

Assessment Of Fair Dealing Provisions In The Nigerian And Namibian Copyright Law

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Abstract: Copyright in a work gives the right owner exclusive right to control the doing of certain Acts in relations to the work. Copyright subsist in literary works such as novels, stories, poetical works, plays, stage direction, film scenarios, broadcasting scripts, textbooks, treaties, biographies, essays, also in musical and artistic works such as lyrics of a song, musical composition and artistic work such as paintings, drawings, wood cuts, engravings, prints, maps, plans and diagrams. Other items covered by copyright includes cinematographic films, sound recording and broadcasting. While the law regulates the right owners. Infringement of copyright is a matter of concern especially with the increasing use of computer and related devices. The Acts which may constitutes infringements of copyright includes reproduction of the work in any material form, publishing or performing in the public, translating, adapting, distributing or communicating the work to the public. In analyzing the views of other authors on the subject, this work examines the relevant provisions of the extant law in two African countries, Nigeria and Namibia with a view of assessing the impacts of the exceptions on the enforcements of copyright claims. It is the finding of this work that infringements of copyright poses serious challenges in view of the wide exceptions created by fair dealing provisions in the extant laws that individuals and corporate organizations can find escape routes. A further review of the laws on fair dealing will serve the enforcement mechanism.

Keywords: Copyright, Fair dealing, Extant laws

I. INTRODUCTION

Intellectual property protection is one area of law which has stimulated interesting debates (Netanel, 1996; Lunney, 1996; Benko, 1987). In particular, its impact on developing countries has been discussed in diverse contexts at various international fora, notably at the World Intellectual Property Organization (WIPO), the World Trade Organization (WTO) and the World Health Organization (WHO). The debates largely revolve around consideration of the impact of the intellectual property system on diverse aspects of development. While there is a little doubt about the importance of intellectual property as a valuable commercial asset and a key player in prompting innovative and inventive Activity in advanced economies, questions are often asked about their role in the developing and least developed countries. On the one hand, protection of intellectual property

facilitates development because of its potential to encourage investment of time and effort in local creativity, inventive and entrepreneurial undertakings, on the other hand it attract foreign direct investment and protect private ownership rights.

Intellectual property has been describe in various ways, and these include “legal rights which result from intellectual activity in the industrial, scientific, literary and artistic fields” (WIPO, 2004) the legal rights which may be asserted in respect of the product of the human intellect (Philip and Firth, 2001), “that area of law which concerns legal rights associated with creative effort or commercial reputation and goodwill” (David, 2007), and “a branch of law which protects some of the finer manifestations of human achievement (William and David, 2003). For present purposes, intellectual property may be defined as legal rights conferred on those who engage in creative, inventive and promotional activities which have resulted in original, useful or other beneficial output. Such

outcome is classified as a form of property, albeit of the intangible, incorporeal variety. This means that unlike physical property, it is incapable of being physically owned or possessed and can therefore be simultaneously enjoyed by different users without being lost to the creator or 'owner' (Oyewunmi, 2015). In two African countries Nigeria and Namibia under reference, there are legal prescriptions regulating the conferment of exclusive rights in intellectual creations.

II. WORKS ELIGIBLE FOR COPYRIGHT

Both the Nigerian and the Namibian Act makes provisions for eligibility requirements. Subsistence of copyright in a work is contingent on the work satisfying the legal requirements for protection under the Nigerian Copyright Act. The first question which needs to be addressed in this regard is whether the work falls within the categories of works which are eligible for copyright protection. After ascertaining this, then, depending on the type of work concerned, due compliance with the stipulated pre-conditions for legal protection needs to be established. These preconditions are the requirement of originality, fixation and qualifying/connecting factors.

In Nigeria to be eligible for copyright protection, a work must fall within the scope of subject matter specified under Section 1(1) of the Act. The six categories of works so specified are: literary works, artistic works, cinematographic films, sound recording and broadcasts. The meaning and scope of this various works are elaborated in Section 51 of the Act. Creative works falling within the first three categories-literary, musical and artistic works are subject to the dual requirements of originality and fixation (Nigerian Copyright Act, 2004). These works also need to have the requisite connection to Nigeria. On their parts, works falling within the last three categories-cinematographic films sound recordings and broadcasts better fit the description of entrepreneurial works. These later categories often consists of derivative works whose existence largely depends on, and almost inevitably the commercial or other exploitation of creative works. Section 2 of the Namibian Act list the aforementioned works and added three others as programme carrying signals, published editions and computer programme. Computer programme under the Nigerian Act is considered alongside literary works.

