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The right to research in Africa

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African researchers continue to face information-access barriers owing to copyright exclusivity preserved by the global copyright system that is designed and skewed towards protecting rights holders' interests. A specific explicit human right to research is an important mechanism that can ensure an equitable balance between the private commercial interest of copyright owners and the public interest in promoting access to information for research in Africa. This article demonstrates how the right to research can be constructed from the normative content and scope of the rights to science and culture, education, property and freedom of expression provided for in international, regional and national human rights regimes in Africa.

Les chercheurs africains continuent à se heurter à des obstacles à l'accès à l'information en raison de l'exclusivité des droits d'auteur préservée par le système mondial des droits d'auteur, qui est conçu et axé sur la protection des intérêts des détenteurs des droits. Un droit de l'homme spécifique et explicite à la recherche est un mécanisme important qui peut assurer un équilibre juste entre les intérêts commerciaux privés des détenteurs de droits d'auteur et l'intérêt public dans la promotion de l'accès à l'information pour la recherche en Afrique. Cet article montre comment le droit à la recherche peut être construit sur la base du contenu normatif et de la portée des droits à la science et à la culture, à l'éducation, à la propriété et à la liberté d'expression prévus dans les régimes internationaux, régionaux et nationaux de protection des droits de l'homme en Afrique.

Los investigadores africanos siguen enfrentándose a barreras que dificultan el acceso a la información debido a la exclusividad de los derechos de autor que protege el sistema mundial de derechos de autor, que está diseñado y sesgado para proteger los intereses de los titulares de los derechos. Un derecho humano explícito y específico a la investigación es un mecanismo importante que puede garantizar un equilibrio equitativo entre el interés comercial privado de los titulares de derechos de autor y el interés público en promover el acceso a la información para la investigación en África. Este artículo demuestra cómo puede construirse el derecho a la investigación a partir del contenido normativo y el alcance de los derechos a la ciencia y la cultura, la educación, la propiedad y la libertad de expresión previstos en los regímenes internacionales, regionales y nacionales de derechos humanos en África.

Globalisation has made knowledge a valuable currency for industrialisation, national economic survival, individual economic security, and the development of an educated and informed citizenry. Global North countries have developed policies and governance tools that continue to put them ahead in the pursuit of knowledge. These enable them to control the knowledge economy and put them on top of the innovation ecosystem, while shutting out Global South countries through information-access barriers, such as a highly inequitable international copyright regime. The continuous difficulty in accessing information by African researchers, especially during the COVID-19 pandemic, underscores how the global knowledge governance architecture is designed to keep Global South countries far behind in the innovation race. Research is an important means of acquiring knowledge, and for research to be effective, researchers must have adequate access to information. The right to research has been identified as an important mechanism to overcome the barriers to access to information, especially in Africa. What should form the normative content and scope of this right?

Conceptualising research

The pursuit of knowledge – the need to access, process, evaluate, analyse, store and reproduce information – is at the heart of research. Research is an act of inquiry geared towards the production of original ideas and knowledge, as well as the capacity to systematically increase the horizons of one's current information in relation to some aspiration, task or goal. Research can be formal or informal. Formal research relates to the systemic organised forms of research aimed at developing new knowledge. Meanwhile, informal research relates to the ordinary, everyday life types of inquiries done for the sake of knowing, that may or may not necessarily lead to the production of new knowledge.

Research may further be categorised into commercial and non-commercial in nature. The line between commercial and non-commercial research is blurry in some circumstances, because information generated from non-commercial research may be accessed and used by third parties involved in commercial research. Also, it is possible for projects conceptualised as non-commercial research to metamorphose into commercial research. Four criteria – purpose, beneficiaries, benefits and public availability – can be deployed to distinguish one from the other.

Thus, commercial research generally aims to create market products (purpose) with the goal of generating long-term monetary income (benefit), through the sale of the products, for investors and/or researchers. As such, access to the outputs of commercial research is restricted to the public through intellectual property (including copyright) regimes to enable the right holders to control the market of the products (public availability). However, participants in non-commercial research generally do not have commerce in mind, nor do they restrict public access to the research output. The output of non-commercial research is usually disseminated through open-access platforms. As such, non-commercial research does not generate monetary benefits and it serves the interest of the public including researchers.

The impact on the interest of authors will differ depending on whether the research is commercial or non-commercial. For commercial research, access to copyright work without compensation will significantly prejudice the legitimate interest of authors and negatively affect their rights especially where such access goes beyond the limits of fairness under copyright law. This will not be so with non-commercial research since it is aimed at sharing knowledge publicly and openly. Thus, in striking the appropriate balance between authors' private concern and the public interest through a right to research, different considerations must be made depending on the type of research since commercial and non-commercial research will affect the material interests of authors differently.

