Date : 02/09/2008 (3rd Version)

The Impact of Copyright on Access to Public Information in African Countries: a perspective from Uganda and South Africa

Denise Rosemary Nicholson
Copyright Services Librarian
University of the Witwatersrand, Johannesburg, South Africa
Denise.Nicholson@wits.ac.za
also
Dissemination & Policy Engagement Advisor
African Copyright and Access to Knowledge Project (ACA2K)

and

Dick Kawooya
Lecturer
School of Information Studies
University of Wisconsin-Milwaukee, USA
kawooya@uwm.edu
also
Lead Researcher
African Copyright and Access to Knowledge Project (ACA2K)

Meeting: **87 Copyright and other Legal Matters with FAIFE**
Simultaneous Interpretation: English, Arabic, Chinese, French, German, Russian and Spanish

WORLD LIBRARY AND INFORMATION CONGRESS: 74TH IFLA GENERAL CONFERENCE AND COUNCIL
10-14 August 2008, Québec, Canada
http://www.ifla.org/IV/ifla74/index.htm

INTRODUCTION

While framed in the broad context of access to information, this paper approaches the subject in the narrow lens of access to government information and the impact of copyright in the access process. We draw from two slightly different contexts: Uganda and South Africa. Both countries share a lot in common, notably the history of colonial experiences and its impact on the socioeconomic, political and legal systems. As a result, they share similar historical evolutions of the copyright laws both introduced by colonialists.[1] In context of the subject of the paper, copyright laws in both countries treat official information in similar ways as described in the paper. They also carry similar access-related laws. However, they present remarkable differences between the two

contexts. Most noticeable is that the South African economy is far stronger than the Ugandan economy, which has implications for copyright law and access to information. Likewise, while both countries have had violent histories, South Africa's Apartheid system was more entrenched. This had far more implications on the South African society than Uganda's two decades of post independence armed conflicts between 1960s and 1980s. Uganda seems to have recovered better from her own conflicts than South Africa has.

Putting the above differences and similarities aside, access to public information in Africa is constrained by a number of other factors which may or may not be shared by both countries. The paper draws from the shared histories of the two countries and other access-related factors to examine the constraints and opportunities for access to public information. We examine copyright laws as important legal frameworks for addressing access to public information. In addition to the copyright law, we analyse other important legal frameworks, including constitutional provisions, with implications for access to public information or government information. The freedom of access to information (FOAI) laws, though not the primary focus of this paper, form an important part of the analysis of the wider access environments in both countries. Some laws with implications on access present in one jurisdiction may not be available in the other, mostly in view of the unique history of that jurisdiction. For instance, in South Africa, the *Suppression of Communism Act No. 44 of 1950* was an excellent tool for suppressing access to government information on racial grounds by the Apartheid regime under the pretext of Communism, despite South Africa not being an aligned country. Uganda did not have such laws but grappled with other legislations and decrees introduced by colonial administrations with implications for access to information by local citizens. The first part of the paper examines the Ugandan situation followed by the South African context.

PART I: UGANDAN CONTEXT

Introduction

Uganda's Copyright system is deeply rooted in that of its former colonial masters, the British. Until 2006, Uganda's copyright law was a replica of the British Copyright Act of 1956. It was introduced mainly to protect foreign literary and artistic works imported into the country, since very little was produced locally. On attaining independence from the British on 9th October 1962, the Government embarked on the exercise of repealing laws instituted by colonial administrations. For the copyright law, i.e. *Copyright Act of 1964 Cap 215*, it only involved a change of the official title of the law. The content of the 1956 British law remained intact. Notwithstanding the relatively long history of copyright in Uganda, most Ugandans have very little knowledge about copyright. Recent debates on copyright took place in the narrow context of entertainment, triggered by a few local musicians who had been led to believe that a strong copyright environment would most likely increase revenues from their works. That is the justification for the repeal of the 1964 Act, and the enactment of *The Copyright and Neighbouring Rights Act of 2006*. This 2006 Act currently regulates copyright in Uganda and is the basis for the analysis of the impact of copyright on access to public information in that country.

The Copyright and Neighbouring Act 2006 and Public information

The review of the 1964 Act leading to the 2006 Act was prompted by a number of factors ranging from requirements of international instruments to which Uganda is a signatory, notably the World Trade Organization (WTO)'s Agreement on Trade-Related Aspects of Intellectual Property ("TRIPS"), to pressures from the domestic entertainment industry. It was also prompted by the changing socio-economic and political realities, many of which required that Uganda review a range of laws regulating commerce (i.e. commercial laws). This review was conducted by the Uganda Law Reform Commission (ULRC) covering intellectual property (IP) laws as part of Uganda's legal infrastructure regulating commerce. That was the basis for a ULRC commissioned study of copyright in Uganda in 2004, which made specific recommendations for purposes of amending the 1964 Act. While a number of other recommendations were omitted, recommendations relating to access to public information were included in the final Act. As noted in the South African section of the paper, provisions on public information are remarkably similar, probably reflecting a trend of simply adopting certain language in their copyright laws from the same source.

