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The Right to Research in Africa: Making African Copyright Whole

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THE RIGHT TO RESEARCH IN AFRICA: MAKING AFRICAN COPYRIGHT WHOLE

Desmond O. Oriakhogba¹

ABSTRACT

The imbalance existing within the African copyright ecosystem in relation to access to information for research and education became more prominent during the COVID-19 pandemic. As teaching, learning and research inevitably occur on digital platforms, learners and researchers continue to grapple with the challenges of accessing materials owing largely to the protection of these resources under copyright law. Similarly, African libraries and knowledge curators found themselves ill-equipped to perform their role of enabling access to information. To create the balance, therefore, there is a dire need for the recalibration of the African copyright system from the perspective of human rights law. Can the balance be achieved through the construction of a human right to research? In view of the existing broad freedom of expression, right to science and culture, education, and property in the global, regional and national human rights regime, is a specific right to research in Africa necessary and justifiable? If it is necessary and justifiable, what should be its minimum core components? Are there existing international and national regimes to support the formulation of a human right to research in Africa? Conducted as desk research and scoping study, this work unpacks and addresses the issues with the aim of constructing a human right to research in Africa.

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PIJIP RESEARCH PAPER NO. 78

ABSTRACT	1
INTRODUCTION	2
I. JUSTIFICATION FOR A HUMAN RIGHT TO RESEARCH IN AFRICA	8
A. <i>Meaning of research</i>	8
B. <i>Interface between Copyright and Human Right</i>	12
C. <i>African copyright system and human right</i>	15
D. <i>Is a specific right to research in Africa necessary?</i>	17
II. HUMAN RIGHTS REGIMES SUPPORTING THE RIGHT TO RESEARCH IN AFRICA	20
A. <i>International treaties</i>	20
B. <i>Regional Treaties</i>	24
C. <i>National Bills of Rights</i>	26
1. West Africa	26
Nigeria	26
Sierra Leone	27
2. Southern Africa	28
South Africa	28
Zimbabwe	31
3. East Africa	32
Kenya	32
Ethiopia	33
4. Central Africa	35
Congo DRC	35
Central African Republic	36
5. North Africa	37
Egypt	37
Tunisia	38
III. CONSTRUCTING THE HUMAN RIGHT TO RESEARCH IN AFRICA	39
CONCLUSION	41
REFERENCES	42

INTRODUCTION

The raging COVID-19 pandemic has reinforced the need for a legal mechanism that will promote and support access to information for research and education,² and enhance the work of researchers, libraries, and archives

² Access to information is a human right forming part of freedom of expression protected under article 9 of the African Charter on Human and Peoples Rights, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (ACHPR). African Charter on Human and Peoples' Rights, June 27, 1981. 1520 U.N.T.S. 217; 21 I.L.M. 58 (1982); article 19 of the Universal Declaration of Human Rights, United Nations, 1948, art. 21.3 (UDHR). Universal Declaration of Human Rights, Dec. 8, 1948. G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948); article 19 of the International Covenant on Civil and Political Rights, 1966, 999 UNTS 171 (ICCPR).

in Africa. As teaching, learning and research are inevitably being conducted through the use of information communication technology (ICT) tools, including virtual learning platforms, teachers, learners and researchers continue to grapple with the challenges of accessing materials owing largely to the protection of these resources under copyright law.³ Libraries and archives, which are supposed to facilitate access to these materials, are constrained by the fact that they offer mostly physical services and were not equipped and ready to render digital services as required by the reality thrown up by the pandemic. This is made worse by the difficulty in accessing funds to obtain digital copyright licenses for online repositories from publishers.⁴ Researchers in, and those deploying, emerging technologies, such as artificial intelligence (AI), especially in the education sector, have to cross the hurdles of copyright exclusivity in their quest for knowledge creation in the digital space. This is so because AI research, for instance, would often involve the procurement of text and data (text and data mining) that may be the subject of copyright protection.⁵

The implication of the forgoing is that the rights to education and access to information, which are necessary to promote the right to science and culture,⁶ often face a significant challenge posed by the exercise of exclusive

International Covenant on Civil and Political Rights, Dec. 16, 1966. 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20; 6 I.L.M. 368 (1967) Education is also a human right recognised under article 17(1) ACHPR, article 26 UDHR, and article 13 of the International Covenant on Economic Social and Cultural Rights, 1966, 993 UNTS 3 (ICESCR). African Charter on Human and Peoples' Rights, June 27, 1981. 1520 U.N.T.S. 217; 21 I.L.M. 58 (1982). Universal Declaration of Human Rights, Dec. 8, 1948. G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948). International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966. 993 U.N.T.S. 3; S. Exec. Doc. D, 95-2 (1978); S. Treaty Doc. No. 95-19; 6 I.L.M. 360 (1967).

³ C Ncube, *The musings of a copyright scholar working in South Africa: is Copyright Law supportive of emergency remote teaching?*, AFRONMICS LAW (May 13, 2020), <https://www.afronomicslaw.org/2020/05/13/the-musings-of-a-copyright-scholar-working-in-south-africa-is-copyright-law-supportive-of-emergency-remote-teaching/>; Afro-IP, *AFRO-LIVE delivers insights from Nairobi, Lagos and Cape Town*, (Apr. 21 2020), <http://afro-ip.blogspot.com/2020/04/iplive-delivers-insights-from-nairobi.html?m=1>; EdTech Hub & eLearning Africa, *The Effect of Covid-19 on Education in Africa and its Implications for the Use of Technology: A Survey of the Experience and Opinions of Educators and Technology Specialists* (Sept., 2020) 28-29 <https://aisa.or.ke/resources/the-effect-of-covid-19-on-education-in-africa-and-its-implications-for-the-use-of-technology/>.

⁴ J Shirley, B Mawire and M Baloyi-Sekese, *COVID-19 and the National Library of South Africa: Adapting to the new normal* 30 ALEXANDRIA: THE J. OF NATIONAL AND INT'L LIB. & INFO. 201 (2020); IFLA, *Building Back Better for Libraries in Africa: An Interview*, IFLA (Dec. 1, 2020) <https://www.ifla.org/news/building-back-better-for-libraries-in-africa-an-interview/>.

⁵ Sean Fill Flynn, et al. *Implementing User Rights for Research in the Field of Artificial Intelligence: A Call for International Action* 48 (Joint PIJIP/TLS Research Paper No. 12, 2020); M Sag, *The New Legal Landscape for Text Mining and Machine Learning* 66 J. of Copyright Soc. USA 164 (2020); M Manteghi, *Text and data mining in the EU: managing a Conflict Between Copyright and the Right to Information* 43(11) EUR. INTELL. PROP. REV. 698 (2021).

⁶ U.N. OHCHR, 28th Sess., Report of the Special Rapporteur in the Field of Cultural Rights,

rights by copyright owners under copyright law without a legal mechanism that equitably balances copyright, from a human right perspective, with the right to education and access to information in the African context.⁷ Reliance on, and working within, the limitations and exceptions (L&Es) provided by the existing copyright regimes are often touted, by the proponents of stronger copyright regimes, as the solution to this malaise. Flowing from their incentivisation-centric disposition, the proponents of strong copyright argue that the existing L&Es are capable of promoting the public interest objective of copyright law.⁸ Indeed, this argument also serves as a basis for their resistance to attempts aimed at making African copyright regimes more balanced;⁹ and the proposed waiver of the existing global IP rights framework under the World Trade Organizations' (WTO) Agreement on Trade Related Aspects of Intellectual Property (TRIPs Agreement),¹⁰ to tackle the challenges of the COVID-19 pandemic.¹¹

In its most simplistic connotation, the public interest objective of copyright is the pursuit of an equitably balanced system that caters equally for the private interests of copyright owners (including authors and corporate

Farida Shaheed, on Copyright Policy and the Right to Science and Culture, (A/HRC/28/57) (Dec. 24, 2012).

⁷ SB HIRKO, *RETHINKING COPYRIGHT FOR SUSTAINABLE HUMAN DEVELOPMENT: HIGHER EDUCATION AND ACCESS TO KNOWLEDGE* (Routledge ed., 1st Ed., 2021) [hereinafter *Rethinking Copyright*]; S Hirko, *Copyright and Tertiary Education for Human Development: Rethinking the Policy, Law and Practice in Ethiopia* (May 20, 2020) (Ph.D. Thesis, University of Ottawa) [hereinafter *Copyright and Tertiary Education*]; Caroline Ncube, *Using Human Rights to Move Beyond Reformism to Radicalism: A2K for Schools, Libraries and Archives* in *A CRITICAL GUIDE TO INTELLECTUAL PROPERTY* 117-143 (M Callahan & J Rogers eds., 2017) [hereinafter *Using human rights*]; K Beiter, *Not the African copyright pirate is perverse, but the situation in which (S)he lives – textbooks for education, extraterritorial human rights obligations, and constitutionalization "from below" in IP Law* (Joint PIJIP/TLS Research Paper No. 4, 2021) [hereinafter *Not the African copyright pirate Is Perverse*].

⁸ *Generally see* GH Tang, *Copyright and the Public Interest in China* (Edward Elgar ed., 2010); N Turkewitz, *Copyright and the public interest: not necessarily competing forces*, IP WATCH, (Jul. 7, 2015) <https://www.ip-watch.org/2015/07/07/copyright-and-the-public-interest-not-necessarily-competing-forces/>.

⁹ The South African copyright law reform experience is a living and classic example of the interference of Global North countries in copyright reform efforts in Africa. *See* L Kayali, *How the U.S. and European Union pressured South Africa to delay copyright reform*, POLITICO, (Jun. 28, 2020) <https://www.politico.com/news/2020/06/28/copyright-reform-south-africa-34410>; G für Freiheitsrechte, *European Commission derails copyright reform in South Africa*, EDRI (Jun. 24, 2020) <https://edri.org/our-work/european-commission-derails-copyright-reform-in-south-africa>; Denise Nicholson, *New Proposed Amendments to Copyright Amendment Bill – Constitutionality in Question*, SCHOLARLY HORIZONS (2022) <https://scholarlyhorizons.co.za/blog/new-proposed-amendments-to-copyright-amendment-bill/>.

¹⁰ World Trade Organization, *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994); World Trade Organization, *WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization*, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).

¹¹ S Thembisetty, *Opposition to the TRIPS waiver: dispatches from the frontline*, LSE BLOG (Dec. 20, 2021) <https://blogs.lse.ac.uk/politicsandpolicy/trips-waiver-one-year-on/>.

investors in the copyright industry) and the concern of the public in promoting science, creativity and culture.¹² As a plethora of research already reveal,¹³ the existing copyright regimes in Africa, as currently formulated, are not fit for purpose and cannot secure the public interest in the sense that they are incapable of supporting the work of researchers, libraries and archives that contribute to the promotion of access to information and education, especially in this era of AI research and the digitisation of teaching and learning. Majority of African copyright regimes contain restrictive general exceptions, such as fair dealing, and very narrow specific exceptions, with none dealing with text and data mining.¹⁴ Hence there has been calls for,¹⁵ and even judicial attempts at,¹⁶ the reading of the copyright rules through human rights lens. In this regard, experts have advocated specifically for the formulation of user rights within the copyright system through the reading of the existing restrictive L&Es in African copyright regimes with human rights and constitutional binoculars in order to position the African

¹² Ruth L. Okediji, *The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries*, 15 UNCTAD - ICTSD PROJECT ON IPRS AND SUSTAINABLE DEVELOPMENT 5, 1-52 (2006), https://unctad.org/system/files/official-document/iteipc200610_en.pdf ; R Giblin & K Weatherall, *Making Sense of “the Public Interest”* IN COPYRIGHT IN INTELLECTUAL PROPERTY AND ACCESS TO SCIENCE AND CULTURE: CONVERGENCE OR CONFLICT? 66-78 (Christophe Geiger ed., 3rd ed., 2016) 66-78; Caroline B Ncube, *Calibrating copyright for creators and consumers: Promoting distributive justice and Ubuntu*, in WHAT IF WE COULD REIMAGINE COPYRIGHT? 253-280 (R Giblin & K Weatherall eds., ANU Press, 2017); H Sun, *Copyright Law as an Engine of Public Interest Protection*, 16(3) NORTHWESTERN J. OF TECH. AND INTELL. PROP. 123 (2019); A Mason, *The Public-Interest Objectives and Law of Copyright* 9 J. OF L. AND INFO. SCIENCE 7 (1998); E. S. Nwauche ‘Open Access and the Public Interest in Copyright’, in CONFERENCE ON ELECTRONIC PUBLISHING AND DISSEMINATION: DAKAR, SENEGAL , 2-7 OCTOBER 2008, , https://codesria.org/IMG/pdf/08_Enyinna_S-_Nwauche.pdf (Last visited Apr. 2, 2022).

¹³ E.g. see HB Hirko *The implications of TRIPs’ criminal provisions on copyright exception for education in Ethiopia: a critical approach*, 29 AFRICAN J. OF F INT’L & COMP. L. 263 (2021); Hirko *Rethinking Copyright*, *supra* note 7; Hirko *Copyright and Tertiary Education*, *supra* note 7; SUSAN ISIKO ŠTRBA, *INTERNATIONAL COPYRIGHT LAW AND ACCESS TO EDUCATION IN DEVELOPING COUNTRIES: EXPLORING MULTILATERAL LEGAL AND QUASI-LEGAL SOLUTIONS* (Brill ed., 2012); C ARMSTRONG ET AL., *ACCESS TO KNOWLEDGE IN AFRICA: THE ROLE OF COPYRIGHT* (UCT Press ed., 2010).