LITERARY WORKS

The Nigerian Act does not attempt to define a literary work. Rather, it provides a descriptive, non-exhaustive list of works falling within the scope of literary works. Thus, according to Section 51 of the Act, "*literary work*" includes, irrespective of literary quality, any of the following work or works similar thereto: novels, stories and poetical works; plays, stage directions, film scenarios and broadcasting scripts; choreographic works; computer programme; textbooks, treaties, histories, biographies, essays and articles; encyclopedia, dictionaries, directories and anthologies; letters, reports and memoranda; lectures, addresses and sermons; law

reports, excluding decisions of courts; and written tables or compilations.

MUSICAL WORKS

Of all eligible works, musical works remains the most generic for the singular reason of its direct impact on the people (Olueze, 1998). Musical works, according to the Act, mean any musical composition, irrespective of musical quality, and includes works, composed for musical accompaniments. Thus unlike the position under Namibian, South African and UK laws where musical works are define to exclude words or Actions intended to be sung, spoken or performed with music (Namibian Copyright Act, 1994; South African Copyright Act, 1978; UK Copyright Act, 1988), the Nigerian definition broadly encompasses the combination of sounds that make up the music as well as the works such as the lyrics of a song which accompany the musical composition. Further, as applies to literary works, a musical work is protectable, irrespective of musical quality. Thus, what may appear as mere unpleasant noise with little more than nuisance value to some may nevertheless qualify for protection as a musical work. Olueze (1998) has no hesitation in concluding that music will include – juju song, rock and roll, jazz, gospel, solo, etc.

ARTISTIC WORKS

The two countries under consideration recognizes Artistic works as including, irrespective of artistic quality, any of the following works or similar thereto: painting, drawing, etchings, lithographs, woodcuts, engravings and prints; maps, plans and diagrams; works of sculpture; photographs not comprised in a cinematograph film; works of architecture in the form of building models of artistic craftsmanship.

The determination of what constitutes "work of artistic craftsmanship is largely a matter of evidence. The House of Lords in (George Hensher Ltd v. Rest-Awile Upholstery (Lancs) Ltd, 1976) held that determining whether a work was one of artistic craftsmanship within the meaning of the Act, the Court should not make an aesthetic judgement but should view the matter generally in accordance with all the evidence. It is always a question of fact on which evidence shall be led in respect of the work. In effect, there is no hard and fast rule in determining whether a work is one of artistic craftsmanship; nevertheless, the work must be seized of artistic element traceable to the originator of the work.

CINEMATOGRAPH FILMS

The Nigerian Act defines a cinematograph film as including the first fixation of a sequence of visual images capable of been shown as a moving picture of being the subject of reproduction (Nigerian Copyright Act, 2004).

The Namibian Act, merely excludes computer programme from the above definition. The concept in Nigeria is sufficiently flexible to accommodate a wide scope of visual images fixed in different media such as video tapes, as well as the more modern CDs, DVDs, and other media (digital, analogue or otherwise), provided such visual images are

capable of being shown as moving pictures, and of being reproduced. The definition is thus broad enough to cover both old and modern techniques of fixation in different media. It further provides a possible platform for the protection of modern forms of interactive works (such as video games), as these games also involve a fixation of images created or fixed by way of appropriately written computer programme (Golden China TV Games Center v. Nintendo Co. Ltd, 1996).

SOUND RECORDINGS

According to the Nigerian Act “sound recording” means the first fixation of a sequence of sounds capable of being perceived aurally and of being reproduced, but does not include a sound track associated with a cinematograph film. Section 1 of Namibian Act also excludes sound track associated with cinematograph film.

BROADCAST

The Nigerian Act defines the term “broadcast”, to mean sound or television broadcasting by wireless telegraphy or wire or both, by satellite or cable programs, and includes re-broadcast. Thus, sound (radio) and audio visual (television) broadcasts using different technological media, such as wire or wireless telegraphy are covered. However, this definition simply describes the two modes of broadcasts (sound or television), without clarifying what falls within the scope of protection as a broadcast.