Two articles of the 2006 Act directly address the question of access to public information. Article 7 subsection 1) on Public Benefit works stipulates that:

> 1) The right to protection of copyrights under this Act shall not extend to the following works –
>
> a) an enactment including an Act, Statute, Decree, statutory instruments or other law made by the Legislature or other authorized body;
> b) decrees, orders and other decisions of courts of law for the administration of justice and any official translations from them;
> c) a report made by a committee or commission of inquiry appointed by Government or any agency of Government;
> d) news of the day, namely reports of fresh events or current information by the media whether published in a written form, broadcast, internet or communicated to the public by any other means.[2]

Article 7 further indicates that:

> 2) The Government shall be the trustee for the public benefit of the works specified in subsection (1).

In a nutshell, Article 7, subsection 1) excludes certain categories of Government works from copyright protection. However, the same Article through subsection 2) entrusts such categories of works to the Government. Language of the Government being the "trustee for the public benefit" of these categories of works can be interpreted as assigning ownership of such works to the Government. Indeed Article 8 on *Employed authors and works for Government or international bodies* affirms the same interpretation thereof. Subsection 2) of Article 8 states that:

> Where a person creates work under the direction or control of the Government or a prescribed international body, unless agreed otherwise, the copyright in respect of that work shall vest in the Government or international body.[3]

Besides clarifying ownership of public information as belonging to Government, the above subsection broadens the scope of works vested in the government to include all works created "under the direction or control of the Government."[4] Taken together, Articles 7 and 8 assign to Government what would otherwise be public domain information, owing to the public nature of such information. Such information is public in nature because it is funded by public funds created in the course of executing public services. Copyright laws in a number of jurisdictions simply pass on government information into the public domain.[5] Uganda does not. The questions we pose are: What are the practical implications of the two Articles? Do the two Articles burden or create barriers to access to Government information in Uganda? This becomes clearer in the section on practical hindrances to information further on in this paper.

Access to public information beyond copyright

While this paper focuses on the impact of copyright on access to information, a few non-copyright laws also impact on access to information. As discussed below, these laws in combination with practical hindrances potentially impact on access to public information far more than copyright. Uganda is a signatory to the University Declaration Human Rights. Article 19 of this Declaration affirms that freedom of Information is a fundamental human right and the touchstone for all freedoms to which the United Nations is consecrated.[6]

The 1995 Constitution of Uganda reaffirmed the right to information through Article 41 which stipulates that:

1) Every citizen has a right of access to information in the possession of the State or any organ and agency of the State except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to privacy of any other person.
2) Parliament shall make laws prescribing the classes of information referred to in clause 1) of this Article and the procedure for obtaining access to that information.[7]

The two caveats in subsection 1) on security and privacy through relevant laws have had significant impact on access to public information. Many security-related laws and decrees have been passed over the years to curb the so-called insecurity in the country. These often have restrictions on disseminating, divulging and accessing public or Government information. Given Uganda's turbulent past, this means the country has had such laws for a long time. The most notable archaic legislation is the *Official Secrets Act of 1964* that curtails obtaining, collecting, recording, publishing or communicating in "whatever manner to any person" official secrets.[8] When the Government wants to curtail

the dissemination of information likely to undermine its image, the *Official Secrets Act* is an excellent mechanism for controlling or limiting the sharing of such information. Normally such information is framed as sensitive and confidential and likely to undermine national security.

On the other hand subsection 2) obliged Parliament to make relevant laws to regulate the access and use of public information outside the national security or sovereignty and privacy caveats. This led to the adoption of *The Access to Information Act, 2005*.[9] This Act was intended to:

- Promote an efficient, effective, transparent and accountable government;
- To give effect to article 41 of the Constitution;
- To protect Whistle-blowers;
- To promote transparency and accountability in Government by providing the public with timely, accessible and accurate information, and
- To empower the public to effectively scrutinise and participate in Government decisions that affect them.[10]

It is clear from the purpose of the Access Act that access to information is a prerequisite to holding the Government accountable and promoting an environment and culture of transparency. It is also clear that the question of access to public information is broader than the question of ownership stipulated by the Copyright law as discussed above.

Practical hindrances: is copyright the issue?

In this section, we attempt to reflect on the practical difficulties of access to information and whether, or not, copyright is a factor. We have not based our arguments on empirical evidence as none was gathered for the purposes of this paper. Instead, we have based them on anecdotal evidence, drawing from years of interacting with and using Government services that entail access and use of Government information.

As noted earlier, political instability in Uganda often translated into states of emergency, which in turn triggered the institution of national security-related laws and decrees. These have gone a long way in denying access to Government or public information to Ugandans. The culture of secrecy, still inherent in the Ugandan public service, is often justified on national security grounds. While Government legally owns information through the copyright laws, as earlier indicated, national security and relevant laws are always invoked to curtail access to what should otherwise be public domain information. Given the limited awareness and knowledge of copyright, Government would find it difficult to invoke the copyright ownership provisions to achieve the same objectives. Indeed falling back on the ownership clause would sound ironic if not outright contradictory. Although copyright does restrict access, these security and related laws do so in a more sinister manner.