¹⁴ Generally, see Sean Fill Flynn at el., *Research Exceptions in Comparative Copyright Law* (PIJIP/TLS Research Paper Series no. 75., 2021); Jonathan Band & Jonathan Gerafi, *The Fair Use/Fair Dealing Handbook*, INFOJUSTICE (Mar. 10, 2015) <http://infojustice.org/wp-content/uploads/2015/03/fair-use-handbook-march-2015.pdf>.2.

¹⁵ LR Helfer & GW Austin, *The Right to Education and Copyright in Learning Materials in HUMAN RIGHTS AND INTELLECTUAL PROPERTY: MAPPING THE GLOBAL INTERFACE* 316-363 (LR Helfer & GW Austin eds., Cambridge Uni. Press, 2011); Ncube *Calibrating copyright for creators and consumers* *supra* note 12; Ncube *Using Human Rights* *supra* note 7; Beiter *Not the African copyright pirate Is Perverse* *supra* note 7.

¹⁶ E.g. see *Moneyweb (Pty) Limited v Media 24 Limited and Another* (3) All SA 193 (GJ) (S. Afr.); *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR (Kenya); *Katatumba v Anti-Corruption Coalition Uganda* (CIVIL SUIT NO 307 OF 2011) [2014] UGCOMM 107 (18 August 2014) (Uganda).

copyright system to effectively achieve its public interest objectives.¹⁷ There are also clamour for the recalibration of the copyright system from a human right law perspective,¹⁸ especially within the African context.¹⁹

Even so, a more effective approach at recalibrating the copyright system in the public interest is to construct a human right to research either within the framework, or as a new right carved out, of the existing right to freedom of expression, right to access information, right to science and culture, right to education, and right to property,²⁰ especially within the African context. This work aims to construct a specific right to research in the African human rights regime. Within the context of this work, African human rights regime is understood broadly to include, primarily, the African Charter on Human and Peoples' Rights (ACHPR), as well as other international human rights instruments to which most African countries are subscribed, and from which inspiration and guidance can be drawn when interpreting the ACHPR.²¹ This approach aligns with article 31(3)(c) of the Vienna Convention on the Law of Treaties,²² in terms of rules of international law applicable in the relationship between parties to a treaty can be considered when interpreting that treaty. This provision should also be read together with articles 60 and 61 of the ACHPR, which allows reliance to other international human rights jurisprudence for the interpretation of its provisions. The African human rights regime is further defined broadly to include the bills of rights in the national constitutions in Africa,²³ for reasons that are further discussed in part 2 below.

In regard to the forgoing, the work considers whether a specific new right

¹⁷ E.g. see Hirko, *Rethinking Copyright*, *supra* note 7; Hirko, *Copyright and Tertiary Education*, *supra* note 7.

¹⁸ Farida Shaheed (Special Rapporteur in the Field of Cultural Rights), *The Right to Enjoy the Benefit of Scientific Progress and its Application*, U.N. Doc. A/HRC/20/26 ¶ 65 (May 14, 2012).

¹⁹ Ncube, *Using Human Rights*, *supra* note 7.

²⁰ C Geiger & BJ Jutte, *Digital Constitutionalism and Copyright Reform: Securing Access through Fundamental Rights in the Online World*, KLUWER COPYRIGHT BLOG (Jan. 25, 2022) <http://copyrightblog.kluweriplaw.com/2022/01/25/digital-constitutionalism-and-copyright-reform-securing-access-to-through-fundamental-rights-in-the-online-world/> [hereinafter *Digital Constitutionalism and Copyright Reform*]; C Geiger, *Reconceptualizing the Constitutional Dimension of Intellectual Property – An Update* (Centre for International Intellectual Property Studies Research Paper No. 11, 2019) [hereinafter *Reconceptualizing the constitutional dimensions of IP*].

²¹ For instance, the UDHR, ICESCR, and ICCPR, among others. Universal Declaration of Human Rights, Dec. 8, 1948. G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948). International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966. 993 U.N.T.S. 3; S. Exec. Doc. D, 95-2 (1978); S. Treaty Doc. No. 95-19; 6 I.L.M. 360 (1967). International Covenant on Civil and Political Rights, Dec. 16, 1966. 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20; 6 I.L.M. 368 (1967).

²² United Nations Vienna Convention on the Law of Treaties, arts. 31-32, May 23, 1969, I-18232, 1155 UNTS 331.

²³ This work focuses on the national constitutions of Nigeria, Sierra Leone, South Africa, Zimbabwe, Kenya, Ethiopia, Egypt, Tunisia, Central African Republic and Democratic Republic of Congo.

THE RIGHT TO RESEARCH IN AFRICA

to research in Africa is necessary and justifiable. If a specific right to research is fundamental and deserving of protection, the work further considers existing frameworks in international and national human rights regimes that will support the framing of a specific right to research in Africa. Here, focus will be on the right to science and culture, right to freedom of expression as well as the right to property as developed in human rights treaties, national constitutions, soft law, and case law. This will be important to ultimately determine the core elements of a specific right to research in Africa.

This article primarily adopts a doctrinal research method. The research is conducted as a desk review of human right treaties, soft law, case law, and relevant literature on the intersection between copyright and human right in relation to the question of access to information. Key focus is on the provisions of the ACHPR, and on the global human rights treaties,²⁴ as well as their jurisprudence, as they become relevant to shed lights on the principles enshrined in the ACHPR.²⁵ The aim is to identify and examine the provisions that will be relevant to formulating the human right to research in Africa. The research also involves a scoping study of African national constitutions, especially the bills of rights, drawn from countries representative of the African sub-regions. The goal here is to determine the constitutional approaches of the countries on the copyright-human right interface and their alignment with the principles enshrined in the international human right treaties relevant to constructing a human right to research. The countries are selected as samples of African countries since a work of this kind will be too unwieldy if all African countries are examined. In this regard, two countries are drawn from each African sub-region of West, South, East, North and Central Africa,²⁶ making 10, and about 20%, of the 55 member states of the African Union.²⁷ Interestingly, some of the countries are currently in the

²⁴ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter *UDHR*]; G.A. Res., United Nations, Treaty Series, vol. 993, p. 3 International Covenant on Economic, Social and Cultural Rights, (Dec. 16, 1966). International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966. 993 U.N.T.S. 3; S. Exec. Doc. D, 95-2 (1978); S. Treaty Doc. No. 95-19; 6 I.L.M. 360 (1967).; ICCPR. International Covenant on Civil and Political Rights, Dec. 16, 1966. 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20; 6 I.L.M. 368 (1967)

²⁵ The ACHPR allows reliance to be placed on, or inspiration to be drawn from, the provisions of international human rights instruments, such as the UDHR, ICCPR and ICESCR, which its contracting parties have adopted. See articles 60 and 61 of the ACHPR. African Charter on Human and Peoples' Rights, June 27, 1981. 1520 U.N.T.S. 217; 21 I.L.M. 58 (1982). Universal Declaration of Human Rights, Dec. 8, 1948. G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948). International Covenant on Civil and Political Rights, Dec. 16, 1966. 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20; 6 I.L.M. 368 (1967)

International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966. 993 U.N.T.S. 3; S. Exec. Doc. D, 95-2 (1978); S. Treaty Doc. No. 95-19; 6 I.L.M. 360 (1967).

²⁶ Nigeria and Sierra Leone from the west; South Africa and Zimbabwe from the south; Kenya and Ethiopia from the east; Egypt and Tunisia from the North, Democratic Republic of Congo and Central African Republic (CAR) from the centre.

²⁷ AFRICAN UNION 'MEMBER STATES', https://au.int/en/member_states/countryprofiles2 (last visited Apr. 2, 2022)

process of reforming their copyright legislations with issues around developing a balanced copyright framework at the front burner and highly contested. Furthermore, study of the national bills of rights in this work reflects the bottom-up tailor made approach to law and policy formulation, which experts have canvassed for developing regions such as Africa, especially within the context of copyright.²⁸

The study is limited by the number of African countries sampled and the official language of some of the countries, which makes it difficult to access and examine texts and case law, that have not been translated to English language, from those countries.

This article reports on the results of the research in three parts. Part I examines the justifications for a right to research as a human right. To this end, it begins by conceptualising research within the context of this work. It then examines the nexus between copyright and human rights, and how conversation around the interface has shaped access to information issues, especially within the African context, as a background to determining whether a specific right to research in Africa is imperative. Part II focuses on the international, regional and national framework for the protection of human rights to determine whether there is support for the development of a specific right to research. In this regard, the paper contends that while the broad rights to freedom of expression, right to access information, rights to science and culture, right to education, and right to property can form useful guides in navigating the access issues within the copyright space, a specific human right to research drawn from such broad rights will more appropriately address the peculiarities of copyright exclusivity as a barrier to the work of researchers, libraries and archives in Africa. Part III highlights and discusses what the core contents of the right to research should be. The conclusion reflects on the importance of the recognition of a right to research in Africa.

I. JUSTIFICATION FOR A HUMAN RIGHT TO RESEARCH IN AFRICA

This part conceptualises the term “research” within the context of this work. It then discusses the interface between copyright and human right as it relates to the access to information discourse, especially within the African context, necessitating a construction of a right to research. It concludes by resolving the question of whether a right to research in Africa is necessary and justifiable.

A. *Meaning of research*

The term “research” is not defined in the international human rights

²⁸ Ncube *Id.*; A Adebambo at el., *Negotiating the Intellectual Property Protocol under the Agreement Establishing the African Continental Free Trade Area: Priorities and Opportunities for Nigeria* 15 LAW AND DEV. REV. 33 (2021); C Ncube, et al., *Intellectual Property Rights and Innovation: Assessing Regional Integration in Africa (ARIA VIII)* (Open AIR Working Paper No. 5, 2017); T Adebola *Mapping Africa’s complex regimes: towards an African centred AfCFTA intellectual property protocol* 1 AFRICAN J. OF INT’L ECO. L. 233 (2020).

treaties. However, for the purpose of this work, and to put discussion in proper perspective, it is important to borrow and draw from case law from Canada, and the United Nations Educational, Scientific and Cultural Organization's Recommendation on Science and Scientific Researchers, 2017 (UNESCO Recommendation).²⁹ As will become apparent shortly, the Canadian case law does not define research as used under the human rights treaties considered in this work. Instead, it defines research in relation to fair dealing under the Canadian Copyright regime, from which useful guidance can be found in promoting the public interest within the African context. Also, the definitions will be useful to demonstrate the nuances of research in relation to access to information within the copyright context and serve as model for developing countries, such as from Africa, in determining the scope of their research exceptions.

On its part, the UNESCO Recommendation focuses on science and scientific researchers. Yet, its definition of research will be useful in the context of this work given the fact that, like this work, the Recommendation hinges, among others, on the right to science and culture enshrined in the Universal Declaration of Human Rights (UDHR).³⁰ Moreover, the UN's Economic and Social Council's Committee on Economic Social and Cultural Rights (ESC Committee), in its General Comment No. 25, relied on the UNESCO Recommendation while conceptualising "science" under article 15(1)(b) of the ICESCR.³¹

Accordingly, research can be described to signify 'those processes of study, experiment, conceptualization, theory-testing and validation involved in the generation' of new knowledge, and includes 'both fundamental and applied research'³² in the natural and social sciences.³³ Research encompasses science, which connotes the

enterprise whereby humankind, acting individually or in small or large groups, makes an organized attempt, by means of the objective study of observed phenomena and its validation through sharing of findings and data and through peer review, to discover and master the chain of causalities, relations or interactions; brings together in a coordinated form subsystems of knowledge by means of systematic reflection and conceptualization; and thereby furnishes itself with the

²⁹ United Nations Educational, Scientific and Cultural Organization, Resolution 15 adopted by the General Conference at its 39th session, Annex II, United Nations Educational, Scientific and Cultural Organization's Recommendation on Science and Scientific Researchers ((Oct.30-Nov.14, 2017), https://en.unesco.org/themes/ethics-science-and-technology/recommendation_science).

³⁰ *Id.*, at. 117-118.

³¹ Comm. on Eco, Soc. & Cult. Rts., *General comment No. 25 (2020) on science and economic, social and cultural rights (article 15 (1) (b), (2), (3) and (4) of the International Covenant on Economic, Social and Cultural Rights)*, U.N. Doc. E/C.12/GC/25 (Apr. 30, 2020).

³² UNESCO, 39 C/Res. 15, *supra* note 29, at 118.

³³ General Comment no. 25, *supra* note 31 at ¶¶ 4-6.

PIJIP RESEARCH PAPER NO. 78

opportunity of using, to its own advantage, understanding of the processes and phenomena occurring in nature and society.³⁴

As will become apparent shortly, research can also be informal in nature and may not lead to the establishment of new knowledge. Nonetheless, inherent in the above definition of research are the ideas of the ability to participation in the research process, and the notion of sharing of research data and findings, which is an important means of promoting access to information for learning and education. Indeed, in terms of the Recommendation, member states of UNESCO are tasked to ensure ‘equal access to [...] the knowledge derived from [research] as not only a social and ethical requirement for human development, but also as essential for realizing the full potential of scientific communities worldwide’. In the copyright context, the member states are expected to ensure the appropriate crediting of contributions to scientific knowledge, and promote balance between copyright protection and ‘the open access and sharing of knowledge’.³⁵ The Recommendation, further encouraged member states to

actively promote the interplay of ideas and information among scientific researchers throughout the world, which is vital to the healthy development of the sciences; and to this end, should take all measures necessary to ensure that scientific researchers are enabled, throughout their careers, to participate in the international scientific and technological community.³⁶

A well-articulated and constructed right to research, developed from a human rights perspective, will be a major step towards achieving these objectives. In constructing such right, however, it is important to bear in mind further that research may be both commercial and non-commercial in nature. The impact on the interest of authors will differ depending on whether research is commercial or non-commercial. Access to copyright work without compensation will significantly impact on and prejudice the legitimate interest of authors and negatively affect their right as protected under copyright,³⁷ and human right, regimes in a commercial research context especially where such research goes beyond the limits of fairness under copyright law. This will not be so with non-commercial research. 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.