III. REQUIREMENT FOR SUBSISTENCE OF COPYRIGHT

In Nigeria, once it has been ascertained that a work falls within one of the six categories of works eligible for copyright, the next step is to determine whether the works fulfils the specific requirements which qualify it for protection under the Act. With regards to literary, musical and artistic works, the Act provides that the work must satisfy the twin requirements of originality and fixation (Nigerian Copyright Act, 2004). Under the Namibian Act all the nine items must be in the original form, and should be written down, recorded or otherwise reduced to material form except for broadcast or programme carrying signals.

Literary, musical or artistic work shall not be eligible for copyright unless sufficient effort has been expended in making the work to give it an original character (Nigerian Copyright Act, 2004). Originality in this context does not mean newness or novelty, in the sense of such work not having been in existence before. According to the case study of (University of London Press v. University Tutorial Press, 1916) “the word ‘original’ does not, in this connection mean that work must be the expression of original or inventive thought... the Act does not be copied from another work but it should originate from the author. In (Ladbroke Football Ltd v. William Hill (Football Ltd), 1964) also made a similar observation to the effect that originality simply connotes that the work should not be copied but should originate from the author.

Thus, originality in copyright law simply, requires that the form or expression of the work must have been the result of the author’s intellectual creation, the outcome of the expenditure of independent skill, labour or judgement in the creation of the work (Macmillan & Co. Ltd, 1923). With regards to compilations and other collective works drawing on existing works, the effort, judgement and skill that go into the selection and arrangement of the compilation have been held to suffice to confer originality on the resulting work. Thus, in (Ladbroke Football Ltd v. William Hill (Football Ltd), 1964) copyright was held to subsist in the respondent’s work, which consisted of a compilation of bets for the purpose of weekly football pool competition. On the forms for the respondent’s coupons were printed lists of forth-coming matches between well-known teams and the list of matches included were selected by the bookmaker from the full list. The appellants’ attempt to dissect the work into its component parts consisting of headings, selection of matches and statements of odds offered for the purpose of determining originality was rejected, as the court held that the coupon must be treated as a single compilation.

The court further held that the respondents had exercised commercial judgments, experience and skill in the selection of the forms of bet, and it was therefore protectable as an original work in which copyright substituted. In Macmillan v. Cooper, 1923) Lord Atkinson clarified the position by stating that “...it is the product of the labour, skill and capital of one man which must not be appropriated by another, not the elements, the raw material...upon which the labour and skill and capital of the first have been expended. To secure copyright for this product, it is necessary that labour, skill and capital should be expended sufficiently to impart to the product some quality or character which the raw material did not possess, and which differentiates the product from the raw material”.

In the Nigerian case of (Masterpiece Investments Ltd v. Worldwide Business Media Ltd & Ors, 1997) the plaintiffs on the image of its (Plaintiff’s) client, Edinson Group. The write-up had been published in the October 1989 edition of the Business Magazine, published by the defendants. Shortly afterwards, the plaintiff’s attention was drawn to a publication in the December 1989 edition of the same magazine, which was almost identical to the earlier write-up by the plaintiff. The court rightly averted its mind to the need to determine whether the article in question was eligible for copyright protection. The defendants had contended that the article was a descriptive one whose format and language was a generic form normally used in advertisements and that the facts therein were true for every company being promoted. In other words, the language was commonplace and therefore lacking in originality. However, consistently with the low threshold of originality in copyright law, it was held that the said article was a literary work which qualified for copyright protection (Elanco Products Ltd v. Mandops (Agrochemical Specialists) Ltd, 1997).

FIXATION

In addition to the originality criterion, Section 1(2) (b) of the Nigerian Act further requires that for copyright to subsist in a literary, musical or artistic works, such work must have

