed 13 March 2023).

26 UNESCO “Reopening with resilience: Lessons from remote learning during COVID-19 in West and Central Africa” (September 2021), available at: <<https://www.unicef-irc.org/publications/pdf/Reopening-With-Resilience-Lessons-from-remote-learning-during-COVID-19-West-and-Central-Africa.pdf>> (last accessed 3 April 2024).

27 P Koninckx, C Fatondji, and J Burgos “COVID-19 impact on higher education in Africa” (19 May 2021), available at: <<https://oecd-development-matters.org/2021/05/19/covid-19-impact-on-higher-education-in-africa/>> (last accessed 22 March 2023).

28 Berne Convention 1888, arts 6–12, available at: <<https://www.wipo.int/wipolex/en/text/283693>>; TRIPS Agreement 1994, arts 10–11 and 14, available at: <https://www.wto.org/english/docs_e/legal_e/27-trips.pdf>; World Intellectual Property Organization (WIPO) Copyright Treaty, arts 6–8, available at: <<https://www.wipo.int/wipolex/en/text/295157>> (all last accessed 12 April 2024).

and enhance the dissemination of information for the benefit of the public. This rationale can be deciphered from the title of the act, “An Act for the encouragement of learning”, and the preamble, which provides for the “Encouragement of Learned Men to Compose and Write useful Books”.²⁹ This places emphasis on the incentive theory of copyright protection, where it is a means of encouraging the creation of works for the socio-cultural and educational development of society.³⁰ According to this theory, with the protection of their rights, authors and creators are incentivized to produce more works.³¹ It is also noteworthy that the Statute of Anne placed emphasis on the continued accessibility of books in public libraries and to university staff and students by requiring the deposit of books in the Royal Library and universities.³² The utilitarian theory also supports this role of copyright law, ie the promotion of social welfare through the advancement of the arts, sciences and learning.³³ Copyright works are therefore essential for education in its various forms, as well as for the cultural and social development of society.³⁴ By incentivizing the production of copyright works and encouraging them to be disseminated and accessed, a copyright system plays a critical role in the development and distribution of works used in education, teaching and research.³⁵

However, copyright reveals a paradox in that it ordinarily prevents unrestricted access to information embedded in copyright works. It allows the copyright owner to prevent others from reproduction, publication, public performance, distribution for commercial purposes, broadcast, communication to the public, adaptation, translation, making into a film or recording of the copyright work without his or her permission. This exclusivity granted to copyright owners can potentially reduce access to educational materials in various forms, whether in print, digital or audiovisual formats, thereby hindering the attainment of inclusive and quality education.

Copyright can inhibit education where there is difficulty in accessing educational materials or the process of gaining access is tedious.³⁶ The latter could be the case where one has to search for the owners and seek out permission. Copyright has also been criticized for increasing the cost of books and educational materials and thereby inhibiting access, particularly in developing countries such as in sub-Saharan Africa, where the earning power of people is on average low.³⁷ In addition, educational materials are mostly available in official languages; this means those who do not understand these dominant languages will mainly be excluded where there are no translated versions for them to enjoy.³⁸ Hence, access to educational materials is a challenge for minority populations or those

29 UK Copyright Act 1710 (Statute of Anne) 8 Anne c. 21 and c. 19, available at: <https://avalon.law.yale.edu/18th_century/anne_1710.asp> (last accessed 12 April 2024); B Atkinson and B Fitzgerald *A Short History of Copyright: The Genie of Information* (2014, Springer International Publishing Switzerland) at 25.

30 SV Shiffirin “The incentives argument for intellectual property protection” in A Gosseries, A Marciano and A Strowel (eds) *Intellectual Property and Theories of Justice* (2008, Palgrave Macmillan) 94; J Campbell “Authorship, incentives for creation, and copyright in the digital 21st century”, available at: <<https://asistdl.onlineibrary.wiley.com/doi/pdf/10.1002/meet.1450430168>> (last accessed 4 April 2023).

31 L Bentley and B Sherman *Intellectual Property Law* (4th ed, 2014, Oxford University Press) at 38; MJ Davison et al *Australian Intellectual Property Law* (3rd ed, 2016, Cambridge University Press) at 194.

32 UK Copyright Act 1710, above at note 29, secs 4 and 5; D Seng “An empirical review of the copyright limitations and exceptions for educational activities” in S Balganes, N Wee Loon and H Sun (eds) *The Cambridge Handbook of Copyright Limitations and Exceptions* (2021, Cambridge Law Handbooks) 267.

33 M Longan, “A system out of balance: A critical analysis of philosophical justifications for copyright law through the lenz [sic] of users’ rights” (2023) 56 *University of Michigan Journal of Law Reform* 779.

34 KD Beiter “Extraterritorial human rights obligations to ‘civilize’ intellectual property law: Access to textbooks in Africa, copyright, and the right to education” (2020) 23 *The Journal of World Intellectual Property* 232.

35 WIPO Standing Committee on Copyright and Related Rights (SCCR) “Objectives and principles for exceptions and limitations for educational, teaching, and research institutions” SCCR/27/8 2014, available at: <https://www.wipo.int/edocs/mdocs/copyright/en/sccr_27/sccr_27_8.pdf> (last accessed 12 April 2024).

36 FO Aboyeji “Copyright, access to knowledge, and the United Nations’ Sustainable Development Goals” (2020) 42/1 *European Intellectual Property Review* 42.

37 L Shaver “Copyright and inequality” (2014) 92 *Washington University Law Review* 117.

38 Ibid.

who understand neglected languages. Copyright has made it difficult to legitimately translate works into languages which can be accessed by most of the world population without obtaining the permission of the copyright owner. In most cases, it is difficult to obtain the permission of these owners, mostly due to not knowing their identity, their geographical location or the cost. The implication of this is that most people remain unable to access knowledge and all its benefits in languages understandable to them. The copyright system should not only be about the production of knowledge or educational materials; more importantly, it concerns the distribution of or public access to such knowledge.³⁹ It is then that copyright can actually contribute to the sustainable development of society; copyright works are expressions of knowledge and are important to development.⁴⁰ The knowledge that people have access to will determine the quality of their education; poor-quality resources lead to poor-quality education, and vice versa.⁴¹

Limitations and exceptions in English-speaking West Africa: A means to quality education

