EFFICACY OF THE DEFENCE OF FAIR DEAL IN COPYRIGHT CLAIMS IN NIGERIA

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CERTIFICATION

I, Ofure Jemima INEGBEDION (PG/LAW2015934), hereby certify that apartfrom references made to other people's works as duly acknowledged herein, this entire project isthe product of my personal research and has neither in part nor in whole been presented foranother degree elsewhere.

……..
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APPROVAL

We certify that this project work was completed and written by Ofure Jemima INEGBEDION (with matriculation number, PG/LAW2015934) in partial fulfillment of the requirement for the award of the Master of Laws (LL.M) Degree of the University of Benin.

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DEDICATION

To the Almighty, the source of wisdom and strength, I dedicate this journey. Your divine guidance has illuminated my path, and Your grace has sustained me. In humble gratitude, I acknowledge Your presence and infinite blessings on this endeavor. All glory belongs to You.

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LIST OF ABBREVATIONS

AC	-	Appeal Cases
AIR	-	All India Reporter
ALR	-	All Report
ALL ER	-	All England Law Report
FHC	-	Federal High Court
LFN	-	Laws of the Federation
NCLR	-	Nigerian Constitutional Law Report
NWLR	-	Nigerian Weekly Law Report
US	-	United States Report

ABSTRACT

This research endeavors to explore and enhance the understanding of fair dealing within the framework of copyright law in Nigeria. Part of its objectives encompasses defining the nature and scope of fair dealing, examining provisions of the Copyright Act related to copyright infringement, determining specific acts constituting fair dealing, and comparing this concept under the Nigerian Copyright Act with "Fair Usage" in other jurisdictions. Additionally, the study aims to identify challenges faced by defendants utilizing fair dealing as a defense and proposes measures to fortify the legal framework for fair dealings in Nigeria.

The findings of this study underscore critical aspects of Nigeria's copyright landscape. The defense of fair dealing is revealed to be inadequately addressed in the current Copyright Act, marked by ambiguity and lack of specificity. Challenges arise from the interpretation and application of fair dealing provisions, leading to uncertainties for users and creators navigating the legal landscape. The study emphasizes the need for educational campaigns to address limited awareness and understanding, promoting responsible navigation of copyright issues. Moreover, the research highlights the evolving challenges posed by digital technologies, necessitating adaptive measures to align fair dealing provisions with contemporary realities.

In conclusion, the thesis advocates for a comprehensive strategy to fortify fair dealing in Nigeria, recommending clarity in legislation, extensive educational efforts, ongoing judicial interpretation, and international benchmarking. These components are deemed integral for fostering a copyright environment that harmonizes creators' rights with the public interest. By addressing these recommendations, Nigeria can navigate the evolving challenges posed by technology and creative practices while upholding the principles of

fair dealings.To ensure the continuous efficacy of the defense of fair dealing in Nigeria, the study proposes a set of recommendations. These include ensuring clarity and specificity in legislation, implementing education and awareness programs, developing guidelines and best practices, regularly reviewing and updating legislation, balancing rights and interests, promoting alternative dispute resolution mechanisms, engaging in international collaboration, conducting public consultations, and addressing technological considerations. These recommendations collectively form a multifaceted approach aimed at fostering a balanced and informed copyright environment in Nigeria.

CHAPTER ONE

INTRODUCTION

1.01 BACKGROUND TO THE STUDY

Copyright law plays a pivotal role in safeguarding the intellectual property of creators and promoting innovation and creativity in the modern world. In Nigeria, as in many other countries, copyright protection is essential for the encouragement of artistic and intellectual endeavors. However, it is equally crucial to strike a balance between protecting the rights of creators and allowing the reasonable use of copyrighted materials by others for purposes such as criticism, comment, news reporting, teaching, scholarship, and research. This balance is achieved through provisions that recognize fair dealings or fair use in copyright law.

The concept of "fair dealings" in Nigerian copyright law is rooted in the Copyright Act of 1988[1], a product of the British administration in Nigeria, which has undergone amendments over the years to adapt to the evolving digital landscape and global intellectual property standards. Fair dealings provide a legal defense against copyright infringement claims when specific criteria are met, allowing individuals or entities to use copyrighted material without the permission of the copyright holder under certain circumstances.[2]

This study aims to explore the efficacy of the defense of fair dealings in copyright claims in Nigeria, analyzing its evolution, application in practice, and its impact on copyright protection and creativity in the country. We will delve into the relevant legal framework, recent case law, and international best practices to assess the effectiveness

[1] Now Copyright Act 2022;
[2] Section 20 (1) (a - r) of the Copyright Act 2022 provides for what will suffice as fair dealing purposes.

of fair dealings in striking the delicate balance between copyright protection and the public interest.

The discussion will include an examination of the criteria for determining fair dealings, the scope of permissible uses, and the challenges faced by creators, educators, researchers, and the general public in navigating this complex legal terrain. Furthermore, we will explore the implications of fair dealings on various stakeholders, including copyright holders, content creators, consumers, and the broader cultural and educational landscape of Nigeria.

In light of the ever-evolving technological and cultural landscape, it is imperative to critically assess the adequacy and efficacy of fair dealings in Nigerian copyright law. This evaluation will contribute toa deeper understanding of the legal framework governing copyright protection and its impact on creativity, innovation, and access to knowledge in Nigeria.

This study is relevant not only to legal scholars and practitioners but also to content creators, educators, policymakers, and the general public who engage with copyrighted material in various capacities. By examining the efficacy of the defense of fair dealings,one aims to shed light on the delicate balance between intellectual property rights and the public interest, ultimately contributing to a more informed and equitable copyright regime in Nigeria**.**

1.02 STATEMENT OF RESEARCH PROBLEM

The efficacy of the defense of fair dealings in copyright claims in Nigeria is a multifaceted and evolving issue that warrants comprehensive investigation. This research seeks to address the following central research problems:

Ambiguity and Inconsistency in Fair Dealings Interpretation: Nigerian copyright law, as defined by the Copyright Act of 2022, provides for fair dealings as a defense against copyright infringement. However, the interpretation and application of fair dealings criteria, such as purpose, nature, amount, and effect of the use, by Nigerian courts exhibit ambiguity and inconsistency. The primary research problem is to assess the extent of this ambiguity and inconsistency and its implications for creators, educators, researchers, and copyright holders.

1.03 AIMS AND OBJECTIVES OF RESEARCH

The aims and objectives of the study are:

(1) To define and delimit the nature and scope of the defence of fair dealing

(2) To examine the provisions of the Copyright Act on the incidences or acts that constitute infringement of copyright

(3) To ascertain what specific acts constitute 'Fair Dealing" as an effective defence to claims for infringement of copyright

(4) To compare "fair dealing" under the Nigerian Copyright Act with "Fair Usage" in other jurisdictions e.g the USA. etc

Additionally, the study will identify challenges and barriers faced by defendants who raise fair dealings as a defence and propose measures to strengthen the legal framework for fair dealings in Nigeria

1.04 SCOPE OF THE RESEARCH

This thesis aims to examine the efficacy of the defence of fair dealings in copyright claims in Nigeria, with a focus on understanding how this defence is invoked and

applied within the country's legal system. More focus will be placed on the provisions of the Copyright Act 2022 specifically on sections concerned with Fair dealings. The research will explore the extent to which fair dealings provisions are utilized in copyright infringement cases and assess the success rates of such defences. Additionally, the study will identify challenges and barriers faced by defendants who raise fair dealings as a defence and propose measures to strengthen the legal framework for fair use in Nigeria. This study is limited to the Copyright Act in Nigeria , but where necessary a foray into the law and practice of copyright in other jurisdictions will be considered for comparative purposes.

1.05 RESEARCH METHODOLOGY

The study is largely based on doctrinal method. Two types of data - secondary and primary sources are used in this research. Primary sources of data which are case law arising out of the decisions of courts and relevant statutes have been extensively used in writing this research. On the other hand, the secondary sources of data used in this research include text books, journals, magazines, newspapers and internet. This, it is strongly believed, will help for understanding and deep appreciation of the subject matter. In all, an analytical mode of writing has been adopted, followed by a descriptive style wherever necessary. Relevant data collected from different sources will be duly acknowledged and analyzed at the foot of every page where they appear; and adequate recommendations made thereon.

1.06 SIGNIFICANCE OF STUDY

The study on the efficacy of the defense of fair dealings in copyright claims in Nigeria holds significant importance due to the following reasons

(1) its potential impact on various stakeholders and the broader legal and cultural landscape of the country.

(2) This research shall help policy/law makers, practitioners and other stakeholder appreciate the nature and scope of the defence of fair dealing in copyright claims in Nigeria

(3) This research will reveal the relevance of the defence of fair dealing to copyright litigations in the Country.

CHAPTER TWO

2.01 CONCEPTUAL CLARIFICATION/LITRATURE REVIEW

This chapter examines the framework on which copyright law is built. In Nigeria, the legislative frameworks governing fair dealings, including fair use, are primarily outlined in the Copyright Act, which provides guidelines and limitations for the use of copyrighted materials. However, The Act stipulates certain exceptions to copyright infringement that may be considered fair dealing under specific circumstances[3].

Under Section 29 of the Nigerian Copyright Act, there are provisions for fair dealing with copyrighted works for purposes such as research, private use, criticism, review, and reporting current events. These provisions offer some leeway for the use of copyrighted materials without infringing on the rights of the copyright owner, provided it falls within the scope of fair dealing.

2.1 Sources of Copyright Law

2.1.1 Statutes

Generally, intellectual property law deals with the law relating to literary works. Here in Nigeria like many countries of the world, apart from international laws regulating intellectual property relations amongst civilized nations, there are local laws, which regulate relationships amongst individuals in relation with intellectual property. Statute is one of the sources of copyright legal framework. Copyright is a legal recognition granting the authors the exclusive right to produce, publish, distribute, perform, broadcast or display their creative works. The goal of copyright law is to encourage

[3] Section 20 and74(1) of the Copyright Act 2022

authors to invest effort in creating new works of art and literature. Law ensures copyright and sanctions for the breach of any of the provisions relating to the right. However, these rights are subject to many exceptions, which are detailed in the copyright act. For instance, certain non-profit organizations can perform certain copyrighted works without the permission of the copyright owner, and libraries can make copies of damaged books without violating the copyright statute. The statute also permits owners of copies of computer software to make one copy as a backup.[4] Copyright notice informs the public that a given work is copyrighted. The notice is placed in each published copy of the protected work and consists of either the word copyright, or the symbol ©, accompanied by the name of the copyright owner and the date of first publication. For sound recordings, the symbol is used instead of the symbol[5] Under the 1909 act, publication of a work without a proper copyright notice resulted in a complete loss of copyright protection.[6] In Nigeria, the Act in place to tackle the issues in copyright and copyright enforcement is the Copyright Act. A writing need not be words on paper. Section 1(1) of the Copyright Act[7] states the works that are eligible for Copyright protection. These works are literary, musical and artistic works, cinematograph films, sound recordings and broadcasts. The Act further clarifies these works in its Section 51 and states that no work will attract the term 'copyright' unless it falls within the listed category. In copyright law, it could be a painting, sculpture, or other work of art. The writing element merely requires that a work of art, before receiving copyright protection, must be reduced to some tangible form.[8] This may be on paper, on film, on audiotape, or on any other tangible medium that can be reproduced

[4] The Copyright Act, 1909.
[5]S.18 Copyright Act, 1909.
[6]A.B. Fabunmi, 'The Roles of Librarians in Copyright Protection in Nigeria' *International Journal of African & African American Studies* Vol. VI, No. 1, (Jan 2007) Pp80-87
[7] ibid
[8] S 51 ibid

(i.e., copied).[9] The writing requirement ensures that copyrighted material is capable of being reproduced. Without this requirement, artists could not be expected to know whether they were infringing on the original work of another. The writing requirement also enforces the copyright rule that ideas cannot be copyrighted: Only the individualized expression of ideas can be protected. Copyrighted material must be original.[10] This means that there must be something sufficiently new about the work that distinguishes it from previous similar works. If the disparity is more than trifling, the work will merit copyright protection. Functionality can be a factor in copyright law. The copyrights to architectural design, for example, are generally reserved for architectural works that are not functional. If the only purpose or function of a particular design is utilitarian, the work cannot be copyrighted. The scope of protection is generally limited to the original work that is in the writing. For example, assume that an artist has created a sculpture of the moon. The sculptor may not prevent others from making sculptures of the moon. However, the sculptor may prevent others from making sculptures of the moon that are exact replicas of his own sculpture. Copyright protection gives the copyright holder the exclusive right to

(1) Reproduce the copyrighted work;

(2) Create derivative works from the work;

(3) Distribute copies of the work;

(4) Perform the work publicly; and

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[9] Understanding copyright and related rights' < http://www.wipo.net/publication >accessed October 7th ,2023

[10] 45 S. 1(2) (a) Copyright Act, Cap C28, LFN, 2004.

(5) Display the work for a period of time. The first two rights are infringed whether they are violated in public or in private. The last three rights are infringed only if they are violated in public.

Infringement of copyright occurs whenever someone exercises the exclusive rights of the copyright owner without the owner's permission. The infringement need not be intentional. There are two types of infringements we have the primary and the second type of infringement. Copyright owners usually prove infringement in court by showing that copying occurred and that the copying was not authorized[11]. These require analysis and comparison of the copyrighted work and the disputed work. The most important exception to the exclusive rights of the copyright holder is the "fair dealing" doctrine

This doctrine allows the general public to use copyrighted material without permission in certain situations. Which includes some educational activities, literary and social criticism, some Parody and news reporting. Whether a particular use is fair, depends on a number of factors, including whether the use is for profit; what proportion of the copyrighted material is used; whether the work is fictional in nature; and what economic effect the use has on the copyright owner.

2.1.2 Judicial Decisions

Case law is another source of the legal framework for copyright protection in Nigeria. Case law is the body of principles and rules of law formulated through pronouncement of courts which are subsequently adhered to and followed in similar situations. Thus decisions of Nigerian Courts on copyright, serve as precedent cases on the same subject matter. The laws on copyright infringements are geared towards protecting the right owner. The rights of an owner of copyright

[11] Cambridge University '*Intellectual Property and Copyright in the Digital Environment'*. https://www.cambridge.org/core/books/copyright-and-elearning/copyright-issues-and-born-digital-resources/F807CBFE9F25A2181677E2ED01D9D398 Accessed 29th September, 2023. Pp.24-34

are infringed when one of the acts requiring authorization of the owner is done by someone else without his consent. The unauthorized copying of copyright materials for commercial purposes. The act provides punitive measures against infringement by way of inspection and seizure order.[12]An essential part of piracy is that the unauthorized activity is carried on for

[12]S.44(2)CopyrightAct,2004.

commercial gain. This element of commercial gain implies that piracy will often be carried out on an organized basis, since not only is the unauthorized reproduction of a work involved, but also the subsequent sale or distribution of the illegally reproduced work,which will require some form of organized distribution network orcontact with potential purchasers. To the consumer, often only the end of the chain of such a distribution network will be visible in the form of one sales outlet selling a pirated product. It is important to bear in mind, however, particularly when addressing the question of the means of dealing effectively with piracy that behind one such outlet will often liea systematically organized illicit enterprise, which illegally reproduces a copyrighted work and distributes it to the consumers.