The foregoing position finds support in some important pronouncements from the Supreme Court of Canada (SCC) on the meaning of research and its implication under the fair dealing exception in section 29 of the Canadian

³⁴ UNESCO, 39 C/Res. 15, *supra* note 29, at 118.

³⁵ *Id.*, at 121.

³⁶ *Id.*, at 123.

³⁷ See Panel Report, *United States — Section 110(5) of US Copyright Act*, WTO Doc. WT/DS160/R (adopted Jul. 27, 2000).

Copyright Act (CCA).³⁸ Notably, in the case of *CCH v Law Society*,³⁹ the SCC pronounced that research, under section 29 of the CCA ‘must be given a large and liberal interpretation in order to ensure that users’ rights are not unduly constrained. Thus, ‘[l]awyers carrying on the business of law for profit are conducting research within the meaning of s. 29 of the [CCA],’⁴⁰ even though the research itself may not be regarded as commercial especially when the institution rendering the copying services is doing so for profit. The case was a claim by the plaintiff that the Law Society’s photocopying practices constituted copyright infringement under the CCA, among other things. Rejecting the claim, the SCC found that the Law Society has an Access Policy in place which governs its custom photocopying services. Commenting on the policy, the SCC made a very important statement that sets out some characteristics of research that are relevant within the context of this work. According to the SCC,

The Law Society’s custom photocopying service is provided for the purpose of research, review, and private study. The Law Society’s Access Policy states that “[s]ingle copies of library materials, required for the purposes of research, review, private study and criticism . . . may be provided to users of the Great Library.” When the Great Library staff make copies of the requested cases, statutes, excerpts from legal texts, and legal commentary, they do so for the purpose of research. Although the retrieval and photocopying of legal works are not research in and of themselves, they are necessary conditions of research and thus part of the research process. The reproduction of legal works is for the purpose of research in that it is an essential element of the [...] research process. There is no other purpose for copying; the Law Society does not profit from this service. Put simply, its custom photocopy service helps to ensure that legal professionals [...] can access the materials necessary to conduct the research required to carry on the practice of law.⁴¹

SOCAN v Bell is another important case,⁴² especially as it relates to the use of copyright works within the digital space. The case involved questions around the allowable limits of royalty collection for the exploitation of musical works on the internet under the CCA. In the determination of the questions, one of which was whether royalty tariffs should extend to previews of musical works online, the SCC adopted its earlier definition of research and held further that the provision of music previews by internet service providers (ISPs) to enable consumers to decide whether, and which music, to subscribe qualify as research under section 29 of the CCA. In this regard, held the SCC, the purpose or aim of research should be examined from the perspectives of the consumers, as the ultimate users, and not the ISPs.

³⁸ Copyright Act, R. S. C. 1985, c. C-42.

³⁹ *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] SCC 13(Can.)

⁴⁰ *Id.* ¶ 51.

⁴¹ *Id.* ¶ 64.

⁴² *SOCAN v Bell*, [2021] 2 R. C. S. 326 (Can.).

Furthermore, held the SCC, research does not need to be for a creative purpose only. Limiting research to only creative purposes would ignore the core objectives of copyright law, which includes the dissemination of copyright works and the promotion of the public interest in ensuring access to information. Moreover, SCC also held that a limitation of research to creative purposes only would undermine its ordinary connotation, which ‘includes many activities that do not require the establishment of new facts or conclusions’.⁴³

B. Interface between Copyright and Human Right

Human rights considerations did not play a role in the development of copyright laws in the Global North, and in the formulation of international copyright regime until fairly recently. Historically, key human rights treaties, such as the UDHR, International Covenant on Civil and Political Rights, 1966 (ICCPR), and International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR), as well as international copyright instruments, such as the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention),⁴⁴ and the TRIPS agreements, developed in isolation of each other.⁴⁵ These instruments focused on specific issues within their jurisprudential domains. Thus, while the human rights instruments were strictly concerned with civil, political, economic, social and cultural rights forming the core of the human rights domain, the copyright treaties were focused on the interest of creators and investors within the context of international trade, investment and the global creative industry. Although the UDHR and ICESCR accommodate copyright within their ambit,⁴⁶ the normative focus is not the trade and investment aspects of copyright. Rather, the concern of the global human rights system is the guarantee of the moral and material interest in the creative output flowing from the creative genius of authors.⁴⁷ Relevant provisions of the UDHR, ICESCR, and ICCPR are examined in more depth in the next part.

It suffices now to note that the historical isolation of copyright and human right meant that the implication of both fields on each other escaped the eyes of scholars, and law and policy makers, until towards the end of the twentieth century when conversations around the interface between copyright and

⁴³ *Id.*, ¶ 22.

⁴⁴ Berne Convention for the Protection of Literary and Artistic Works, Sep. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 99-27 (1986).

⁴⁵ See A.R. Chapman, *A human rights perspective on intellectual property, scientific progress, and access to the benefits of science*, 35 (3) UNESCO COPYRIGHT BULLETIN 4 (2001), <https://unesdoc.unesco.org/ark:/48223/pf0000125505>; LR Helfer, *Human rights and intellectual property: conflict or coexistence* 5 MINNESOTA INTELL. PROP. REV. 47 (2003) [hereinafter *Human Rights and Intellectual Property*]; PLC Torremans, *Is copyright a human right*, MICHIGAN STATE L. REV. 271 (2007).

⁴⁶ See article 24 of the UDHR and article 15 of the ICESCR. Universal Declaration of Human Rights, Dec. 8, 1948. G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948). International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966. 993 U.N.T.S. 3; S. Exec. Doc. D, 95-2 (1978); S. Treaty Doc. No. 95-19; 6 I.L.M. 360 (1967).

⁴⁷ Helfer, *Human rights and intellectual property*, *supra* note 45.

human rights started emerging.⁴⁸ Two key approaches to the interface are evident in the literature: the conflict and compatibility approaches.⁴⁹

Proponents of the conflict approach believe that the exercise of copyright exclusivity is incompatible with, and undermining of, a broad array of human rights, and, that, this conflict and incompatibility can be resolved only when human rights norms maintain supremacy over copyright in areas of conflict.⁵⁰ Put differently, the conflict approach perceives copyright as drawing its legitimacy from human rights. As such, human rights considerations should be the bases for copyright validity. This approach appears to have informed earlier engagement in the copyright terrain at the global human rights normative forum.⁵¹ For instance, in its Report of 2001, the UN noted that article 15 of the ICESCR obligates states to develop an IP system that equitably balances the public interest in ensuring access to information with the protection of authors (private) interests in their works embodying the information. However, in striking the balance, according to the UN, states must understand the different characteristics of copyright (economic privilege granted for a limited period on individuals and corporations, also revocable), and human right (universal, inherent, inalienable and recognised by state); and ensure that the primary objective is the protection and

⁴⁸ See HC Jehoram, *Freedom of Expression in Copyright and Media Law* EUR. INTEL. PROP. REV. 3 (1984); LR Patterson, *Free Speech, Copyright and Fair Use*, 40 VANDERBILT L. REV. 1 (1987); Chapman, *supra* note 45; F. Dessemontet, *Copyright and Human Right*, UNIL, (last visited Apr. 2, 2022), <https://www.unil.ch/cedidac/files/live/sites/cedidac/files/Articles/Copyright%20%26%20Human%20Rights.pdf>; P TORREMANS, *INTELLECTUAL PROPERTY AND HUMAN RIGHTS* (Wolters Kluwer Ed., 4th ed., 2020); LR HELFER, *INTELLECTUAL PROPERTY AND HUMAN RIGHTS* (Edward Elgar, 2013); C GEIGER, *RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY* (Edward Elgar, 2016); C Geiger *Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles*, in *RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY* 661 (C Geiger ed., Edward Elgar, 2016); LR Helfer, *Intellectual Property and Human Rights: Mapping an Evolving and Contested Relationship* in *OXFORD HANDBOOK OF INTELLECTUAL PROPERTY LAW* 117-143 (R Dreyfuss and J Pila eds., OUP, 2018); RL Okediji, *Does Intellectual Property Need Human Rights* 51(1) INT'L L. & POL. 1, 67 (2018); Ncube, *Using Human Rights*, *supra* note 7; V Mahalwar, *Copyright and human right: the quest for a fair balance*, in *COPYRIGHT LAW IN THE DIGITAL WORLD* 151-174 (MK Sinha & V Mahalwar eds., Springer, 2017); K Buss, *Copyright and Free Speech: The Human Rights Perspective* 8(2) BALTIC J. OF L. & POL. 182 (2015); D Mathews *Reappraising the relationship between intellectual property rights and human rights: A COVID-19 Pandemic response* (Queen Mary Law Research Paper No. 366, 2021).

⁴⁹ Helfer, *Human rights and intellectual property*, *supra* note 45; Torremans *Is copyright a human right?*, *supra* note 45.

⁵⁰ Helfer *Id.*

⁵¹ For instance, see the Human Right Council Res. 2000/7, U.N. Doc.E/CN.4/Sub.2/RES/2000/7 on Intellectual Property and Human Rights (Jun. 17, 2000) <https://www.aas.org/sites/default/files/SRHRL/PDF/IHRDArticle15/E-CN_4-SUB_2-RES-2000-7_Eng.pdf> ; Economic and Social Council, UN Economic and Social Council Report on the impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights, E/CN.4/Sub.2/2001/13 (27 June 2001) "[hereinafter UN ESC Report 2001].

promotion of human rights. Thus, to be regarded as legitimate, the implementation of a copyright regime must achieve results that are compatible with human right.⁵²

On the other hand, the compatibility approach views copyright and human right as serving the same core ideal of promoting the public interest in ensuring that authors benefit from their creative outputs in order to be incentivised to further create, while the public has access to the fruits of the authors' creativity. Nonetheless, the compatibility approach does not deny the tensions that exists between copyright and human right especially in relation to striking the appropriate balance between incentivisation and access. Instead of allocating primacy of one over the other, the compatibility approach seeks for ways to ensure that human right considerations help copyright to achieve its public interest objective.⁵³ This approach permeates subsequent engagements with the copyright human rights interface at international normative fora such as the World Intellectual Property Organization (WIPO).⁵⁴ It drives the access to knowledge (A2K) movement, which is an amalgam of open education resources, open access, and open science advocates, among others,⁵⁵ within the African context.⁵⁶

Indeed, in its recent General Comment No. 25 (examined in more depth in the next part), the ESC Committee recognised the important role of IP (copyright, in this instance) in rewarding and incentivising researchers, on the one hand, and promoting research, creativity and innovation, on the other hand.⁵⁷ It, thus, enjoins states to strike an appropriate balance between 'open access and sharing of scientific knowledge and its application', on the one hand, and IP, on the other hand, especially in relation to the realisation of the right to education, among others.⁵⁸ Similar obligation for states was also established earlier by the ESC Committee in its General Comment No. 17 (discussed in the next part).⁵⁹ In carrying out this obligation, the ESC Committee urged states to realise that, from a human right perspective, IP (copyright, in this instance) is a social product with a social function. As such, the states 'have a duty to prevent unreasonably high costs for access to [...] schoolbooks and learning materials' from 'undermining the rights of large segments of the population to [...] education'.⁶⁰

⁵² UN ESC Report 2001, *supra* note 51, at ¶¶ 10-15.

⁵³ Helfer, *Human rights and intellectual property*, *supra* note 45.

⁵⁴ This approach informs the formulation of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, 2013.

⁵⁵ Ncube, *Using human rights* *supra* note 7.

⁵⁶ See the AFRICAN SCHOLARS FOR KNOWLEDGE JUSTICE (ASKJUSTICE), <https://askjustice.org/>, (last visited Apr. 2, 2022)

⁵⁷ General Comment no. 25, *supra* note 31 at ¶¶ 58-62.

⁵⁸ General Comment no. 25, *supra* note 31 at ¶ 4.

⁵⁹ General Comment no. 25, *supra* note 31 at ¶ 39(d).

⁶⁰ General Comment no. 25, *supra* note 31 at ¶ 62.

C. African copyright system and human right

Within the African context, the tensions between copyright and human right continues to manifest in the challenge which the exercise of copyright poses to access to information for research and learning in Africa. The reasons for this state of affairs are not far-fetched. Chiefly, the history of copyright law-making, both at national and international fora, evinces that the access needs of researchers, learners and teachers in Africa were never considered. Copyright laws, both internationally and nationally, were developed and extended to African countries by states from the Global North that exercised colonial powers in Africa at that time.⁶¹ Indeed, the states from the Global North continue to exert enormous influence on copyright law reform efforts in Africa with the aim of maintaining the status quo on the continent to the benefit of large corporate interests from the Global North. Such influence manifest in the form of threat of trade sanctions or cutting of aid against African countries. Thus, forcing the countries to give up plans for open and flexible L&Es in favour of the existing mechanisms which cannot support the work of researchers, libraries and archives,⁶² especially in the era of the fourth industrial revolution.

Also, the existing copyright regime at the regional and sub-regional level in Africa follows similar lopsided approach owing to the influence of the Global North in their development.⁶³ However, there are ongoing efforts to develop an IP protocol containing broad guiding principles in Africa.⁶⁴ Experts have called for the guiding principles in the proposed IP protocol to be formulated in a way that will allow African countries some policy space to develop open, flexible and balanced national copyright systems suitable to solving the access challenge.⁶⁵ From a human right perspective, there is a specific official recommendation that, to have a viable IP protocol under the Agreement Establishing the African Continental Free Trade Area (AfCFTA Agreement),⁶⁶ such protocol should require African countries to ratify the ‘Marrakesh Treaty, with the additional commitment to adhere to any other multilateral agreement that promotes access to work for persons with

⁶¹ Jermeij de Beer at el. *Evolution of Africa’s intellectual property treaty ratification landscape* 22 THE AFRICAN J. OF INFO. & COMM. 53 (2018).