been fixed in the definite medium of expression now known or later to be developed, from which it can be perceived, reproduced or otherwise communicated either directly or with the aid of any machine or device. Similarly the Namibian Act by Section 2(2) requires copyright work must be written down, recorded or otherwise reduced to material form except broadcast or programme carrying signal. Fixation is what distinguishes a work, which is protectable, from an idea, as ideas are deemed to be in the public domain and may freely be used as building blocks for the creation of intellectual works by members of the public (Green v. Broadcasting Corporation of New Zealand, 1989). What copying protects is the particular expression of an idea. The requirement is particularly important because unlike some other categories of intellectual property, such as patents and industrial designs, copyright protection is not dependent on registration or other government authority. Rather, it comes into existence the moment the work is fixed. To be protected therefore information whether in the form of words, music or art, must take a material form, and this may be written or printed form, or be recorded on tape or any other media, provided such media affords the opportunity to perceive the information. In the case of (Yeni Anikulapo Kuti & Ors v. T.M. Iseli Ors, 2003-2007) the question of eligibility of certain musical words by late music maestro, Fela Anikulapo Kuti for copyright protection was raised by the defendant, who argued that the work did not satisfy the requirement of fixation. The court held that the written lyrics, as well as the tapes containing yet to be published songs sufficiently reduced the work into a permanent form from which it could be perceived, within the meaning of Section 1(2) (b) of the Act.

The definition of fixation provided under the Nigerian Act is sufficiently broad to accommodate new and future developments in technology. Questions may however arise as to whether the “definite” medium translates to a requirement for a stable or permanent embodiment, or whether fixation in transient forms would suffice. This is particularly important in the context of the emergence of digitization and internet use on the technological landscape. The question then may be whether a literary work communicated through transient chat messages satisfies the requirement, a work should be deemed to be fixed provided there is some record which serves as proof of what has been created.

IV. INFRINGEMENT

Infringement of copyright occurs when any person, without the licence or authorization of the Copyright owner, does or causes any other person to do any of the restricted or prohibited Acts in relation to a copyright work. An Act of Copyright infringement, *ex facie*, presupposes that the alleged infringer has copied the work of the Copyright owner, and that there is a substantial objective similarity between the Copyright work and the alleged infringing work so much so that there is a reasonable inference that the infringing work derived substantially from the Copyright work. Basically, there must be a casual connection between the Copyright work and the alleged infringing work. The issue of substantial similarity is not determined by word comparison of the

Copyright work and the infringing work, but depends on whether the alleged infringing work is substantially similar to the Copyright work in question (Hawkes & Sons (London) Ltd v. Paramount Film Service Ltd, 1934).

Section 29 of the Namibian Act and Section 14 of the Nigerian Act provides for infringement of copyright. The laws makes unlawful anything done without licence or authorization of the copyright owner. Such Acts under the two laws extends to imports into the two countries, exhibitions in public article in which copyright subsists, making and distribution of copyright works etc.

V. EXCEPTIONS

Copyright is not one of those rights that admits of no exception. Ordinarily, certain rights are exempted from copyright control. The laws under considerations specifies a number of exceptions from the general principle of Copyright control. The exceptions do not have general application to all the eligible works. Application, therefore, depends on the nature and type of a particular work. In Nigeria for instance, all the exceptions specified in the second schedule to the Act apply to literary, musical, artistic works and cinematograph film, they have limited application in respect of sound recordings and broadcasts. For instance, sound recordings are only subject to paragraphs (a), (h), (k), (l) and (p) of the second schedule while at the same time paragraphs (a), (h), (k), (n) and (o) apply to broadcast (Nigerian Copyright Act, 2004). Further to the exceptions provided in the second schedule to the Act, there are some other special exceptions specified under the Third Schedule in respect of sound recordings of musical works. Beside, other exceptions abound throughout the length and breadth of the Act.

The legal effect of these exceptions is that Copyright in a work is not infringed by any person whose Act comes within the context of any of the specified exceptions. As held in (Johnston v. Bernard Jones Publications Ltd & Beauchamp, 1983) a defendant who proves that his Act falls within the rules of exception is protected (Hubard & Anor v. Vosper, 1972; British Oxygen Co. Ltd v. Liquid Air Ltd, 1925).

There are 19 exceptions to copyright works under the 2nd schedule to the Act and 8 other exceptions in respect of a sound recording of a musical work under the 3rd schedule (Ocheme, 2000).

INTEREST OF AUTHOR VERSUS INTEREST OF SOCIETY

The rationale for exceptions to copyright infringement lies in the goal or objectives which copyright strives to achieve. These goals may be said to be two principal interests. There is the interest of the individual author; the interest of the creator of a literary or other work in reaping the economic and other benefits which derive from his skill, talent or effort. In the protection of copyrighted works, considerations must be given to this effect; there is the interest of the society in which the creator lives and thrives; the need of the society to preserve and promote its arts and its interest in the growth and

development of its culture. These two interests: that of the individual and of his public is intricately related.