Limitations and exceptions (L&Es) to copyright allow users to carry out certain activities with respect to the copyrighted work which would otherwise fall within the exclusive rights conferred by copyright.⁴² L&Es exist for certain special cases as long as they do not conflict with normal exploitation of the copyright work and do not unreasonably prejudice the legitimate interest of the copyright owner.⁴³ They are essential to allow flexibility of access to copyrighted works for educational, scientific and research purposes, among others, allowing certain uses of the works for non-profit purposes and maintaining a balance between the rights of authors and public interest in education, research and access to information.⁴⁴ These L&Es also help advance the goals of helping individuals to achieve and maximize their potential, as well as to participate meaningfully in society, through access to information or educational materials. They help to solve the challenges for those who cannot afford to reward copyright owners for the use of their works or who cannot go through the lengthy process of obtaining a special licence based on the type of use, such as educational purposes.⁴⁵ It is therefore critical to get the right balance between protecting copyright and granting A2K.⁴⁶

It must also be noted that L&Es in many jurisdictions were crafted to suit learning or education in an analogue environment or a face-to-face scenario. However, education in the digital environment nowadays takes place in various forms, including distance learning. The lack of adaptation of L&Es to digital learning poses serious challenges to access to information or educational materials.⁴⁷ In addition, the extent of L&Es differs from one jurisdiction to another. The next sections examine L&E provisions in English-speaking West Africa (Gambia, Ghana, Liberia, Nigeria and Sierra

39 Id at 123.

40 Aboyeji "Copyright", above at note 36 at 45.

41 H Chuma-Okoro "Nigerian copyright reform and implications for access to teaching and learning materials (TLMs) in the digital age" (2018) 22 *The African Journal of Information and Communication* 2.

42 AJC Silva "Beyond the unrealistic solution for development provided by the appendix of the Berne Convention on Copyright" (2012, Program on Information Justice and Intellectual Property Research Paper No. 2012-08) at 1 and 5.

43 TRIPS Agreement, above at note 28, art 13; Berne Convention, above at note 28, arts 9(2), 10; WIPO Copyright Treaty, above at note 28, art 10; WIPO Performances and Phonograms Treaty, art 16, available at: <https://www.wipo.int/edocs/pubdocs/en/wipo_pub_227.pdf> (last accessed 12 April 2024).

44 WIPO SCCR "Objectives", above at note 35.

45 Beiter "Extraterritorial human rights", above at note 34 at 232.

46 A Adewopo "According to intellectual property: A pro-development vision of the law and the Nigerian intellectual property law and policy reform in the knowledge era" (2012, 5th Inaugural Lecture, Nigerian Institute of Advanced Legal Studies) at 16.

47 M Torres and R Xalabarder "Interim report on practices and challenges in relation to online distance education and research activities" (29 March 2018), SCCR/38/9, available at: <https://www.wipo.int/edocs/mdocs/copyright/en/sccr_38/sccr_38_9.pdf> (last accessed 12 April 2024).

Leone) in order to assess the extent to which their copyright laws promote the attainment of quality education through facilitating access to educational materials by both educators and students. The parameters used include the term of copyright; the existence of general (fair use or fair dealing) or specific copyright exceptions; quotation and teaching exceptions; exceptions for libraries and archives; reproduction and adaptation of computer programs; exceptions for persons with disabilities; payment for public-domain use; and the existence of national intellectual property polices. All these parameters have an impact on access to educational materials. Table 2 provides a summary of the L&Es for education, research and scholarship in these countries as gleaned from this study.

Term of copyright

In Gambia, the duration of both economic and moral rights is the life of the author and 50 years after his or her death.⁴⁸ A similar position obtains in Liberia and Sierra Leone.⁴⁹ These countries maintain the minimum term of protection as set out under article 7 of the Berne Convention. By not providing for a longer period, copyright works can enter the public domain and be freely available in a shorter period of time for educational and other purposes. However, in Ghana, copyright is protected for the life of the author and 70 years thereafter.⁵⁰ Nigeria provides for a similar duration for literary, musical and artistic works.⁵¹ This is a longer term than the minimum set by the Berne Convention, which means that educational materials take a longer time to enter the public domain and be available freely. It has been argued that a longer period of protection does not necessarily spur creativity but rather limits access to works and makes their entry into the public domain too long.⁵² In addition, it has been criticized as being unnecessary, potentially limiting access to learning materials.⁵³ Nevertheless, it is important to examine L&Es provided in these jurisdictions to inquire whether they ensure access to educational materials, despite the longer copyright term.

General copyright exceptions (fair use or fair dealing) or specific exceptions

General copyright exceptions in the form of fair use or fair dealing exist only in Liberia (fair use) and Nigeria (fair dealing), among the countries studied. Gambia, Ghana and Sierra Leone do not have such general exceptions, although there are specific exceptions, most of which are focused on the right of reproduction. In both Gambia and Sierra Leone, the “private reproduction of a published work in a single copy is permitted without the authorisation of the copyright owner or author” as long as it is made by “an individual exclusively for his or her own personal purposes”,⁵⁴ while Ghanaian law goes beyond just reproduction to provide a general exception for the “reproduction, translation, adaptation, arrangement or other transformation” of literary or artistic works that have been made public where the user is an individual and the purpose is exclusively personal use.⁵⁵ Students can use this exception for their private study. This does not extend to reprography of the

48 Gambian Copyright Act, 2004, sec 21.

49 Liberian Intellectual Property Act 2016, sec 9(20); Sierra Leone Copyright Act 2011, sec 21(1).

50 Ghanaian Copyright Act 2005, sec 12.

51 Nigerian Copyright Act 2022, sec 19(1).

52 S Flynn et al “Research exceptions in comparative copyright” (2022) (Project on Information Justice and Intellectual Property / Technology, Law, and Security research paper series 75) at 20, available at: <<https://digitalcommons.wcl.american.edu/research/75/>> (last accessed 12 April 2024); P Adusei, K Anyimadu-Antwi and N Halm, *ACA2K Country Report: Ghana* (May 2009) at 23, available at: <<https://hdl-bnc-idrc.dspacedirect.org/server/api/core/bitstreams/3fed7011-54ed-4617-9927-e46a033baf62/content>> (last accessed 12 April 2024).

53 SW Ugwumba “Examining the role and limits of copyright law and policy in facilitating access to education in Nigeria: A development inquiry” (PhD dissertation, University College Cork, 2020) 248.

54 Gambian Copyright Act 2004, sec 27(1); Sierra Leone Copyright Act 2011, sec 27(1), the same wording in both.

55 Ghanaian Copyright Act 2005, sec 19(1)(a).

whole or a substantial part of a book or a musical work in the form of notation, the whole or a substantial part of a database in digital form, a computer program or any other work.⁵⁶ Hence, the photocopying of a whole book or a substantial part of it, which is done by students in many educational institutions due to poverty, the high cost of books or an inability to access educational materials, amounts to an infringement.