⁶² Classic example is the vehement opposition to the more open and flexible general fair use and specific text and data mining in South Africa by Western countries. see *supra* note 9.

⁶³ For a discussion of the regional and sub-regional copyright legal framework in Africa, see CARLINE B NCUBE, SCIENCE, TECHNOLOGY & INNOVATION AND INTELLECTUAL PROPERTY: LEVERAGING OPENNESS FOR SUSTAINABLE DEVELOPMENT IN AFRICA (Claremont: Juta and Company, 2021); CAROLINE B NCUBE, INTELLECTUAL PROPERTY POLICY, LAW AND ADMINISTRATION IN AFRICA: EXPLORING CONTINENTAL AND SUB-REGIONAL CO-OPERATION (Routledge, 2016).

⁶⁴ Ncube, *supra* note 28.

⁶⁵ For instance, see Ncube *Id.*; Adebambo at el. *supra* note 28; Ncube et al, *supra* note 28; Adebola *supra* note 28.

⁶⁶ Agreement Establishing the African Continental Free Trade Area (AfCFTA), Mar. 21, 2018, https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf

disabilities'.⁶⁷ There are also calls in the academic circles for the infusion of, and the catering for, the gendered dimensions of IP,⁶⁸ which is both a human right and development imperative,⁶⁹ within the proposed IP protocol. If these recommendations are accepted and implemented, they may serve as lee-way to infuse human rights considerations within the regional copyright system. However, such approach will be limited in view of the fact that the IP protocol is being developed and negotiated within the context of regional trade, and it will be focusing more on the core commercial and industrial aspect of copyright.⁷⁰ Like other actions to infuse human rights consideration into the IP system within the context of international trade,⁷¹ the approach will further be limited by strictures of the copyright exclusivity and the existing restrictive L&Es in the African copyright system unless a more open, flexible, and balanced IP protocol is adopted.

To change the state of play, therefore, it is important to look outside the copyright legal framework to the human rights regimes enshrined in international law and national constitutions in Africa and to construct a specific human right to research to match the exercise of copyright by copyright owners, which, as already now over-flogged, often interferes with access to information for research and education in Africa. Adopting the human right approach is important because human right regimes possess remarkable elasticity and flexibilities for the development of 'more precise norms and standards over time'.⁷² As such, human right regimes can provide guidelines for a balanced application and reorganisation of copyright.⁷³ For instance, approaching the access malaise from a human rights perspective may result in the enshrinement of maximum standards for copyright protection within the copyright system and forestall the inclusion of unbridled higher standards in trade agreements by Global North Countries.⁷⁴ It will also infuse greater flexibility, as well as ethical and moral values, in the

⁶⁷ UNECA, et al *Accessing Regional Integration in Africa ARIA IX: Next Steps for the African Continental Free Trade Area* (2019) 131 <<https://repository.uneca.org/bitstream/handle/10855/42218/b11963189.pdf?sequence=1&isAllowed=y>

⁶⁸ Ncube, *Intellectual Property and the AfCFTA*, supra note 64.

⁶⁹ DO Oriakhogba, *Empowering rural women crafters in KwaZulu-Natal: the dynamics of intellectual property, traditional cultural expressions, innovation and social entrepreneurship* 137 SOUTH AFRICAN L. J. 145 (2020); C Musiza & D Oriakhogba, *Emphasising the IP gender gap*, UCT NEWS, (Apr. 26, 2018) <https://www.news.uct.ac.za/article/-2018-04-26-emphasising-the-ip-gender-gap>; J de Beer, et al., *Integrating Gender Perspectives into African Innovation Research*, OPENAIR AFRICA, (Sept., 2017) <https://openair.africa/wp-content/uploads/2018/11/Briefing-Note-Gender-2017-09-21.pdf>.

⁷⁰ UNECA, et al, supra note 67, at. 126.

⁷¹ See, e.g., the limitations in the WTO Doha Declaration on the TRIPS Agreement and Public Health. World Trade Organization, Ministerial Declaration on The TRIPS Agreement and Public Health of 14 November 2001 WT/MIN(01)/DEC/2 41 I.L.M. 755 (2001), https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm.

⁷² Helfer, *Human rights and intellectual property*, supra note 45 at 57.

⁷³ Geiger, *Reconceptualizing the constitutional dimensions of IP*, supra note 20 at 30-52.

⁷⁴ Helfer, *Human rights and intellectual property*, supra, note 45 at 58.

considerations of international copyright normative standards, such as the three-steps tests, for the application of L&Es in international copyright law,⁷⁵ especially within the African context.

A human right approach to the access challenge in Africa is not novel as evident in foregoing discussion, especially in part 1 above. However, as is apparent already, this work focuses on considerations for the development of a specific human right to research as a means of solving the access malaise in Africa. In so doing, the work aligns with the compatibility approach in the sense that it does not seek to project or advocate the supremacy of human right over copyright. Rather, it aims to make copyright whole, albeit through the lens of human right, by canvassing for a specific right to research for researchers, including authors, since copyright already enjoys some form of human right protection. But is the construction of a new human right to research necessary in view of the existing broad right to science and culture, right to freedom of expression, right of access to information, right to education, and right to property (discussed in the next part)? This question is answered in the affirmative for the reasons discussed below.

D. Is a specific right to research in Africa necessary?

Gleaned from the human rights literature, to be recognised as a human right, the nature of the phenomenon, as well as the possible consequences of its recognition as such should be considered. A candidate for human right must, by nature, satisfy the minimum criteria, which often include universality and urgency.⁷⁶ Universality demands that for a claim to acquire the status of a right it must be inherent in all human beings irrespective of time and space.⁷⁷ Urgency is linked to the moral significance of the supposed right. If it protects a value that is intrinsically valuable, rather than being just a means to something else, it satisfies the condition.⁷⁸ Others state this criterion slightly differently. According to Cranston, a ‘human right is something of which no one may be deprived without a grave affront to justice. There are certain deeds which should never be done, certain freedoms which should never be invaded, some things which are supremely sacred’.⁷⁹ The emphasis here is on the paramount importance of the value protected by the supposed right.

As gleaned from the Venice Statement on the Right to Enjoy the Benefits

⁷⁵ Geiger, *Reconceptualizing the constitutional dimensions of IP*, *supra* note 20 at 39-41.

⁷⁶ The criteria are extensively discussed in DM Chirwa & DO Oriakhogba, *Access to the Internet as a Human Right in THE INTERNET, DEVELOPMENT, HUMAN RIGHTS AND THE LAW IN AFRICA* (DM Chirwa & CB Ncube eds., Routledge, 2022) (forthcoming).

⁷⁷ E.g. *see*, M CRANSTON, *WHAT ARE HUMAN RIGHTS?* (Taplinger Publishing Co Inc., 1973); *see also* J DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* (Cornell University, 3rd ed., 2013).

⁷⁸ *See* B Skepys, *Is There a Human Right to the Internet?*, 5 *J. OF POL. & L.* 15, 16 (2012); M Cranston, *Human Rights: Real and Supposed*, in *POLITICAL THEORY AND THE RIGHTS OF MAN* 171 (DD Raphael ed., Indiana University Press, 1967) [hereinafter *Human Rights: Real and Supposed*].

⁷⁹ Cranston, *Human Rights: Real and Supposed Id.* at 174.

of Scientific Progress and its Application,⁸⁰ research, as well as its freedom, is not only a universal phenomenon, it is a common good and will play a significant role in the creation of new knowledge, the development of science and culture, and the advancement of mankind and the society, especially in this era of emerging technologies, including AI, research. As such it readily satisfies the conditions of universality and urgency for it to be regarded as human right. In this regard, also, the right to research does not only possess intrinsic values of being of common good to mankind, it has an instrumental value since it will promote and lead to the realization of the rights of access to information, education, science and culture, and freedom of expression. Moreover, while the right to science and culture, freedom of expression, access to information, education, and property, relate to broader ideals (as shown in the next part), a specific right to research will serve as a mechanism for states to implement their obligation under the international human rights regimes of striking an appropriate balance between authors interest and public access needs in Africa.

Furthermore, the right to research will lead to the enshrinement of a positive user right that will confer researchers (including authors), libraries and archives the capacity to protect and enforce a right of access to information covered by copyright, especially in cases where copyright owners refuse to grant licenses for use of their works, as opposed to relying on mere L&Es in defence to copyright infringement claims.⁸¹ Case law already exist in the Court of Justice of the European Union (CJEU), for instance, where enforceable user right of equal value to copyright were given some recognition.⁸² And these can form useful guide for the construction of a right to research. Indeed, a human right to research will obligate states to respect, protect, and fulfil the right of researchers to access information by refraining from formulating laws and policies that will unjustifiably limit the knowledge space, and form a strong legal infrastructure to support AI and emerging technologies research in Africa. It will also solve the copyright exclusivity challenge to text and data mining within the African context. Moreover, it will serve as a means of implementing Africa's digital transformation strategy, which recognises education as one of the critical sectors that will drive the transformation and research as a key cross-cutting theme linking the foundational pillars of digital innovation and

⁸⁰ United Nations Educational, Scientific and Cultural Organization, Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and its Application, Experts' Meeting on the Right to Enjoy the Benefits of Scientific Progress and its Applications (Jul.16-17, 2009), https://www.aaas.org/sites/default/files/VeniceStatement_July2009.pdf.

⁸¹ Geiger, *Reconceptualizing the constitutional dimensions of IP*, *supra* note 20 at 44 -45

⁸² For instance, *see* Case C-314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* 2014; C-117/13 *Technische Universität Darmstadt v Eugen Ulmer KG* (2014); C-201/13 *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others* (2014); C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH and Others* (2011); C-467/08 *Padawan Case* (2010).

entrepreneurship, among others.⁸³

Importantly, the right to research will ensure a holistic ‘constitutionalisation’⁸⁴ of copyright in Africa since it will ensure a specific right corresponding to the protection which copyright enjoys in the Bills of Rights in African national constitutions,⁸⁵ and in international human rights regimes. The right to research will better interact, as Dessemontet put it, ‘with copyright on the level of constitutional rights rather than mere legislative enactment’.⁸⁶ Moreover, according to Geiger, the existing copyright

exceptions’ restrictive scope and potential technological override already provide arguments for a revision based on fundamental rights, mainly by constructing a right (to research) out of existing fundamental rights such as freedom of information, freedom of art and science, freedom of expression and others. It could even lead, [...]. to inform constitutional reforms since the current constitutional framework for [IP] does not provide the appropriate tools to ensure an inclusive, innovative and creative environment, and that also promotes cultural participation.⁸⁷

Put differently, a human right approach will ensure equality of rights between copyright owners and researchers, libraries and archives, since there is technically no hierarchy of rights within the human rights regime.⁸⁸ In this connection, it should be kept in mind that authors or creators, as users of creative outputs,⁸⁹ also qualify as researchers because research is at the very core of the acts of authorship. Thus, the right to research will enable authors to harness the moral and material benefits of their authorship, in deserving cases, while also allowing them access to information, protected by existing copyright, for the creation of new/derivative works in Africa. However, like Geiger argued, the formulation of a new human right ‘must be approached with care for the same reasons that a balancing of competing [human] rights must be conducted carefully’. Thus, the ‘right to research’ [...] must be

⁸³ Africa Union *The Digital Transformation Strategy for Africa (2020-2030)* (May. 18, 2020), <https://au.int/sites/default/files/documents/38507-doc-dts-english.pdf>.

⁸⁴ Beiter, *Not the African copyright pirate is perverse* note 7; Geiger *Reconceptualizing the constitutional dimensions of IP supra* note 20; AJ Van der Walt & RM Shay, *Constitutional analysis of intellectual property* 17(1) PER/PELJ 52 (2014) [hereinafter *Constitutional analysis of IP*].

⁸⁵ See, e.g., CONSTITUTION art. 40(5), art. 69, art. 260 (2010) (Kenya). CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art. 67, art. 69, 18 Jan. 2014. CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF CONGO, art. 46, XXXX; of the CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA (1999), § 44. S. AFR. CONST., 1996, § 25.

⁸⁶ Dessemontet *supra* note 48, ¶ 22.

⁸⁷ Geiger & Jutte, *Digital Constitutionalism and Copyright Reform, supra* note 20 at 2.

⁸⁸ Generally, see P Ducoulombier, *Interaction between human rights: are all human rights equal?* in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY (C Geiger ed., Edward Elgar, 2015) 39-51.

⁸⁹ Authors or creators are also users of copyright works. See Ncube, *Using Human Rights, supra* note 7 at 119; A Drassinower, *Taking User Rights Seriously*, in IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW 462-479 (M Geist ed., 2005).

properly rooted in and grown out of [...] national and international [human] rights traditions'.⁹⁰

II. HUMAN RIGHTS REGIMES SUPPORTING THE RIGHT TO RESEARCH IN AFRICA

This part is divided into three sections. The first section examines provisions of the international human rights regimes relevant for constructing the right research in Africa. Here, the focus is on the provisions of the UDHR, ICESCR and ICCPR. The second examines regional human rights regimes. Here, key focus will be on relevant provisions of the ACHPR. In discussing provisions of the ACHPR, reliance will be placed on the European Convention on Human Rights (ECHR),⁹¹ and the jurisprudence developed on it. Reliance on the ECHR is justified on the basis of articles 60 and 61 of the ACHPR, which enables implementers of the ACHPR to draw inspiration and guidance from other international human rights regimes. The work will also draw from relevant regional instruments to which African countries are subscribed, such as the Cairo Declaration of the Organization of Islamic Cooperation on Human Rights (Cairo Declaration).⁹² This section will conclude with an examination of relevant provisions of the Bills of Rights in the constitutions of African countries, such as Nigeria, Sierra Leone, South Africa, Zimbabwe, Kenya, Ethiopia, Democratic Republic of Congo, Central African Republic, Egypt, and Tunisia.