If authors are not enabled to reap adequate rewards from their creation the urge to create will no doubt, be impaired and creativity will suffer and the public will be the poorer for it. On the other hand, if the public as a whole is to derive the advantage it ought to derive from the skill or effort of its members, there is no doubt that some limitation must therefore be put on the rights of authors (Ocheme, 2000).

FAIR DEALING

Nigerian Copyright Act (2004), provides in respect of literary, musical, artistic works, cinematographic film, sound recording and broadcast shall not be infringed by the doing of any of the Act reserved for the Copyright owner by way of fair dealing for purposes of research, private use, criticism or review or the reporting of the current events. If the use of the work by way of fair dealing for any of the aforementioned purposes in public, it must be accompanied by an acknowledgement of the title of the work and its authority except where the work is incidentally included in a broadcast.

The second schedule to the Nigerian Copyright Act deals generally with exceptions to copyright infringement, particularly, paragraph (a) provides for fair dealing as follows:

The doing of any of the Acts mentioned in the said Section 6 by way of fair dealing for purposes of research, private use, criticism or review or the reporting of current events, subject to the condition that, if the use is public, it shall be accompanied by an acknowledgement of the title of the work and its authorship except where the work is incidentally included in a broadcast.

The owner of Copyright is barred from claiming authorship of his work where such work is included incidentally when reporting current event in a broadcast. For the defence of fair dealing to avail any defendant it must be shown that the use is for any of the following purposes; that is,

- ✓ For research;
- ✓ For private use;
- ✓ For criticism or review of the reporting of current events.

Like the Nigerian Act, the Namibian Act by Section 15 provides detail exceptions in respect to literary and musical works. It states

“Copyright shall not be infringed by a fair dealing in the use of a literary or musical work – for the purpose of research or private study by, or the personal private use of, the person using the work; for the purpose of criticism or review of the work or of another work; or for the purpose of reporting on a current event – in a newspaper, magazine or similar periodical; or by means of broadcasting or in a cinematograph film, no copyright shall subsist in the official text of any work of a legislative, administrative or legal nature, or an official translation thereof; a speech of a political nature or a speech delivered in the course of judicial proceedings; or publications or broadcasts of news of the day.

The implication of extensive fair dealing provisions is that while intellectual property have replaced the brick and mortar economy of the past, copyright laws encourages creativity for economic development. Nigeria and Namibia followed other

developed nations to make provisions safeguarding the interest of society and authors in the area of creativity. While some of this nations have set up clear parameters as to what constitutes exceptions or fair dealings, others like the United Kingdom have excluded commercial works from the domain of fair dealings. Fair dealing is not clearly defined in both the Nigerian and the Namibian Act, leaving the court to decide what is fair and unfair to the creator of copyright or the users.

Philips, Robyn and Ian (1993), has argued that;

The Act nowhere prohibits the copying of the full text of a work from being a fair dealing in it, although it would have been easy for parliament to do so. Accordingly, it is clear that, if the circumstances are fair, the reproduction of an entire book can constitute a fair dealing.

It is the view of these writers that while it is true that it would have been easy for the parliament to define fair dealing strictly or at least set out factors to be considered in accepting the defence, we disagree entirely with the proposition that the reproduction of an entire book constitutes fair dealing. How many of such entire reproduction would occur, and what befalls the right of the author to reap the fruit of his labour? We shall examine some steps taken in some jurisdictions reviewing the wide provisions on fair dealings in balancing the interest of the intellectual creator and that of the society.

CANADA

The Canadian concept of fair dealing is similar to that in the UK and Australia. The fair dealing clauses of the (Canadian Copyright Act, 2016) allows users to engage in certain Activities relating to research, private study, education, parody, satire, review, or news reporting. With respect to criticism, review, and news reporting, the user must mention the source of the material, along with the name of the author, performer, maker, or broadcaster for the dealing to be fair.

Prior to 2011, fair dealing in Canada was not definitely found to contain exceptions for parody (unlike fair use in the United States), but the Copyright Act has since been amended to include parody and satire (along with educational use) under its fair dealing provisions. Previously, a Quebec Court of Appeal in *Les productions Avanti Cine Video v. Favreau*, (1999) had recognized that parody could potentially be a ‘critique’, however it refused to recognize the exception in that circumstance.