Gambian and Sierra Leonean laws go further to provide a general limitation on the permitted use of private reproduction such that it does not extend to instances where “the reproduction would conflict with a normal exploitation of the work or would otherwise unreasonably prejudice the legitimate interests of the author or copyright owner”.⁵⁷ This is gleaned from the three-step test for intellectual property (IP) exceptions and limitations contained in international IP treaties. However, by incorporating this additional limitation, the act leaves the ambit of the private reproduction exception susceptible to varied interpretations by courts and may lead to a narrower interpretation of it.⁵⁸ This leaves students and educators unclear on what may or may not be covered by this provision. Furthermore, the addition of this limitation is unnecessary and superfluous, since the exception already allows for only the reproduction of a single copy for strictly private use.

The scope of fair use under Liberian law includes criticism, comment, news reporting, teaching (“including multiple copies for classroom use”), scholarship or research.⁵⁹ Unlike the other jurisdictions examined here, allowing multiple copies for classroom use is commendable and more favourable for the use of copyright works for educational purposes. In addition, private reproduction of a copyright work in a single copy for private purposes is permissible.⁶⁰ Permissible purposes under Nigeria’s fair dealing provisions include private use; parody, satire, pastiche, or caricature; non-commercial research and private study; criticism and review; or the reporting of current events.⁶¹ A general educational purpose is not expressly stipulated within the permitted purposes for fair dealing, like the Liberian position; however, it permits private use, private study and non-commercial research. Educators can also be protected where their dealing with a copyright work is for the purpose of criticism or review. In addition, Nigeria has an open-ended fair dealing model where the listed purposes are introduced by the phrase “such as”, showing that fair dealing purposes are not restricted to only those mentioned in the act. Therefore, although education is not expressly stated, it is not foreclosed.

Quotation exceptions

The law in all the jurisdictions examined provides for quotation exceptions as mandated under article 10(1) of the Berne Convention. Gambia, Liberia and Sierra Leone allow reproduction in the form of quotation from a published work, compatible with fair practice and not exceeding the extent justified by its purpose.⁶² In addition, the user must indicate the source and the name of the author or copyright owner. The term “fair practice” is not defined under these laws; Dreier and Hugenoltz state that the practice will be “fair” when quotations are used in support of the ideas expressed by the person quoting, to illustrate or criticize someone’s views or work, and where they do not merely substitute for the use of the work that has been quoted from.⁶³ Nigerian law simply provides that

56 Gambian Copyright Act 2004, sec 27(b); Ghanaian Copyright Act 2005, sec 19(2); Sierra Leone Copyright Act 2011, sec 27(2).

57 Gambian Copyright Act 2004, sec 27(2)(e); Sierra Leone Copyright Act 2011, sec 27(2)(e).

58 Ugwumba “Examining the role”, above at note 53 at 248.

59 Liberian Intellectual Property Act 2016, sec 9(8).

60 Id, sec 9(10).

61 Nigerian Copyright Act 2022, sec 20.

62 Gambian Copyright Act 2004, sec 29; Liberian Intellectual Property Act 2016, sec 9(9), Sierra Leone Copyright Act 2011, sec 29.

63 T Dreier and P Hugenoltz (eds) *Concise European Copyright Law* (2006, Kluwer Law International) 45.

Table 2. Summary of L&Es for A2K, education, research and scholarship in English-speaking West African Countries

Parameters for exceptions	Gambia	Ghana	Liberia	Nigeria	Sierra Leone
Term of copyright	Author's life +50 yrs	Author's life +70 yrs	Author's life +50 yrs	Author's life +70 yrs	Author's life +50 yrs
Fair use / fair dealing	None	None	Fair use	Fair dealing	None
Specific exceptions	<ul style="list-style-type: none"> - Permits limited private reproduction of a published work in a single copy - Further limitation of the three-step test 	Private-use exception	<ul style="list-style-type: none"> - Private use - Multiple copies for classroom teaching permitted 	<ul style="list-style-type: none"> - Private use, non-commercial research and private study; criticism, review or the reporting of current events 	<ul style="list-style-type: none"> - Private reproduction - Further limitation of the three-step test
Quotation exception	Yes	Yes	Yes	Yes	Yes
Teaching / research / instructional and illustration	Available but reprographic reproduction is limited to face-to-face teaching	Includes use for professional training and public education	Includes making available in computer networks, but access must be limited to enrolled students and their teachers	<ul style="list-style-type: none"> - Reproduction permissible through non-reprographic means - Reprographic reproduction limited to maximum of 5% of the work 	Reprographic reproduction limited to face-to-face teaching
Exceptions for libraries and archives	Single copy for study, scholarship, private use and preservation purposes or to replace lost copy	<ul style="list-style-type: none"> - Reproduction of a single copy - Multiple copies require permission of copyright owner - Right made subject to the interest of the copyright owner, author and collective management organization 	Single copy permissible	Not more than three copies	Single copy
Temporary reproduction and adaptation of computer programs	Yes	Yes	Yes	Yes – provides specifically for exceptions to anticircumvention measures	Yes

Compulsory licences	No	No	Yes	Yes	No
Persons with disabilities	No	No	Yes	Yes	No
Payment to use public-domain works	No	Yes	No	No	Yes
National intellectual property policy	Yes	No	No	Yes	No

“quotations in the form of short excerpts” are permissible,⁶⁴ while Ghanaian law states that permitted quotations include those from “newspapers or periodicals in the form of press summaries”, as long as there is an indication of the source and the name of the author.⁶⁵

In all five jurisdictions, this exception is applicable to any category of works and it is not limited to reproduction rights, as quotations can take place during a lecture, performance or in a material form such as books or visual arts.⁶⁶ However, in Nigeria and Gambia, the extent of quotation allowed is stipulated as a “short excerpt” and “short part” respectively. Although quotation exceptions generally refer to a short part of a work, there may be instances where quoting a long part, to ensure accurate presentation, or an entire work, such as where the original is short, such as a poem or an artistic work, may be necessary.⁶⁷ The inclusion of “short” in the quotation exceptions may therefore be too restrictive in such instances.