A. *International treaties*

A discussion of this nature will necessarily commence with a look at the provisions of the UDHR relevant to the issue of access to information in the copyright context. Accordingly, article 19 guarantees the right of everyone to freedom of expression, which includes the right of access to information framed as the liberty to 'seek, receive and impart information and ideas through any media and regardless of frontiers'. The right of access to information also finds similar expression in article 19(2) of the ICCPR. This right is linked to, and is interdependent with, the right to science and culture recognised under article 27 UDHR. This is so because, as will be apparent shortly, the protection and promotion of this right is important for, and may limit, the realisation of the right to science and culture enshrined in article 27, and vice versa.⁹³

⁹⁰ Geiger & Jutte, *Digital Constitutionalism and Copyright Reform*, *surpa* note 20 at 3.

⁹¹ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ.T.S. No. 5; 213 U.N.T.S. 22. [hereinafter ECHR]

⁹² Organization of Islamic Countries (OIC), Cairo Declaration of the Organization of Islamic Cooperation on Human Rights [hereinafter Cairo Declaration], 1990 and revised in 2020. African members of the OIC are Uganda, Benin, Burkina Faso, Chad, Togo, Tunisia, Algeria, Egypt, Djibouti, Senegal, Sudan, Sierra Leone, Somalia, Comoros, Guinea Bissau, Mali, Nigeria, Niger, Mozambique, Morocco, Libya, Gabon, Gambia, Cameroon, Cote D'Ivoire, and Guinea. See ORGANISATION OF ISLAMIC COOPERATION, MEMBER STATES, <https://www.oic-oci.org/states/?lan=en> (last visited Apr. 2, 2022).

⁹³ General Comment no. 25, *supra* note 31, ¶ 46; Comm. on Eco., Soc. & Cultural Rts, *The Right of Everyone to Benefit from the Protection of the Moral and Material Interests*

The right to science and culture under article 27 UDHR is an amalgam of the rights of everyone to participate freely ‘in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits’; and ‘to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which’ they are the authors.⁹⁴ Historically, article 27 was formulated based on the lessons learnt from the misuse of scientific, and creative output (propaganda) during the World War II. This gave rise to the need to prevent futuristic abuse of copyright and ensure that everyone shares in creativity and access the creative output, while guaranteeing some benefits for authorial ingenuity.⁹⁵ However, being a declaration, the provisions of the UDHR, including article 27, was regarded merely as advisory and aspirational. Nonetheless, the UDHR has now attained the status of customary international law and serves as the most authoritative normative framework for human rights internationally.⁹⁶ Moreover, provisions of article 27 have been relied upon to protect authors rights nationally.⁹⁷

Any doubt in the legal force of the UDHR is removed by the adoption and expansion of its provisions under ICESCR and ICCOPR, which are clearly legally binding human rights treaties. In particular, article 15(1) of the ICESCR contains guarantees which have been collectively referred to as the right to science.⁹⁸ Specifically, article 15(1) recognises the right of every to ‘take part in cultural life’, ‘enjoy the benefits of scientific progress and its application’, and ‘benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which [they are] the author’. To ensure the full realisation of the rights, article 15(2) enjoins state parties to take steps which must ‘include those necessary for the conservation, the development and the diffusion of science and culture’. State parties also ‘undertake to respect the freedom indispensable for scientific research and creative activity’,⁹⁹ and to encourage and develop ‘international contacts and co-operation in the scientific and cultural fields’.¹⁰⁰

The normative scope and effect of these rights, as they relate to the access challenge by copyright, have formed the focus of UN Special Rapporteur

Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (Art. 15, Para. 1 (c) of the Covenant), ¶ 5, E/C.12/GC/17 (Jan. 12, 2006). See also Chapman *supra* note 44; Dessemontet *supra* note 45 at 7-10; Faridah Shaheed 2014 *supra* note 6, ¶ 4.

⁹⁴ Faridah Shaheed 2014 *supra* note 6, ¶ 4.

⁹⁵ Chapman, *supra* note 45 at 6; Torremans *supra* note 45 at 273.

⁹⁶ Chapman, *supra* note 45 at 9.

⁹⁷ Dessemontet, *supra* note 48 at 3-4.

⁹⁸ Faridah Shaheed 2014 *supra* note 6, ¶ 4.

⁹⁹ Article 15(3) of the ICESCR. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966. 993 U.N.T.S. 3; S. Exec. Doc. D, 95-2 (1978); S. Treaty Doc. No. 95-19; 6 I.L.M. 360 (1967).

¹⁰⁰ Article 15(4) of the ICESCR. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966. 993 U.N.T.S. 3; S. Exec. Doc. D, 95-2 (1978); S. Treaty Doc. No. 95-19; 6 I.L.M. 360 (1967).

Reports,¹⁰¹ the ESC Committee General Comments,¹⁰² and academic literature.¹⁰³ One thread that runs through the Reports and the General Comments is that the relationship between the rights contained in article 15 is ‘at the same time mutually reinforcing and reciprocally limitative’.¹⁰⁴ Put differently, the right to participate in cultural life has an intrinsic inter-linkage with the right to benefit from scientific progress and its application, and the rights of authors to enjoy the moral and material benefits of their creativity. The enjoyment of each of these rights is dependent on and linked to the realisation of the others. Collectively, the exercise of these rights is relevant to the enjoyment and promotion of the right to access information and the right to education.

Taking the right to participate in cultural life first, in article 15(1)(a), the ESC Committee has identified the availability of cultural goods and services, including through libraries, that are open for everyone to enjoy and benefit from, and access to cultural goods, especially for persons with disabilities, as some of the core normative contents of the right. Thus, states are under a duty not to interfere with the rights of everyone to access cultural goods. Rather, states are obligated to take positive actions geared towards realising this right. However, the right to freely participate in cultural life is not to be construed as a guarantee for the engagement in any action that is destructive or unjustifiably limiting of other rights recognised in the ICESCR, such as the rights of authors to enjoy the moral and material benefits of their creativity. The objective is always to strike an appropriate balance between these rights.¹⁰⁵ To this end, while examining the right to culture and its implementation within the context of copyright policy-making, the UN Special Rapporteur – Faridah Shaheed – recommended the encouragement by states of the use of open licenses, such as those developed by Creative Commons, and the expansion of L&Es, ‘to empower new creativity, enhance rewards to authors, increase educational opportunities, preserve space for non-commercial culture and promote inclusion and access to cultural works’.¹⁰⁶

With reference to article 15(1)(b), which covers the right to science, the ESC Committee holds that the right generally covers freedoms and entitlements. While the freedoms ‘include the right to participate in scientific progress and enjoy the freedom indispensable for scientific research’, the

¹⁰¹ Faridah Shaheed 2014 *supra* note 5; Faridah Shaheed 2012, *supra* note 18.

¹⁰² General Comment no. 25, *supra* note 31; General Comment 17, *supra* note 93; Comm. on Eco., Soc. & Cultural Rts, *General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)* E/C.12/GC/21 (Dec. 21, 2009) (hereafter *General Comment 21*).

¹⁰³ For instance, see KD Beiter, *Where have all the scientific and academic freedoms gone? And what is ‘adequate for science’? The right to enjoy the benefits of scientific progress and its applications* 52(2) ISRAEL L. REV. 233 (2019).

¹⁰⁴ General Comment 17, *supra* note, 93, ¶ 4.

¹⁰⁵ Faridah Shaheed 2012, *supra* note 18.

¹⁰⁶ Faridah Shaheed 2012, *supra* note 17 at 1.

entitlements comprise the ‘right to enjoy, without discrimination, the benefits of scientific progress’.¹⁰⁷ Specifically, the core elements of the right include the liberty of everyone to have equal access to scientific applications, especially when the applications of science are instrumental for the realisation of other economic, social, and cultural rights, such as the right to education;¹⁰⁸ the right to an enabling environment that fosters the conservation, development, and diffusion of science and technology; and the right to be afforded the opportunity to contribute to the scientific enterprise and to enjoy the liberty inevitable for scientific research.¹⁰⁹

The core obligations of the state to respect, promote and fulfil the right to science include the duty to eliminate laws, policies, and practices that unjustifiably limit access to science-related information, scientific knowledge, and its application; to ensure access to those applications of scientific progress that are critical to the realisation of other economic, social and cultural rights, such as the right to education.¹¹⁰ To this end, states are reminded of the social dimensions of copyright, and their duty to prevent unreasonably high costs of learning materials and school books. They are, thus, encouraged, through their national regime and international commitments on copyright, to secure the social functions of copyright in line with their human rights obligations. To bring this about, the ESC Committee enjoins states to strike an appropriate balance between copyright and ‘the open access and sharing of scientific knowledge and its applications, especially those linked to the realization’ of the right to education.¹¹¹

With regards to the rights of authors to enjoy the moral and material benefit emanating from their authorial ingenuity, under article 15(1)(c), it is important to keep in mind that ‘author’ (also known as creators), for the purpose of the right, is understood in a narrow sense to mean individuals or group of individuals, excluding corporations, as only individuals or group of individuals are regarded as right holders.¹¹² Also, it should be noted that the recognition of copyright under article 15(1)(c) does not mean the human right protection of copyright as defined in international IP and copyright treaties. Rather, article 15(1)(c) recognises in a narrow sense the entitlements of authors for their creative endeavours.¹¹³ This recognition reflects the linkage of the author's rights to their property right (under articles 17 of the UDHR and 14 of the ACHPR), and the right to adequate remuneration as workers (under article 7(a) of the ICESCR).¹¹⁴ Furthermore, article 15(1)(c) recognises authors moral rights in a similar fashion as recognized under national copyright regimes: that is, authors’ right to claim authorship and

¹⁰⁷ General Comment 25, *supra* note 31, ¶ 16.

¹⁰⁸ General Comment 25, *supra* note, ¶¶ 17-18.

¹⁰⁹ Faridah Shaheed 2012 *supra* note 17.

¹¹⁰ General Comment 25, *supra* note, ¶ 52.

¹¹¹ General Comment 25, *supra* note, ¶ 62.

¹¹² General Comment 17, *supra* note 93 ¶ 7.

¹¹³ Faridah Shaheed 2014 *supra* note 5. ¶ 26.

¹¹⁴ General Comment 17, *supra* note 93 ¶.

object to the mutilation, distortion, modification, and derogatory use of their creative output.¹¹⁵

In general, article 15(1)(c) focuses on the social dimensions of copyright, which includes providing a human rights platform for authors to effectively bargain in their contractual dealings with investors and users of their creative output, and the duty of authors to not exercise their copyright in a manner that prevents the realisation of the rights to science and culture, access to information and education. To ensure the realisation of article 15(1)(c), states are obligated to ensure that authors are not deprived of their moral right, and not unreasonably and unjustifiably deprived of remuneration from the use of their works. Also, states are obliged to ensure that there is adequate judicial and/or administrative mechanism for remedies for unauthorised and unjustifiable exploitation of authors' creative output. In so doing, however, state parties must strike appropriate balance between authors' private interest and the public concern in promoting access to information for research and education. In other words, states must ensure that their copyright regime do not impede their obligation to respect, protect and fulfil other economic, social and cultural rights,¹¹⁶ such as the right to education, and the right to science and culture

B. Regional Treaties

The ACHPR, in article 9(1), recognises the right of everyone to receive information. This provision is yet to be construed within the copyright context by the judicial and implementing mechanism under the ACHPR. However, the African Commission on Human and Peoples Rights (African Commission) recently underscored the importance of this right to the actualisation of other human rights, such as the rights to education and culture.¹¹⁷ It then enjoins states to refrain from interfering with people's rights 'to seek, receive and impart information through any means of communication and digital technologies', except the 'interference is justifiable and compatible with international human rights law and standards'.¹¹⁸

In connection to the foregoing, states are required to not obligate ISPs 'to proactively monitor content which they have not authored'. They are also required to prevent ISPs from interfering with 'the free flow of information'; and to obligate ISPs to 'mainstream human rights safeguards into their processes' and adopt mitigation strategies to address all restrictions to access to information online. However, states may only limit the right of access to

¹¹⁵ General Comment 17, *supra* note 93 ¶ 13.

¹¹⁶ General Comment 17, *supra* note 93 ¶¶ Paras 30-35.

¹¹⁷ African Commission on Human and Peoples' Rights, Declaration of Principles on Freedom of Expression and Access to Information in Africa, adopted at ACHPR 65th Ordinary Session (Oct. 21-Nov. 10, 2019) https://www.achpr.org/public/Document/file/English/Declaration%20of%20Principles%20on%20Freedom%20of%20Expression_ENG_2019.pdf [hereinafter *Declaration of Principles*]. *Declaration of Principles*, Principle 1.