A copyright owner whose right has been infringed through any of the actsstate above can enforce such right through civil proceedings. infringing copy of any such work, or has in his possession, sells, lets for hire or distribution for the purposes of trade or business, or exposes or offers for sale or hire any copy of a work which, if it had been made in Nigeria, would be an infringing copy, unless he proves to the satisfaction of the court that he did not know and had no reason to believe that any such copy was licensed and thus requires authorization.

Under Section 36 of the Copyright Act,[13]copyright is infringed by any person who, without the license or authorization of the copyright owner, undertakes any of the acts provided under s36 (1)(a-g) of the Copyright Act.[14] When infringement occurs, an action for infringement will be brought against the infringer. An action for infringement of copyright is provided for underSection 37 of the Copyright Act.[15]Copyright infringement isactionable at the initiation of the owner, assignee or an exclusivelicenseeofthecopyrightintheFederalHighCourtwhichhasjurisdiction in theplace wheretheinfringement occurred. Remedies forinfringement ofcopyright or for violation of related rights consist of civil redress.

Some laws also provide for penal remedies in the form of fines and/or imprisonment. Infringing copies, receipts resulting from infringement and any implementusedforthesameareusuallysubjecttoseizure[16]. Mainremedieswhichare availabletoacopyrightownerinrespectof infringement incommon-lawjurisdictions

[13]S.36 of the Copyright Act 2022

[14] S.36(1)(a-g)ibid.

[15] Copyright Act 2022.

[16] N. Obianuju,*GlobalJournalofPoliticsandLawResearch* Vol.2,No.5,2011Pp.22-34,(Published by European Centre for Research Training and Development UK).

areaninjunctiontorestrainthecontinuationofthe infringement anddamagesto

compensate the copyright owner for the depreciation caused by the infringement tothevalueofhiscopyright.Inthecontextofpiracy,becauseitisoftencarriedoutasan organized activity, the effectiveness of these remedies may be jeopardized for a number of reasons.[17]

Thus in May 2016 a telecommunication giant in Nigeria, MTN[18] was charged with copyright Infringement in an action brought by the Nigerian Copyright Commission (NCC) against them by Copyright Society of Nigeria (COSON).[19] A restraining order was sought by COSON at Federal High Court, restraining MTN, its agent's privies or servants from the continued unauthorized copying, communication to the public, streaming, selling, broadcasting, making available for downloading and permitting the unauthorized performance and infringement of the copyright in the musical works and sound recordings belonging to the members, affiliates and assignors of COSON.[20]

The copyright ownermaybeconfrontedwithasituationinwhichitispossible to locate only a small proportion of these outlets, withoutbeing able to proveany link between the outlets, or any common source of supply for theoutlets. Furthermore, the service of a writ commencing an action for infringement, by giving notice to thepirateortothosedistributingtheworkswhichhehasillegallyreproduced,mayhasten the destruction of vital evidence required to indicate the source of supply and the extent of sales which have taken place. In addition, since piracy often involves an international dimension, there is a risk that the financial resources and other assets ofa pirate may be removed from the jurisdiction in which legal proceedings are commenced against him, thereby depriving the copyright owner of the possibility of recovering damages.[21]

These difficulties have accentuated the need for preliminary remedies which may be obtained speedily, which will assist in the collection of evidence against a

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[17] J.O. Asein*(et al)* "*ADecadeofCopyrightLawinNigeria*" (ed.) publishedbyNCC,(2002)p.34

[18]*MTN v. COSSON*FHC/L/CS/619/2016

[19] Action against MTN, for non-payment of requisite royalties for the musicalworks and sound recordings deployed by the company

[20] COSON slams MTN with 16 billion infringement law suit' Nigerian Law Intellectual Property Watch,availableathttp://nlipw.com/copyright-infringement-cosom.comaccessed October 2023.

[21] WIPO Intellectual Property Handbook, WIPO PUBLICATION, ISBN978-92-805-1291-5,2004, P.53.

pirate,andwhichwillpreventthedestructionofevidence and the removal of financial resources againstwhich damages may beclaimed. In many common-law jurisdictions

2.1.3 Regulations

The source of copyright law also includes regulations. Such as Copyright Optical Disc Regulations 2006 made by the Nigerian Copyright Commission to regulate Optical Disc Plants in Nigeria, and Copyright (Collective Management Organisations) Regulations 2007 to regulate collective management of Copyright and Video Rental) Regulations 1999.

2.1.4 InternationalLaw

International law is another source of copyright legal framework which provides the legal platform for cross-border protection. Nigeria is a signatory to the following conventions and treaties on Copyright. They include; Universal Copyright Convention, Berne Convention, Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement, the Rome Convention, WIPO Copyright Treaty, the Madrid Agreement, the Patent Cooperation Treaty (PCT), the Paris Convention, inter alia.[22]

There are some solid arguments that could be stated in favour of international protectionof works[23]ifprotectionweretobelimited only tonationalworks,foreignworkswouldbeallowedintothelocalmarket without anycopyrightcost.Theywould be sold atcut prices.Ofcourse,consumers may benefit

[22]Universal Copyright Convention as revised at Paris on 24 July 1971, with Appendix Declaration relating to Article XVII and Resolution concerning Article XI 1971; the Berne Convention for the protection of literary and artistic works, of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, revised at Brussels on June 26, 1948, and revised at Stockholm on July 14, 1967.; Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement EstablishingtheWorldTradeOrganization,Annex1C,1896U.N.T.S,299,33I.L.M.1197 (1994).; the Convention of Rome of June 19, 1980 on the Law Applicable to Contractual Obligations.; WIPO Copyright Treaty, adopted December 20, 1996, WIPO Doc. CRNR/DC/94.; the Madrid Agreement ConcerningtheInternationalRegistrationofMarksandtheProtocolRelatingtotheMadrid Agreement, April 14, 1891, as last revised, Stockholm, July 14, 1967, 828 U.N.T.S 389; the Patent Cooperation Treaty, June 19, 1970; the Paris Convention for the Protection of Industrial Property, March 20, 1883.

[23] WIPOIntellectualPropertyHandbook:Policy,Lawanduse,2nd(Geneva:WIPO,2004)at 262.

fromsuchlow prices. Butthis practice could detrimentally affect the sale of locally made products, which would have to compete with works of foreign origin distributed at a more attractive price. Thedangerous resultis thatconsumers mightreject nationally made products andbuy foreign ones. National culture, whether it is the music, or book or other industry may, therefore, suffer.

At international level an important step towards a strengthened international copyright protection was the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement). It was signed in Marrakesh in 1994. The TRIPS Agreement covers areas such as copyright and related rights, trademarks, geographical indications, industrial designs, and patents, among others. In respect of each of the main areas of intellectual property covered by the TRIPS Agreement, the agreement sets out the minimum standards of protection to be provided by each member. The Agreement sets out these standards by requiring first, that the substantive agreements of the main conventions of WIPO, the Paris ConventionandtheBerneconvention,intheirmostrecentversions,mustbecomplied with. With the exception of Article 6b of the Berne Convention[24] which concerns moral rights, andaddedprovisionsoncomputer programs, databases,rental rightsand so on.[76] The TRIPS Agreement is a trade-related agreement since it was adopted as part of the outcome of the Uruguay GATT round of trade negotiations and it is administered by the World Trade Organization (WTO).[25]

[24]Article 6 of the Berne Convention for the protection of literary and artistic works, of September 9, 1886,completedatParisonMay4th,1896,revisedatBerlinonNovember13th,1908,completedatBerne onMarch20th,1914,revisedatRomeonJune2nd,1928,revisedatBrusselsonJune26th,1948,andrevised at Stockholm on July 14, 1967

[25]WIPO Intellectual Property Handbook, (WIPOPublication,2004)

2.2 DEFINITION AND IMPORTANCE OF COPYRIGHT

In defining copyright, the principal enactment which deals with Copyright law in Nigeria does not properly state what copyright is. It simply states that "copyright" means copyright under the Act[26];Although specific sections do make inference as to its nature[27]. However, in general, copyright is a legal concept that grants the creator of an original work exclusive right to control the use and distribution of that work. These rights typically include the right to reproduce, distribute, and display the work, as well as the right to create derivative works based on the original. Copyright is intended to protect the rights of creators and encourage the creation of new works by providing a legal framework for the ownership and use of creative works. Contrary to the Nigerian Copyright Act, the World Intellectual Property Organization (WIPO)[28] gave what appears to be a more comprehensive definition, describes copyright thus:

[26] See section 108, Copyright Act of 2022

[27] See sections 9- 13 Ibid; The nature of copyright varies depending on the type of work being protected. For example, copyright in literary and musical works is the exclusive right to do and authorize the doing of certain acts, such as reproducing, publishing, and performing the work in public. Copyright in artistic works, on the other hand, includes the right to reproduce, publish, and communicate the work to the public. Copyright in audiovisual works includes the right to reproduce, distribute, and communicate the work to the public, as well as the right to perform the work in public. Copyright in sound recordings includes the right to reproduce and distribute the recording, while copyright in broadcasts includes the right to authorize the rebroadcasting of the original broadcast. Additionally, authors of copyrighted works have moral rights, which include the right to be identified as the author of the work and the right to object to any distortion, mutilation, or other modification of the work that would be prejudicial to their honor or reputation.

[28] The United Nations specialised agency responsible for intellectual property (including copyright) matters. Cited in Ekpa, F. Okpanachi Kure, Blessing Riche '*Fair Dealing as an exception to the infringement of copyright: An obstacle to the effective enforcement of copyright claims In Nigeria*', Idah Bar Journal of Contemporary Legal Issues, Vol. 2, 2014/2015, Pp. 245 – 270.

Generally considered to be the exclusive right granted by law tothe author of a work to disclose it as his own creation, toreproduce it and distribute or disseminate it to the public in anymanner or by any means, and also to authorize others to use the work in specified ways…[29]

According to Idris,[30] "Copyright is thearea of the law that provides protection to "original works of authorship" including paintings,sculpture, music, novels, poems, plays, architecture, dance, instruction manuals, technicaldocumentation, and software, among other items. Legal protection flows from the fact that anauthor independently creates the work and that his or her 'expression' of an idea is original,rather than copied from another person. Copyright extends only to the expression of ideas andconcepts, and not to the ideas or concepts themselves."[31]

The term "copyright" refers to the sole authority that the creator of an original work has over all subsequent uses of that work, whether in its original form or in any form that can be recognized as deriving from the original, with some statutory exceptions.[32] Asein in his book,[33] opines that the word "copyright" evokes three possible meanings. First, it suggests the right that a person has over the physical copy of his work. This was true in earlier times when the author of a work exercised effective control over his physical manuscript. It is obvious that this is hardly possible today and the author cannot be content with the mere possession of the physical copy of his work. The second idea according to the author is the right to copy, i.e. the right that the owner of a work has to reproduce his work. This sense of the word is probably the closest to the modern concept of copyright. The third connotation suggests that the work must be copied "right". This

[29] WIPO. 1980. "*Glossary of Terms of the Law of Copyright and Neighbouring Rights. Geneva: WIPO"*. As cited ibid

[30]I. Kamil, "*Intellectual Property A Power Tool for Economic Growth"*, Geneva: WIPO Publication No.888 at 190.

[31] F.O. Babafemi, 2006. "*Intellectual Property The Law and Practice of Copyright, Trade Marks, Patents and Industrial Designs in Nigeria,"* 1st Ed., Ibadan: Justinian Books Ltd, at 7 footnote 1.

[32] J. O. Odion and N. E. O. Ogba, "*Essays on Intellectual Property Law: Copyright, Trade Marks, Patents, Industrial Design"s*, (Ambik Press Limited, 2010): 1.

[33]J.O. Asein, 2012. "*Nigerian Copyright Law & Practice"*. 2nd ed. Abuja: Books and Gavel Ltd. As cited ibid at footnote 5

suggests a license to copy on the condition that the copying would be done in a manner prescribed or permitted by law; leaving the copyright owner with a right to be remunerated.[34] In ***Adenuga v. Ilesanmi Press Sons (Nig) Ltd***.[35] copyright in relation to eligible work was defined as the exclusive right to control, to do or authorize the doing of any of the acts restricted to the copyright owner.

Courts have defined copyright as a sort of property when enforcing it. Copyright is "one of the three basic divisions of intellectual property law," giving the owner the sole authority to permit or forbid specific uses of his work by third parties[36]. Businesses have emphasized copyright as property strongly. Since the majority of these copyrights have been sold off by their inventors, creators no longer typically possess the rights to their works even though copyright was originally intended to be personal property granted to authors. Oyewunmi,[37]also defines copyright as the bundle of rights including economic and moral rights which authors derives from their literary and artistic works. The Economic rights aim at securing the financial or pecuniary interest of the author by conferment of an exclusive rights to exploit the work commercially, on the other hand, the moral right protects the authors honorand reputation in regards to the work. By way of juxtaposition, copyright law may be regarded as the body of laws, conventions and treaties which seeks to protect the intellectual property right of an author of an original work, by highlighting the scope of protection, the exceptions, together with the penalty for infringement of such right.However, when a person intentionally or unintentionally copies or uses the work of another creator, without his prior consent or permission, or any contract or

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[34] Ibid.

[35] (1991) 5 NWLR (Pt. 189) 82

[36]G. Gopinger and S. James, *On Copyright* (15th Edition) (Sweet & Maxwell, 2005): 1, cited in A. O. Oyewunmi,*"Nigerian Law of Intellectual Property"*, (University of Lagos Press Ltd., 2015): 21.

[37]A. O. Oyewunmi,*"Nigerian Law of Intellectual Property"*, (University of Lagos Press Ltd., 2015): 21.

license or assignment with the author as covered by the copyright law, it amounts to infringement.

2.2.1 The Concept of Copyright and Requirement of Originality

Copyright protection is only given to original creative works. Typically, the term "original" refers to something novel or previously untried; a fundamental type or shape from which others are descended. Copyright only applies to the portions of a work that are original to the author. Thus, "originality is the sine qua non of copyright." The concept of originality assumes enormous relevance in the study of copyright law because it is one of the factors that determines copyright ability.

A work must possess two essential characteristics in order to be eligible for copyright protection under the Copyright Act. Therefore, it must:

i. Be imbued with a "tangible medium of expression," and

ii. Create a "original work of authorship"

The aforementioned characteristics are reflected in legislation worldwide, with copyright laws in most regions stating that "original" works or "original expression" shall be protected by copyright.

A literary, musical, or artistic work must have been given enough effort to give it an original character in order for copyright to exist in that work, according to Section 1(2)(a) of the Copyright Act. The element of a created or invented work that makes it unique or novel and sets it apart from copies, clones, frauds, or derivative works is called originality. An original work stands out in this aspect because it wasn't a copy of someone else's work. A work need not have a

specific minimum amount of content to be under the purview of copyright. Thus, "originality" calls for "at least a minimal degree of ingenuity" in addition to the author not having plagiarized another's work."