Teaching exceptions (research, instruction and illustration)

The Berne Convention leaves the provision for teaching exceptions to the discretion of national laws, permitting “the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice”.⁶⁸ All five English-speaking West African countries provide for this exception, although the scope differs in each jurisdiction. In Gambia and Sierra Leone, the teaching exception is limited to the reproduction of a short part of a published work for teaching purposes by way of illustration in writing or sound or visual recording, provided it is compatible with fair practice and does not exceed the extent justified by its purpose.⁶⁹ The reprographic reproduction of published articles, short works or short extracts for face-to-face teaching in educational institutions whose activities do not serve a direct or indirect commercial gain is also permissible. This permission is only to the extent justified by the purpose, and the act of reproduction must be an isolated occurrence; if it is repeated, it should be on separate and unrelated occasions. In addition, there must be evidence that there is no collective licence offered by a collecting society, of which the educational institution is or should be aware, under which the reproduction can be made. Clearly, reprographic reproduction for teaching under these laws is limited and crafted for face-to-face teaching only; it does not take into consideration the use of or need for educational materials for distance and online learning which is prominent in the educational system today, so is not in line with the realities of today’s digital society.

Section 19(1)(c) of the Ghanaian Copyright Act 2005 allows the use by illustration of works made public in publications and broadcasts of sound or visual recordings to the extent justified. Communication of literary and artistic works or broadcasts for teaching purposes in educational institutions is permitted; the use of such works for professional training or public education is also permissible. The teaching exception for literary and artistic works in Ghana is broad, and the conditions to be fulfilled are clear, unlike the position in Gambia and Sierra Leone, where there are different layers of conditions before one can enjoy this permitted use. In Liberia, the teaching exception includes availability in computer networks, but access must be limited to enrolled students and their teachers.⁷⁰ This will allow the use of these educational materials in online or

64 Nigerian Copyright Act 2022, sec 20(1)(g).

65 Ghanaian Copyright Act 2005, sec 19(1)(b).

66 S Ricketson “WIPO study on limitations and exceptions of copyright and related rights in the digital environment” (2003) WIPO doc SCCR/9/7, available at: <http://www.wipo.int/edocs/mdocs/copyright/en/sccr_9/sccr_9_7.pdf> (last accessed 5 October 2023) at 12.

67 Ibid; Dreier and Hugenholz *Concise European Copyright Law*, above at note 63 at 45.

68 Berne Convention, art 10(2).

69 Gambian Copyright Act 2004, sec 30; Sierra Leone Copyright Act 2011, sec 30.

70 Liberian Intellectual Property Act 2016, sec 9(12).

distance learning environments. Just like Gambia and Sierra Leone, reprographic reproduction of published works is also permissible for face-to-face learning in educational institutions that is not directly for commercial purposes, as long as such reproduction is an isolated act and, if repeated, is done on separate and unrelated occasions, and if there is no collective management organization for licences that the institution should be aware of.

Nigeria's teaching exception also caters for educators and students where learning is online by providing that "copyright in a literary, musical or artistic work is not infringed by its being copied in the course of instruction or of preparation for instruction, where done by a person giving or receiving instruction and it is not by means of a reprographic process".⁷¹ In addition, "reprographic copying of passages from published literary or musical works by or on behalf of an educational establishment for the purposes of instruction" is not infringing.⁷² However, this is limited to not more than 5 per cent of a work within a period of three months, unless there is a reprographic licence in place. Hence, photocopying an entire book or large chunks of a book without a licence, even for educational purposes, will not be exempted under the act. Sound recordings, audiovisual works, broadcasts or cable programmes can be copied in a not-for-profit educational institution for the purpose of instruction by either the presenter or the receiver of the instruction.⁷³ Unlike literary, musical and artistic works, there is a caveat of "not for profit" attached to copying these entrepreneurial works. Furthermore, acts done for the purposes of examinations (setting, communicating or answering) do not infringe copyright.⁷⁴ Educational establishments may record a broadcast or cable programme or make a copy of such a recording for educational purposes, and this shall not infringe the copyright in the incorporated work except where there is a licensing scheme for the purpose.⁷⁵

Exceptions for libraries and archives

Exceptions for libraries and archives are important for the availability of educational materials, since these are places where both educators and students can gain access to such materials for study, scholarship and research. This exception is present in all the English-speaking West African countries examined.⁷⁶ It is only for "libraries or archives whose activities do not serve direct or indirect gain" and is limited to the making of "a single copy of the work by reprographic reproduction".⁷⁷ Where the reproduction of a published work is at the request of an individual, the library must be satisfied that the copy will be used "solely for the purpose of study, scholarship or private research".⁷⁸ Also, the exception covers the purpose of preserving an original copy by replacing a lost or destroyed copy or a deteriorated work. Hence, copies can be made in order to preserve or replace a copy that was "lost, destroyed or rendered unusable in the collection of another library or archive" if it is impossible to obtain the copy under reasonable conditions and the act of reproduction is isolated, separate or on unrelated occasions if it is repeated. The restriction to the making of a single copy for preservation purposes may not suffice in the face of an overwhelming demand for educational materials with a teeming population of students in educational facilities in these countries. The tendency of library copies to deteriorate or be destroyed or lost due to a large number of users is high; hence, libraries may need to reproduce multiple copies for preservation. Also,

71 Nigerian Copyright Act 2022, sec 21(1).

72 *Id.*, sec 23.

73 *Id.*, sec 21(2).

74 *Id.*, sec 21(3).

75 *Id.*, sec 22.

76 Gambian Copyright Act 2004, sec 31; Sierra Leone Copyright Act 2011, sec 31; Liberian Intellectual Property Act 2016, sec 9(13); Ghanaian Copyright Act 2005, sec 21.