Closely related to the political instability is the lack of or poor records management systems in the public service. This single factor accounts for far more access barriers than

all laws combined, even the most ruthless national security laws. Following years of political instability, many Government record offices and registries have been mismanaged or have fallen into disarray, making it difficult, if not impossible, to access Government information, even when there has been a will on the part of the Government to make such information available. While *The Access to Information Act* is almost three years old, poor records management systems continue to make implementation of this Act very problematic. Efforts to address these problems through various reform programmes in the public services have not been successful.

Recommendations and Conclusion

While copyright is an access barrier to public information owing to the problematic Articles 7 and 8 of *The Copyright and Neighboring Act, 2006,* the real and urgent access problems lie with other laws, especially laws regulating access to sensitive government information. Secondly, practical problems associated with the (mis)management of records and information in public services remains the most pressing barrier to access and use of public information in Uganda. That notwithstanding, if the two aforementioned Articles which vest ownership of public information in the Government are retained, rather than this information being in the public domain, with quick and easy access and without legal barriers, then access and use of public information is likely to be severely hampered in the future. It is therefore our recommendation that the Ugandan Copyright Act be reviewed, as soon as possible, with the intention of assigning or releasing public information into the public domain.

PART II: SOUTH AFRICAN CONTEXT

Introduction

This section of the paper relates to copyright and access issues in South Africa. It will show that copyright has a negative impact on various pieces of legislation and restricts public access to information. It will also show that there are other legislative and practical hindrances to accessing public information in South Africa.

South African Copyright Act No. 98 of 1978[11]

The South African Copyright Act has been amended several times since it was enacted in 1978. Section 13 of the Act, i.e. the Copyright Regulations, contains limited exceptions for education and libraries but they have not been updated since 1978. Although they are not media-specific, they apply to the main method of reproduction used thirty years ago, i.e. photocopying. The current law fails to address the needs of libraries and education, particularly in the digital age. This Act is in conflict with the South African Constitution and a number of other laws which mandate access to information by the public. It is also discriminatory in nature and conflicts with legislation that protects disabled persons. It makes no provision for persons with sensory-disabilities to access information, whether public or private information.

Works that are eligible for copyright in terms of Section 2 of the Copyright Act are:

(a) literary works;
(b) musical works;
(c) artistic works;
(d) cinematograph films;
(e) sound recordings;
(f) broadcasts;
(g) programme-carrying signals;
(h) published editions

Government or official texts are defined in Article 2(4) of the Berne Convention for the Protection of Literary and Artistic Works. They are texts of a legislative, administrative and legal nature and the official translations of such texts. The Convention indicates that "it shall be left to the discretion of each member country of the Berne Convention to determine the protection to be granted to such official texts in that country"[12]

The South African Copyright Act divides official government documents into two categories - those that are free from copyright protection and those that are protected with all the rights and conditions pertaining to copyright protected works as set out above.

Section 5 of the Copyright Act provides that:

(1) This Act shall bind the state,
(2) Copyright shall be conferred by this section on every work which is eligible for copyright and which is made by or under the direction or control of the state or such international organization as may be prescribed.
(3) Copyright conferred by this section on a literary or musical work or an artistic work, other than a photograph shall subsist for fifty years from the end of the year in which the work is first published.
(4) Copyright conferred by this section on a cinematograph film, photograph, sound recording, broadcast, programme-carrying signal, published edition or a computer program shall be subject to the same term of copyright provided for in section 3 for a similar work
(5) Section 3 and 4 shall not confer copyright on works with reference to which this section applies.
(6) Copyright which vests in the state shall for administrative purposes be deemed to vest in such officer in the public service as may be designated by the State President by proclamation in the *Gazette*[13]

Section 12 (8) of the SA Copyright Act of 1978 provides that:

(a) No copyright shall subsist in official texts of a legislative, administrative or legal nature, or in official translations of such texts, or in speeches of a political nature or in speeches delivered in the course of legal proceedings, or in news of the day that are mere items of press information.

(b) The author of the speeches referred to in paragraph (a) shall have the exclusive right of making a collection thereof.[14]

Section 12(1) provides for 'fair dealing'. Reproduction of literary or musical works (and some other categories) is permitted, without permission:

(a) for the purposes of research or private study by, or the personal or private use of, the person using the work;
(b) for the purposes of criticism or review of that work or of another work;
(c) for the purpose of reporting current events
(i) in a newspaper, magazine or similar periodical; or
(ii) by means of broadcasting or in a cinematograph film.

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

Section 12 also provides that use of these `works is permitted for the purposes of judicial proceedings, or for the purposes of a report of judicial proceedings; for quotation; or 'by way of illustration' for teaching purposes.[15]

Section 13 Regulations permit limited exceptions for teaching in a classroom situation and for libraries and archive depots. They do not have any provisions for persons with visual, aural or learning disabilities, or for distance learners and literacy training purposes. They do not address digitization, or preservation and curation in the digital environment to enable libraries and archives to carry out their mandates in terms of other Acts of Parliament. They have no provisions for adaptations, translations, parodies, broadcasts or public performances for non-commercial or educational purposes.[16]

The provisions of Section 5 of the Act mean that a great deal of government documents is subject to copyright restrictions. Even though this is publicly-funded information, the public requires copyright clearance to reproduce it for any purposes beyond 'fair dealing' or the limited exceptions in Section 13 of the Act, as referred to above. Even though individual speeches as described in Clause 12(8)(a) above are in the public domain, all collective works of those speeches are subject to the exclusive rights of the authors in terms of the Copyright Act.