Copyright protection has traditionally been conditional on originality. Justice Story described the prerequisite in ***Gray v. Russell***, an 1839 case between a public domain work, Adam's Latin Grammar. The current unprotected text had "original annotations" that claimed copyright. The author of the notes is said to be Benjamin Gould. Additionally, the defendant released a copy of Adamr Latin Grammar with notes that were purportedly written by C.D. Cleveland. However, according to the complaint, Gould's copyrighted annotations were used as the source material for the notes. The second publisher argued that since Gould had ostensibly compiled remarks from multiple copies of the book, the copyright in the Gould annotations was invalid due to a lack of unique material. Justice Story declared the copyright to be valid in his ruling:

The claim that one party may second-hand, without exerting any industry, talent, or skill of his own, borrow from another all the materials that he has amassed and combined together has no legal support because all people have access to the same sources of information and could have produced a similar work from all of them through the exercise of their own industry, talents, and skill. Consider a map of a county, a state, or an empire. It is obvious that each of these maps must be similar to, if not identical to, every other map in terms of accuracy. Let's say someone has donated their time, talent, and attention, In order to perfect such a map, great care was taken, and numerous topographical surveys were conducted. The result is a map that far outperforms all others of its kind. It is obvious that, notwithstanding this production, he cannot trump another person's right to employ the same strategies through comparable research and labor to reach the same goal. It is also obvious, however, that he has no right to sit down and replicate the entire

map that the first party has already created using their expertise and labor without having undertaken any such surveys or other work.

In a related case Justice Story went back to the originality standard while dealing with a mathematics book, using the Gray map example this time. The Justice stated that a second mapmaker does not violate the law by independently creating a map of the same territory using his own "talent, or labor, or expense" after stating that a person is entitled to a copyright on a map he compiles from existing materials or from his own survey. However, the copyrighted map cannot be significantly duplicated by the second mapmaker. "If he substantially duplicates from the map of the other, it is outright theft; yet it is obvious that both maps must approach closer in conception and execution to each other the more accurate they area minimum criterion of originality, emphasizing the need for the work being sought to be independently created, and restricting the scope of protection to those parts of the work that are. A threshold created by Justice Story essentially allowed copyright to exist in a work that was created with "talent or labor or money." These needs can be separated because they are stated in the disjunctive. Since they are all equally important, skill and labor are seen as being on an equal footing, and there are no restrictions on the kind of labor that can be used. When taken as a whole, these requirements establish a standard that is actually negative: a work is only protected if it is not copied.

In conclusion, it is generally agreed upon that a piece of work must be original to the author. To put it another way, the work does not necessarily need to be original in the sense that it must contain any original or imaginative thought. Copyright safeguards the manner in which an idea is expressed, not the idea itself. The idea itself does not have to be novel in order for copyright

protection to be granted. There are several methods to express a concept, and the only ones that are protected are the forms of expression.

In ***University of London Press, Ltd. v. University Tutorial Press, Ltd.,***[38] as Justice Peterson argued, when deciding whether or not test questions that used concepts from the public domain were original works.

The term "original" does not in this context mean that the work must be the expression of original or inventive thought. The expression of thought is what copyright laws are concerned about, not the originality of ideas. The essential originality pertains to the way in which the notion is expressed.[39]

It was just necessary that the phrase "should originate from the author" be used. Even though it is clear that copyright protects a work's expression, the work need not even involve the original articulation of a notion. The only need for originality of expression is that it not be a direct copy of another work.[40] As a result, the mode of expression need only be original and created by the author alone. So long as neither author plagiarized the other's work, it is technically quite possible for two authors to create the exact same work and have both obtained copyright to it. Thus, copyright does not at all need "novelty," which is a crucial requirement of patent law and necessitates that the invention represent some inventive advance beyond the preceding state of

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[38] (1916) 2 Ch. 601 At 610

[39] Ibid at 608-609

[40] *Sawkins v. Hyperion Records Ltd*, [2005] EWCA Civ. 565 at para. 31; see Mag Jewelry Co., *Inc. v. Cherokee, Inc.*, 496 F.3d 108, 116 (1st Cir. 2007*); Boisson v. Banian, Ltd*., 273 F.3d 262, 270 (2d Cir. 2001); *Novelty Textile Mills, Inc. v. Joan Fabrics Corp*., 558 F.2d 1090 (2d Cir. 1977); *Merrit Forbes Co. v. Newman Inv. Sec., Inc*., 604 F. Supp. 943, 951 (S.D.N.Y. 1985).

the art. In light of this, Ezra Pound once said that "complete originality is, of course, out of the question."[41]

2.2.2 Test of Originality

Several doctrines on the idea of "Originality" have developed as a result of judicial decisions. These judicial rulings have given rise to a number of originality tests, including:

i. **Sweat of the Brow:** The doctrine lays emphasizes on the amount of labour, skill and diligence expended on a work as opposed to placing weight on how original the work is.

   The theory was initially introduced in the UK in the case of ***Walter v. Lane***[42] where the Court ruled that, taking into account the reporter's labor-intensive efforts in writing down and recording the address, the verbatim reproduction of an oral speech in a newspaper was permissible under copyright law.

ii. **Modicum of Creativity:** According to this philosophy, a work must exhibit a minimal level of creativity in order to qualify for copyright protection.

   The United States Supreme Court advocated for this strategy in the case of ***Fiest Publications v. Rural Telephone Service***[43], The Court further highlighted that in addition to effort and skill, a minimum amount of creativity is necessary for a work to be declared unique since facts cannot be a subject matter of copyright because they do not claim their origin to the creator.

iii. **Skill and Judgment**: This philosophy emphasizes that a work must be the result of the author's practice and talent in order to be considered original. In the case of ***CCH***

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[41] K. Hariani and A. Hariani, "*Analyzing Originality in Copyright Law: Transcending Jurisdictional Disparity*," The Intellectual Property Law Review, Vol. 51(3) (211): 491.
[42] 1900) AC 539
[43] (1991) 499 U.S 340

Canadian v. Law Society of Upper Canada, the court ruled that in order for a work to be considered original, it must be created by the creator and not be a copy of another work.

2.2.3 Literary Work

The term "literary work" is used to refer to a variety of "literary works," such as (a) novels, stories, and poetic works; (b) plays, stage directions, film scenarios, and broadcasting scripts; (c) choreographic works; (d) computer programs; (e) text-books, treatises, histories, biographies, essays, and articles; (f) encyclopedias, dictionaries, directories, and anthologies; (g) lectures..

2.2.4 The Concept of Authorship

A work's creator is referred to as the author. A literary work's writer is known as the work's author. It is important to remember that the individual who actually creates the work—for example, by putting pencil to paper—may not always be the author.

Authorship is defined by the Copyright Act in relation to many types of works. The Act's concept of authorship sometimes aligns with the common sense meaning, which connects authorship to the mental labor, skill, and labor needed in creating works.

Other times, the foundation for authorship is less immediately connected to creative or intellectual input. Instead, it is more closely related to the decision to make or taking on financial responsibility.

According to Section 14 of the Act[44], the term "author" refers to the person who created a work when referring to literary and related works. In this sense, the term "creator" refers to participation in the initial utterance that gives rise to the work.

[44] Copyright Act 2022

Thus, rather than simply contributing ideas, the author of a literary work is the one who invests effort in terms of input of labor, judgment, and ability in generating the specific expression that forms a work.

2.2.5 The Concept of Licensing

Therefore, a literary work's author is the one who spends effort in terms of input of labor, judgment, and aptitude in developing the precise expression that makes a work, rather than just contributing ideas.

An exclusive license is often a written document signed by the copyright holder or on their behalf that grants the licensee the only right to exercise an action that would otherwise be reserved for the holder alone.

A license is strongly implied by the payment of royalties. In an exclusive license, a licensee may sue after joining the work's owner in the event of a legal dispute or with the court's permission because only the owner has the authority to file a lawsuit. Infringement can be broadly classified into two[45]:-

1. Primary infringement;

2. Secondary infringement.

Primary infringement deals with the real act of copying, while secondary infringement deals with other kinds of dealing like selling the pirated books, importing etc.[46] it can then be said that, the

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[45] http://lawmantra.co.in/infringement-of-copyright/ as cited in Prashant Rahangdale *'Fair Dealing: Limitation to Copyright?'*, Global Journal of Multidisciplinary Studies (2017) (6) (7) 265 https://www.researchgate.net/publication/342863184 accessed on 20th September 2023

[46] Prashant Rahangdale *'Fair Dealing: Limitation to Copyright?'*, Global Journal of Multidisciplinary Studies (2017) (6) (7) 265 https://www.researchgate.net/publication/342863184 accessed on 20th September 2023

primary purpose of Copyright is to promote public welfare by the advancement of knowledge with the specific intent of encouraging the production and distribution of new works for the public. It was held in the case of ***Gero v Seven-Up Company***[47] that the goal of Copyright protection is to encourage dissemination of ideas by protecting the embodiment of expression of an idea in a creative work and reserving the right in it to the creator of the work. It was also held in ***Oladipo Yemitan v Daily Times & Gbenga Odusanya***[48]that the function of Copyright law is to safeguard the product of another's hard work, labour, skill or taste from annexation by other people,.

2.3 COPYRIGHT AND ITS SCOPE OF PROTECTION

Works eligible for copyright protection under the Nigerian Act are provided for as follows:[49]

Subject to this section, the following shall be eligible for copyright –

a. Literary works;

b. Musical works;

c. Artistic works;

d. Audio visual;

e. Sound recording and

f. Broadcasts.

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[47] 215 USPQ, p.512
[48] (1980) F.H.C.R. p.180; S John, Jurisprudence, (12th edn, London, Sweet & Maxwell, 1966) p.901
[49] Section 2 (2) Copyright Act, 2022

Literary work includes, irrespective ofliterary quality, any novel, stories and poetical works,plays, stage directions, film scenarios and broadcasting scripts, computer programmes, textbooks, treaties, lectures, sermons, among others[50]. Musical work on the other hand means anymusical work, irrespective of musical quality, and includes works composed for musicalaccompaniment. Whereas, Artistic Work includes irrespective of artisticquality, paintings,drawings, etchings, lithographs, maps, plans and diagrams, photographs not comprised in acinematograph film, works of architecture in the form of buildings, models, works of artisticcraftsmanship.[51] Cinematograph Film on its part includes the first fixation of a sequence of visualimages capable of being shown as a moving picture and of being the subject of reproduction, andincludes the recording of a sound track associated with the cinematograph film. While SoundRecording is the first fixation of a sequence of sound capable of being perceived aurally and ofbeing reproduced but does not include a sound track associated with a cinematograph film[52]. Andfinally, Broadcast is sound or television broadcast by wireless telegraphy or wire or both or bysatellite or cable programmes and includes re-broadcast[53].Works must therefore fall within any of the above categories to be capable of attractingcopyright protection.

Sections 14 of the Act confers rights on copyright owners to do andauthorise inter alia the reproduction, publication, performance, distribution or communication tothe public for commercial purposes, or to make an adaption of the work in which copyrightsubsists.Any act done in violation of the above provisions of the Act amounts to an infringement of the right of the copyright owner.

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[50] Section 108 Copy right Act 2022
[51] ibid
[52] ibid
[53] ibid

Note that to qualify for protection, Section 2(2) of the act[54] provides that the work must be original and fixed in any definite medium of expression which is known or later to be developed from which it can perceived with the exclusion cinematograph film, sound recording and broadcast, it remains to be seen for the purpose ofevidence how fixation is not applicable to those categories as well.

In accordance with the Copyright Act, 2022,

> Copyright is infringed by any person who without the authorization of the owner of the copyright[55] —
>
> (a) does or causes any person to do an act, which constitutes a violation of the exclusive rights conferred under this Act ;
>
> (b) imports or causes to be imported into Nigeria any copy of a work which if it had been made in Nigeria would be an infringing copy under this Act ;
>
> (c) sells, offers for sale or hire any work in respect of which copyright is infringed under paragraph (a) ;
>
> (d) makes or has in his possession, plates, master tapes, machines, equipment or contrivances used for the sole purpose of making infringing copies of the work ;
>
> (e) permits a place of public entertainment or of business to be used for a public performance of the work, where the performance constitutes an infringement of copyright in the work, unless the person permitting the place to be used was not aware and had no

[54] Copyright Act 2022
[55] Section 36 (1) Ibid

reasonable ground to suspect that the performance constitutes an infringement of the copyright ;

(f) permits within its premises, the reproduction of a copyright work ; or

(g) performs or causes to be performed for the purposes of trade or business or the promotion of a trade or business, any work in which copyrightsubsists.

(2) The doing of any of the acts referred to in this section shall be inrespect of the whole or a substantial part of the work either in its original formor in any form recognisably derived from the original[56].

2.3 EXCEPTIONS TO THE PROTECTION COPYRIGHT

The general principle that has come to stay in our legal system is that "to every general rule,there is an exception". This exception could be peremptory, that is, a defensive pleadingasserting that no legal remedy exists for the Plaintiff's alleged injury, that res judicata orprescription bars the claim, or that an indispensable party has not been included in the litigation[57].It also means something that is excluded from a rule's operation. It could be a statutoryexception in which case, it is a provision in a statute exempting certain persons or conduct fromthe statute's operation.

The Copyright Act 2022 unlike its predecessors expands the categories of exemptions to copyright, including special exemptions such as infringement in the form of adaption of computer programs,[58]infringement for the purpose of instruction or examination, recording of

[56] Section 36 (2) Ibid
[57] The United Nations specialised agency responsible for intellectual property (including copyright) matters. Cited in Ekpa, F. Okpanachi Kure, Blessing Riche '*Fair Dealing as an exception to the infringement of copyright: An obstacle to the effective enforcement of copyright claims In Nigeria*', Idah Bar Journal of Contemporary Legal Issues, Vol. 2, 2014/2015, Pp. 245 – 270.
[58] Section 20(2) Copyright Act

abroadcast or cable programme or a copy of such a recording by or on behalf of aneducational establishment for educational purposes,[59] exemptions granted to archives,libraries, museums, and galleries.

While the old Act provided for fair dealing as an exception to copyright protection,there was little guidance on actions which could be deemed fair dealing. In the newAct, the four-factor test utilized under American law with respect to fair use,[60] havebeen adopted. The factors are[61]:

a. the purpose and character of the usage;

b. the nature of the work;

c. the amount and substantiality of the portion used in relation to the work as awhole; and

d. the effect of the use on the potential market value of the work.