¹¹⁸ *Declaration of Principles*, *supra* note 117, Principle 38.

information if the limitation is prescribed by law, serves a legitimate aim, and is a necessary and an appropriate means of serving the stated goals in a democratic society.¹¹⁹ To interpret these provisions within the copyright context, the African Commission is within its powers, in terms of articles 60 and 61 of the ACHPR, to rely on the jurisprudence developed under article 10 of the ECHR.¹²⁰

Like similar right in article 19 of the UDHR and article 19(2) ICCPR, article 9(1) ACHPR is linked to, and interdependent with, the right to science and culture as enshrined under the UDHR and ICESCR (discussed above). The right to cultural participation is recognised under article 17(2) of the ACHPR, within the framework of the right to education, and the principles espoused in the ESC General Comment 21 will have same effect on its provision. However, the ACHPR does not have guarantees equivalent to those enacted in article 15(1)(b) and (c) ICESCR. Nonetheless, 27 African countries, who are members of the Organization of Islamic Countries (OIC), subscribed to the Cairo Declaration, which has provisions similar to article 27 UDHR and article 15 ICESCR. Specifically, article 17 of the Cairo Declaration stipulates that

- a. Everyone shall have the right to enjoy the benefits of his/her scientific, intellectual, literary, artistic or technical production, and protection of the moral and material interests stemming therefrom.
- b. States shall ensure that benefits of such scientific progress and its application are also enjoyed by everyone, including through the encouragement and development of international cooperation in the scientific and cultural fields.

Interpretation of the above provisions can draw from the principles espoused in the ESC General Comments discussed above. In addition, African countries are bound by those provisions of the UDHR and the ICESCR by virtue of their ratification/accession of the instruments. Thus, the principles espoused in the ESC Committees' General Comments on the right to science are relevant within the African context.

Moreover, the authorial rights (copyright) recognised under articles 27 UDHR, 15 ICESCR, and 17 Cairo Declaration, can be accommodated under article 14 of the ACHPR, which guarantees the right to property. In terms of article 14 of the ACHPR the property right may only be expropriated in the

¹¹⁹ *Declaration of Principles*, *supra* note 117, Principle 39.

¹²⁰ Among other things, article 10 of the Euro. Con. Hum. Rts provides that "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." This provision has been interpreted and applied within the copyright context. ECHR, *supra* note 91, art. 10. *See* Neij and Sunde Kolmisoppi v Sweden, Eur. Ct. H. R., App. No. 40397/12 (19 February 2013); *Ashby Donald and Others v France*, Eur. Ct. H. R., App. No. 36769/08 (10 January 2013); *Socit Nationale De Programmes FRANCE 2 v France*, App. No. 30262/96 (Eur. Comm'n H.R. Dec. & Rep. Jan. 15, 1997); *N.V. Televizier v The Netherlands*, App. No. 2690/65 (Eur. Comm'n H.R. Dec. & Rep. Oct. 3, 1968).

public interest and in accordance with appropriate laws. Indeed, similar provisions in article 1 of the First Protocol to the ECHR¹²¹ have severally been interpreted to extend to copyright, and the jurisprudence continue to highlight and recognise the tension between copyright and other human rights, such as the right of access to information.¹²² According to Manteghi, although the European Court of Human Right (ECtHR) ‘has acknowledged the conflict between copyright and the right to information, the balancing test, the exhaustive list of clear criteria which would be evaluated when balancing competing rights, has yet to be developed’.¹²³ Thus, in relying on the ECtHR interpretation of the right to property within the copyright context, however, it must be kept in mind that the protection extends to the social function of copyright.¹²⁴ In this regard, therefore, the principles developed by the ESC Committee in their interpretation of the authorial rights guaranteed under UDHR and ICESCR would be useful to enrich the property rights for the construction of a specific right to research in Africa.

C. National Bills of Rights

The discussion in this sub-part is divided into five sections. The first section focuses on countries from West Africa. The second examined the situation in countries from Southern Africa. The third section discusses the constitutions of Eastern African countries. The fourth examines countries from Central Africa, while the fifth section focuses on North Africa.

1. West Africa

Nigeria

The bill of rights enshrined in chapter four of the Constitution of the Federal Republic of Nigeria, 1999 (CFRN) does not contain rights to education, and science and culture including authorial rights, as provided for under the UDHR and ICESCR. Matters of science, culture and education are framed as fundamental objectives and directive principles of state policy under chapter two of the CFRN. The Nigerian government is obligated to direct its policies towards creating equal and adequate educational opportunities at all levels. This obligation includes the promotion of science and technology.¹²⁵ Also, the government has a duty to protect, preserve, and promote Nigerian cultures that enhance human dignity; and to encourage the development of technological and scientific studies that enhance cultural values in Nigeria.¹²⁶ Although Chapter II of the CFRN is non-justiceable

¹²¹ Council of Europe, Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, E.T.S. 9.

¹²² *Neij and Sunde Kolmisoppi supra* note 112; *Ashby Donald and Others supra* note 112; *Balan v. Moldova*, App. No. 19247/03 Eur. Ct. H. R. (2008); *Melnychuk v Ukraine*, App. No. 28743/03 Eur. Ct. H. R. (2005); *Dima v. Romania*, App. No. 58472/00 Eur. Ct. H. R. (2005); *Aral, Tekin and Aral v Turkey*, App. No. 24563/94 Eur. Ct. H. R. (1998); *A.D. v the Netherlands*, App. No. 21962/93, Eur. Ct. H. R. (1994).

¹²³ Manteghi *supra* note 5 at 701.

¹²⁴ Geiger, *Reconceptualizing the constitutional dimensions of IP*, *supra* note 20 at 25.

¹²⁵ CONSTITUTION OF NIGERIA (1999) § 18.

¹²⁶ CONSTITUTION OF NIGERIA (1999) § 21.

THE RIGHT TO RESEARCH IN AFRICA

directly,¹²⁷ unless indirectly through other innovative means such as under a law made to implement its stipulations,¹²⁸ these above provisions may offer a foundation for the promotion of the right to research since the right is a means of promoting culture, science and education, as already now over-flogged

Specifically, however, the Bill of Rights recognises the right to property in Nigeria. Accordingly, no

moveable property, or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purpose prescribed by a law that, among other things – (a) requires the prompt payment of compensation therefore; and (b) gives to any person claiming such compensation a right of access for the determination of his interest in the property and the amount of compensation to a court of law or tribunal or body having jurisdiction in the part of Nigeria.¹²⁹

So far, judicial interpretation of the above provision within the context of copyright in Nigeria stops at the point where copyright is recognised as accommodated under the phrase ‘moveable property’ which cannot be appropriated without compensation.¹³⁰ As such, the interpretation has only focused on the economic aspect of copyright as property, without interrogating the social dimension of the right especially as it relates to the realisation and fulfilment of other human rights such as the right to access information which forms part of the right to freedom of expression under section 39(1) of the CFRN. If read with the provision in section 39(1), guided by the principles developed in the construction of similar provisions from other jurisdiction, such as South Africa, discussed below, the property clause in the CFRN would offer a useful guide in the formulation of the right to research. This is so because such approach at interpreting the property clause will highlight both the economic and social dimensions of copyright.

Sierra Leone

Like Nigeria, the Bill of Rights in Sierra Leone does not contain rights to

¹²⁷ CONSTITUTION OF NIGERIA (1999) § 6(6)(c) (It provides that the “judicial powers vested in accordance the foregoing provisions of this section – (c) shall, not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution”); *see* *Abacha v Fawehunmi* (2000) 6 NWLR Pt 600 228 (Nigeria); *FRN v Anache* (2004) 14 WRN 1 (Nigeria); *Okojie v Attorney general of Lagos State* (1981) 2 NCLR 337 (Nigeria).

¹²⁸ *Attorney General of Ondo State v Attorney General of the Federation* (2002) 9 NWLR (Pt 722) 222 (Nigeria). *Generally, see* FO Osador & DO Oriakhogba, *Protecting socio-economic rights in Nigeria: any lesson from South Africa?* 7(1) *Ebonyi St. Uni. L. J.* 232 (2016).

¹²⁹ CONSTITUTION OF NIGERIA (1999) § 44 (1).

¹³⁰ *See* *Music Copyright Society Nigeria v Compact Disc Technology Ltd*, [2018], SC 425/2010 (Nigeria); *Adeokin Records v MCSN*, [2018], SC 336/2008 (Nigeria).

education, science and culture, including authorial rights, as provided for in the UDHR, ICESCR and the ACHPR. The right to education, science and culture in the Constitution of Sierra Leone 1991 (as amended) are framed as Fundamental Principles of State Policy in Chapter 2 thereof, like that of Nigeria discussed above. Accordingly, the State is enjoined to provide the necessary facilities, among other things, for education as and when practicable in Sierra Leone.¹³¹ The obligation to promote science and culture is framed within the broader context of the national cultural objective. Thus, to enhance national culture, the state is obligated to promote Sierra Leonean culture which includes arts, science and education. Unfortunately, like its Nigerian counterpart, these provisions are non-justiceable as expressly stated in section 14 of the Constitution as follows:

[...] the provisions contained in this Chapter shall not confer legal rights and shall not be enforceable in any court of law, but the principles contained therein shall nevertheless be fundamental in the governance of the State, and it shall be the duty of Parliament to apply these principles in making laws

Nonetheless, the Constitution, like its Nigerian counterpart, recognises the freedom of expression and right to property. Specifically, the Constitution guarantees the rights of everyone to freedom of expression, which includes the right to receive and impart information, and academic freedom in learning institutions. This right can be hindered with the consent of the person. It can also be abrogated by a law, which is reasonably justifiable in a democratic society, in the interest of public order, public health and for protecting the right and freedom of others.¹³² Also, the Constitution prohibits the compulsory acquisition of property of any description, or an interest in or right over such property. However, the acquisition is allowed if it is in the public benefit and for the promotion of public welfare, is reasonably justifiable in view of the hardship that may occur to the property owner, and is done in pursuant to a law permitting the acquisition, which must provide for the compensation of the property owner.¹³³

2. Southern Africa

South Africa

An attempt to include copyright (IP generally), especially from the corporate investment and trade perspective, was rejected by the South African Constitutional Court. The attempt came in form of an objection to the application by the South African parliament seeking certification of the Constitution of the Republic of South Africa, 1996 (CRSA). The objection was made by Association of Marketers and others. Relying on the recognition of IP in the UDHR and ICESCR, the objectors prayed the Constitutional Court to refuse the certification of the CRSA because it failed to recognise

¹³¹ CONST. OF SIERRA LEONE (1991) § 9(c).

¹³² CONST. OF SIERRA LEONE (1991) § 25.

¹³³ CONST. OF SIERRA LEONE (1991) § 21.

the right to IP in the Bill of Rights.¹³⁴ A look at the case of the objectors shows that they were interested in a right to IP that caters to all the features of IP as protected in the existing IP regimes in South Africa.¹³⁵ The Constitutional Court rejected this objection on the ground that the right to IP, including copyright, is not a universally recognised right. According to the Constitutional Court, ‘although it is true that many international conventions recognise a right to [IP], it is much more rarely recognised in regional conventions protecting human rights and in the constitutions of acknowledged democracies’. The constitutional Court further based its decision on the fact that IP, including copyright, is covered by the property clause in section 25 of the CRSA.¹³⁶

Viewed from the lenses offered by the ESC Committee General Comments and UN Rapporteur Reports examined 4.1 above, the Constitutional Court’s decision cannot be faulted. This is so because it is established that the recognition afforded copyright in international human rights instruments is limited to the authorial rights of natural persons aimed at achieving the social functions of copyright, and does not include the corporate investment and trade dimensions of copyright. Thus, it is appropriate to contend that juristic persons cannot seek to enforce a right to copyright under the CRSA since, by its nature, the right as recognised, is limited to natural authors in South Africa.¹³⁷ Moreover, the authorial right is interlinked with the rights to science and culture and freedom of expression. As such, states are duty bound to formulate regimes that appropriately balances authorial rights, on the one hand, and the other human rights, on the other hand, in a manner that the exercise of one does not prevent the realisation of the other.

Similarly, within the South African context, although some scholars believe that section 25 of the CRSA recognises a right to IP, including copyright, in its entire connotation,¹³⁸ there is more support for the proposition that the recognition afforded copyright as human right is aimed at the pursuit of the public interest objectives espoused in the CRSA.¹³⁹ Indeed, some provisions in the CRSA further support this view. Accordingly, the recognition afforded copyright, as property, under section 25 CRSA may be expropriated, in terms of a general law, in the public interest, and subject to appropriate compensation. The right to freedom of expression recognised under section 16 of the CRSA includes the right to access information,

¹³⁴ *In re Certification of the Constitution of the RSA* 1996 (4) SA 744 (CC) (S. Afr.).

¹³⁵ OH Dean, *The case for Recognition of Intellectual Property in the Bill of Rights* 60 J. OF CONTEMP. ROMAN-DUTCH L. 105 (1997).

¹³⁶ *In re Certification*, *supra* note 134, ¶ 75.

¹³⁷ See S. AFR. CONST., 1996 § 8(4) (It provides “A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person”).

¹³⁸ O Dean, *Intellectual property and the constitution*, THE ANTEN MOSTERT CIP, (Jul. 14, 2015) <https://blogs.sun.ac.za/iplaw/2015/07/14/intellectual-property-and-the-constitution/>.

¹³⁹ AJ Van der Walt & RM Shay, *Constitutional analysis of IP*, *supra* note 84.

freedom of artistic creativity, and freedom of scientific research.¹⁴⁰ Sections 30 and 31, read together, recognises the rights of participation in the cultural life of one's chosen community. Undoubtedly, the foregoing provisions, taken jointly, can be regarded as a domestication of the right to freedom of expression, and the right to science and culture, including authorial right, recognised under the UDHR, ICCPR and ICESCR. Thus, within the context of this work, an interpretation of the CRSA provisions will benefit from the principles espoused in the ESC General Comments and UN Rapporteur Reports examined in 4.1 above.