Government departmental publications are subject to copyright, which means that the public would need copyright permission to reproduce multiple copies, beyond what is permitted in Section 13. This means that the Copyright law would require that important documents on health issues, such as HIV/AIDS, Tuberculosis, Malaria, Hepatitis and other serious diseases, be cleared for copyright by, or through, relevant government departments, before being able to be reproduced for use by health workers in rural areas. In a pandemic, such as AIDS, this information should be in the public domain. Similarly, in view of the high levels of crime in this country, documents published by the Department of Safety and Security, the South African Police and other government security enforcement agencies should be in the public domain. In a transforming

democracy, this should also apply to government documents pertaining to education, housing, employment, welfare and other matters of socio-economic importance. Since citizens have financed the production of government documents, they should have free access to such information to enable them to make informed decisions in their lives and to participate fully in the democracy.

Copyright restrictions therefore have a major impact on access to information, particularly in historically-disadvantaged and rural communities where access to information is particularly difficult and library resources are limited.

The abovementioned thread of inadequacies in the Copyright Act also impacts on other laws, which mandate or enable access to government information. Examples will be given when various laws are discussed later on in this paper.

Historical restrictions on access to information

Article 19 of the Universal Declaration of Human Rights` states: "Everyone has the right to freedom of opinion and expression; this right includes opinions without interference and to see, receive and impart information and ideas through any media and regardless of frontiers?"[17]

Despite the above, "the political, social and economic edifice of the apartheid system in South Africa was built on the foundation of an institutionalized violation of basic human rights." [18] Access to government information in South Africa was particularly difficult, due to protective or restrictive legislation. Information management by the State was in the form of obsessive record keeping, well-versed 'disinformation' and strict censorship laws, including the confiscation and banning of publications. Media freedom and public access to information were severely compromised. Political censorship was a means of preventing access to information and 'gagging' free expression, so that citizens were not in a position to question government's powers or (mis)conduct or to rebel against it. Many secret Government records 'disappeared' or were destroyed before the changeover to a democracy in 1994. The following censorship laws were measures used by the apartheid regime to restrict or prohibit access to information:

- The Suppression of Communism Act No. 44 of 1950
- Internal Security Act No. 74 of 1982
- The Protection of Information Act 84 of 1982 – this Act provided for the classification and declassification of information
- The Publications Act No. 42 of 1974 – this was the main instrument for restricting access to information.

As the Preamble of the Promotion of Access to Information Act of 2002 (discussed later in this paper) states "the system of government in South Africa before 27 April 1994, amongst others, resulted in a secretive and unresponsive culture in public and private bodies which often led to an abuse of power and human rights violations"[19] Ironically, during the strict sanctions imposed on South Africa by the international community,

individuals and many organizations used the copyright laws, albeit by infringement, to gain access to necessary information for research, education, libraries, health, business and other purposes. Enforcement of censorship and security laws was top priority of the State at that time.

The importance of access to government information in a transforming democracy

"Governments serve the people, and, therefore, the information governments hold, public information, belongs to the people, not to the government. Government information is a national asset and crucial for making day-to-day operating decisions in every element of society, and at all levels.[20] As the custodian of that information, governments are obliged to make information equitably and conveniently accessible by the public. However, despite the precepts embodied in the United Nation's Human Rights Convention, across the world the laws, policies, practices, and conventions followed by individual governments in this respect vary widely. Very few nations consider public access to government information as a basic human right."[21] "There is no fixed international standard governing the right of access to information held by public bodies - nor indeed is there even clear consensus that such a right exists under international treaty law, which establishes only a general right to freedom of information".[22]

"Two of the pillars of democracy are freedom of expression and freedom of access to information – including, crucially, access to government information. Without access to information people cannot participate rationally in democratic decision-making" [23]

In modern democracies, like South Africa (since 1994), public access to government information is reasonably assured by placing limits on the ability of the government to censor those who would report on its activities and enacting legislation to enable citizens to obtain government records of various types. Although it does not provide absolute freedom to individuals, there is a strong presumption that government action should not be shielded from public view.[24]

"One of the key critical success factors for a stable democracy is an informed and empowered citizenry. A more formal way of saying this is to proclaim that public information is a strategic resource needed at all levels of society, by all people, and in all walks of life."[25] "The ability of individuals to obtain information about their government is central to democracy. Only a well-informed public can sensibly carry out its obligation to shape policy and political institutions. When government operates in secret, these goals are undermined."[26]

"Diffusing government's knowledge resources efficiently and effectively to all of a country's citizens is essential to:

- Sustaining the competitive competency of the country's businesses and industries, in both domestic and global marketplaces, not only for large multi-national global enterprises, but especially for small and medium-sized enterprises;

- Attaining the highest levels of educational excellence for all the nation's children and adults in a lifelong learning context;
- Enabling citizens to participate more effectively in all facets of a democratic society, especially in the governance activities of their government, such as voting and elections;
- Informing public officials at all levels of government so that they can enact better laws, formulate and enact enlightened public policies, monitor the programs they authorize effectively, and govern fairly, equitably, and wisely; and
- Enhancing the quality of life of all a country's citizens, including responsibility to the special government information needs of disadvantaged and disabled individuals."[27]

Access to information in the New South Africa

Since its democracy in 1994, "South Africa has come to value unrestricted access to information as the cornerstone of open, transparent, participatory and accountable government, which was instilled in its Constitution in 1996. [28]. Although promoted in post-1994 legislation, access to information is still hampered by other factors highlighted in this paper.