2.4 FAIR DEALINGS

The doctrine of fair use or fair dealing is an integral part of copyright law. Fair dealing permits reproduction of the copyrighted work or use in a way, which but for the exception carved out would have amounted to infringement of copyright. It has, thus, kept out the mischief of the copyright law.[62] The defence of fair dealing originated as an equitable doctrine allowing certain uses of literary works that copyright would otherwise have prohibited, if prohibiting such uses would stifle the very creativity which that law is designated to foster.[63] Fair dealing also serves as an answer to those 'fair' copyright proponents who actively argue that copyright, not being a

[59] Section 22 Ibid
[60] Section 107, Title 17 of the United States Code.
[61] Section 20 (1) ibid
[62] S.K. Dutt V. Law Book Company & Ors., AIR 1954 All 570 at Para 12 cited in Prashant Rahangdale 'Fair Dealing: Limitation to Copyright?', Global Journal of Multidisciplinary Studies (2017) (6) (7) 265 https://www.researchgate.net/publication/342863184 accessed on 20th September 2023
[63] *Harper and Row Publishers V Nation Enterprises*, 471 US 539 at 550 cited Ibid

patent, is not an absolute right and should therefore be balance against user rights[64].Therefore, the doctrine of fair dealing is a key part of the social bargain at the heart of the copyright law, in which as a society we concede certain limited individual property rights to ensure the benefits of creativity to a living culture.[65] As the term Fair dealing is not defined under Copyright Act, the Court often get befuddled to call What if covers under purview of Fair dealing and what ought? Usually Court relies on the case of ***Hubbard vs Vosper***[66] where Lord Denning enthused that "It is impossible to define what fair dealing. It must be a question of degree. You must consider first the number and extent of the quotations and extracts." Fair dealing in simple terms means allowing the use of a copyright work without permission from the author. Fair dealing applies to literary, musical, artistic works and cinematography film works only with the exception of Sound recordings and broadcast.[67] In determining fair dealing, the court would consider the value of the portion of the work taken to the work[68]. Essentially, fair dealing must be determined on a case by case basis, as each case must be determined on its own merit[69]. Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next,you must consider the proportions. To take long extracts and attach short comments may be unfair. But, short extracts and long comments may be fair. Other considerations may also come to mind. But, after all, whatever said and done, it must be a matter

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[64] A. Giuseppina D'Agostino, *Healing for Fair Dealing? A comparative copyright analysis of Canada's fair dealing to UK fair dealing and US fair use*, McGill law Journal 53 cited Ibid

[65] Association of video and filmmakers, documentary filmmaker's statement of best practices in fair use (18 november 2005) at 1-2. As cited Ibid

[66] [1972] 2 Q.B. 84

[67] *What is the defense of fair dealing in Nigerian copyright law?*https://www.chamanlawfirm.com/defense-of-fair-dealing-in-nigeria-copyright accessed 23rd September 2023

[68] Ibid

[69] In *Dodsley v. Kinnersley(1761) Amb. 403.*, the court held that no certain line can be drawn to distinguish a fair abridgment, but every case must be tried on its own peculiar facts. This is very pivotal because the slightest circumstances in the different cases can make the most important distinction.

of impression.[70] As with fair comment in the law of libel, so with fair dealing in the law of copyright. The tribunal decides on facts of the case. In the present case, there is material on which the tribunal of fact could find this to be fair dealing.[71]

The exceptions contained in the Act are quite extensive to the extent that it is unclear whether all the acts mentioned therein would in practice be treated as fair dealing acts or as mere exceptions. However, in practice much reliance is placed on the English position in determining whether a particular use is fair deal by the Nigerian courts. Similarly the fair dealing approach used in various other jurisdictions would come in handy before the Nigerian judges where there is a question as to whether a use is fair or not.

Fair dealing purports that the dealing with the work must be genuine and reasonable. It follows that fair dealing with an author's work for the purpose of a review which involves the evaluation or estimation of the qualities or character of a work, parody a deliberate exaggeration or imitation of someone else's original work in such a way that it humorously and critically comments on existing work to ridicule or criticize such work and to expose its flaws.or criticism does not constitute an infringement. See the case of ***Fraser-Woodward Ltd v BBC & Brighter Pictures Ltd***[72]. 11Here the Claimant company brought copyright infringement proceedings against the Defendants for the use of 14 photographs of Victoria Beckham and her family in a television programme. The programme was produced by the Second Defendant and broadcast by the First Defendant. The Defendants relied on the defences of (1) fair dealing for the purposes of criticism and review within The Court held, dismissing the claim, that in respect of all but one of the photographs the use was for the purposes of criticism and review of other works, namely the

[70] Prashant Rahangdale '*Fair Dealing: Limitation to Copyright?', Global Journal of Multidisciplinary Studies* (2017) (6) (7) 265 https://www.researchgate.net/publication/342863184 accessed on 20th September 2023
[71] Ibid
[72] [2005] EWHC 472 (Ch); [2005] EMLR 487; [2005] FSR 36; [2005] 28(6) IPD 11

tabloid press and magazines, applying ***Pro Sieben AG v Carlton UK TV Ltd [1999]*** and that the use was fair. ***Whilst Ashdown v Telegraph Group Ltd*** was authority for the proposition that the criticism must be of a work or another work and it was not sufficient to criticise anything to invoke the section, there was no requirement that the criticism and review contain specific reference to the work in question. The use of the remaining photograph amounted to incidental inclusion. Sufficient acknowledgment did not need to be express and it did not need to be a contemporaneous act of identification.The law specifically states in section 20(1)[73], that acts done by way of fair dealing for the purposes of research, private use, criticism, or review of the reporting of current events are exempted from copyright control. In other words, where a work is used for the purpose of research, private use, parody, criticism or review or reporting of current events, there is no question of infringement of the copyright in such a work provided the use is by way of fair dealing.

Fair dealing is a limitation and exception to the exclusive right granted by copyright law to the author of a creative work. It is Obstacle to the Effective Enforcement of Copyright Claims in Nigeria. It is important to note that fair dealing is a defense to a case for copyright infringement. To successfully raise this plea however is not an easy task.

2.5 CRITERIA TO DETERMINE WHETHER A COPYRIGHTED WORK IS FAIR

In determining whether the use of a work in any particular case is fair dealing, the factors to be considered shall include one or any of the following:[74]

1. **The degree of use:** Under this factor, courts look at both the quantity and quality of the copyrighted material that was used. If the use includes a large portion of the copyrighted

[73] Copyright Act 2022
[74] Copyright Act 2022 section 20 (1)

work, fair dealing is less likely to be found; if the use employs only a small amount of copyrighted material, fair dealing is more likely. That said, some courts have found use of an entire work to be fair under certain circumstances. And in other contexts, using even a small amount of a copyrighted work was determined not to be fair because the selection was an important part—or the "heart"—of the work.

2. **The type of use involved, the use for research, commercial, criticism or illustration Incidental and background uses, the use of earlier works by writers:** Courts look at how the party claiming fair dealing is using the copyrighted work, and are more likely to find that nonprofit educational and noncommercial uses are fair. This does not mean, however, that all nonprofit education and noncommercial uses are fair and all commercial uses are not fair; instead, courts will balance the purpose and character of the use against the other factors below. Additionally, "transformative" uses are more likely to be considered fair. Transformative uses are those that add something new, with a further purpose or different character, and do not substitute for the original use of the work**.**
3. **Effect of the use on the original work:** Here, courts review whether, and to what extent, the unlicensed use harms the existing or future market for the copyright owner's original work. In assessing this factor, courts consider whether the use is hurting the current market for the original work (for example, by displacing sales of the original) and/or whether the use could cause substantial harm if it were to become widespread.[75]
4. **The amount of users labour involved:** here the court looks at how much of the user's effort went into the publication or creation of the work

[75] https://guides.library.emerson.edu/FairUse accessed 15/11/2023

Fair dealing may be applicable in situations where copyrighted material is used for purposes such as research, private study, criticism, review, news reporting, education, parody, satire, and other similar purposes. For example, quoting a few lines from a book in a review, using a copyrighted image in a news report, or using a short clip from a movie in a classroom lecture may be considered fair dealing. However, it is important to note that the use of copyrighted material must be fair and not excessive, and must not compete with the original work or harm the interests of the copyright owner.[76]

Fair dealing impacts the rights of both copyright owners and users. Copyright owners have the exclusive right to control the use of their copyrighted material, but fair dealing provides an exception to this exclusive right. Fair dealing allows users to use copyrighted material without permission from the copyright owner, under certain circumstances, which may limit the control that copyright owners have over their work. However, fair dealing also benefits copyright owners by allowing for the use of their work in ways that promote creativity, innovation, and the sharing of knowledge. Fair dealing strikes a balance between the rights of copyright owners and the interests of users, by allowing for the use of copyrighted material in a way that is fair and reasonable.

[76] Ibid

CHAPTER THREE

3.0 THE HISTORY OF FAIR DEALING

3.1 COMMON LAW ORIGINS

Fair use and fair dealing were not born by statute. The concept of fair use developed as judgemade law, first by English and then by American judges, who mutually influenced and crossreferenced each other.[77] The prehistory of fair use and fair dealing has been documented by several scholars[78] and need not be repeated here fully, but a few highlights are worth mentioning. First, as Bill Patry writes, "unlike Athena, the doctrine of fair use did not spring forth fully formed."[79] Its scope and contours developed gradually, although "the basic foundation and rationale were established [by English judges] remarkably early."[80] By 1841, when the doctrine made its full appearance in the United States in Folsom v. Marsh,[81] American courts already had a developed body of English case law to draw upon. During the nineteenth century, fair use was a broad concept that encompassed several issues that today would often be treated separately, such as copying of non-protectable facts and ideas as distinct from protectable expressions,[82] the copying of non-substantial parts of protected expressions,[83] as well as the permissible copying of substantial parts of protected expressions. While current doctrine tends to treat these issues as

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[77] Ariel Katz, *"Debunking the Fair Use vs. Fair Dealing Myth: Have We Had Fair Use All Along?"* in Balganesh, S, Wee Loon, N, & Sun, H (eds) The Cambridge Handbook of Copyright Limitations and Exceptions 111-39 (Cambridge, UK: Cambridge University Press, 2021) doi:10.1017/9781108671101

[78] ibid

[79] Eq. 718, 722 (quoting Justice Story's famous formulation of fair use in American law from Folsom v. Marsh 9 F. Cas. 342 (C.C.D. Mass. 1841)), and noting that "the general principles guiding the court in cases of this description could hardly be found better stated" than in that case). Cited ibid

[80] ibid

[81] 9 F. Cas. 342 (C.C.D. Mass. 1841).

[82] See E. J. MacGillivray, '*The Copyright Act, 1911, Annotated'* 29 (1912). Cited ibid.

[83] Cited ibid

conceptually distinct, and confine fair dealing to the third, the three are not entirely separate. The tests used for determining "substantiality" involve similar questions to those that are asked in determining "fairness,"[84]and whether the work is mainly factual or expressive may influence the outcome of the fairness analysis.[85] Second, the common terminology in English copyright law prior to 1911 was often "fair use,"[86] just like the American terminology, but it was also common to use the term "fair" as an adjective to describe specific activities, such as "fair quotation,"[87] "fair criticism," "fair refutation," and, in the earlier cases, "fair abridgement". Sometimes courts would not use the term "fair" but its synonyms, such as "bona fide imitations, translations and abridgements." The switch to "fair dealing" in Commonwealth jurisdictions seems to simply follow a terminology adopted when the doctrine was codified in 1911 in the UK, but, as will be discussed in greater detail below, there is no evidence that the switch from "use" to "dealing" was intended to reflect any change in the law or its direction**.**

Third, the English judges who created fair use should not necessarily be seen as champions of users' rights and the public interest, reining in overly expansive copyrights – as might be seen through contemporary spectacles. Rather, recognizing fair use allowed judges to actively expand the scope of copyright protection, beyond the original exclusive right to print or reprint books.[88] Still, even before the Supreme Court of Canada declared in CCH that fair dealing is a "users' right,"[89] courts and commentators often referred to the ability to use another's work without permission as a users' right and employed the term "the right of fair user." Similarly, the connection between fair use, the scope of protection, and the public interest was not invented in

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[84] Cited ibid
[85] See *Cambridge University Press v. Becker*, 863 F. Supp. 2d. 1190, 1225 (N.D. Ga. 2012).
[86] Lewis v. Fullarton (1839) 48 Eng. Rep. 1080.
[87]*Wilkins v. Aikin* (1810) 34 Eng. Rep. 163, 164. Cited ibid at note 43 p 7
[88] See Robert Burrell & Allison Coleman, Copyright Exceptions: The Digital Impact (2005).
[89]*CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, paras. 12–13 (Can.)

Canada's CCH case, or in the US, but had been recognized two centuries earlier in England. For example, as already noted, in ***Cary v. Kearsley***, decided in 1802, Lord Ellenborough explained that:

A man may fairly adopt part of the work of another: he may so make use of another's labours for the promotion of science, and the benefit of the public; but having done so, the question will be, was the matter so taken used fairly with that view, and without what I may term the animus furandi? Then, after further elaboration, he put the question for the jury to consider as whether what so taken or supposed to be transmitted from the plaintiff's book, was fairly done with a view of compiling a useful book, for the benefit of the public, upon which there has been a totally new arrangement of such matter – or taken colourable, merely with a view to steal the copy-right of the plaintiff?[90] And by the end of the nineteenth century, in the famous ***Hanfstaengl v. Empire Palace*** case supra, the Court of Appeal described copyright as "a monopoly restraining the public from doing that which, apart from the monopoly, it would be perfectly lawful for them to do." The court explained that the "monopoly is itself right and just, and is granted for the purpose of preventing persons from unfairly availing themselves of the work of others . . ."[91]The court recognized the need to limit the scope of copyright lest it be turned into an "instrument of oppression and extortion" and explained that on the basis of such considerations courts recognized various limitations on the scope of copyright, before concluding that infringement occurs only if one "copies more than is fair, so that his copy may be used as a substitute for the original." The House of Lords affirmed the decision. In his judgment, Lord

[90]*Cary v. Kearsley* (1802) 170 Eng. Rep. 679, 680.
[91]*Hanfstaengl v. Empire Palace* [1894] 3 Ch. 109 (CA) 128 (Eng.), aff'd, *Franz Hanfstaengl v. H. R. Baines & Co.* (1895)AC 20 (HL).

Macnaghten similarly described the case as one "in which there has been no unfair use and no copying of anything which the artist can claim as his."[92]

Therefore, to the extent the CCH may be seen as revolutionary, it is only revolutionary when viewed through a very narrow historical perspective, but viewing it with a longer historical gaze suggests that if CCH departed from earlier case law, it only brought back the law to its historical path.

[92]*Hanfstaengl v. Baines* (1895) AC at 30n

CHAPTER FOUR

COMPARATIVE ANALYSES OF FAIR DEALING EXCEPTIONS IN DIFFERENT JURISDICTIONS

4.1 Introduction

Copyright law is a statutory creation of the United Kingdom, which was subsequently extended to the Commonwealth of Australia. This chapter examines the law regulating the exclusive rights of copyright owners and the fair dealing provisions which limit these rights in the United States, United Kingdom and Australia. In this chapter the exclusive rights (also known as restricted acts) granted to copyright owners in these jurisdictions are compared. The similarities and differences between the exclusive rights in the copyright laws of these states are highlighted, enabling the fair dealing provisions of these jurisdictions to be compared on equal footing. The historical origins of fair dealing exceptions are then traced and the developments are illustrated through the various amendments. The current categories of fair dealing in the United Kingdom are reiterated in Australia, with the addition of a parody/satire fair dealing provision in the latter. Case law is discussed to illustrate the construction and functioning of the various fair dealing defences. Although the public interest defence is often raised in conjunction with fair dealing (especially for purposes of news reporting and criticism or review), the scope of this thesis does not extend to this defence**.**Australian courts frequently rely on British and other commonwealth case law for authority, and vice versa, and the case law should therefore be considered with this in mind.[93]

4 2 United States

[93]See eg *Fraser-Woodward Ltd v British Broadcasting Corporation and Another* [2005] EWHC 472 (Ch) para 35; *Newspaper Licensing Agency Ltd v Marks and Spencer Plc* [2001] 3 All ER 977 paras 18, 65; *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 65 IPR 513 para 31. Stellenbosch University http://scholar.sun.ac.za

copyright law in the United State originated with the introduction of the printing press to England in the late fifteenth century. As the number of presses grew, authorities sought to control the publication of books by granting printers a near monopoly on publishing in England. The Licensing Act of 1662 confirmed that monopoly and established a register of licensed books to be administered by the Stationers' Company, a group of printers with the authority to censor publications. The 1662 act lapsed in 1695 leading to a relaxation of government censorship, and in 1710 Parliament enacted the Statute of Anne to address the concerns of English booksellers and printers. The 1710 act established the principles of authors' ownership of copyright and a fixed term of protection of copyrighted works (14 years, and renewable for 14 more if the author was alive upon expiration). The statute prevented a monopoly on the part of the booksellers and created a "public domain" for literature by limiting terms of copyright and by ensuring that once a work was purchased the copyright owner no longer had control over its use. While the statute did provide for an author's copyright, the benefit was minimal because in order to be paid for a work an author had to assign it to a bookseller or publisher.