The linkages between IP, including copyright, and the right to freedom of expression, under section 16 of the CRSA, in particular, and the impact of each on the other, has been recognised by South African courts. Thus, there is some guidance to also draw from the South African jurisprudence when constructing a right to research in Africa. In a case involving trademark,¹⁴¹ the Constitutional Court encouraged the reading of the Trade Marks Act (TMA) through the prism of the provisions of the CRSA, especially those relating to freedom of expression. According to the Constitutional Court, such exercise would inevitably involve a 'weighing-up of the constitutional safeguard of free expression [...] against the right to [IP]'.¹⁴² Thus, held the court, a party seeking 'to oust an expressive conduct protected under the [CRSA] must, on the facts, establish a likelihood of substantial economic detriment to the claimant's [IP]'.¹⁴³

Similar approach has also been adopted in the copyright context. In the first important case in this regard,¹⁴⁴ the defendant's attempt to rely on the exercise of the right to freedom of expression as a defence to the claimant's copyright infringement claim was rejected by the courts because the defendant's unauthorised use of the claimant's work was for commercial purpose, a right which only the copyright owner or anyone authorised by them could exercise. By implication, it appears the court would have upheld the defendant's freedom of expression defence under section 16 of the CRSA if their use was non-commercial.

Another interesting case further exemplifies the judicial approach to the linkage between copyright and freedom of expression.¹⁴⁵ Briefly put, the fact of the case involves a contract between the respondent and the applicant wherein the respondent contracted to produce a documentary for a fee for the applicant and the copyright in the documentary was assigned to the applicant.

¹⁴⁰ S. AFR. CONST., 1996 §§ 16(1) (b), (c) and (d).

¹⁴¹ *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).

¹⁴² *Laugh It Off Promotions Id.*, ¶ 18.

¹⁴³ *Laugh It Off Promotions Id.*, ¶ 56.

¹⁴⁴ *National Soccer League v Gidani (Pty) Ltd.* 2014 JDR 0523 (GSJ). See also *Moneyweb (Pty) Limited v Media 24 Limited and Another* [2016] ZAGPJHC 81.

¹⁴⁵ *South African Broadcasting Corporation SOC Ltd v Via Vollenhoven and Appollis Independent CC and Others* (13/23293) [2016] ZAGPJHC 228.

Attempts by the respondent to use the work without the applicant's permission led to this suit. Relying on section 16 of the CRSA, the respondent urged the court to read an exploitation right into the exceptions provided under the South Africa Copyright Act.¹⁴⁶ In essence, the respondent wanted the court to rule that the failure of copyright owners to exploit their work should be an exception to copyright infringement against any user who uses the work in such circumstances. The respondents claim that such an exception aligns with the user's right to freedom of expression guaranteed under the CRSA.

In rejecting the respondent's contention, the court acknowledged the established approach of reading IP laws in South Africa through the prism of the CRSA but ruled that such reading is not an invitation to amend the Copyright Act, especially in the context of the case where the respondent contracted out their copyright in the documentary in exchange of a fee duly paid by the applicant. From a human rights perspective, the court's ruling would imply that authors that derived material benefit from their creative output by contracting out their economic right relating to that output cannot rely on claims to the freedom of expression to exploit the work without the authorization of the new owner, except such exploitation falls within the recognised L&Es in the South African Copyright Act. A specific human right to research will assist such a creator, especially where the work is being exploited for non-commercial research purposes.

Zimbabwe

Like South Africa, the Bill of Rights in the Constitution of Zimbabwe 2013 makes provision for the right to science and culture, the right to property, and freedom of expression which can form useful guidance for the construction of a right to research in Africa, especially when construed in line with the principles enunciated in the ESC General Comments discussed in 4.1 above. The right to science is protected within the broad freedom of expression, while the cultural right is enshrined as a stand-alone right. The right of access to information forms part of the broad freedom of expression, and as a free-standing right under the Constitution, like the right to property.

In terms of section 61 of the Constitution, freedom of expression guaranteed therein includes the liberty of artistic creation, creativity, scientific research and academic freedom, and the right to receive, seek and communicate information.¹⁴⁷ Within the context of this work, the right to receive, seek and communicate information should be read along with the specific recognition of the right to access 'any information held by any person, including the State, in so far as the information is required for the exercise or protection of a right'.¹⁴⁸ Also, the constitutional guarantee is specifically made of the right of everyone to participate in their cultural life

¹⁴⁶ COPYRIGHT ACT 98 of 1978 (S. Afr.).

¹⁴⁷ CONST. OF ZIM., (2013) § 61.

¹⁴⁸ CONST. OF ZIM., (2013) § 62(2).

provided the right is not exercised to interfere with other rights recognised in the Bill of Rights.¹⁴⁹

Further, the Constitution recognizes the right of everyone to hold, acquire, lease, use, occupy, transfer or ‘dispose of all forms of property, either individually or in association with others.’¹⁵⁰ Here, the property is defined to mean ‘property of any description and any right or interest in property’.¹⁵¹ Undoubtedly, this definition is broad enough to cover IP, including copyright, in view of the interpretation that was given to similar property clauses under the ECHR considered in 4.2 above. That being said, the Constitution prohibits the deprivation of the right to the property except if such deprivation is done in the public interest, and pursuant to a law of general application providing for appropriate compensation to the property owner, among others.¹⁵²

3. East Africa

Kenya

Like the UDHR and the ICESCR, the Kenyan Constitution recognizes the right to science and culture, including authorial rights, and the right to access to information. The right to science, including authorial rights, is recognised within the framework for the protection of freedom of expression, while cultural life is guaranteed under the right to language and culture. The right to access information is protected under freedom of expression and under a dedicated provision.

Accordingly, article 33(1) of the Kenyan Constitution recognizes the rights of everyone to freedom of expression, including freedom of artistic creativity and scientific research. Also, the Constitution guarantees the rights of everyone to freely participate in the cultural life of their communities.¹⁵³ Furthermore, in terms of article 33(1)(a), the right to receive or impart information or ideas is recognized as forming part of the freedom of expression in Kenya. This right must be read with the specific right of everyone to access ‘information held by another person and required for the exercise or protection of any right or fundamental freedom’.¹⁵⁴

Like the ACHPR, the Kenyan Constitution recognizes the right of everyone to acquire and own property of any description and in any part of Kenya. This right cannot be abrogated or limited, except in the public interest or for the public purpose, subject to payment of adequate compensation to the owner of the property.¹⁵⁵ Article 260 of the Kenyan Constitution defines property to include IP. Specifically, the Kenyan Constitution obligates the

¹⁴⁹ CONST. OF ZIM., (2013) § 63.

¹⁵⁰ CONST. OF ZIM., (2013) § 71(2).

¹⁵¹ CONST. OF ZIM., (2013) § 71(1).

¹⁵² CONST. OF ZIM., (2013) §§ Section 71(3) & (4).

¹⁵³ CONSTITUTION ART. 45, (2010) (Kenya).

¹⁵⁴ CONSTITUTION ART.35(1)(b) (2010) (Kenya).

¹⁵⁵ CONSTITUTION ART. 40(1), (2), (3) (2010) (Kenya).

state to protect the IP rights of Kenyans,¹⁵⁶ and to ‘protect and enhance [IP] in, and indigenous knowledge of, biodiversity and the genetic resources of the communities’ in Kenya.¹⁵⁷

The foregoing provisions and their linkage and implication on the right to access information, within the copyright context, was pronounced upon by the Kenyan Supreme Court (KSC) in the broadcasting rights copyright case of *Communications Commission of Kenya & Ors. v Royal Media Services Limited & Ors.*¹⁵⁸ In that case, the KSC rejected the claims of some group of broadcasters that a regulation by the broadcast regulator in Kenya which sought to make aspects of their broadcast signal accessible to the public was an infringement of their copyright. In rejecting the claim, the KSC noted that the regulation was in the public interest and was important for the realisation of the right to access information.¹⁵⁹ The KSC relied on this ruling to expand the fair dealing provision in the Kenyan Copyright Act¹⁶⁰ to read like fair use.¹⁶¹

Importantly, the KSC upheld the decision of the Kenyan High Court, which held that a case involving the violation of [IP] rights could not be addressed by a petition to enforce fundamental rights and freedoms, ‘because there is a specific legal regime established by law to address [IP] rights’ in Kenya.¹⁶² By implication, the position in the General Comments and Reports, examined above, that the protection of copyright under the human rights regime is not synonymous with its protection under copyright law because human rights regime are focused on the social dimensions of copyright as against its corporate investment and trade perspectives finds support in the KSC’s decision.

Ethiopia

The Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution) does not contain the right to science as enshrined in the UDHR and ICESCR. However, it has stipulations relating to the right to culture. In this regard, it obligates the state to “protect and preserve historical and cultural legacies, and to contribute to the promotion of the arts” among other things.¹⁶³ The right of access to information and the liberty of artistic creativity are recognised in Ethiopia under the right to freedom of expression. Accordingly, the FDRE Constitution, guarantees to everyone the freedom of artistic creativity, and the liberty to ‘seek, receive and impart information and

¹⁵⁶ CONSTITUTION ART. 40(5) (2010) (Kenya).

¹⁵⁷ CONSTITUTION ART.69(1)(c) (2010) (Kenya).

¹⁵⁸ *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR (Kenya).

¹⁵⁹ *Communications Commission of Kenya v Royal Media Services Limited Id.* at paras 210-258.

¹⁶⁰ COPYRIGHT ACT No. 12 (2001) (Kenya).

¹⁶¹ VB Nzomo, *In the public interest: how Kenya quietly shifted from fair dealing to fair use*, *WIPO-WTO Colloquium Papers* 1-12 (2016).

¹⁶² *Communications Commission of Kenya*, *supra* note 156, ¶ 213.

¹⁶³ CONST. OF THE FED. DEM. REP. OF ETH. (1995) art. 41.

ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media' of their chosen.¹⁶⁴ These rights can, however, be legally limited in order to protect the reputation and honour of others, among other things.¹⁶⁵ The interrelationship and interdependence which the right of freedom of expression shares with copyright within the context of access to information for education in Ethiopia has been addressed extensively elsewhere.¹⁶⁶ It suffices now to note that the prevailing view in this regard draws from the established position in international human rights jurisprudence as examined in 4.1 above.

Also, the FDRE Constitution recognises the right of everyone to own private property. This right includes the freedom to 'acquire, to use and, in a manner compatible with the rights of other citizens, to dispose of such property by sale or bequest or to transfer it otherwise'.¹⁶⁷ For purpose of this provision, the FDRE Constitution defines private property to mean

any tangible or intangible product which has value and is produced by the labour, creativity, enterprise or capital of an individual citizen, associations which enjoy juridical personality under the law, or in appropriate circumstances, by communities specifically empowered by law to own property in common.¹⁶⁸

Like similar rights in the instruments examined so far, the FDRE Constitution allows the state to expropriate private property in the public interest subject to the payment of compensation commensurate to the property in question.¹⁶⁹ It is established by the literature in Ethiopia that these stipulations apply equally to IP, and copyright in particular.¹⁷⁰

Examining the provision within the context of conversations around the impact of copyright on access to information for tertiary education and human development in Ethiopia, Hirko noted that 'a limitation intended for access to learning materials at all levels of education can be justified on the basis of a public interest consideration embodied in a law' under the FDRE Constitution.¹⁷¹ The expert noted further that in the context of copyright, expropriate of private property under the FDRE Constitution 'could take the form of a non-statutory compulsory licensing or a state's total acquisition of

¹⁶⁴ CONST. OF THE FED. DEM. REP. OF ETH. (1995) arts. 29(2) & (3).

¹⁶⁵ CONST. OF THE FED. DEM. REP. OF ETH. (1995) art. 29(6).

¹⁶⁶ M Addo, *Legislative protection of property rights in Ethiopia: an overview*, 7(2) MIZAN L. REV. 165 (2013); Hirko, *The implications of TRIPs' criminal provisions* *supra* note 12; Hirko *Rethinking Copyright*, *supra* note 7; Hirko, *Copyright and Tertiary Education*, *supra* note 7 at 265-268.

¹⁶⁷ CONST. OF THE FED. DEM. REP. OF ETH. (1995) art. 40(1).

¹⁶⁸ CONST. OF THE FED. DEM. REP. OF ETH. (1995) art. 40(2).

¹⁶⁹ CONST. OF THE FED. DEM. REP. OF ETH. (1995) art. 40(8).

¹⁷⁰ Hirko, *The implications of TRIPs' criminal provisions*, *supra* note 13; Hirko *Rethinking Copyright*, *supra* note 7; Hirko *Copyright and Tertiary Education* *supra* note 7; B Haile, *Human rights perspective of intellectual property: a few lessons for Ethiopia* 1(1) ETHIOPIAN J. OF LEGAL EDU. 41 (2008); Addo, *supra* note 166.

¹⁷¹ Hirko, *Copyright and Tertiary Education*, *supra* note 7 at 269.

the right for public purposes'. In this regard, argued Hirko, the 'sole governing rule is the requirement of public purpose or interest to warrant the action. For an execution of the envisaged expropriation, the measures should be transparent and in accordance with the appropriate legal or administrative rules'.¹⁷²

In summary, the FDRE Constitution offers support for the construction of a specific right to research through its guarantee of the right to culture, freedom of expression including the right of access to information and the liberty of artistic creativity, the right to private property. An interpretation of these rights, to construct a right to research, will further draw from the principles espoused in the jurisprudence that developed from the international instruments examined in 4.1 and 4.2 above. Indeed, this approach finds support in the FDRE Constitution, which permits the interpretation of its Bill of Rights in a manner that conforms to 'the principles of the [UDHR]], International Covenants on Human Rights and International instruments adopted by Ethiopia'.¹⁷³

4. Central Africa

Congo DRC

The Constitution of the Democratic Republic of Congo, 2005 (Congo DRC Constitution) contains interesting provisions in its Bill of Rights that can form useful guidance for the construction of a human right to research in Africa. The Bill of Rights in the Congo DRC Constitution is contained in Title II thereof and is categorised into civil and political rights (Chapter 1), and economic, social and cultural rights (Chapter 2). The right to freedom of expression and access to information are contained in Chapter 1. In terms of the Congo DRC Constitution, all persons have the rights to freedom of expression and to information. The exercise of both rights is subject to respect for the law, public order, morality and the rights of others.¹⁷⁴

The right to science and culture, including authorial rights, and property are guaranteed in Chapter 2 of the Congo DRC Constitution. Accordingly, Congo DRC Constitution declares private property as sacred. It then recognises the right to individual and collective property acquired in conformity with law and custom. Although private assets may only be confiscated pursuant to the decision of a competent court, the right to private property can be abrogated in the public interest subject to compensation in line with the conditions laid down by law.¹⁷⁵

Furthermore, the Congo DRC Constitution guarantees the 'right to culture, freedom of intellectual and artistic creation and that of scientific and technological research'. The exercise of these rights is, however, subject to 'respect for the law, public order and morality'. Interestingly, the Congo DRC

¹⁷² Hirko, *Copyright and Tertiary Education*, *supra* note 7 at 270.