77 *Id.*

78 *Id.*

restricting this exception to public libraries or libraries that are not for gain has been criticized in the light of the increasing number of private educational institutions that cater for a large population of students who cannot be absorbed by the public institutions; hence, this provision should not deter these libraries from benefiting from this exception.⁷⁹

Of note under Ghanaian law is the requirement to obtain permission from the author, copyright owner or relevant collective administration society where a library or archive needs more than one copy of a work.⁸⁰ This imposes additional burdens on libraries and archives to seek out the owners of the right and their agents for permission to make more than one copy, even where the situation warrants the making of multiple copies. It also makes libraries and archives into enforcers of copyright rather than service providers.⁸¹ According to a study by the African Copyright and Access to Knowledge Network, photocopying is practically the only way to obtain access to teaching and learning materials in institutions where up to 1,000 students may be sharing two or three copies of a book.⁸² Furthermore, libraries stated that seeking authors or owners for permission to make multiple copies is unworkable, as it is burdensome and they do not know where some copyright owners can be found.⁸³ Furthermore, section 21(6) of the Ghanaian Copyright Act stipulates that the provisions of the section are “subject to the interest of the publisher, author or the relevant collective administration society”, which is a way to take back the permitted use. What would be the interest of the copyright owner other than that they should be remunerated for such reproduction? If the intention is to create an exception for libraries and archives, then sub-section 6 is not necessary, particularly since there are quite a number of conditions imposed already to ensure that the reproduction and use by the library or archive is limited in scope and does not extend beyond what is essential. It must be stated that despite these strict requirements, the impact of the law is not felt because of a lack of strict enforcement or compliance.⁸⁴

In Nigeria, any use made of a work by or under the direction or control of the government or by public libraries, non-commercial documentation centres or scientific or other institutions is permitted where the use is in the public interest.⁸⁵ No revenue should accrue based on the use, and such use must not substantially affect the potential market or value of the work. This provision has also been criticized for excluding private libraries, even though they are also serving the public interest by making educational works available.⁸⁶ It is also permissible to make not more than three copies of a work by or under the direction of the person in charge of a public library for the use of the library where such a work is not available for purchase.⁸⁷ This allowance for three copies is more than the single copies permissible in the other countries examined. In addition, reproduction for the purpose of research or private study of an unpublished literary or musical work kept in a library, museum or other similar institution to which the public has access is permissible.⁸⁸ Communication or making available to members of the public works and other materials not subject to purchase or licensing terms for the purpose of research or private study through dedicated terminals on the premises of publicly accessible libraries, educational establishments, museums and archives is also permissible.⁸⁹

79 EM Darkey and H Akussah “Academic libraries and copyright issues in Ghana: The University of Ghana in focus” (2008) 36/3 *International Journal of Legal Information* 439.

80 Ghanaian Copyright Act 2005, sec 21(5).

81 Darkey and Akussah “Academic libraries”, above at note 79 at 440.

82 Adusei, Anyimadu-Antwi and Halm *ACA2K Country Report*, above at note 52 at 20.

83 *Id* at 21.

84 *Ibid*.

85 Nigerian Copyright Act 2022, sec 20(1)(i).

86 T Oloko “Assessing the limitations and exceptions to copyright infringement: Nigeria in perspective” (2022) 13/1 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 112.

87 Nigerian Copyright Act 2022, sec 20(1)(m).

88 *Id*, sec 20(1)(n).

89 *Id*, sec 20(1)(r).

Other allowable acts for libraries, archives, galleries and museums in Nigeria which must be for non-commercial purposes are stipulated in section 25 of the Copyright Act. They can make and distribute copies of copyright works as part of their ordinary activities; can make copies of works in their collection for the purpose of back-up and preservation; can make or procure a copy of any missing part of a work in the collection from another institution; can make or procure a copy of any work that is or should be available in the collection in any chosen format where the work cannot reasonably be acquired in that format through general trade or from the publisher; or can make or procure a copy of any work where the permission of the copyright owner cannot be obtained after reasonable effort, or where the work is not available by general trade or from the publisher. Such copies may be lent to users or used for private study or research on the premises of the institution. The Nigerian copyright law also gives greater freedom to libraries and archives to use digital materials and integrate their services through consortiums, thus making educational materials more accessible.⁹⁰ It also enables them to make copies in any format, which includes reprography, digital and Braille. Indeed, the permissible acts by libraries, museums, archives and similar institutions are quite broad in Nigeria, in order to facilitate access to educational and information materials in the promotion of quality and inclusive education.

Reproduction and adaptation of computer programs and exceptions to anticircumvention measures

All the jurisdictions examined provide exceptions for the temporary reproduction and adaptation of computer programs.⁹¹ Such reproductions or adaptations must be in a single copy and made by the lawful owner of the program. It must also be for the use of the computer program for the purpose and extent for which it was obtained, for archival purposes or for replacement of the lawfully owned copy in the event that the program is lost, damaged or destroyed. Sirinelli explains that the reproduction of a computer program in the RAM by a user should logically not be covered by copyright, as it is essential for the use of the program; furthermore, such reproduction is ephemeral.⁹² By allowing reproduction for archival purposes and for the replacement of lost, damaged or destroyed programs, this exception is useful in accessing and preserving educational materials, which in today's digital learning environment can also be in computerized form.

In addition to this, Nigerian copyright law stipulates that "transient and incidental reproductions, which are integral and essential parts of a technological process, whose sole purpose is to enable transmission in a network between third parties by an intermediary or for other lawful use where such use has no independent economic significance" is permissible.⁹³ Furthermore, only the Nigerian law expressly stipulates that anticircumvention provisions shall not affect the exercise of any L&Es under the act.⁹⁴ Hence:

"[A] person who has lawfully obtained the right to use a copy of a computer programme, may circumvent a technological protection measure that effectively controls access to a particular portion of that programme for the sole purpose of identifying and analysing those elements

90 Chuma-Okoro "Nigerian copyright reform", above at note 41 at 14.

91 Gambian Copyright Act 2004, sec 34; Ghanaian Copyright Act 2005, sec 20(1); Liberian Intellectual Property Act 2016, sec 9(15); Sierra Leone Copyright Act 2011, sec 34; Nigerian Copyright Act 2022, sec 20(2).

92 P Sirinelli "Exceptions and limits to copyright and neighboring rights" (paper presented at WIPO Workshop on Implementation Issues of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)), WCT-WPPT/IMP/1, 1999) at 32, available at: <https://www.wipo.int/edocs/mdocs/copyright/en/wct_wppt_imp/wct_wppt_imp_1.doc> (last accessed 12 April 2024).

93 Nigerian Copyright Act 2022, sec 20(1)(o).

94 Id, sec 50(7). Anticircumvention provisions prohibit the circumvention of technological protection measures used by copyright owners to prevent the infringement of their copyright, such as preventing reproduction of the work.

of the programme; to achieve interoperability of an independently created computer programme with other programmes.”⁹⁵

This is commendable and provides an exception to technological protection measures used by copyright owners which could be absolute, without considering lawful uses by those who have legitimately obtained such copyright works or who are covered by an exception under the law.