Importance of research and the state of play in Africa

Research holds great importance because it will improve innovation and creativity, and citizen participation in socio-economic development initiatives and the democratic process in Africa. Research will enable the development of home-grown, tailor-made sustainable solutions to Africa's challenges, which include barriers to access to information for quality education, poverty and hunger, underdevelopment and technology deficit. Also, research is important to harness and improve the talent and skills of Africa's youthful population to contribute to the development of the continent, and to increase Africa's scientific output and channel it towards resolving the public health challenges on the continent. Furthermore, research is very relevant to unlocking Africa's economic potential and improving her competitive advantage in the global economy, as well as cultivating and nourishing the potential of Africa's intelligentsia in order to check the loss of Africa's intellectual property, among others.

Unfortunately, Africa produces less than one per cent of the global scientific research output. Several reasons have been advanced for this state of affairs, including low funding; low investment in digital and physical research infrastructure; and low number of researchers. These factors contributed to placing Africa far behind in the global race for the production of vaccines to fight the COVID-19 pandemic and made countries on the continent dependent on the vaccines produced from the Global North.

More importantly, barriers to access to the information embedded in published literature are a major challenge to research in Africa. This challenge affects both formal and informal research at all levels of African education. For instance, a recent study on basic education during the COVID-19 in South Africa found the unavailability of learning materials translated into learners' home languages; and the availability of other useful learning materials behind

paywalls and beyond the reach of poor learners as barriers to teaching, research and learning.[1] The cause of these challenges is rooted in copyright exclusivity preserved under national copyright laws and specific human rights regimes in Africa. Thus, a right to research is an important means to enable Africa to unlock and achieve the gains of research for the development of the continent.

Conceptualising the right to research

Research requires access to information through inclusivity and effective participation of researchers in the research process as well as equitable sharing of data. A well-articulated and constructed right to research, developed through a human rights lens, is important to promote research in Africa. Generally, the right to research is "the right to the tools through which any citizen can systematically increase that stock of knowledge which they consider most vital to their survival as human beings and to their claims as citizens". [2]

From a copyright perspective, the right to research can be viewed as the research-enabling limitations and exceptions (L&Es) provided for in copyright legislations. However, a global study on L&Es paints a grim picture for Africa [3]. Out of the 55 African Union Member States, 25 have research L&Es falling under general exceptions, such as fair dealing. The most common specialised exceptions are for preservation. This was found in 26 countries. While

[1] Debra Shepherd and Nompumelelo Mohohlawane, "The Impact of COVID-19 in Education – more than a year of disruption", NIDS-CRAM Survey (8 July 2021). Available from <https://cramsurvey.org/wp-content/uploads/2021/07/11.-Shepherd-D.-Mohohlwane-N.-2021.-Changes-in-education-A-reflection-on-COVID-19-effects-over-a-year.pdf>.

[2] Arjun Appadurai, "The right to research", *Globalisation, Societies and Education*, Volume 4, Issue 2 (2006), p 168. Available from <https://www.tandfonline.com/doi/epdf/10.1080/14767720600750696?needAccess=true>.

[3] World Intellectual Property Organization, document SCCR/35/6. Available from https://www.wipo.int/edocs/mdocs/copyright/en/sccr_35/sccr_35_6.pdf.

13 countries have no exception for libraries, 10 countries have general exceptions that do not specifically set out specialised library activities. The number of countries that have exceptions for other types of uses drops off dramatically – for example, inter-library loan (one country) and document delivery (one country). No countries permit cross-border exchange. L&Es – although referred to as ‘user rights’ – are not positive in nature. In practice, they remain defences that can be relied upon in copyright claims by copyright owners if specifically provided for in the national laws.

Furthermore, the history of international copyright norm-setting evinces that the access needs of researchers in Africa were never considered. Historically, copyright norms were developed and extended to African countries by Global North countries that exercised colonial powers over Africa at that time. [4] The Global North countries continue to exert enormous influence on copyright law reform efforts in Africa to maintain a *status quo* that benefits corporate interests in the Global North. As the South African experience shows, such influence manifests in the form of threat of trade sanctions or aid cutting against African countries.[5] Thus, African countries are forced to drop plans they may have for equitably balanced copyright regimes in favour of the existing mechanisms.