The ruling by the Supreme Court of Canada in (*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004), has gone far in clarifying the concept of fair dealing in Canada. In considering fair dealing the Court makes the following general observation:

It is important to clarify some general considerations about exceptions to copyright infringement. Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however, the fair dealing exception is perhaps more properly understood as an integral part of the Copyright Act than simply a defence. Any Act falling within the fair dealing exceptions in the Copyright Act, is a user’s right. In order to maintain the proper balance between the rights of a Copyright owner and user’s interests, it must not be interpreted restrictively.

Furthermore, by taking “a liberal approach to the enumerated purposes of the dealing”, the Court has made fair dealing more flexible, reducing the gap between this provision and US fair use (D’Agostino, 2008). It then establishes six principal criteria for evaluating fair dealing.

- ✓ *The Purpose of the Dealing.* Is it for research, private study, criticism, review or news reporting (or additionally, since 2011, education, parody or satire)? It expresses that “these allowable purposes should not be given a restrictive interpretation or this could result in the undue restriction of users’ rights. “In particular, the court gave “a large and liberal interpretation” to the notion of research, stating that “lawyers carrying on the business of law for profit are conducting research”.
- ✓ *The Character of the Dealing.* How were the works dealt with? Was there a single copy or were multiple copies made? Were these copies distributed widely or to a limited group of people? Was the copy destroyed after been used? What is the general practice in the industry?
- ✓ *The Amount of the Dealing.* How much of the work was used? What was the importance of the infringed work? Quoting trivial amounts may alone sufficiently establish fair dealing as there would not be copyright infringement at all. In some cases even quoting the entire work may be fair dealing. The amount of the work taken must be fair in the light of the purpose of the dealing.
- ✓ *Alternatives to the Dealing.* Was a “non-copyrighted equivalent of the work” available to the user? Was the dealing “reasonably necessary to achieve the ultimate purpose”?
- ✓ *The Nature of the Work.* Copying from a work that has never been published could be fairer than from a published work “in that its reproduction with acknowledgement could lead to a wider public dissemination of the work – one of the goals of copyright. If, however, the work in question was confidential, this may tip the scales towards finding that the dealing was unfair.”
- ✓ *Effect of the Dealing on the Work.* Is it likely to affect the market of the original work? “Although the effect of the dealing on the market of the copyright owner is an important factor, it is neither the only factor nor the most important factor that a court must consider in deciding if the dealing is fair.”

Though the Supreme Court outlined these six criteria, it noted that in some contexts, factors other than those listed may be relevant in determining whether a particular dealing is fair. Nigeria and Namibia may even go further by way of a legislative response.

SINGAPORE

Under the provisions for “fair dealing” in the Copyright Act, Chapter 63 of Singapore Statutes, a certain amount of copying for legitimate purposes, such as for the purpose of research or education, is permissible as long as it is a “fair dealing”

In deciding whether the use is a fair dealing, the following factors will be considered:

- ✓ Purpose and character of the dealing, including whether such dealing is of a commercial nature or is for non-profit educational purposes;
- ✓ Nature of the work or adaptation;
- ✓ Amount copied, relative to the whole work;
- ✓ Effect of the dealing upon the potential market for the work, and effect upon its value;
- ✓ The possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price.

In other cases, Singapore followed the Canadian position of criticism or review; for the purpose reporting of news; for the purpose of judicial proceedings or professional advice would not constitute an infringement. In the case of criticism or review and the reporting of news, a sufficient acknowledgement of the work is required. The reporting of the news could be by any means of communication to the public.

INDIA

Indian Copyright Act (1957) states that a fair dealing with any work (except computer programmes) is allowed in India for the purpose of-

- ✓ Private or personal use, including research,
- ✓ Criticism or review,
- ✓ Reporting of current events and current affairs, including the reporting of a lecture delivered in public.

The term fair dealing has not been defined anywhere in the Copyright Act 1957. However, the concept of ‘fair dealing’ has been discussed in different judgments, including the decision of the Supreme Court of India in *Academy of General Education v. B. Malini Mallaya* and the decision of the High Court of Kerala in *Civic Chandran v. Ammini Amma* (Gopalakrishnan, and Agitha, 2014).