Since the Statute of Anne almost 300 years ago, US law has been revised to broaden the scope of copyright, to change the term of copyright protection, and to address new technologies.[94]the provision for the protection of copyright implemented by the US Constitution was in 1790 and was named the Copyright Act of 1790. It granted American authors the right to print, re-print, or publish their work for a period of 14 years and to renew for another fourteen. The law was meant to provide an incentive to authors, artists, and scientists to create original works by providing creators with a monopoly. At the same time, the monopoly was limited in order to stimulate creativity and the advancement of "science and the useful arts" through wide public access to

[94]*Copyright Timeline: A History of Copyright in the United States*https://www.arl.org/copyright-timeline/ *accessed on the 16th November 2023*

works in the "public domain."[95]The act was subsequently reviewed in the year 1831 extending the term of protection of copyrighted works to 28 years with the possibility of a 14-year extension. Congress claimed that it extended the term in order to give American authors the same protection as those in Europe. The extension applied both to future works and those current works whose copyright had not expired[96]. In the year of 1909 A major revision of the US Copyright Act was once again completed. The bill broadened the scope of categories protected to include all works of authorship. The Congress addressed the difficulty of balancing the public interest with proprietor's rights:

> "The main object to be desired in expanding copyright protection accorded to music has been to give the composer an adequate return for the value of his composition, and it has been a serious and difficult task to combine the protection of the composer with the protection of the public, and to so frame an act that it would accomplish the double purpose of securing to the composer an adequate return for all use made of his composition and at the same time prevent the formation of oppressive monopolies, which might be founded upon the very rights granted to the composer for the purpose of protecting his interests"[97]

The United States became a Berne signatory in 1988. The major changes for the US copyright system as a result of Berne were: greater protection for proprietors, new copyright relationships with twenty-four countries, and elimination of the requirement of copyright notice for copyright protection[98]

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[95] Ibid.
[96] Ibid.
[97] H.R. Rep. No. 2222, 60th Cong., 2nd Sess., p. 7 [1909]
[98] Ibid.

Fair use

The United States ("US") Copyright Act of 1976[99] codifies the "fair use" doctrine developed by the American courts from the middle of the 19th century. It is the most general exception in US copyright law.The fair use of a work…for purposes such as criticism, comment, news reporting, or teaching (including multiple copies for classroom use, scholarship, or research), is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include—

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors. The provisions bear similarities to that of the Nigerian Copyright Act in determining fair dealing. The question of fair use must necessarily be dealt with on a case-by-case basis. No one factor is determinative of whether a use is a fair use. For example, just because a use may be for criticism or news reporting does not necessarily mean that it is a fair use if it begins to do more harm for the copyright owner and less good for the public. In general, the "purpose of the use" factor turns on whether the use is one of the typical fair uses mentioned in the first part of the section (e.g., news reporting, criticism). If it is, then the use is more likely to be deemed fair. The courts also take into consideration whether the

[99] Pub L No 94-553, 90 Stat 2541 (codified as amended in 17 USC).

work is "transformative," that is, whether the alleged infringer has added something new, different, and valuable to what went before or whether the user has simply rote copied the work. The rote copy is simply a substitute for the original and does only harm to the original while adding nothing new for the public. Finally, if the use is nonprofit educational, then it is more likely to be considered a fair use. To this, the U.S. Supreme Court added the question of whether the use is a private noncommercial use. This is more likely to be considered fair use.In the case ***Salinger v. Random House*Inc**[100] A biographer paraphrased large portions of unpublished letters written by the famed author J.D. Salinger. Although people could read these letters at a university library, Salinger had never authorized their reproduction. In other words, the first time that the general public would see these letters was in their paraphrased form in the biography. Salinger successfully sued to prevent publication. Important factors: The letters were unpublished and were the "backbone" of the biography—so much so that without the letters the resulting biography was unsuccessful. In other words, the letters may have been taken more as a means of capitalizing on the interest in Salinger than in providing a critical study of the author.., Additional categories of typical fair use include parody, where the infringer seeks to offer some literary or social commentary or criticism of the original work by holding it up to ridicule. So, a 2 Live Crew parody of the Roy Orbison/William Dees song, Oh, Pretty Woman, may succeed as a fair use because its "words can be taken as a comment on the naïveté of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies." Even if the use of the work is commercial, that does not necessarily preclude a finding of fair use.

[100]811 F.2d 90 (2d Cir. 1987). Cited in https://fairuse.stanford.edu/overview/fair-use/cases/ accessed on th 16th November 2023

In examining the second factor, courts most often consider whether the original work is a creative "artistic" work or whether it is a work whose purpose is to convey information. If a work is a creative work, then use of such a work is more likely to be deemed unfair.

The factor that addresses the amount taken has two areas of inquiry. First, how much in terms of a percentage or ultimate amount is taken? The more that is taken, the less likely the use is to be fair. Also, the statute directs a court to consider the substantiality of the portion taken. How important to the original is what was taken? The more important it is, the less likely the use is to be fair. Taking the "hook" of the popular song would be more likely to be unfair than taking a few words out of a verse. Taking a critical 300 words out of a book of many thousands of words might not be fair if those words are arguably the most important ones in the entire book. In the case of ***Wright v. Warner Books, Inc.***[101]***,*** A biographer of Richard Wright quoted from six unpublished letters and ten unpublished journal entries by Wright. It should be noted that no more than 1% of Wright's unpublished letters were copied and the purpose was informational.

Finally, courts consider the impact of the use on the market value of the protected work. In some instances, a harsh criticism or comment may have a very negative effect on the value of the original work and still be fair: "When a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act." Rather, does the use diminish the value of the original because it serves the same function? Does the use diminish the potential market for further derivative works of the original? If so, then such uses are more likely to be unfair. In the case of ***Hustler Magazine, Inc. v. Moral Majority, Inc***[102]Publisher Larry Flynt made disparaging statements about the Reverend Jerry Falwell on

[101]953 F.2d 731 (2d Cir. 1991)
[102]606 F.Supp. 1526 (C.D. Cal., 1985).

one page of Hustler magazine. Rev. Falwell made several hundred thousand copies of the page and distributed them as part of a fund-raising effort. It is worthy of note that Rev. Falwell's copying did not diminish the sales of the magazine (since it was already off the market) and would not adversely affect the marketability of back issues.On the other hand, just because the use is commercial does not necessarily mean that it is unfair.

Sorting out the merits of a particular case involves weighing all of the factors. The area of fair use, then, is one where it is difficult to make any hard-and-fast rules. In countries other than the United States, the exemptions for uses like "fair use" are more likely to be specific narrow exemptions clearly stated in the statutes. Judicious balancing of its four statutory factors assists the happy cohabitation of private rights in works of authorship with public rights of free expression.[103] It also has tempered claims of copyright infringement in order to foster technological innovation. Many lay the credit-and some, the blame-for the recent expansion of fair use to favour increasingly parasitic new works and aggressively copyright-dependent new business models on the US Supreme Court's 1994 adoption of "transformative use" as a criterion for evaluating the first statutory fair use factor. As the previous EW Barker Centre for Law Business Distinguished Visitor in Intellectual Property, Barton Beebe, has observedsince the US Supreme Court's 1994 adoption of "transformative use" as a criterion for evaluating the first statutory fair use factor ("nature and purpose of the use"), the "transformative use" analysis has engulfed all of fair use, becoming transformed, and perhaps deformed, in the process.[104]

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[103]*Harper & Row v Nation Enters*, 471 US 539 at 558 (1985) (copyright is the "engine of free expression"); *Eldred v Ashcroft*, 537 US 186 at 219 (2003); *Golan v Holder*, 565 US 302 at 328 (2012).
[104] See generally Barton Beebe, "*An Empirical Study of US Copyright Fair Use Opinions"*, 1978-2005, 156 U Pennsylvania L Rev 549 (2008). For a more recent empirical study, see Jairui Liu, "*An Empirical Study of Transformative Use in Copyright Law*" (2019) 22 Stan Tech L Rev 163.

The Napster Litigation, and its effect on the application of the Fair Use doctrine.

Napster had a significant impact on the concept of fair dealing, particularly in the context of copyright law. Napster was a peer-to-peer file-sharing service that gained popularity in the late 1990s and early 2000s.[105] Users could share and download music files, often without obtaining proper permissions from copyright holders.

Napster, by enabling widespread sharing of copyrighted material without proper authorization, posed significant challenges to the fair dealing doctrine. Fair dealing (or fair use in the United States) is a legal doctrine that allows for the limited use of copyrighted material without permission for certain purposes, such as criticism, comment, news reporting, teaching, scholarship, or research.

The Copyright Act includes a fair use exception, which contains specific limitations on copyright owners' exclusive rights. As stated under section 107 of the United States Code, "the fair use of a copyrighted work … for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."[106]

The four factors that are considered when determining whether or not the fair use exception applies to other uses of copyrighted material are:

(1) the purpose and character of the use, including whether such use is of a commercial

[105] Napster.com, a popular site once exisiting in a slightly different format on the Internet, provided free peer-to-peer music file sharing. This allowed registered users to directly exchange MP3 music files among one another anonymously and at no cost to the user. Through Napster, users freely exchanged musicial recordings in the MP3 file format (Motion Picture Expert Group 1, Audio Layer 3: an algorithm that compresses digital music files).
The MP3 format helps facilitate sharing by reducing the file size so it can be transferred quickly and easily. MP3's can also be copied over and over again without a decline in quality. The Napster system provided free "Music Share" software from its website for users to exchange these music files. The software allowed users to connect their computers to a hub of servers maintained by Napster and interact with other software developed and maintained by Napster on its computer server.

[106] 17 U.S.C. § 107 (1976).

nature or is for nonprofit educational purposes,

(2) the nature of the copyrighted work,

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and

(4) the effect of the use upon the potential market for or value of the copyrighted work.[107]

In 1999, the Recording Industry Association of America (RIAA), recording artists, and record companies filed a lawsuit against Napster claiming that users were guilty of copyright infringement. Napster contested the allegation arguing that its users were not copyright infringers but merely "fair users."[108]

Fair Use Factor 1: Character and Purpose of Use

The first "fair use" factor is concerned with the nature and character of the "new" work, rather than the original copyrighted work. Court are more likely to find a new work that substantially "transforms" the original to be fair use. In the Napster case, the court ruled that simply transforming CD music into MP3 file format, or even "space-shifting"[109] the files to a different computer, did not constitute a transformation. What "transformation" meant to the court was building upon original work to develop a completely new and different creative work (a socially productive use in order to share a new piece of creative expression).[110] Simply repackaging music files into a different medium was not sufficient.[111]

This factor of the fair use test also takes into account the "purpose of use" of the original work -- personal use being viewed more favorably than commercial use. Napster claimed that its users

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[107] ibid
[108] A&M Records, Inc., et al. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).
[109] Lee B. Burgunder, Reflections on Napster: The Ninth Circuit Takes a Walk on the Wild Side,
[110] ibid
[111] Napster, 239 F.3d at 1016-7.

were downloading songs for personal use and not for commercial purposes.[112]

The company argued that its users did not sell the music they downloaded.[113]

Despite these arguments, the court still found that Napster users were engaged in commercial use of the copyrighted music because:

> (1) users were getting music, something that they would typically have to purchase, for free; and
>
> (2) it was hard to consider the practice of sending files to strangers as a form of personal use.[114]

Although Napster asserted that its users were downloading songs to sample music to decide whether or not they wanted to buy the CD, the court dismissed the sampling argument. According to the court, even those users who were downloading songs using Napster to sample music were engaging in commercial use because they otherwise might have had to pay the record companies to download the full-length song samples.[115] The court found Napster users to be engaging in direct copyright infringement since they were distributing and reproducing copyrighted material without authorization.[116]

Fair Use Factor 2: Nature of the Copyrighted Work

The second fair use factor concerns the nature of the works that are downloaded. Unauthorized use of creative works are less likely to be viewed as fair than use of more fact-based material.[117] The Napster court ruled that the copyrighted musical works and sound recordings at issue were highly creative in nature, thereby leaning against a finding of fair use under this factor as well.

Fair Use Factor 3: Amount and Substantiality of Work Used

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[112] Burgunder at 692.
[113] Ibid at 693
[114] Napster, 239 F.3d at 1015.
[115] Burgunder at 693.
[116] Zimmerman at 43.
[117] Napster, 239 F.3d at 1016.

The third fair use factor calls for an examination of the substantiality and amount of the portion of the copyrighted work used that has been taken. Napster argued that whole albums were not being downloaded from its central servers, just individual songs. However, the court concluded that copying entire songs still weighed in favor of copyright infringement.

Even though three out of the four use factors seemed to be leaning in favor of copyright infirngement, the court's analysis was not complete. The Supreme Court had previously ruled that these three factors alone were not enough to necessarily override fair use. For instance, when the use of videotape recorders was challenged in court, the fact that highly creative television programs were copied in their entirety for home "time-shifiting" purposes was not enough to defeat a finding of fair use. The Court thus gave precedent to the notion that the fourth fair use factor might be more important than the other three factors combined.[118]

Fair Use Factor 4: The Market Effect

The fourth fair use factor calls for an exination as to whether the plaintiff has proven that the use of his or her copyrighted work is harming the potential market for that work. Technically speaking, over the last few years the courts have stated that whenever a use of copyrighted work is deemed "commercial" under the first fair use factor, an adverse effect on the market for the copyrighted work will be presumed. This allowed the Napster court to dismiss the fair use defense without critical analysis of the large amount of evidence presented to suggest that Napster usage might actually help, and certainly didn't hurt, the market for recorded music.

However, the parties did present evidence on this factor. The plaintiff RIAA (Recording Industry Association of America) made its case by arguing that sales of CD's were dramatically decreasing as a result of the growing popularity of Napster. As evidence, the plaintiffs enlisted the help of SoundScan's CEO, Michael Fine, to study the effect of online file-sharing on retail

[118] Burgunder at 691.

music sales. Nielsen SoundScan is an information system that tracks sales of music and music video products throughout the United States and Canada by collecting actual point of sale purchasing data from retail stores.[119]

Fine's data revealed that music sales at retail stores located near colleges and universities were steeply declining during the "Napster years." Since college students were Napster's key demographic, the plaintiffs claimed that the use of Napster by college students was causing harm to the market for music CD's. In its defense, Napster maintained that its program did not have a substantial effect on the overall market value of the copyrighted music.