To facilitate and promote access to information to all citizens, and to provide protection to the public, South Africa has enacted and/or amended several pieces of legislation as follows:

(a) ***Constitution of South Africa (Act No. 108 of 1996*)**[29]

South Africa's Constitution has been recognized as one of the most liberal constitutions in the world. Article 32 of the Constitution includes a 'Bill of Rights' for South African citizens and access to information is regarded as a basic human right. However, rights relating to equality, freedom, housing, health, education and security have tended to take priority and overshadow the importance of the right to access to information. Ironically, "without the right of access, the affirmation, and more concretely, the realization of all other rights is fundamentally compromised."[30]

The preamble of the Constitution promotes the fostering of a "culture of transparency and accountability in public and private bodies by giving effect to the right of access to information" and actively promotes "a society in which the people of South African have effective access to information to enable them to more fully exercise and protect all of their rights"[31]

Article 9 provides that "Everyone is equal before the law and has the right to equal protection and benefit of the law"

1. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed

to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.
2. The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
3. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
4. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.[32]

Article 15 deals with freedom of religion, belief and opinion, whilst Article 16 deals with freedom of expression. Article 32 of the Constitution provides for access to information in that "Everyone has the right of access to any information held by the state; and any information that is held by another person and that is required for the exercise or protection of any rights." It also provides that "national legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state"[33] in giving effect to its obligation to promote and fulfil the right of access to information.

Article 36 provides for limitation of rights:

1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom
2. Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.[34]

The Copyright Act has not been amended to incorporate these rights, for instance, people with sensory-disabilities have no provisions to convert material into alternative formats, hence being deprived of their rights to exercise 'fair dealing' too. The Copyright law is discriminatory and therefore infringes their constitutional rights.

(b) ***National Archives & Records Service Act (No 43 of 1996 as amended)***[35]

The object and functions of the National Archives are to:

(a) "preserve public and non-public records with enduring value for use by the public and the State;
(b) make such records accessible and promote their use by the public;
(c) ensure the proper management and care of all public records;
(d) collect non-public records with enduring value of national significance which cannot be more appropriately preserved by another institution, with due regard to the need to document aspects of the nation's experience neglected by archives repositories in the past."

The conditions of access and use are that only archival information that is more than twenty years old should automatically be made available to the public. It, however, has the power to identify records that might be made available sooner, on request. Apart from copyright restrictions, this Act seriously restricts access to more recent archival information.

The National Archivist may refuse access to a record on the grounds of its fragile condition, subject to the right of appeal by a user. To preserve such works, to provide access to them, the National Archives should be able to digitize the works to preserve them, but at the same time provide access to them electronically. Fragile works do not necessarily mean very old works only. Works still in copyright could have become damaged by over-handling. The Copyright Act does not permit digitization without prior copyright clearance, so works could become inaccessible if copyright permission is denied or rights-owners are not traceable.

(c) ***Legal Deposit Act No. 54, 1997*** [36]

This Act provides for the preservation of the national documentary heritage through legal deposit of published documents; to ensure the preservation and cataloging of, and access to, published documents emanating from, or adapted for South Africa: to provide for access to government information; to provide for a Legal Deposit Committee; and to provide for matters connected therewith;

It is important that legal deposit provisions be worded in such a way that repositories have permission to copy, reformat, refresh or migrate deposited publications and to unlock technological protection measures embedded in them, for preservation purposes. If this permission is not granted, it will not be possible to maintain materials for posterity.[37] However, without appropriate copyright exceptions permitting these activities, legal deposit libraries are hampered in carrying out their legal obligations to the public. They would need copyright clearance for all material needing to be digitized for preservation, accessibility and digital curation purposes.

The Legal Deposit Act makes provision for five legal deposit libraries and the creation of official publications depositories (OPDs) in all provinces to widen public access to official government information and other South African publications.

Although the Government places high priority on free access to information in support of the ideals of open democracy, much of its own information is copyright protected and subject to copyright clearance before being able to be reproduced.

(d) ***South African Library for the Blind Act 91, 1998*** [38]

Clause 4(1) of this Act states that “the functions of the Library for the Blind are:

(a) "to build up a balanced and appropriate collection of South African and other documents for the use of blind and print-handicapped readers;
(b) (i) to record its collections appropriately;
(ii) to provide a bibliographic service to those readers;
(c) to provide access to documents nationally and internationally to those readers;
(d) to provide library and information services on a national basis to those readers;
(e) to co-ordinate and preserve the national audio and Braille literary heritage;
(f) to produce documents in special mediums such as Braille and audio in the formats required by those readers;
(g) to develop standards for the production of those documents;
(h) to research production methods and technology in the appropriate fields; and
(i) to acquire, manufacture and disseminate the necessary technology required to read, replay or reproduce the media referred to in paragraph (f")" [39]

These functions must be performed solely in respect of documents for the use of relating to blind and print-handicapped readers.