The effect of the foregoing is the absence of an equitably balanced copyright regime and the existence of copyright systems that tilt in favour of copyright owners in Africa. Such systems cannot support the research required to move Africa up on the global innovation scale. Thus, there is a need for a specific researchers’ right developed as a human right that has equal footing as, and equitably

balances copyright protection in Africa. Such right can be distilled from the explicit rights to science, culture, freedom of expression, education and property drawn from relevant international human rights instruments relevant to Africa and national constitutions. The normative content and scope of these rights have been interpreted by different international, regional, and national human rights bodies, such as the United Nations (UN) Economic and Social Council, the African Commission on Human Rights and national courts in Africa. [6]

Specifically, the right to science and culture encompasses the rights to benefit from scientific progress and its application, participate in cultural life, and the entitlement of authors to enjoy the material and moral benefits of their creativity. The normative content and scope of the scientific right cover the right of individuals and communities to enjoy the benefits of scientific progress and its application, including the right of access to scientific knowledge and the products of scientific research, as well as freedom of scientific researchers to determine their research methodologies and choose the path to scientific and technological development. The core obligations of States include the duty to eliminate laws, policies and practices, and refrain from international commitments, that unjustifiably limit researchers’ rights of access to science-related information, scientific knowledge and its application; put appropriate measures in place to prevent third parties from limiting the right of access to scientific

[4] Jeremy de Beer, Jeremiah Baarbé and Caroline Ncube, “Evolution of Africa’s intellectual property treaty ratification landscape”, *The African Journal of Information and Communication (AJIC)*, Issue 22 (2018), pp. 53-82. Available from <https://scielo.org.za/pdf/ajic/v22/03.pdf>.

[5] Gesellschaft Für Freiheitsrechte, “European Commission derails copyright reform in South Africa”, European Digital Rights (EDRI), June 24, 2020. Available from <https://edri.org/our-work/european-commission-derails-copyright-reform-in-south-africa/>.

[6] UN Committee on Economic, Social and Cultural Rights, General Comment No. 25, E/C.12/GC/25 (30 April 2020); UN Committee on Economic Social and Cultural Rights, General Comment No. 17, E/C.12/GC/17 (12 January 2006); UN Committee on Economic, Social and Cultural Rights, General Comment No. 21, E/C.12/GC/21 (21 December 2009); *Blind SA v Minister of Trade, Industry and Competition and Others* [2022] ZACC 33 (Blind SA); African Commission Communication No. 97/93 (2000), *John K. Modise vs Botswana*; *Laugh it Off Promotions CC v The South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC); *Communications Commission of Kenya & Ors. v Royal Media Services Limited & Ors.* [2014] eKLR; Principle 1 of the Declaration of Principles on Freedom of Expression and Access to Information in Africa, 2019.

knowledge; and to ensure access to those applications of scientific progress that are critical to the realisation of other rights, such as the right to education. States are thus enjoined to strike an equitable balance between copyright and open access and open science initiatives. States' duties also include the obligation to refrain from interfering with academic freedom and to promote scientific research through international cooperation.

The availability of cultural goods and services, including through libraries and museums open for everyone to enjoy and benefit from, and access to cultural goods, especially for persons with disabilities, are some of the core normative contents of the cultural right. States are obligated to not interfere with this right. They are under a duty to put measures in place to prevent third parties from contravening the right, and to take positive actions towards the realisation of this right. Such actions include the adoption of strategies that will guarantee access for all to cultural products, activities and events. To this end, States are encouraged to adopt policies that will enhance creativity, incentivise authors, preserve space for non-commercial culture, promote inclusion and access to cultural works and increase educational opportunities.

Authors' rights align with the view of copyright as property. However, its core focus is the protection of the rights of authors to derive adequate remuneration for their creativity. Authors' right to claim authorship for their works and object to the mutilation, distortion, modification, and derogatory use of their creative output, are also covered by this right. States are obligated to not interfere with such rights. They also have a duty to prevent third parties from infringing authors' rights, and not unreasonably and unjustifiably deprive authors of remuneration from the use of their works, especially for commercial purposes. States are obligated to create appropriate mechanisms for the authors to seek redress for the unauthorised commercial use of their literary, scientific and artistic creations. However, in carrying out their duty, States are enjoined to recognise the interlinkages between authorial rights and other rights, such as the right to education, as well as the

limitative potentials of the exercise of authorial rights on these rights, especially as it affects access to information in Africa. Thus, States are obligated to strike an appropriate balance between authorial rights and access to information.

The right to access information forms part of the right to freedom of expression. It is also important for effective research and the realisation of the right to education. The right to access information can be limited by the exercise of copyright. Similarly, an exercise of the right to access information can implicate copyright adversely, especially if the right is exercised for commercial gain. Thus, States' duty to balance authors' rights with the right to access information includes an obligation to determine – through appropriate laws – the boundaries of the exercise of the right to access information and to put mechanisms in place to ensure that copyright is not exercised to shrink the knowledge space.