Napster argued that many of its customers were downloading music just to sample specific songs, thus prompting them to go out and buy the entire album later on. Napster claimed that overall CD sales actually went up due to the exposure of the music as a result of its service and that it caused no harm to the market. Napster provided studies by its own expert witnesses in this regard, in addition to anectodal testimony by several recording artists. The court did consider this evidence to a certain extent, but ruled that some of Napster's expert witnessess were less reliable than the RIAA's witnesses. Thus, the court was inclined to believe that Napster usage did negatively affect CD sales by allowing users to download works without paying for them. Second, the court maintained that Napster usage made it difficult for record companies to enter the digital download market if they sought to allow sell downloaded music for a fee.

After taking all four of the fair use factors into consideration, the court ultimately did not accept the fair use defense offered on behalf of Napster's users. Had the court been less inclined to treat the music downloading as "commercial use," or more inclined to believe the data

[119] Michael Fine, declarant, filed by Russell J. Frackman, on behalf of Mitchell Silberbert & Knupp, LLP, and Carey R. Ramos, on behalf of Paul Weiss Rifkind Wharton & Garrison, attorneys for A&M Records et al., Joint Motion for Preliminary Injunction, A&M Records et al. v. Napster (prepared June 10, 2000) at 1017.

presented by Napster's expert witnesses as to the positive market effects of Napster usage, things might have turned out differently. In the following analysis, we take a much closer look at these issues.

Napster's impact on fair dealing was contentious because it brought into question the boundaries of acceptable use, especially in the digital age. While fair dealing is designed to balance the rights of copyright holders with the public interest in accessing and using creative works, Napster's model allowed for large-scale, unauthorized sharing that went beyond what traditional fair dealing exemptions were meant to cover.

The legal battles that ensued between Napster and copyright holders highlighted the tension between technological advancements, the evolving nature of content distribution, and the need to protect the rights of creators. The courts had to grapple with whether Napster's activities could be considered fair use or whether they constituted copyright infringement.

The effect of Napster on fair dealing or fair use, was complex. On one hand, Napster allowed users to share music freely, raising questions about the infringement of copyright and the fair dealing/fair use exemptions.

Napster's widespread sharing of copyrighted music posed a challenge to the traditional boundaries of fair dealing. Users were freely exchanging copyrighted material without authorization, raising concerns about the impact on the music industry.The rise of Napster led to numerous legal battles between the service and copyright holders, particularly in the music industry. Copyright owners argued that Napster facilitated widespread copyright infringement, while Napster contended that it was merely providing a platform for users to share files.These legal battles prompted a reevaluation of fair dealing and fair use in the digital age. Courts had to consider whether the widespread sharing of music files on Napster could be considered fair

use or if it went beyond the scope of acceptable practices.

The Napster case and subsequent legal developments contributed to the evolution of copyright laws, with lawmakers and courts adapting to the challenges posed by new technologies. This evolution aimed to strike a balance between protecting the rights of copyright holders and allowing for reasonable uses of copyrighted material.

The Napster era also played a role in the transformation of the music industry. The widespread availability of music through file-sharing services forced the industry to adapt and find new business models, such as digital downloads and streaming services.

In summary, Napster had a profound impact on the interpretation and application of fair dealing/fair use in the context of digital music distribution. The legal challenges and debates prompted a reassessment of existing copyright laws and the need for adaptation to the changing landscape of digital media.

United Kingdom

Copyright law arose in the United Kingdom as a result of the threat of unauthorised book printing.[120] The first copyright legislation, the Statute of Anne of 1709, was introduced to protect publishers from this danger and is the foundation of modern copyright law.[121] Literary works are therefore the oldest category of works protected by copyright, although copyright law has expanded its application to much more than printed editions of literary works.

[120]*Garnett K, Davies G & Harbottle G Copinger and Skone James on* Copyright (15th ed 2005) 29.
[121]Ibid at pg. 34.

The United Kingdom has been party to the Berne Convention[122] since its inception in 1887 and ratified the latest text, the Paris Act[123], on July 24 1971. The United Kingdom is also party to the Rome Convention,[124] the UCC[125], TRIPS,[126] the WCT[127] and the WPPT.[128] Although a common law copyright in unpublished works was initially recognised, the case of Donaldson v Beckett[129] saw the end of this phenomenon and the only current source of protection is statute.[130] The Copyright, Designs and Patents Act of 1988 (hereafter the CDPA) is the source of protection of copyright owners' economic and moral rights, and performers' rights. One of the controversial aspects of this latest Act is the absence of regulation of private copying (copying sound recordings and audio-visual works for non-commercial, domestic use) and parody, which are recent additions to Australian copyright law.[131] The Act has been amended numerous times, primarily to incorporate the directives of the European Commission.[132]

4 2 2 Rights Subsisting in Copyright

The CDPA grants a statutory property right in original literary, artistic, musical and dramatic works, sound recordings (also referred to as phonograms), films, broadcasts and published

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[122]World Intellectual Property Organisation Berne Convention for the Protection of Literary and Artistic Works (9-9-1886) 1161 UNTS 3 (1886). See chapter 3 section 21.
[123] 1161 UNTS 3 (1971).
[124] World Intellectual Property Organisation International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (26-10-1961) 496 UNTS 43 (1961). See chapter 3 section 31
[125] United Nations Universal Copyright Convention (6-9-1952) 216 UNTS 132 (1952). See chapter 3 section 1.
[126] World Trade Organisation Trade-Related Aspects of Intellectual Property Law (15-4-1994) Marrakesh Agreement Establishing the World Trade Organization, Annex 1C 1869 UNTS 299 (1994). See chapter 3 sections 2 2 and 32.
[127] World Intellectual Property Organisation Copyright Treaty (20-12-1996) 36 ILM 65 (1996). See chapter 3 section 23.
[128] World Intellectual Property Organisation Performances and Phonograms Treaty (20-12-1996) 36 ILM 76 (1996). See chapter 3 section 33
[129]*Donaldson v Beckett* (1774) 4 Burr 2408.
[130] Garnett K, Davies G & Harbottle G Copinger and Skone James on Copyright I (15th ed 2005) 41.
[131] Ibid 44
[132] Ibid 44-45. Stellenbosch University http://scholar.sun.ac.za

editions.[133] This is an exhaustive list of the subject matter that can be endowed with copyright protection. The CDPA deals with literary, dramatic, musical and artistic works separately from sound recordings, films and broadcasts, and treats the typographical arrangement of a published edition separately still.

Copyright grants the author an exclusive right to authorise certain acts in relation to her work.[134] The exclusive acts that have a bearing on the fair dealing provisions are discussed in this section to provide a context in which to examine the fair dealing exception. The essence of copyright protection is the prohibition of unauthorised reproductions of protected works. Copyright owners are also granted a number of other rights in Chapter II of the CDPA in accordance with European Directives and, most recently, the Information Society Directive. Copyright is infringed by an unauthorised person doing, or authorising another person to do, any of the acts listed in Chapter II. Infringement of any of the rights granted to copyright owners gives rise to a remedy in the form of an action for infringement, which is the primary method of enforcing copyright. There must be a primary infringement of a substantial part of a copyright work and guilty knowledge must be attributable to the infringing party for such an action to arise. A copyright owner is not required to show damage; she only needs to prove that one of the restricted acts was done without authorisation. The defence of fair dealing can then be raised against a claim for the infringement of any of the economic rights discussed below.

Section 16 of the CDPA defines the restricted acts that are the substance of the exclusive rights granted to the copyright owner. These acts are considered below to give a comprehensive background of fair dealing as a defence to a claim of infringement of one of these acts. As

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[133] S 1(1)(a)-(c) CDPA.
[134]Garnett K, Davies G & Harbottle G Copinger and Skone James on Copyright I (15th ed 2005) 367.

mentioned, the right to authorise reproductions of a work is the essenceof a copyright owner's rights, not coincidentally being the oldest right. The Information Society Directive[135] fully defines the scope of the right and specifically provides that "this Directive should define the scope of the acts covered by the reproduction right with regard to the different beneficiaries".[136] The content of this right includes the "exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part" of authors' works, performers' fixations of their performances,[137] and phonogram producers' phonograms.[138] This goes beyond the reproduction right envisaged by the Berne Convention, which merely requires the right to prohibit reproduction without going into any more detail.[139]The CDPA needed no amendment as it already complied with the Information Society Directive.[140]

The exclusive right of reproduction as contained in section 1731 of the CDPA is compliant with the Information Society Directive, although it employs different terminology. The right granted in terms of the CDPA covers direct and indirect copies,[141] as well as permanent and transient copies as envisioned by the Information Society Directive.[142] The term "copy" comprises two elements: (i) a considerable level of similarity, evaluated objectively, between the original and the alleged infringement, and (ii) a causal connection between the original and the alleged copy. The question to consider is not whether the alleged infringer used the claimant's work in a derivative way, but whether the work was copied. The allegedly infringing copy must therefore

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[135] Directive 2001/29/EC
[136]Directive 2001/29/EC para 21
[137] Art 2(b) of Directive 2001/29/EC.
[138] Art 2(C) of Directive 2001/29/EC.
[139] Art 9 of the Berne Convention
[140] Garnett K, Davies G & Harbottle G Copinger and Skone James on Copyright I (15th ed 2005) 370
[141] Art 2(d) of Directive 2001/29/EC.
[142] S 17(6) of the CDPA

represent the original in an objective and substantial way. Making use of a work, for example as inspiration for a derivative work, will therefore not be an infringement of the reproduction right if there is no substantial similarity in the expression of the concept represented.[143]

Less than complete copying can still be an infringement of the reproduction right if the amount copied is not negligible. This is to ensure that the skill, effort and labour of the author are rewarded, while safeguarding against overreaching claims of ownership.

4.2.3 Fair Dealing

The point of departure in copyright law is that when a person undertakes an act restricted by copyright without authorisation, he infringes the copyright owner's exclusive rights. Unless a statutory defence can be successfully raised, the user will be found liable of infringing one or more of the copyright owner's exclusive rights. The fair dealing provisions constitute some of these statutory defences.

The fair dealing defence was introduced in the United Kingdom by the Copyright Act of 1911.[144] The fair dealing exceptions contained in the 1911 Act are included and expanded on in the CDPA.[145] There is an exhaustive list of situations that can be raised as fair dealing defences: using a copyright work for the purposes of research or private study, criticism or review, or reporting current events can qualify as fair dealing and consequently be exempted from liability for infringement in terms of the CDPA. However, there is no open-ended defence of fairness as is the case with fair use. Accordingly, the inquiry of whether the particular use is exempted must

[143] Garnett K, Davies G & Harbottle G Copinger and Skone James on Copyright I (15th ed 2005) 371
[144] S 2(1)(i).
[145]Ss 29-30. Stellenbosch University http://scholar.sun.ac.za accessed 4th november 2023

start with the question whether the exception appliesto that type of work, and whether the use is for one of the approved purposes.[146] If both of these questions are answered in the affirmative, the inquiry proceeds to the second stage, where it is established whether there has been a sufficient acknowledgement of the source (if necessary), and whether the use is in fact fair.[147]

The United Kingdom is party to the Berne Convention and the statutory exceptions must therefore be in line with the framework created by this treaty. The Information Society Directive required various amendments to be made to the CDPA to comply with the mandates regarding fair dealing. Article 5(3) of the Directive stipulates that for fair dealing to apply to research and private study, the act in question must be for a non-commercial purpose.[148] Section 30(1) of the CDPA has been amended to state that fair dealing for purposes of criticism or review will only be allowed if the work has been made lawfully available to the public.

The fairness inquiry is an objective analysis, measured against the standard of whether "a fair minded and honest person would have dealt with the copyright work in the manner in which the defendant did for the purpose in question". The decision of whether the use of a work is fair will ultimately be a matter of impression, but a variety of factors remain important (to varying degrees, depending on the specific purpose of fair dealing and the facts of each case). One of the most important factors considered is the extent to which the use competes with the exploitation of the work by the copyright owner.[149] Here the courts take instruction from article 9(2) of the Berne Convention – expanded by article 13 of TRIPS – which allows member states to permit exceptions to the reproduction right in specific cases where the reproduction by a user does not

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[146] Burrell R & Coleman A Copyright Exceptions: The Digital Impact (2005) 116.
[147] Ibid.
[148] This qualification was implemented by reg 9(a) of the Copyright and Related Rights Regulations 2003 (SI 2003/2498), which amended s 29(1) of the CDPA
[149] Garnett K, Davies G & Harbottle G Copinger and Skone James on Copyright I ibid.

unreasonably prejudice the legitimate interests of the owner or conflict with the normal exploitation of the work[150]. Furthermore, the court will have regard to how much of the work has been used and theextent of the use, as well as whether the purpose achieved by using the work could have been achieved without relying on the reproduction, although an affirmative answer will not automatically render the use unfair.[151]

A defence that is closely related to the fair dealing exceptions is the reproduction of a work in the public interest.[152] Although the defences are often raised in conjunction with one another, the public interest defence falls beyond the scope of this study and will not be analysed separately.

Research and Private Study

The rationale behind the first of the fair dealing exceptions, allowing non-commercial research and private study, is to afford students and researchers the opportunity to access and use works protected by copyright.[153] The exception relates to literary, dramatic, musical and artistic works, as well as the typographical arrangement of a work, but requires that a sufficient acknowledgment of the author and source of the work must be made in the case of research, unless this proves to be practically impossible. One aspect that is notably lacking from this exception is the inclusion of cinematographic films and sound recordings, which are becoming an increasingly prevalent means of conveying information.[154] Making use of a sound recording for the purpose of research would therefore infringe the copyright in the sound recording itself,

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[150] Art 9(2) of the World Intellectual Property Organisation Berne Convention for the Protection of Literary and Artistic Works (9-9-1886) 1161 UNTS 3 (1886)
[151] Hyde Park Residence Ltd v Yelland and Others [2001] Ch 143 para 40; Ashdown v Telegraph Group [2002] Ch 149 CA paras 76-81; Garnett K, Davies G & Harbottle G Copinger and Skone James on Copyright I (15th ed 2005) 499.
[152] Hubbard and Another v Vosper and Another [1971] 1 All ER 1023 CA; Beloff v Pressdram [1973] 1 All ER 241; Hyde Park Residence Ltd v Yelland and Others [2001] Ch 143; Ashdown v Telegraph Group [2002] Ch 149 CA
[153] See Garnett K, Davies G & Harbottle G Copinger and Skone James on Copyright I (15th ed 2005) 485.
[154] Burrell R & Coleman A Copyright Exceptions: The Digital Impact (2005) 116

but not the musical work underlying it.[155] As is shown later in this chapter, the Australian equivalent is to be preferred in this respect because of its broader construction and scope.

The Information Society Directive allows member states to provide exceptions for private study and research not only to the reproduction right, but also to the distribution right.[156] In this respect the CDPA clearly states that fair dealing with a work "does not infringe any copyright in the work",[157] which extends the scope of the exception to all the exclusive rights granted to copyright owners. This statement was formulated on the premise that fair dealing for the purposes of research or study will rarely, if ever, have an impact on any rights other than reproduction and distribution.[158]

The meaning of "non-commercial research" is not exact, as the CDPA implemented the qualification without incorporating a correlative definition. However, the meaning of the term is informed by recital 42 of the Information Society Directive (which is the cause of its inclusion), which states:

"The non-commercial nature of the activity in question should be determined by that activity as such. The organizational structure and the means of funding of the establishment concerned are not the decisive factors in this respect."