Since the Copyright Act has no appropriate copyright exceptions for blind and print-handicapped persons, the South African Library for the Blind has had to rely on licensing agreements with the Publishers Association of South Africa (PASA) to make works, including government copyrighted works, accessible in alternative formats, e.g. Braille or via text-to-speech software.

Units servicing disabled persons at educational institutions have to obtain copyright clearance from copyright owners for conversion of all material, including government copyrighted works, needed for study purposes for blind and print-handicapped students, as well as for deaf students who need more visual texts or speech-to-text conversions. Most publishers, including the Government Printer, do not provide alternative formats, nor do they make the source files available to users. This means that educational institutions that have specialized units have to scan whole works and edit them for students, after obtaining copyright permission. Alternatively, students have to find a facility that can do this for them. The whole process is very time-consuming and costly. In addition, the quality of scanned copies for students is often very poor, which affects the final converted product. Ultimately, access is affected, which impacts negatively on the students' progress.[40]

Although there are no provisions for anti-circumvention technologies in the Copyright Act, Clause 86 of the Electronic Communications and Transactions Act No. 25 of 2002 (as mentioned in (i) below) provides for them, without any exceptions for 'fair dealing' or for library functions or access by visually-impaired persons. This clause prohibits users from bypassing or circumventing copyright technological protection measures or digital rights management systems for legitimate purposes. This prevents blind and print-handicapped persons accessing electronic books, as copyright protection measures block speech-to-text software. Access can only be obtained with permission from the rights-

owner. This is also an infringement of the sensory-disabled person's constitutional rights of access to information and 'fair dealing' rights as provided in the Copyright Act.

The 'locking up' of information could become a bigger problem for all library users, if Government continues to outsource its documentation to online service providers that are increasingly making use of these technological protection measures. As has happened in Canada and other developed countries, decentralization, privatization, and commercialization of government information in South Africa and the increased use of electronic technologies to produce and disseminate information could lead to large amounts of government information eluding the primary systems of public access.[41]

(e) ***National Library of SA Act 92 of 1998*** [42]

This Act provides "for the National Library of South Africa: for collecting, preserving, making available and promoting awareness of the national documentary heritage; and to provide for matters connected therewith".

Functions of the National Library which relate particularly to access and preservation are provided for in Clause 4(1) as follows:

> (c) to promote optimal access to published documents, nationally and internationally;
> (d) to provide reference and information services, nationally and internationally;
> (e) to act as the national preservation library and to provide conservation services on a national basis;
> (f) to promote awareness and appreciate of the national published documentary heritage.[43]

Again, copyright laws hamper the National Library in carrying out its mandate since activities such as digitization for preservation purposes, accessibility and digital curation are not permitted, without copyright permission.

"Digitisation and copyright do not make for easy bedfellows. Copyright law does its best to prohibit the copying of original material. Digitisation embraced the act of copying, firstly when developing a digital surrogate from a physical original, and secondly, in putting this surrogate on the Internet which thousands of uses can then access and copy onto their own computers."[44]

Digitization projects also create copyright problems, since they "can be steadily building up their own copyright, as there is copyright in the original and also in the surrogate produced in the digitization process".[45]

(f) ***The National Heritage Council Act No. 11 of 1999*** [46]

This Act provides for a Heritage Council to advise the Minister on various responsibilities with regard to heritage matters, including indigenous knowledge systems, living treasures, restitution and other relevant matters. Awareness and access to such

heritage are promoted in this Act. Proposed amendments in the Intellectual Property Amendment Bill, 2007, to address traditional knowledge systems in the Copyright Act (discussed later in this paper) will unfortunately 'lock up' traditional works and shrink the public domain.

(g) ***Promotion of Access to Information Act (PAIA), No. 2, 2000*)** [47]

Although the right of access to information is grounded in Section 32 of the South African Constitution, it is the Promotion of Access to Information Act of 2000 (known as PAIA) to which citizens must turn for practical help.[48] PAIA was enacted to 'foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information"[49] held by the State and any information held by another person that is required for the exercise or protection of any rights.

Freedom of access to information (foi) legislation in South Africa "has taken place as part of a rapid negotiated political transition, and as part of a self-conscious attempt to begin building a national human rights culture."[50] In other words, this legislation has been derived more from a constitutional imperative than from popular pressure. PAIA was implemented in March 2001, "7 years after the advent of democracy. On the same day, the Promotion of Administrative Justice Act was also passed, laying an obligation on the state to provide written reasons for Government action, if requested. The two laws are intended to work together to provide the citizen with tools for political participation; information records and reasons for actions."[51]

"The question naturally arises, why is the South African citizenry, so long oppressed by the racist ideology of apartheid, not making more extensive use of what is generally agreed to be in most respects a model piece of freedom of access to information legislation? It seems likely that at least part of the difficulty lies in SA's cultural and linguistic diversity, and in the fact that not only information but also the actual discourse of power remains inaccessible to many of the historically excluded sectors of society."[52]