Compulsory licences

Compulsory licences are a kind of statutory licence granted by the state in situations where the copyright owner cannot be found or has refused or is unwilling to grant voluntary licences for the use of his or her work on reasonable terms.⁹⁶ They are a mechanism that can assist in balancing the monopoly of the copyright owner and the public interest of access to educational materials. A compulsory licence granted for the reproduction of a work which is not readily available addresses the challenge of the paucity of educational materials. Where granted for the translation of a work into a specific language, it can be useful to address the availability of educational materials in neglected languages, a concern raised by Shaver.⁹⁷ In addition, compulsory licences can also be used to address the challenge of the high cost of educational materials, as high prices is a valid reason for such a licence to be granted in some jurisdictions. There are no provisions for compulsory licences of copyright works in Gambia, Ghana and Sierra Leone, but Liberia and Nigeria do have provisions for this under their copyright laws.

In Liberia, a compulsory licence may be granted for the translation of a published literary or dramatic work for the purposes of teaching, scholarship or research.⁹⁸ It can also be granted to produce and publish literary or artistic works whose copies are not made available in Liberia by the copyright owner after the expiration of a limited period, or if it is an instructional material and is not made available at a reasonable price. Sections 31–35 of the Nigerian Copyright Act 2022 make provisions for compulsory licences. They can be granted to produce and publish a translation of a literary work which has been published in printed form or in an analogous form of reproduction for the purposes of teaching, scholarship or research. Similarly, after the expiration of the relevant period, compulsory licences may be granted for the reproduction of a literary or artistic work where such has not been made available in Nigeria at a reasonable price where it relates to systematic instructional activities. Another interesting position under the Nigerian law is that compulsory licences can also be granted in order to rectify the abuse of a dominant market position or to promote public interest.⁹⁹ This provision can be useful in addressing the high cost of books and unreasonable licence terms for educational materials in the country. However, for the purpose of compulsory licences, “research” does not include industrial research or research carried out by corporate bodies not owned or controlled by the government, carrying on any business. This suggests that research carried out by private educational institutions may not fall within this definition. Nevertheless, “purposes of teaching, research or scholarship” is defined broadly to include “all types of organised educational and instructional activities at any level in educational institutions”.

Exceptions for persons with disabilities

Access to and availability of educational materials is essential for the attainment of inclusive education for all. Persons affected by a disability may not be able to access educational materials, unlike

⁹⁵ Id, sec 50(8).

⁹⁶ DO Oriakhogba and IA Olubiyi *Intellectual Property Law in Nigeria: Emerging Trends, Theories and Practice* (2nd ed, Paclerd Press, 2023) 268.

⁹⁷ Shaver “Copyright”, above at note 37 at 117.

⁹⁸ Liberian Intellectual Property Act 2016, sec 9(19) and schedule 1.

⁹⁹ Nigerian Copyright Act 2022, sec 35.

their counterparts who do not have such a disability. Often, persons with disabilities need to convert copyright works to accessible formats that can be used by them. It is therefore essential for copyright legislations to make special provisions for this category of persons. Gambia, Ghana and Sierra Leone do not have this exception, which adversely affects the access of disabled persons to educational materials and makes reproducing copyright materials or adapting them to accessible formats without the copyright owner's permission illegal.¹⁰⁰

Gambia is not a party to the Marrakesh Treaty for Visually Impaired Persons 2013 (the Marrakesh Treaty). Although the Intellectual Property Policy and Strategy of the Gambia mentions the Gambia Association of the Deaf and Hard of Hearing and The Gambia Organisation of the Visually Impaired in its list of abbreviations, there is no further mention of them.¹⁰¹ Nothing in the policy documents how the copyright law enables or proposes to enable these challenged persons to get access to copyrighted materials for educational or other purposes. Ghana, for its part, has signed and ratified the Marrakesh Treaty, in 2013 and 2018 respectively.¹⁰² However, its copyright law has not been amended to reflect this. In practice, universities convert some of their learning materials into Braille for visually impaired persons; however, this is not sufficient to cater for all persons with disabilities.¹⁰³ The country's Persons with Disability Act 2006 (Act 715) generally seeks to promote policies that can provide fair opportunities for persons with disabilities.¹⁰⁴ Nevertheless, this law fails to address persons with disabilities' access to copyright-protected works; it only provides that "a public library shall as far as practicable be fitted with facilities that will enable a person with disability to use the library".¹⁰⁵ This does not address the reproduction or adaptation of copyright works to accessible formats.

On the other hand, Liberia and Nigeria provide copyright exceptions covering persons with disabilities. In Liberia, it is permissible to reproduce a published work for the benefit of visually or aurally impaired persons or persons with print disabilities in a specialized format which enables their perception of the work, and to distribute the copies exclusively to those persons, provided that the work is not reasonably available in an identical or largely equivalent form.¹⁰⁶ Under the Nigerian copyright law, the use of a copyright work for the benefit of persons with disabilities and of a non-commercial nature, to the extent required by the specific disability, is permissible.¹⁰⁷ In addition, the Nigerian act domesticates the provisions of the Marrakesh Treaty in its section 26, wherein an authorized entity may, without the permission of the owner of copyright in a work, make or procure an accessible-format copy of a work or subject matter and supply the copy to beneficiary persons by any means, including non-profit lending or electronic communication by wire or wireless means. The law grants access to the visually impaired and other people with physical disabilities that cannot use conventional information resources due to disability and gives exclusive rights for transformation into Braille. This provision encourages accessibility and use of the materials.

100 A Stamm and H Yu-Chang "The Marrakesh Treaty's impact on the accessibility and reproduction of published works" (2021) 65/5 *TechTrends* 692.

101 GM Alemu *Intellectual Property Policy and Strategy of the Gambia: Final Draft* (2018), available at: <<https://www.wipo.int/wipolex/en/text/583830>> (last accessed 12 April 2024).

102 WIPO "Marrakesh notification no. 40: Ratification by the Republic of Ghana", available at: <https://www.wipo.int/treaties/en/notifications/marrakesh/treaty_marrakesh_40.html> (last accessed 9 May 2023).

103 Adusei, Anyimadu-Antwi and Halm *ACA2K Country Report*, above at note 52 at 12.

104 *Id* at 20.

105 Persons with Disability Act 2006 (Act 715), sec 22.

106 Liberian Intellectual Property Act 2016, sec 9(16).

107 Nigerian Copyright Act 2022, sec 20(1)(p).

Payment to use public-domain works and other relevant exceptions

Ghana and Sierra Leone require payment for the use of public-domain works.¹⁰⁸ These are works whose copyright has expired, works where the author has renounced ownership and foreign works not protected within a country. A rich public domain is essential for access to knowledge and education. The use of works in the public domain without restriction in these countries is subject to the payment of a fee, which may be specified by a minister (in Ghana) or registrar (in Sierra Leone). If these works are already in the public domain, it means they are now freely available for the public to use, subject only to the author's moral rights where applicable. Why is the payment of a fee for the use of a work which is already freely available therefore specified? Although the laws state that these funds are for the benefit of institutions that promote authors, performers, producers of sound recordings, translators and the arts in general, having to pay a fee before one can use public-domain works is a hindrance to their use, particularly for educational purposes. This provision seems to be merely an attempt by the government to raise funds, which can be adverse to educational interests.