It is clear from the above extract that the determination of whether the allegedly infringing act does indeed infringe is unique to each specific scenario, and the conduct can be found to be non-commercial regardless of the otherwise-indicating organizational structure. It is suggested that the activity complained of should be viewed on a continuum representing intentions to profit and

[155] Ibid.
[156] Art 5(2)(b), (3)(a) & (4).
[157] S 29(1a)&(1c).
[158] Garnett K, Davies G & Harbottle G Copinger and Skone James on Copyright I (15th ed 2005) 489.

didactic purposes as the two extremes, with the purpose of the specific research being determinative instead of the larger purpose of the researcher. Notwithstanding, research carried out for a non-profit organization with the intention to raise funds for the organization will likely still be deemed to be of a commercial nature.[159]

The requirement that a sufficient acknowledgment must be made in the case of research is a reflection of the standards of fair practice that are expected of users, although section 29(1B) provides that no acknowledgment needs to be made if it is impossible for practical reasons. This provision will have effect in three scenarios. The first situation envisioned by this clause is where a work was published anonymously. However, while the Information Society Directive requires that the author must be acknowledged if her identity is knowneven where the work was published anonymously, the CDPA does not contain any provision to this effect. The CDPA is therefore not in compliance with the Directive in this regard.[160] Secondly, where the work is unpublished and it is not possible to establish the author's identity by reasonable enquiry, the user will be excused from making a sufficient acknowledgement.[161] Finally, if the work was originally published with the author's name but it has since become impossible to name her for reasons of practicality, no acknowledgement needs to be made. If, for example, the copy of a work used for research does not bear the author's name, the requirement of sufficient acknowledgment may be dispensed with if it is not possible to ascertain her identity after reasonable enquiry.[162] If the author is not also the copyright owner, it is important that the author of the work is indicated, not the copyright owner.[163] The requirement that the author must be acknowledged indicates that the exception applies to the entire research process; from procuring

[159] Ibid.
[160] Ibid.
[161] ibid
[162] Ibid.
[163] Ibid. at 488

the source material to reproductions of such material in the publication of the research.[164] This view is fortified by the fact that a distinction is drawn in the CDPA between research and private study.

As regards private study, the Information Society Directive requires that the use of a work for private study is not for commercial ends, either directly or indirectly.[165] This suggests that courses presented for vocational improvement will not benefit from this fair dealing exception. However, no acknowledgment of the author or source is required in this case because the results of the exercise are not published and attribution is therefore senseless. The meaning of "non-commercial" as discussed in relation to research applies equally to private study. The fact that a work is used for private study does not necessarily indicate that the use will be protected by the fair dealing exception; a contextual evaluation of the use must be undertaken to determine whether the particular conduct is exempted.[166]

The CDPA extensively regulates acts of copying by persons other than researchers and students.[167] In the case of libraries, a librarian cannot rely on the fair dealing provision to make copies because this act is regulated by sections 38 – 40. These sections make it possible for librarians to provide copies of articles from periodicals and sections from published works (subject to certain conditions) without infringing copyright.[168] Such copying must still, however, be for the purpose of non-commercial research or private study, and librarians are therefore exempted from liability if they provide materials for others to use for purposes of fair

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[164] Burrell R & Coleman A Copyright Exceptions: The Digital Impact (2005) 118.
[165] Art 5(2)(b). The CDPA has been amended accordingly by reg 2(1) of the Copyright and Related Rights Regulations 2003 (SI 2003/2498) and this definition of private study is now included in section 178.
[166] Garnett K, Davies G & Harbottle G Copinger and Skone James on Copyright I (15th ed 2005) 489.
[167] S 29(3). CDPA
[168] Garnett K, Davies G & Harbottle G Copinger and Skone James on Copyright I (15th ed 2005) 489-490.

dealing.[169]Limited instances of copying are therefore allowed where the person doing the research or private study is not the person doing the copying.

Computer programs are the subject of two provisions that curtail the functioning of the fair dealing exception.[170] Fair dealing does not extend to the act of converting a computer program from a low level language to a high level language or the incidental reproduction of the program while doing so.[171] Furthermore, it is not fair dealing to "observe, study or test the functioning of a computer program in order to determine the ideas and principles which underlie any element of the program".[172] The fair dealing exception is specifically excluded from these scenarios because they are regulated separately in the act.[173]

There has been no case law where the defence of fair dealing for research or private study has been raised in the United Kingdom and authors have therefore looked to other commonwealth jurisdictions for cases where the courts have had the opportunity to consider the application of this exception.[174] The Supreme Court of Canada decided such a case in *CCH Canadian v Law Society of Upper Canada*,[175] that where it held that the factors considered in cases of fair dealing for the purposes of criticism, review and news reportingcan be helpful in deciding whether specific acts of research and private study are fair. Interestingly, the Canadian Copyright Act[176]does not require that the research must be of a non-commercial nature for it to qualify as fairdealing, and the court accordingly held that lawyers can rely on the defence even when their actions are commercial and aimed at making a profit.

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[169] Ss 38(2)(a)(i)-(ii) & 39(2)(a)(i)-(ii) of the CDPA.
[170] S 39(4) & (4A). Ibid
[171] S 39(4). Ibid
[172] S 29(4A). Ibid
[173] In S 50B & 50BA respectively.
[174] Garnett K, Davies G & Harbottle G Copinger and Skone James on Copyright I (15th ed 2005) 489; Burrell R & Coleman A Copyright Exceptions: The Digital Impact (2005) 118-119
[175] [2004] SCC 13
[176] 1985

It is clear that the UK exception of fair dealing for the purpose of non-commercial research or private study is of great importance to the public's interest in education and developing academic schools of thought. However, the provision is formulated narrowly in comparison with the Australian equivalent, where a more inclusive approach is adopted.

4.3 Australia

The first federal Australian Copyright Act was passed into law in 1905.[177] This Act is sanctioned by the Constitution of the Commonwealth of Australia, which specifically provides the legislature with the power to regulate copyright law.[178] The 1905 Act did not incorporate the principles or provisions of the Berne Convention (or any other international agreements) and sought to free Australia from the UK copyright law as it stood at the time. The 1905 Act introduced fair dealing to Australian copyright law, with a provision that contained the majority of the substance of the contemporary fair dealing exceptions.[179] However, this only lasted until 1912, when the Copyright Act of 1912 was promulgated, repealing the 1905 Copyright Act and adopting the United Kingdom's Copyright Act of 1911 in its entirety (with additional provisions to aid its application in Australia). The 1911 Act statutorily abolished common law copyright and statute is now the only source of protection.[180] In the United Kingdom the Copyright Act of 1956 repealed the Act of 1911, but this Act continued to remain in force in Australia.[181] Following the repeal of the Act in the United Kingdom, the Australian Attorney-General

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[177] The statute was known as the Copyright Act, 1905; see Atkinson B The True History of Copyright: The Australian Experience 1905-2005 (2007) 13.
[178] S 51(xviii) of the Commonwealth of Australia Constitution Act 1900.
[179] S 28 read: "Copyright in a book shall not be infringed by a person making an abridgment or translation of the book for his private use (unless he uses it publicly or allows it to be used publicly by some other person), or by a person making fair extracts from or otherwise fairly dealing with the contents of the book for the purpose of a new work, or for the purposes of criticism, review, or refutation, or in the ordinary course of reporting scientific information."
[180] Lahore J Copyright and Designs: Commentary I (RS 87 2010) 4041
[181] Lahore J Copyright and Designs: Commentary I (RS 87 2010) 2043

appointed a committee to examine the implications of the United Kingdom's repeal in Australia and the accession by Australia to the Berne Convention and the Universal Copyright Convention.[182] This body, known as the Spicer Committee, published a report in 1959 which provided the impetus for legislative reform and consequently formed the foundation of the 1968 Act.[183]

The Australian Copyright Act of 1968 (hereafter the "Copyright Act") came into operation on May 1, 1969, and regulates the current law of copyright in Australia. Australiais party to the latest text of the Berne Convention (the Paris Act)[184] as of March 1, 1978. Australia is also party to the Rome Convention,[185] the UCC[186], TRIPS[187], the WCT[188] and the WPPT[189], which are discussed earlier. Part VIII of the Copyright Act makes provision for the Act to be applied to qualified works of foreign countries in accordance with the principle of national treatment.[190]

4.3.2 Rights Subsisting in Copyright

The Copyright Act has a fragmented structure when compared to the CDPA, although the substantive provisions are largely similar. The Copyright Act recognises artistic, literary, dramatic, and musical works as works eligible for copyright protection.[191] Moreover, it treats sound recordings, cinematographic films, broadcasts and published editions as "subject-matter

[182] Ibid
[183] Ibid. Pg 2043
[184] 1161 UNTS 3 (1971).
[185] World Intellectual Property Organisation International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (26-10-1961) 496 UNTS 43 (1961).
[186] Ibid at footnote 108
[187] Ibid at footnote 109
[188] Ibid at footnote 110
[189] Ibid at footnote 111
[190] S184-185. Of the Act
[191] Part III of the Act.

other than works" also eligible for copyright protection.[192] Computer programs are protected independently from literary works by the Copyright Act, while the CDPA does not treat computer programs as distinct from literary works. Apart from this, the categories of subject-matter eligible for protection are identical to those recognised in the CDPA, although the CDPA gives separate protection to databases while the Copyright Act treats them as a subset of literary works.

The Copyright Act grants a property right to the author of a work in the form of the exclusive right to do or authorise certain acts in relation to that work.[193] Accordingly, guilty knowledge is irrelevant when establishing infringement.[194] These acts correspond with the restricted acts granted by the CDPA; they entail the reproduction right, the publication right, the performance right, the right of communication to the public, the adaptation right, and the right to do any of these restricted acts in relation to an adaptation (depending onthe type of work in question).[195] To comply with TRIPS, the right to authorise the commercial rental of a literary, musical or dramatic work, or a computer program or sound recording was introduced by the Copyright (World Trade Organization Amendments) Act.[196] As these rights have already been discussed in relation to the CDPA, it is unnecessary for present purposes to do so again, given that the rights contained in the Copyright Act are substantially the same, save for a few divergences which warrant a brief analysis.

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[192] Part IV of the Act.
[193] Lahore J Copyright and Designs: Commentary I (RS 92 2011) 2095.
[194] Lahore J Copyright and Designs: Commentary I (RS 92 2011) 34185
[195] Ibid. at 34041-34043
[196] Ss 3 & 4 of the Copyright (World Trade Organization Amendments) Act, 149 of 1994, inserted s 31(1)(c) - (d) and s 85(d) respectively into the Australian Copyright Act

While the CDPA provides for a distribution right, the Copyright Act grants only a publication right.[197] The right to publish a work has been interpreted by the courts to mean the right to make a work public which has not been available to the public previously in the copyright territory.203 The publication right does not allow the copyright owner to prohibit issuing additional copies to the public (although this could infringe the reproduction right). This differs greatly from the distribution right, especially in the digital environment where distribution is coupled with reproduction over the internet and both the distributing and reproducing parties can be held liable. Accordingly, the publication right is not as extensive in its scope as the distribution right.

The rights of public performance and communication to the public contained in the Copyright Act of 1968 are very similar to those contained in the CDPA. As with the UK equivalent, the communication right includes making a work available or transmitting it electronically, although it does not include tangible copies (which are addressed by the publication right). The Copyright Act also includes a broadcast as a communication to the public.[198]

The rental right – which was introduced internationally by TRIPS as a new addition to the exclusive rights208 and introduced into Australian law one year after the commencement of TRIPS[199] – applies to different subject-matter than it does in terms of the CDPA. Article 11 of TRIPS requires member states to provide the rental right to authors of "at least" computer programs and cinematographic films if the rental of these works has led to widespread copying. While the CDPA protects the rights of the producers of films on this occasion, it ignores the owners of computer programs in this context. The Australian position, inversely, protects the

[197] Ss 29 & 31(1)(a)(ii).
[198] Broadcasting is also included in the right to communicate a work to the public in the CDPA: see s 20
[199] Ss 2, 3 of the Copyright (World Trade Organization Amendments) Act 149 of 1994

rights in computer programs, but neglects the rental rights of producers of films.[200] It must therefore be assumed that the rental of the different types of works has different effects in the eyes of the two legislators.

Sensibly, the rights in respect of computer programs are limited to exclude situations where the computer program is not capable of being copied in the ordinary use of the machine or device in which it is embodied, and where the computer program is not the essential object of the rental.211 The distinction drawn between rental and lending in the CDPA is upheld in the Copyright Act, albeit with different terminology. Whereas the CDPA refers to "rental", the Copyright Act employs the term "commercial rental" to illustrate its intended distinction from "lending". The Copyright Act specifically states that it "is not the intention of Parliament that a lending arrangement should be regarded as a commercial rental arrangement".212

The exclusive rights as set out in the Copyright Act therefore do not differ greatly from those in the CDPA. With the exceptions of the different subject-matter covered by the rental right and the distinction between the publication and distribution rights, the content of the protection granted to copyright owners is largely the same. Given this context the fair dealing provisions can now be compared in the same light.

4.3.2FAIR DEALING

The fair dealing provisions in the Australian Copyright Act are arranged according to the subject-matter each one covers. The fair dealing provisions relating to literary, artistic,dramatic and musical works are contained in Division 3 of Part III,[201] while those relating to sound

[200] The Copyright Act provides for computer programs (s 31(1)(d)), sound recordings (s 85(1)(d), and literary, musical and dramatic works embodied in sound recordings (s 31(1)(c)).
[201] S40-42. Of the Copyright Act

recordings, cinematographic films, broadcasts and published editions are contained in Division 6 of Part IV.[202] The most notable substantive difference in this regard between the Copyright Act and the CDPA is that the former contains an additional fair dealing exception for parody or satire.[203]

When the Copyright Act was promulgated in 1968, it soon proved to not strike an effective balance between the interests of the copyright owner and the public interest.[204] Consequently, the first reform committee, known as the Franki Committee, was appointed in 1974 to re-examine the reprographic needs and trends in Australia, and the Copyright Amendment Act of 1980 was drafted to implement the recommendations made by the committee.[205] The Amendment Act introduced three subsections to the fair dealing provision relating to research and study, which aim to inform users of what will be considered fair. This amendment introduced the four factors traditionally associated with fair use that courts adopted in the United States in the case of Folsom v Marsh,[206] as well as an additional factor.220 These factors are considered when assessing the use of the copyright work to determine the fairness of the conduct. The Act also amended the exception by removing the word "private" from private study, thereby making the category broader than the UK equivalent.[207] Another Copyright Amendment Act[208] was promulgated shortly afterwards, which extended the application of the fair dealing provisions relating to criticism, review and news reporting to audio-visual works.

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[202] S103A-103C of the Copyright Act
[203] S41A, 103AA. of the Copyright Act
[204] Lahore J Copyright and Designs: Commentary I (RS 77 2008) 40041-40042.
[205] Ibid. at 40042
[206] 9F Cas 342 (1841). These factors are now statutorily embodied in s 107 of the American Copyright Act
[207] S 7 of the Copyright Amendment Act of 1980
[208] S 11, which introduced ss 103A and 103B. Audio-visual works are defined in section 110A to include sound recordings, cinematographic films, and sound and television broadcasts.