There are other problems, for example, PAIA is limited only to recorded information, leaving out all other types of information that are not contained in a record. This directly contradicts Section 32 of the Constitution that "everyone has the right of access to any information". The requesting process and two-tiered appeals process in this Act are cumbersome and generally prohibitive to many South Africans. "If the PAIA is to work, and particularly in favour of vulnerable communities and groups, it is essential that its enforcement procedures are inexpensive, quick and easy to use"[53]

The PAIA provides for certain grounds for refusal of information, but "there are no specific guidelines to enable an information officer to make a distinction between that which is mandatory and that which is optional, thus leaving the field of interpretation wide open for refusing access to centrally important spheres of information, including information that involves human rights violations"[54]

Disclosure of certain information is also prohibited by legislation such as the Protection of Information Act 84 of 1982, as amended, the Intelligence Services Oversight Act 40 of 1994, the South African Police Services Act 68 of 1995, the Public Service Regulations, 2001, the Intelligence Services Act 65 of 2002 and the Defence Act 42 of 2002.[55]

Not all requestors making use of PAIA are treated equally, which indicates that government institutions sometimes discriminate in the provision of information. Officials often exhibit a bias towards requestors affiliated with institutions (media in particular and also civil society) over members of the general public.[56] Access may also be hindered, depending on the copyright conditions attached to certain material.

(h) ***Promotion of Equality & Prevention of Unfair Discrimination Act No. 4 of 2002*** [57]

Section 12 of this Act "prohibits the dissemination or publication of any information that could reasonably be construed as or understood to show the intention to unfairly discriminate against any person. This provision contradicts the PAIA provisions, if, for example, someone researching discrimination disseminates such information."[58]

(i) ***Electronic Communications and Transactions Act No. 25 of 2002*** [59]

This Act, known as the ECT Act, provides "for the facilitation and regulation of electronic communications and transactions; to provide for the development of a national e-strategy for the Republic; to promote universal access to electronic communications and transactions and the use of electronic transactions by SMMEs; to provide for human resource development in electronic transactions; to prevent abuse of information systems; to encourage the use of e-government services; and to provide for matters connected therewith".

Article 86(3) states that "A person who unlawfully produces, sells, offers to sell, procures for use, designs, adapts for use, distributes or possesses any device, including a computer program or a component, which is designed primarily to overcome security measures for the protection of data, or performs any of those acts with regard to a password, access code or any other similar kind of data with the intent to unlawfully utilise such item to contravene this section, is guilty of' an offence.[60]

Article 86(4) states, "A person who utilises any device or computer program mentioned in subsection (3) in order to unlawfully overcome security measures designed to protect such data or access thereto, is guilty of an offence."[61]

Article 86(5) states, "A person who commits any act described in this section with the intent to interfere with access to an information system so as to constitute a denial, including a partial denial, of service to legitimate users is guilty of an offence. Ironically, this is exactly what this Act does to persons with sensory-disabilities, since they are prohibited in terms of sub-clause 3 and 4 above from circumventing technologies to access electronic books and other works for legitimate access purposes. In this instance, this Act overrides 'fair dealing' provisions in the Copyright Act."[62]

This Act does not have any provisions or exceptions for circumvention of these technologies for legitimate 'fair dealing' purposes, as well as for library functions and access to electronic works by visually-impaired users. The effect of these technological protection measures or digital rights management systems (DRMS), "if conditions are not applied to these measures, is to make copyright perpetual, which goes against the long-standing principles of all existing intellectual property laws. By the time copyright expires the rights-holder company may have gone out of business or merged one or more times with other companies.[63] DRMS work to control access and use of content. They determine whether the content may be copied and how many times, the duration of access, whether it can be cut and pasted or even printed at all. Some DRMs also have geographic coding to restrict use to certain regions or countries. They also control whether works (e.g. e-books, CDs, or DVDs) may be loaned, re-sold or given to another user or used on different platforms.[64]

Since governments are increasingly outsourcing public information to private service providers, "there is huge concern that DRM technology to protect content could lead to 'digital lockout' and the diminishment of the material freely available for use existing in the public domain. DRM can prevent a person from using a legitimate exception in copyright… because it doesn't recognize that a user fits into one of the relevant categories"[65]

How is the South African Government addressing access to digital information by the public?

"Governments use documents to capture knowledge, store critical information, coordinate activities, measure results, and communicate across departments and with businesses and citizens. Increasingly documents are moving from paper to electronic form. To adapt to ever-changing technology and business processes, governments need assurance that they can access, retrieve and use critical records now and in the future".[66]

This means that if an open document format is used, then documents will never be locked up again, because users are not limited to using the one application that created the document in order to read or use that document in the future".[67] To resolve this, South Africa, in October 2007, adopted the OpenDocument (ODF) format as the official standard for South African government communications.

"Governments using applications that support ODF gain increased efficiencies, more flexibility and greater technology choice, leading to enhanced capability to communicate with and serve the public."[68] The adoption of ODF has "now cleared the playing field for the adoption of government's free and open source software policy"[69]

Apart from resolving accessibility issues, ODF also addresses long-term preservation of cultural heritage. "As more and more documents of potentially historical significance are being created and stored in digital form, it is essential that governments retain the ability to keep these documents and files free and accessible not only today but for future generations. ODF is the only open XML-based document file format currently on the

market that satisfies this basic test of public service."[70] In support of ODF, the South Africa Bureau of Standards submitted an official appeal in May 2008 to the International Organization for Standardization (ISO) and International Electrotechnical Commission (IEC) against the controversial process which led to 'Open Office' XML (OOXML) being designated as an ISO standard.[71] The OOXML format is based on Microsoft's proprietary document format and depends on software patents.