SOUTH AFRICA

In South Africa, fair dealing is dealt with in the Copyright Act of 1978 (Act 98 of 1978, including subsequent amendments). Fair dealing itself is described in Section 12(1) of the Act, whereas Sections 13 to 19 explains various exceptions to copyright. Section 20 deals with the author’s moral rights, which, if infringed, may also impact on a fair dealing ruling.

According to this Act, copyright shall not be infringed by any fair dealing with a literary or musical work:

- ✓ For the purposes of research or private study by, or the personal use of, the person using the work;
- ✓ For the purposes of criticism or review of that work or of another work; or
- ✓ For the purpose of reporting current events.
 - In a newspaper, magazine or similar periodical; or
 - By means of broadcasting or in a cinematograph film;

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

UNITED KINGDOM

Fair dealing is limited to the following purposes: research and private study (both must be non-commercial), criticism/review/quotation, and news reporting (Sections 29, 30, 178); as well as parody, caricature and pastiche (Section 30A) and illustration for teaching. Although not actually defined as a fair dealing, incidental inclusion of a copyrighted work in an artistic work, sound recording, film, broadcast or cable programme doesn't infringe copyright. Since 2014 the UK has protected the fair dealing exceptions from override by contracts or contractual terms and conditions.

For copying beyond the boundaries of fair dealing, universities and schools in the UK obtain licences from a national copyright collective, the UK Copyright Licensing Agency (CLA). Under these licences, multiple copies of portions of copyrighted works can be made for educational purposes.

The UK is the only Member State of the European Union that does not have a private copy exception, since the High Court has quashed the relevant regulations in *British Academy of Songwriters, Composers and Authors (BASCA) & Ors v. Secretary of State for Business, Innovation and Skills*, (2015). Consequently, now commonplace Activities such as format shifting (saving one's music contained in their CD's or their MP3 players or on their smartphones) have become illegal; legal scholars foresee that the said exceptions will shortly re-introduced.

UNITED STATES

The parallel concept in United States copyright law is fair use. The term "fair dealing" has a different meaning in the U.S. It is a duty of full disclosure imposed upon corporate officers, fiduciaries, and parties to contracts. In the reported cases, it usually arises in the context of the "implied covenant of good faith and fair dealing," which underlies the tort cause of Action for insurance bad faith (*Davis v. Blue Cross of Northern California*, 1979).

NORWAY

In Norway, there has been the introduction of the payments of "Public Lending Rights" to author of works so fairly dealt with or used in libraries. Nigeria and Namibia should borrow a leaf from this laudable example.

NEW ZEALAND

Copyright Council of New Zealand (2009) qualified fair dealing in the following:

- ✓ That only the person copying can rely on a fair dealing defence. It is not fair dealing to copy for someone else.
- ✓ No more than one copy may be made on any one occasion.

The Copyright Act lists several factors that must be taken into account in determining whether copying for research or private study is fair. These factors are:

- ✓ The purpose of the copying (for example, copying for commercial purposes is less fair than copying in connection with a course of study);
- ✓ The nature of the work copied (for example, it may be less fair to copy from a work resulting from a high degree of skill than a mundane work);
- ✓ Whether the work could have been obtained within a reasonable time at an ordinary commercial price (it may be fair to copy all or part of a work that is not available commercially, but unfair to copy where you can buy it);
- ✓ The effect of the copying on the potential market for or value of the work (for example, where a person copies a work that is available for sale or licence); and
- ✓ The amount and substantiality of the part copied (for example, it is less fair to copy a large or important part of a work than to copy a small or unimportant part).

VI. CONCLUSION AND RECOMMENDATIONS

It is the findings of this work that there are gaps in the two countries laws on fair dealings in comparison with the position in other jurisdiction noted above. These includes:

- ✓ No clear definition in the statutes.
- ✓ No defined parameters as the court is left to define what is fair to the author and the user of copyright work.

It suffices to say that the need for the Nigerian and the Namibian Copyright Act to witness reformations in these areas is not only necessary, but is long overdue. It is our conviction that these reformations will not only enhance the protection which the Nigerian and Namibian Acts purports to afford the owners or authors of copyrighted works, but will also go a long way in encouraging the spirit of creativity and productivity that will ultimately make for national progress development.

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