Although various other amendments to copyright law were made around the same time, the next amendment to fair dealing came with the Copyright Amendment (Digital Agenda) Act in 2000. As the short title suggests, the Act was aimed at bringing the legislation relating to copyright in line with the technological developments of the past decades. Forthis reason, the term "copy" was replaced by "reproduce" to make it applicable to digital technologies (while using the term "facsimile copy" in reference to an analogue copy), both in the sections that provide for this exclusive right and the fair dealing provisions relating to it.[209] The Act also extended the fair dealing provisions to apply to the exclusive right of communication to the public and introduced definitions for a "reasonable portion" that may be used for fair dealing.[210] Although it was suggested that this Act should replace the specific fair dealing provisions with a general fair use provision (which would retain the specific purposes as indicative of what should be considered fair),[211] this suggestion was not enacted.

Pursuant to the Australia-United States Free Trade Agreement (AUSFTA), numerous amendments to Australian copyright law were made by the US Free Trade Agreement Implementation Act. However, this Act only contained some minor alterations to the definitions relating to fair dealing. Subsequent to the promulgation of the Implementation Act, the Parliamentary Committee launched an inquiry into the desirability of incorporating a fair use exception as found in American copyright law.[212] Similarly, the Senate Select Committee suggested that adopting a fair use defence could provide an adequate redress to the balance of

[209] S23, 25, 42A-42D, 134-150 of the Copyright Amendment (Digital Agenda) Act 110 of 2000.
[210] S10(2A)-(2C) of the Copyright Act. See Lahore J Copyright and Designs: Commentary I (RS 77 2008) 40043-40044.
[211] Copyright Law Review Committee Simplification of the Copyright Act 1968 – Part 1 – Exceptions to the Exclusive Rights of Copyright Owners (1998) para 6.10 <available at http://www.austlii.edu.au/cgi bin/sinodisp/au/other/clrc/4.html?stem=0&synonyms=0&query=Simplification%20AND%20Copyright%20Act&no context=1> (accessed 16-11-2023).
[212] Lahore J Copyright and Designs: Commentary I (RS 77 2008) 40044.

interests between copyright owners and users.[213] However, instead of replicating the American fair use exception, the existing fair dealing provisions were retained and a new fair dealing exception providing for parody and satire was added, while exceptions were also adopted for time-shifting and format-shifting.[214] This Act also clarified the meaning and scope of a "reasonable portion" by use of a systematic table inserted into the fair dealing for research and study provision.[215] Accordingly, no general defence currently existsand users have to rely on one of the numerous clauses of fair dealing defences, also known as "specific purpose" defences.[216]

These developments have shaped the copyright law of Australia generally and the fair dealings provisions specifically. With this historical context it is possible to analyse the amended statute, the Copyright Act, as regards the individual fair dealing provisions.

4.3.3.2 Research and Study

The core fair dealing for the purpose of research or study provision, section 40(1)[217], states:

"A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, for the purpose of research or study does not constitute an infringement of the copyright in the work."

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[213] Senate Select Committee on the Free Trade Agreement between Australia and the United Stated of America Final Report (5-8-2004) 75-76 <available at http://www.aph.gov.au/senate_freetrade/report/final/report.pdf> (accessed 16-11-2023).
[214] These additions were promulgated by the Copyright Amendment Act 158 of 2006 in 2007. See Lahore J Copyright and Designs: Commentary I (RS 77 2008) 40045.
[215]S (5), inserted by s 11 of the Copyright Amendment Act of 2006.
[216] Lahore J Copyright and Designs: Commentary I (RS 77 2008) 40046.
[217] Copyright Act

Section 103C(1), which relates to audio-visual works, is substantively identical and the commentary on the above section therefore applies, mutatis mutandis, to this section as well.[218]In contrast to the UK counterpart, this provision does not require a sufficient acknowledgement of the author and source to be made in the case of research, although this could arguably be relevant to the determination of fairness. The next subsection, section 40(1A), reiterates this exception for persons enrolled as external students at aneducational institution, but it specifically excludes lecture notes from its definition of literary works.

The Federal Court of Australia has applied the terms "research" and "study" according to their dictionary meanings. "Research", in terms of the Macquarie Dictionary (as relied on by the court), is the "diligent and systematic inquiry or investigation into a subject in order to discover facts or principles", while study is defined as the "application of the mind to the acquisition of knowledge, as by reading, investigation, or reflection".[219]

When deciding on whether a particular use qualifies as fair dealing for the purpose of research or study, courts are directed by statutory guidelines. Courts are instructed to consider five factors, namely the purpose and character of the dealing, the nature of the work that was used, the possibility of obtaining the work within a reasonable time at an ordinary commercial price, the effect of the dealing on the potential market for or the value of the work, and the amount and substantiality of the part of the work reproduced if the entire work is not used. All of these statutory guidelines (except the possibility of obtaining the work by legitimate means) correspond with the factors contained in the fair use analysis in the American Copyright Act of

[218] The section reads: "A fair dealing with a literary work (other than lecture notes) does not constitute an infringement of the copyright in the work if it is for the purpose of, or associated with, an approved course of study or research by an enrolled external student of an educational institution."
[219] ***De Garis v Neville Jeffress Pidler Pty Ltd*** (1990) 18 IPR 292 at 298.

1976.[220] The fourth consideration – the effect of the dealing on the potential market for the work, or the work's value – is clearly aimed at catering for the Berne three-step test. These factors aid the courts in establishing whether a particular use is fair, which is to be determined on each set of facts individually.[221] Section 103C, which covers fair dealing in relation to audio-visual works, also contains these statutory guidelines, although that is where the provision ends; the following commentary therefore relates only to section 40 subsections (3) and (4) further regulate the application of this fair dealing exception.[222] In terms of these provisions, an article that appears in a periodical may be reproduced in part or in its entirety for the purpose of research or study, unless another article from the same publication is also reproduced (provided the latter reproduction is for the purpose of different research or another course of study). This serves as a quantitative guideline regarding what may be reproduced. An article from a periodical publication may therefore be reproduced regardless of other statutory guidelines or the size of the article; the reproduction will be deemed fair dealing. However, the Explanatory Memorandum to the Copyright Amendment Bill of 2006 makes it clear that more than one article from the same periodical may be reproduced if it is for the same research or course of study in terms of section 40(4). With the amendment of the section, the emphasis has shifted from the subject-matter of the articles copied to the nature of the research or study.[223] Reproducing more than one article from a periodical can now qualify as a deemed fair dealing if it is for the same research or study.

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[220] S 107(1)-(4), which is reflected in s 40(2)(a), (b), (d) & (e) of the Australian Copyright Act.

[221] ***Haines v Copyright Agency Ltd (1982) 42 ALR 549*** at 556. Stellenbosch University http://scholar.sun.ac.za

[222] These subsections were introduced by s 7 of the Copyright Amendment Act 154 of 1980 and amended by s 11 of the Copyright Amendment Act 158 of 2006

[223] The Explanatory Memorandum states that the provision now "effectively allows more than one article from the same periodical publication to be reproduced (that is, it provides that this will constitute a fair dealing) where those articles are required for the same piece of research or the same course of study, but prohibits the reproduction of large portions of unrelated articles from a periodical publication": Explanatory Memorandum on the Copyright Amendment Bill 2006 (2006) 113 <available at http://www.austlii.edu.au/au/legis/cth/bill_em/cab2006223/memo_0.> (accessed 16-11-2023). See also Lahore J Copyright and Designs: Commentary I (RS 77 2008) 40066-40067.

Another quantitative guideline is the reasonable portion test contained in section 40(5) of the Copyright Act. This section provides a great deal of clarity to the fair dealing exception by providing thresholds for specific portions of works that qualify as "reasonable portions". In terms of this section, if a literary, dramatic or musical work is contained in a published edition of at least ten pages, 10% of the total number of pages of the published edition may be reproduced, or, alternatively, one chapter if the work is divided into chapters. Furthermore, a reproduction of a literary or dramatic work published in electronic form may not exceed 10% of the total number of words or a single chapter if the work is divided into chapters. If a work is available both in publication and electronic form, the use will qualify as a deemed fair dealing if it satisfies either of a reasonable portion.[224] However, once a reproduction qualifies as a deemed fair dealing in terms of subsection (5), any further use of the same work will not be eligible for the same exemption. Further use may still qualify as a fair dealing, but the usual judicial evaluation will have to be consulted to ascertain this. Furthermore, the definition of a "reasonable portion" contained in section 10 of the Act will not be applicable to the inquiry of whether the use qualifies for the protection of subsection (5), as the use will be deemed to be a reasonable portion only if it fulfills the criteria of the latter.[225]

The five statutory guidelines contained in section 40(2) will still be applicable to the evaluation of whether the dealing with a work is a fair dealing if it does not fall within the ambit of a reasonable portion in terms of subsection (5). If, for example, an amount of more than 10% of the words in an electronic publication is used, the defendant can still raise a defence of fair dealing for the purpose of research or study in terms of section 40(1) and the court will then consider the statutory guidelines contained in section 40(2). The deemed fair dealing provisions

[224] Lahore J Copyright and Designs: Commentary I (RS 77 2008) 40067
[225] S 40(8). Australian Copyright Act

(section 40(3)-(5)) therefore act as an extra-judicial mechanism to determine whether the use qualifies as a fair dealing, failing which the courts will have to be consulted.

The Australian defence of fair dealing for the purpose of research and study has a wider range of application than its UK or Nigerian counterpart as it is not confined to non-commercial research or private study. The statutory guidelines provide a greater degree of certainty than the comparatively uninformed provision in the CDPA, as the Australian courts are instructed to take these guidelines into account when assessing the fairness of the dealing. Extra-judicial guidelines are also provided to inform users of thresholds that will automatically deem conduct to constitute fair dealing. The Australian provision incorporates the three-step Berne test, which is absent from the CDPA in the context of fair dealing. Accordingly, the Australian provision is better structured and much more comprehensive.

CHAPTER FIVE

5.1 SUMMARY OF FINDINGS

This study on the efficacy of the defense of fair dealings in Nigeria has yielded insightful findings, shedding light on critical aspects of the nation's copyright landscape. The examination of historical developments, legal frameworks, and practical applications of fair dealings in Nigeriahas revealed the following:

1. That the defence of fair dealing is not well espoused in the extant Copyright Act in Nigeria. The existing legal framework for fair dealings, still hold a degree of ambiguity and lack of specificity. This has resulted in challenges relating to the interpretation and application of fair dealing provisions, leaving users and creators grappling with uncertainties in navigating the legal landscape. The historical evolution of fair dealings in Nigeria, as explored in the thesis, underscores a gradual recognition of the need for equilibrium between safeguarding the rights of copyright holders and advancing the broader public interest.Findings have emphasized that limited awareness and understanding of fair dealing provisions contribute to inadvertent copyright infringements. Therefore, educational campaigns and awareness programs are crucial components in enhancing the efficacy of fair dealings, ensuring that stakeholders are well-informed and can navigate copyright issues responsibly.
2. The Courts in Nigeria have not exhaustively defined and circumscribed the scope of the defence of fair dealing in relation to copyright infringement. The thesis findings underscore the importance of ongoing case law development to provide guidance on the nuanced application of fair dealing provisions across diverse contexts. Technological challenges further complicate the landscape, with the advent of digital technologies necessitating adaptive measures to align fair dealing provisions with contemporary realities.
3. The Courts in the U.S have in the Napster Case expounded on the scope of fair dealing as a defence to copyright in the U.S. International comparisons highlight areas for improvement within Nigeria's fair dealing framework. The thesis findings recommend learning from the experiences of other jurisdictions, emphasizing the need for a globally aligned approach to strengthen the efficacy of the defense.
4. This study also finds that the advent of digital technologies poses challenges to the

traditional understanding of fair dealings. Adapting fair dealing provisions to address new technological landscapes is crucial for relevance and effectiveness

In conclusion, the thesis findings collectively advocate for a multifaceted approach to fortify the defense of fair dealings in Nigeria. Clarity in legislation, extensive educational efforts, ongoing judicial interpretation, and international benchmarking are integral components of a strategy aimed at fostering a copyright environment that harmonizes the rights of creators with the public interest. By addressing these findings, Nigeria can position itself to navigate the evolving challenges posed by technology and creative practices while upholding the principles of fair dealings.

5.2 RECOMMENDATIONS

In a bid to ensure the continuous efficacy of the defence of fair dealing in Nigeria the following recommendations have been made:

1. Clarity and Specificity in Legislation.Ensure that the legal framework clearly defines and outlines the scope of fair dealing. Clarity in the legislation helps guide individuals, institutions, and the judiciary in understanding the acceptable uses of copyrighted material.
2. Education and Awareness Programs**.** Implement education and awareness programs to inform the public, creators, and users of copyrighted materials about the provisions of fair dealing. This can help prevent unintentional infringement and promote a better understanding of the principles behind fair dealing.
3. Guidelines and Best Practices.Develop and disseminate guidelines and best practices that provide practical insights into how fair dealing can be applied in various contexts. These guidelines can be beneficial for creators, educators, researchers, and other stakeholders.
4. Regular Review and Update of Legislation. Conduct periodic reviews of copyright legislation to ensure that it remains relevant in the face of technological advancements and societal changes. Consider amendments or updates to address emerging issues and align with international best practices.
5. Balancing Rights and Interests**.** Maintain a balanced approach that considers the rights of copyright owners and the public interest in promoting education, research, and innovation. Strive for a fair equilibrium that supports creativity while allowing for the reasonable use of

copyrighted material.

6. Alternative Dispute Resolution Mechanisms.Encourage the use of alternative dispute resolution mechanisms to resolve copyright disputes related to fair dealing outside of traditional litigation. This can be more efficient and cost-effective for all parties involved.
7. International Collaboration. Engage in international collaboration to stay informed about global developments in fair dealing and intellectual property law. This can provide insights into best practices and facilitate a harmonized approach that aligns with international standards.
8. Public Consultation.Conduct public consultations when considering changes to copyright laws, including fair dealing provisions. Soliciting input from various stakeholders can help identify potential concerns and ensure that the legal framework reflects the interests of the broader community.
9. Technology Considerations**.** Address technological challenges and advancements. With the rise of digital technologies, it is important to consider how fair dealing applies to new forms of creative expression and distribution methods.

5.3 CONCLUSION

This study has established that the efficacy of the defense of fair dealings in Nigeria remains a critical and evolving aspect of the country's copyright framework. Through an examination of the historical development and legal provisions surrounding fair dealing, it is evident that this defense serves as a crucial mechanism to balance the rights of copyright holders with the broader public interest in accessing, using, and building upon creative works.

The recommendations outlined, including the need for legislative clarity, education and awareness initiatives, and the promotion of stakeholder collaboration, are vital steps toward enhancing the effectiveness of fair dealing. A transparent and well-defined legal framework, coupled with ongoing judicial interpretation through case law development, can provide the necessary guidance for creators, users, and the legal system.

As Nigeria navigates the challenges posed by digital advancements and changing creative practices, it is essential to conduct regular reviews and updates of copyright laws, ensuring they remain adaptive and responsive to the dynamic nature of the digital age. Embracing international best practices and considering the experiences of other jurisdictions will further

contribute to a robust and globally aligned fair dealing framework.

In essence, a holistic approach that combines legal, educational, and collaborative efforts will fortify the defense of fair dealings in Nigeria. By doing so, the nation can foster a creative environment where the rights of copyright holders are respected, while allowing for the continued growth of knowledge, innovation, and cultural expression for the benefit of society as a whole.

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