In Gambia and Ghana, it is permissible to reproduce, broadcast or otherwise communicate to the public an article in a published newspaper or periodical on a current economic, political or religious topic; to report current events about a work seen or heard in the course of such events; or to reproduce in a newspaper or broadcast a political speech, lecture, address, sermon or similar, or a speech delivered during legal proceedings.¹⁰⁹ Interestingly, these exceptions are taken back by being excluded where the right to authorize reproduction, broadcast or communication to the public is expressly reserved by the copyright owner or author. This approach does not recognize the exceptions as a right the public can use; instead, their availability is subject to authors or copyright owners. This means that where many copyright owners or authors exclude this permission, students and educators cannot make use of it. Nevertheless, Gambia allows the publication of portraits of a copyright owner or author without authorization if it is related to scientific, educational or cultural purposes, facts or events of public interest that have occurred in public.¹¹⁰ The importation of copies of a work by an individual for personal purposes is also permitted under section 35 of the Gambian law; hence, students may import educational materials for their personal use.¹¹¹

Section 36 of the Gambian copyright law allows for the public display of the original or copies of a work, provided that the display is made by means other than slide, film, television image or otherwise on screen or any other device and the work has been published or the original copy has been sold, given away or transferred by the author or his or her successor in title. This covers only the display of works in analogue form, which can take place only in a face-to-face learning environment. It adversely affects education in the digital environment, and online and distance learning, as it excludes the use of digital devices such as television, slides and screens, which are necessary tools in such learning environments. Unlike the very limited exceptions under the law for literary, musical and artistic works, the exceptions to the right of performers and broadcasting organizations and for sound recordings and audiovisual works is wider for educational purposes, as section 43 provides for a broad exception in this regard where the acts are related to private use, teaching or scientific research, and quotation is in the form of short excerpts which are compatible with fair practice and are justified by the informative purpose of those quotations. This shows that the exceptions for literary, musical and artistic works under the act are stricter.

A significant provision of the Nigerian Copyright Act 2022 is section 20(3), which stipulates that any contractual term which purports to restrict or prevent any act (L&Es) under the law shall be void. This does not give room for copyright owners or authors to exempt these permitted acts, as is allowable for some of the L&Es discussed contained in the laws of some of the jurisdictions

108 Ghanaian Copyright Act 2005, sec 38; Sierra Leone Copyright Act 2011, sec 48(4).

109 Gambian Copyright Act 2004, sec 32; Ghanaian Copyright Act 2005, sec 19(1)(d).

110 Gambian Copyright Act 2004, sec 33.

111 Also see Sierra Leone Copyright Act 2011, sec 35.

examined above. Despite the absence of such clear stipulations in the laws of the other countries, copyright users there may still be able to void provisions that take away their L&Es through other sections of the relevant copyright act or other laws.

National intellectual property policy and the attainment of SDG 4

A national IP policy is a “set of policy measures formulated and implemented by a government to improve its IP and innovation ecosystem in line with social, cultural and economic development goals”.¹¹² IP policies can be a road map of how the country seeks to use copyright, in this case to facilitate quality and inclusive education for the attainment of sustainable development. An IP policy which considers this will be a starting point for the review of laws and practices to align with this objective and to ensure the availability of educational materials for both online and offline environments.

Among the countries examined, only Gambia and Nigeria have concise national IP policies formulated by the government. The Nigerian IP Policy and Strategy 2022 emphasized the importance of copyright exceptions to address online education. Provisions of L&Es to guarantee access to creative works is stated as one of the objectives of the Copyright Act 2022.¹¹³ This may explain why the new act now has exceptions which can permit the use of copyright materials for educational purposes in the online environment. In Gambia, the Intellectual Property Policy and Strategy of the Gambia, from February 2018, is silent on how copyright can be used to facilitate the attainment of SDG 4 or as a useful tool for education.¹¹⁴ Rather, it focuses on how to improve IP education and training in schools and among the judiciary. This IP policy is not helpful to understanding how the country uses or intends to use copyright law as means of facilitating access to educational materials.

Using copyright to promote SDG 4

Despite the flexibilities available through L&Es, where these are not appropriately maximized, copyright laws can still negatively impact education, scholarship and research, particularly in developing countries.¹¹⁵ There are no uniform laws in the English-speaking West African countries examined with respect to relevant L&Es to facilitate access to educational materials. The common exceptions in all the examined countries include quotation, teaching generally or by way of illustration, libraries and archives, as well as the temporary reproduction of computer programs. However, the specific conditions for each of these may vary, such as the number of copies that can be made under exceptions for libraries and archives; all seem to require only a single copy except in Nigeria, where three copies may be made. Also, not all jurisdictions have a general exception in the form of fair dealing (Nigeria) or fair use (Liberia). Nigeria and Liberia have the most open research exceptions among the countries examined.¹¹⁶ They also have exceptions to specifically cater for access to copyright works by persons with disabilities. While Gambia has not signed the Marrakesh Treaty,

112 WIPO “National intellectual property strategies”, available at: <<https://www.wipo.int/ipstrategies/en>> (last accessed 6 October 2023).

113 Nigerian Copyright Act 2022, sec 1(b).

114 Alemu *Intellectual Property Policy*, above at note 101.

115 Y Omondi and J Otiye “Copyright exceptions and limitations in Kenya and Ghana: An analysis of the extent to which they support teaching, learning and research in universities”, available at: <https://www.academia.edu/29998494/COPYRIGHT_EXCEPTIONS_AND_LIMITATIONS_IN_KENYA_AND_GHANA_An_analysis_of_the_extent_to_which_they_support_teaching_learning_and_research_in_universities> (last accessed 24 May 2023).

116 Flynn et al “Research exceptions”, above at note 52.

Sierra Leone has but has not acceded to it, and Liberia, Nigeria and Ghana have acceded.¹¹⁷ Of the latter countries, only Nigeria has domesticated its provisions.