Framing the right to research

Gleaned from the discussion above, the following constitutes the normative content and scope of the right to research:

a. Normative scope and content

- **Researchers' right of access to information:** This right should include researchers' entitlement to access scientific knowledge, the products of scientific research, and any form of information embedded in a copyright work regardless of whether the copyright is owned by private or public bodies. This right should also cover the liberty to have access to cultural goods, products and services and to libraries, museums, and archives with up-to-date holdings that are open for everyone to enjoy and benefit from. Special attention must be given to persons with disabilities, and researchers falling within other vulnerable groups such as women, children, the elderly, the poor, and those in rural areas. Furthermore, researchers' right of access should cover the liberty to access knowledge freely, especially where it is for non-commercial

research. However, in cases of commercial research, an exercise of the right could be subject to the condition of making adequate payment to owners of the copyright covering the knowledge. Even so, in such circumstances the right to access information should be enforced if copyright owners refuse to grant authorisation or withhold consent to access their works based on unreasonable terms. Furthermore, the right of access should empower researchers to demand that the State put in place appropriate infrastructure, such as Internet access, that will promote open access and sharing of information; and to demand that States refrain from international commitments that will shrink the open access and sharing space and thereby prevent the realisation of the right of access to information.

- The liberty of researchers to determine the strategy and course of their research: This right draws from the academic freedom and the freedom of academic research which forms part of the core normative content of the right to science.
- Researchers' (as authors) entitlement to benefit from their creative, literary and scientific endeavours: Simply put, the core focus of this right is the protection of the rights of authors to derive adequate remuneration for their creativity, especially where the output is used by third parties for commercial purposes. Also, the right includes the entitlement of authors to claim authorship for their works, and object to the mutilation, distortion, modification, and derogatory use of their creative output. For this purpose, authors should be defined broadly to include indigenous/traditional communities. This definition is important in the African context, especially as it relates to the large repertoire of traditional knowledge, and the rich cultural heritage existing on the content. These resources should be owned by the respective indigenous/traditional communities who have created and preserved them. There is an increasing interest and quest to access traditional knowledge, traditional cultural heritage for research purposes with serious implications on the rights of the originating communities.

Thus, the right to research should apply to those communities.

b. Core obligations

This relates to the obligation of African States to respect, fulfil and protect the right to research. This should cover the duty of African States to eliminate laws, policies and practices, and refrain from international commitments that unjustifiably limit researchers' rights of access to science-related information, scientific knowledge and its application, and all other forms of information. The duty should include refraining from enacting limited and inflexible copyright L&Es in national copyright laws. States should negotiate for open and flexible limitations and exceptions in international fora before committing to proposed copyright provisions in international treaties.

States also have a duty to put appropriate measures in place to prevent third parties from limiting the right of access to information and scientific knowledge; and to ensure access to those applications of scientific progress that are critical to the realisation of other rights, such as the right to education. They are enjoined to strike equitable balance between copyright and open access and open science initiatives. States' duties also include the obligation to refrain from interfering with academic freedom and to promote scientific research through international cooperation. Furthermore, States' obligation under the right to research will include the duty to take actions, which include the adoption of strategies that will guarantee access to information, enhance creativity, incentivise authors and indigenous/traditional communities, preserve space for non-commercial culture, promote inclusion and increase educational opportunities. This can be achieved through the provision of well-equipped and publicly-accessible libraries, archives and museums with current holdings, along with adequate and accessible Internet infrastructure. Special attention must be given to the needs of persons with disabilities, women, children, the aged and people living in rural areas.

States have a duty to not interfere with authors' rights to benefit from the commercial exploitation of their creativity. They must prevent third parties from infringing authors' rights, and not unreasonably and unjustifiably deprive authors of remuneration from the use of their outputs, especially for commercial purposes. Appropriate mechanisms must be created for authors to seek redress for the unauthorised commercial use of their creativity. Authors should be defined broadly to include indigenous communities.

Conclusion

The right to research in Africa is an important mechanism to address the copyright challenge to access information for research, education and learning, and empowering researchers, libraries, archives and similar institutions in Africa, especially in an era of emerging technology research. The right to research is an important means for equitably balancing in the African copyright the interest of the public and those of private creators and copyright owners. Overall, the right to research in Africa is necessary and justifiable because it is important to the realisation and fulfilment of the right to science and culture, the right to education, freedom of expression, and the right to property. Importantly, it is essential to the development of science, culture,

creativity, and education, the promotion of an enlightened and expressive populace and, more broadly, the advancement of society and mankind.

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