The South African Government has adopted a more transparent approach to providing information and making it accessible via printed reports and on websites. However, use of this information is subject to copyright conditions.

- *The Government Communication Information System (GCIS*) [72] is primarily responsible for communication between government and the people. Its strategic objective is "to enhance the government communication system and its operations, in ways that contribute to the process of further consolidating our democracy and taking the country onto a higher growth and development path".[73] However, material featured on this website is subject to copyright protection. The material is not to be used for any financial gain. Photographs included in this website may not be used for any purpose without the permission of GCIS.[74]

- *SA Government Online's*[75] main objectives are:

  - "to facilitate easy access to government information on the Internet
  - to avoid duplication regarding the availability of government information on the Internet
  - to ensure a coordinated approach to government Internet publishing
  - to meet transparency goals
  - to keep the electorate informed
  - to place information on the global network" [76]

  It also provides links to web pages of government departments, provinces and other government bodies, as well as to a wide range of South African websites and news sources. Use of this material is copyright-protected for informational or reference purposes only, and for non-commercial purposes.[77]

"The legal, policy, technical, and administrative barriers to intra-governmental and inter-governmental sharing of government information, and the lack of a national public informational infrastructure which can be linked effectively to the lower levels of government public information infrastructures, is hampering exploiting the full benefits of the Internet Age"[78]

Current proposed legislation which will impact on access to public information.

The South African Department of Arts and Culture will present the Cultural Laws Third Amendment Bill, 2007 to Parliament during the current 2008 session. This Bill proposes to amend eleven different laws, three of which pertain to libraries. These are the National

Library of South Africa Act, the South African Library for the Blind Act and the Legal Deposit Act, all of which mandate access to government and other information. The proposed Bill fails to include provisions for libraries, education and persons with disabilities, particularly with reference to access to information and preservation in the digital environment.

In March, 2008, the South African Ministry of Intelligence published the Protection of Information Bill, 2008, which aims "to provide a statutory framework which provides direction to those in government who are charged with information protection; substantially reduce the amount of state information that is protected from disclosure; provide more effective protection to that information that truly requires safeguarding; and to align the information protection regime with the values, rights and freedoms enshrined in the Constitution".[79] This Bill intends to improve access to state information but copyright restrictions will still apply.

The South African Department of Trade and Industry published the Intellectual Property Amendment Bill, 2007, on 5 May 2008, in the Government Gazette, Vol. 515, No. 31026.[80] This Bill proposed to include 'traditional works' as a separate category of work in the Copyright Act, and proposed amendments to other intellectual property laws. Stakeholders have raised several objections to the Bill and have questioned why the South African Government was not adopting a 'sui generis' system in line with international trends. If incorporated in the Copyright Act, traditional works will be subjected to all the restrictions of international intellectual property agreements. As highlighted in this paper, access to information is already restricted by the Copyright laws. Adding traditional works, many of which are already in the public domain, as an extra category of work in the Copyright Act, will shrink the public domain even more. The State, through a National Trust, will become the copyright owner of traditional works. There will therefore be a conflict of ownership if unpublished traditional works are published, as they will then become conventional copyright works with individual copyright owners. This creates a whole new range of copyright clearance obligations for users, and in the process, exacerbates access to information. This Bill is expected to be submitted to Parliament before its session closes later in 2008.

Despite the open access policies promoted by the National Research Council, the Academy of Sciences of South Africa and the South African Department of Science and Technology, the said Department presented its controversial Intellectual Property from Public-Financed Research and Development Bill to Parliament on 17 June 2008. Although it does not address government information directly, but could include it depending on the research undertaken, the Bill proposes that universities and science councils retain intellectual property rights from public-funded research.[81] Access to this information by the public will therefore be subject to copyright clearance.

Recommendations and Conclusion

A culture of the right to information needs to be nurtured in South Africa, so that the public are confident to file requests for information through relevant legislative channels.

Government officials should be qualified to provide advice and information to the public on exercising their rights in terms of the Promotion of Access to Information Act and other relevant legislation. This would also help "to reduce the culture of secrecy embedded in many areas of public administration".[82] To avoid access to information law being undercut by any new state secrets law or other related legislation, e.g. commercial secrecy or data protection, civil societies need to monitor the whole body of laws that manage the right to information. They need to ensure that any changes to these others laws are consistent with maximum enjoyment of the right to know. [83]

Librarians need to lobby strongly for changes in the South African Copyright Act to address the digital environment; to include provisions for libraries, education (including distance learning and literacy training) and access in alternative formats for the sensory-disabled. Other laws mentioned above which negatively affect access to information, particularly public information, also need to be challenged. Librarians need to be pro-active in international and regional copyright debates and in access to knowledge initiatives, particularly in Africa, e.g. the "African Copyright and Access to Knowledge Project"[84]

In light of the above, and because of constant changes in technology and production of information, librarians will *always* have to make effective and long-term access to government information *a priority*.[85]

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