¹⁷³ CONST. OF THE FED. DEM. REP. OF ETH. (1995) art. 13(2).

¹⁷⁴ CONST. OF THE DE. REP. CON. (2005) art. 24.

¹⁷⁵ CONST. OF THE DE. REP. CON. (2005) art. 34.

Constitution specifically guarantees the ‘rights of authors and [IP] rights’, which must be protected by law. In this regard, it obligates the State to take ‘into account the cultural diversity of the country’. The Congo DRC Constitution also guarantees the protection and promotion of the national cultural heritage of Congo DRC. The recognition of the right to science and culture, including authorial rights, should be read together with the duty of the State to encourage the exercise of the rights of arts and craftsmanship in Congo DRC, through a law setting the conditions for their practice.¹⁷⁶

Owing to language barrier, it is not possible to discover any local case law on the interpretation of the above provisions, especially within the context of access to information for learning and research as it relates to copyright. Nonetheless, given their framing, which largely shares similarities with the stipulations in the international instruments considered in 4.1 and 4.2 above, the interpretation of the above provisions will no doubt be guided by the principles developed in the international human rights jurisprudence examined above, especially with regards to the construction of a specific right to research in Africa.

Central African Republic

The Bill of Rights is contained in Title I of the Constitution of the Central African Republic, 2016 (CAR Constitution). Unlike its Congo DRC’s counterpart, there is no distinction between civil and political rights, and economic social and cultural rights. The CAR Constitution contains an important feature which distinguishes it from others considered so far. It protects the freedom of expression, subject to respect for the rights of others,¹⁷⁷ without including right of access to information within the broad freedom of expression. Instead, the right of access to information (knowledge) and the right to culture are recognised within the ambit of the right to education.

Accordingly, the CAR Constitution recognises the rights of everyone to access sources of knowledge. In this regard, it guarantees to everyone access to instructions, culture, and professional training.¹⁷⁸ The right to culture finds further recognition with the authorial rights under the CAR Constitution. Indeed, article 17 of the CAR Constitution guarantees the ‘freedom of intellectual, artistic and cultural creation’, which must be exercised according to the conditions stipulated by law. The CAR Constitution does not contain the right to science as provided for under the Congo DRC constitution and article 15(1)(b) of the ICESCR.

Like other constitutions examined above, the CAR Constitution guarantees the right to property. In this regard, it recognises the right of every person, natural and juristic, to property, which may not be exercised contrary to public and social interest, and in a manner prejudicial to the security,

¹⁷⁶ CONST. OF THE DE. REP. CON. (2005) art. 35 & 46.

¹⁷⁷ CONST. OF THE CEN AFR. REP. (2016) art. 15.

¹⁷⁸ CONST. OF THE CEN AFR. REP. (2016) art. 9.

freedom, and the existence of the property of others. The right to property may be deprived for a public purpose declared by law and subject to prior compensation.¹⁷⁹

Like its Congo DRC counterpart, the language barrier makes it impossible to find case law that have interpreted the provisions of the CAR Constitution examined above. Nonetheless, for the construction of the right to research in Africa, an interpretation of the provisions on access to knowledge, freedom of expression, culture and authorial rights in the CAR Constitution will be effective if guidance is drawn from the principles espoused in international jurisprudence discussed in 4.1 and 4.2 above.

5. North Africa

Egypt

The Constitution of the Arab Republic of Egypt, 2014 (Egyptian Constitution) is an interesting document. Its rights framework is contained in two separate parts: Chapter two that defines the basic components of the Egyptian society, and Chapter three which deals with public rights, freedoms and duties. The rights in Chapter two are economic, social and cultural in nature. Relevant to this work, Chapter two includes the right to education, freedom of scientific research, right to property, and cultural right. The rights in chapter three are largely civil and political in nature but with a mix of few economic, social and cultural rights. Relevant to this work also, are the freedom of expression, freedom of research, right to access information, freedom of artistic and literary creation, and IP rights. Despite their different compartment, some of the rights overlap and will, accordingly, be examined together in the following discussion. It suffices now to note that, in addition to these rights, the Egyptian state commits to enforcing the human rights contained in the agreements, covenants, and international conventions ratified by Egypt, and which have been published locally ‘in accordance with the specified circumstances’.¹⁸⁰

The Egyptian Constitution grants freedom of scientific research as means of achieving national sovereignty and developing a knowledge economy. It obligates the state to sponsor researchers and inventors, devote a percentage of its gross national product (GNP) to scientific research, and provide effective means for public, private and expatriate Egyptians to contribute to the development of scientific research.¹⁸¹ This right is reinforced and expanded in chapter three wherein freedom of scientific research is specifically guaranteed with obligations on the State to ‘sponsor researchers and inventors and protect and work to apply their innovations’.¹⁸² Related to this, is the duty of the state to provide education of global quality in Egypt, and the guarantee of the right to education for everyone. The aim of this

¹⁷⁹ CONST. OF THE CEN AFR. REP. (2016) art. 18.

¹⁸⁰ CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 93.

¹⁸¹ CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 23.

¹⁸² CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 66.

guarantee is to entrench the roots of scientific thinking, develop talents, and promote innovation, among other things.¹⁸³ Also, the Egyptian Constitution recognizes cultural rights and places a duty on the state to support culture and provide relevant cultural materials to different groups of people, especially those in rural areas and those most disadvantaged, in Egypt.¹⁸⁴

Furthermore, the Egyptian Constitution protects private property ownership and inheritance generally. However, private property may be expropriated for a public good subject to compensation as indicated by law and court order.¹⁸⁵ Although this provision may be applied to IP based on the interpretation of similar provisions in the constitutions examined so far, the Egyptian Constitution grants some protection for IP. Here, it obligates the state to protect IP in all fields through appropriate laws and to establish a specialized body for the protection of IP in Egypt.¹⁸⁶ More specifically, the Constitution guarantees the freedom of artistic and literary creation (authorial rights) in Egypt. To this end, the state undertakes ‘to promote art and literature, sponsor creators and protect their creations, and provide the necessary means of encouragement to achieve this end’.¹⁸⁷

Finally, the Egyptian Constitution recognizes the right of everyone to ‘express their opinion through speech, writing, imagery, or any other means of expression and publication’.¹⁸⁸ Interestingly, the Constitution places ownership of information, data, statistics, and official documents on the Egyptian people. It further guarantees the right of everyone to the disclosure of such information, data, statistics, and official documents from any source and obligates the state to make them available to everyone transparently.¹⁸⁹

Tunisia

The Bill of Rights in the Constitution of the Republic of Tunisia (Tunis Constitution) is contained in Title two thereof as rights and freedoms. Relevant to this work, it contains the freedom of expression, right to access information, the right to science and culture including authorial rights, right to property and IP, among others.

In terms of the Tunis Constitution, the broad freedom of expression, information, and publication is guaranteed.¹⁹⁰ The Constitution also specifically recognizes the right to information, right of access to information, and communication networks.¹⁹¹ Furthermore, the Tunis Constitution guarantees the freedom of scientific research and academic freedom. Here, it obligates the state to ‘provide the necessary resources for

¹⁸³ CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 19.

¹⁸⁴ CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 48.

¹⁸⁵ CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, arts. 34 & 35.

¹⁸⁶ CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 69.

¹⁸⁷ CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 67.

¹⁸⁸ CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 65.

¹⁸⁹ CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 68.

¹⁹⁰ CONST. OF THE REP. OF TUNIS., (2014) art. 31.

¹⁹¹ CONST. OF THE REP. OF TUNIS., (2014) art. 32.

the development of scientific and technological research'.¹⁹² The right to culture and the freedom of creative expression are guaranteed jointly under the Tunis Constitution. To this end, the 'state encourages cultural creativity and supports the strengthening of national culture, its diversity and renewal, in promoting the values of tolerance, rejection of violence, openness to different cultures and dialogue between civilizations'. The state is also obligated to 'protect cultural heritage and guarantees it for future generations'.¹⁹³ Finally, the Tunis Constitution protects the right to property and stipulates that the right cannot be interfered with unless in accordance with circumstances and protections established by law. IP is guaranteed under this framework.¹⁹⁴

To conclude, it is important to note that the Tunis Constitution makes a general provision for the limitation of the rights and freedoms it guarantees. Accordingly, limitations on the exercise of the rights and freedoms under the Constitution must be established by law, without compromising their essence. The limitations must be necessary in a civil and democratic state, must be made pursuant to the goal of 'protecting the rights of others, or based on the requirements of public order, national defence, public health or public morals', and must be proportional with the objective sought to achieve.¹⁹⁵

III. CONSTRUCTING THE HUMAN RIGHT TO RESEARCH IN AFRICA

As already now over-flogged, the challenge that the exercise of copyright poses to access to information for research and education, and the incapacity of African Copyright regimes to equitably balance the public interest in promoting access and the private economic interest of copyright owners, in Africa have resulted in advocacy for a recalibration of the copyright system through a human right approach. The formulation of a specific human right to research is an effective means for achieving the recalibration in order to ensure equitable balance in the copyright system in Africa.

From the conceptualization adopted in this work, research, which can be both scientific and non-scientific, formal and informal, and commercial and non-commercial, is a universal phenomenon undertaken by individuals, groups of persons, states, and corporations, and which is essential to the development of science, culture, creativity, and education; the promotion of an enlightened and expressive populace; and the advancement of society and mankind. Thus, it satisfies the criteria of universality and urgency to be protected as a human right, especially within the African context. Also, the idea of sharing and access to information is core to the sustenance of research. Therefore, to be effective, a right to research must accommodate the culture of sharing and access to information and be capable of supporting both scientific and non-scientific, commercial and non-commercial research.

¹⁹² CONST. OF THE REP. OF TUNIS., (2014) art. 33.

¹⁹³ CONST. OF THE REP. OF TUNIS., (2014) art. 42.

¹⁹⁴ CONST. OF THE REP. OF TUNIS., (2014) art. 41.

¹⁹⁵ CONST. OF THE REP. OF TUNIS., (2014) art. 49.

Furthermore, because of the impact access to information may have on copyright, especially in relation to commercial research that unjustifiably prejudices the interest of authors, a human right to research must cater to the moral and material benefits of authors or creators.

International, regional, and national human rights instruments provide an adequate framework that can support the construction of a human right to research in Africa. As shown in the discussion so far, the right to science and culture, including authorial rights, the right to education, freedom of expression, the right of access to information, and the right to property afford a very strong framework for the construction of the human right to research. Although broadly framed to address varying concerns, the international, regional and national jurisprudence examined in part 4 above reveals that the rights are interlinked and interdependent and they provide windows through which a specific right that has the promotion of access to information for research and learning, while protecting author's moral and material interest as its core elements, can be distilled and recognized.

Indeed, research has been linked to the development of IP in general, and copyright in particular, because of its capacity to lead to the production of new knowledge, the dissemination of information, and the promotion of access to information. In the same vein, copyright is regarded as important to the development of research since it enables the availability of information, especially when exercised within an open, flexible, and equitably balanced regime. To ensure a smooth co-relation between research and copyright, the human rights instruments considered in part 4 above obligate States to respect, protect, and fulfill the right to science and culture, including authorial rights, for instance, through laws and policies that effectively and equitably balance the access to information needs and sharing the culture of researchers, and the private material interest of creators. This can be achieved by the construction of a human right to research. Gleaned from the jurisprudence of the human rights instruments examined in 4 above, individuals and groups of researchers would qualify as the right bearers of a human right to research. However, such right must obligate the State to provide legal, policy, and digital infrastructure that will support the work of libraries, archives, and similar institutions since these are important avenues for the promotion of research and learning.

Flowing from the foregoing, a human right to research in an African human rights regime that can effectively balance the public interest in ensuring access to information for research and learning while preserving the moral and material interest of authors should be framed broadly to:

recognise the right of researchers to freely access information protected by copyright, through any means, especially for non-commercial research;

obligate states to promote the right of researchers by providing necessary legal, policy and digital infrastructure to support libraries, archives and similar institutions;

THE RIGHT TO RESEARCH IN AFRICA

obligate states to ensure that authors get adequate compensation for exploitation of their copyright for commercial research that unjustifiably prejudices their moral and material interest through relevant administrative or judicial mechanisms.

CONCLUSION

The construction of a human right to research within the African human right regime is an important mechanism to address the copyright challenge to access to information for research and learning, and empowering libraries, archives and similar institutions in Africa, especially in this era of emerging technology, such as AI, research. A human right to research is an important means of making the African Copyright whole by equitably balancing the interest of the public and the private concerns of creators and copyright owners. Overall, a human 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, including authorial rights, the right to education, the right to access to information, 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 the advancement of society and mankind.

PIJIP RESEARCH PAPER NO. 78

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THE RIGHT TO RESEARCH IN AFRICA

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