The teaching exceptions are also sometimes limited to face-to-face learning, as seen in Gambia and Sierra Leone, and are not applicable for a digital or online environment. This is very limiting for A2K in today's society, where online and distance learning are the order of the day, particularly after the experience of the COVID-19 pandemic. In addition, only Gambia and Nigeria have national IP policies, but these focus mainly on the promotion of IP training rather than on the use of copyright to promote access to educational materials or to attain quality and inclusive education.

The provision in some countries that make copyright exceptions and permitted uses subject to the publishers or right owners not reserving their right, or requiring their permission prior to use, makes a mockery of provisions on L&Es. Such provisions do not view L&Es as users' rights but as mere defences to actions for infringement. L&Es should be viewed as the rights of users to have access to copyright works, as adumbrated by the Canadian Supreme Court in *CCH Canadian Ltd v Law Society of Upper Canada*.¹¹⁸ The court gave a liberal interpretation to the fair dealing exception by stating that it, "like other exceptions in the Copyright Act, is a users' right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively."¹¹⁹ This approach will also ensure equality of treatment for both users and copyright owners where the interest of one does not take precedence over that of the other.¹²⁰ National laws should also expressly void any contractual obligations which seek to take away L&Es validly granted by law, as provided under the Nigerian Copyright Act.

Another lesson for West Africa can be gleaned from article 6(4) of the EU Copyright (InfoSoc) Directive, which provides that member states should take appropriate measures to ensure that rights-holders make available to the beneficiary of L&Es the means of benefiting from those L&Es.¹²¹ This is made compulsory for exceptions such as teaching or scientific research, for libraries, educational establishments, museums and archives but are optional for private copying. Belgian copyright law, in domesticating this provision, requires rightsholders to take adequate voluntary measures to provide beneficiaries of certain exceptions with the means to use those exceptions.¹²² A beneficiary of an exception can litigate where such measures are not provided; hence the president of the tribunal of first instance has the power to order the rightsholder to provide such access when requested by various persons, including the beneficiary of the exception.¹²³ It has been advocated that uncooperative copyright owners who do not provide such means of access should be subjected to a compulsory licence for abuse of rights, and the government or a public institution should be able to remove technological protection measures without incurring any additional costs of litigation.¹²⁴ The Nigerian Copyright Act can also be commended in this regard for providing for compulsory licences where the copyright owner abuses his or her dominant market position or in the public interest.

Nigeria has the broadest and most flexible provisions with regards to L&Es to facilitate access to educational materials for both online and offline use. This is not surprising, as the country has the most recent copyright legislation among the countries examined and has been able to domesticate the World Intellectual Property Organization (WIPO) Copyright Treaty, the WIPO Performances

117 WIPO "WIPO-administered treaties: Contracting parties > Marrakesh VIP Treaty (Total Members: 92)", available at: <https://www.wipo.int/wipolex/en/treaties/ShowResults?start_year=ANY&end_year=ANY&search_what=C&code=ALL&treaty_id=843> (last accessed 17 May 2023).

118 [2004] SCC 13.

119 Id at 12.

120 MJ Tawfik "International copyright law and fair dealing as a 'user right'" (2005) *e-Copyright Bulletin* 1, available at: <<https://unesdoc.unesco.org/ark:/48223/pf0000262609>> (last accessed 20 March 2023).

121 Available at: <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:167:0010:0019:EN:PDF>> (last accessed 12 April 2024).

122 Belgian Copyright Act (May 2005), art 79bis(2).

123 Id, art 87bis.

124 Strba "A model", above at note 2 at 296-97.

and Phonograms Treaty and the Marrakesh Treaty, among others. It can be gleaned from the laws examined that the more recent copyright legislations have more liberal and flexible provisions for educational purposes. It is important for the other examined countries to update their copyright laws, while taking the need for access to educational materials into consideration.

Many studies on reprographic reproduction in the selected countries indicate that there is a substantial amount taking place due to the high cost of books and the poor economic conditions of the students and teachers. The recommendations made by the studies' authors usually call for increased copyright enforcement, rather than looking at it from the ability of copyright laws to facilitate access to knowledge and the promotion of education.¹²⁵ Where the law is too restrictive and does not allow access that can meet the needs of both teachers and students, it is likely to be disregarded, and people will do what suits their requirements. The implication is that the law is not or cannot be effectively enforced, and legitimate access to educational materials is not encouraged. It is better to update copyright laws to ensure access to educational materials, particularly through distance learning and in the digital environment. L&Es to protect persons with disabilities should also be incorporated to attain inclusive education.

National IP policies should also be geared towards using copyright as a tool to facilitate education and drive the attainment of the SDGs in West Africa. Developing countries must not seek to merely fulfil international obligations, but must also serve their own public interest by having access to quality educational materials in the light of the paucity of such in their jurisdictions and because of their poor economic capacity.¹²⁶ They must maximize the flexibilities provided through L&Es in the copyright system. Furthermore, L&Es must be couched in a clear and easy-to-understand manner for the general public. They are for the benefit of the populace, particularly for educational and A2K purposes; hence people must be able to know what they can or cannot validly do with respect to copyright works. L&Es should also not be restricted to the benefit of public educational institutions alone; many private educational institutions now cater for the needs of the large population in the region, and they should not be excluded from L&Es that facilitate access to educational materials. Education also takes place in both the formal and informal sectors, and L&Es should extend to these sectors. It is therefore better to provide broad L&Es for education and A2K in West Africa. Attention must also be given to L&Es that can facilitate the translation of educational materials into local languages in order to ensure the availability of these materials to those who may not understand the dominant (official) languages and to guarantee that they are included in being able to attain quality education.

Conclusion

Copyright law presents a paradox for education. On the one hand, it promotes the production of educational and cultural materials by providing exclusivity to the copyright owner, who can prevent unauthorized access to his or her work. On the other hand, it seeks to balance public interests and protect users of the works by the provision of L&Es to the rights of the copyright owner in order to ensure public access. Quality education is one of the SDGs, and there can be no quality education without adequate access to educational materials. This is where copyright comes in, by providing access to such materials through the instrumentality of exceptions to copyright control. English-speaking West African countries must maximize these flexibilities in order to attain quality education.

Competing Interests. None

¹²⁵ Ugwumba "Examining the role", above at note 53 at 184.

¹²⁶ Strba "A model", above at note 2 at 293.

Cite this article: Olubiya IA, Khali A (2024). The Role of Copyright Law in the Attainment of Inclusive and Equitable Quality Education in English-Speaking West African Countries. *Journal of African Law* 68, 301–321. <https://doi.org/10.1017/S0021855324000160>