

**FAIR DEALING AS AN EXCEPTION TO THE INFRINGEMENT OF COPYRIGHT:
AN OBSTACLE TO THE EFFECTIVE ENFORCEMENT OF COPYRIGHT CLAIMS IN
NIGERIA**

BY

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ABSTRACT

This paper examines intellectual property rights, particularly copyright, the breach of such rights, right of action in torts, and the defence of Fair Dealing in an action for Copyright Infringement. This is done with a view to determining whether the defence as it were under the Nigerian Copyright Act, enhances the success of a claim for Copyright Infringement. Aptly put, the paper contends that the defence of fair dealing (as provided under the extant Copyright Act) is a clog in the wheel of effective enforcement of copyright claims in Nigeria. The conclusion is hinged on the fact that under the Nigerian Act, there are no parameters for determining what dealing in another's work is fair or otherwise. The analysis is made with the extant Copyright Act under review as well as consideration of the views of other authors on the subject matter. Suggestions are thereafter made that the Act be amended to reflect the conditions to be considered in adjudicating on what is fair or unfair dealing in copyright cases without necessarily stifling the international standard for the defence of fair dealing thereby balancing the interest of the owner of copyright and the user alike.

1. INTRODUCTION

Copyright is a system of laws for promoting both the creation of and access to artistic, literary, musical, dramatic and other creative works. It is usually presented as a balance between promoting the public interest in the encouragement of the creation and dissemination of works of the arts and intellect, and obtaining a just reward for the copyright holder (or, more accurately, to prevent someone other than the holder from appropriating whatever benefits may be generated). The essence of Copyright is to balance the interest of the author, the society and that of the users. In an attempt to balance these interests, the Act *inter alia* provides for the defence of fair dealing.

This paper examines the fair dealing exception to copyright infringement as it relates more particularly to literary works, weighs the extent of balance achievable between the interests at 'conflict' and make recommendation on the way forward.

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2. DEFINITIONS

There are no universally agreed definitions of Copyright. We shall here, consider some scholars on the subject matter. Kamil Idris¹ defined copyright in the following words: “Copyright is the area of the law that provides protection to “original works of authorship” including paintings, sculpture, music, novels, poems, plays, architecture, dance, instruction manuals, technical documentation, and software, among other items. Legal protection flows from the fact that an author 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 and concepts, and not to the ideas or concepts themselves.”²

Hon Justice Karibi Whyte (JSC as he then was)³, on his part, opined that Copyright is an intangible incorporeal right granted by statute to the author which invest the author with the sole and exclusive privilege of multiplying copies of his work and publishing and selling them.

The Nigerian Copyright Act⁴ simply defines copyright as “copyright under the Act”.⁵ This definition, Rose Oluaina Ugbe, pointed out, “does not enable laypersons to really understand what copyright means”.⁶ This definition “is grossly inadequate and imprecise”.⁷

Unlike the Nigerian Act, its United Kingdom (UK)⁸ counterpart defines copyright as

... a property right which subsists in accordance with their part in the following descriptions of work –

a. original literary, dramatic, musical or artistic works,

b. sound recordings, films or broadcasts, and

c. the typographical arrangement of published editions.

¹ Kamil, I., *Intellectual Property A Power Tool for Economic Growth*, Geneva: WIPO Publication No.888 at 190.

² It is ‘works’ that are protected and not ‘ideas’. If ideas can be taken without copying a ‘work’, the copyright owner cannot interfere. Thus, if a photograph is taken of a scene which is identical with a former photograph of the same scene, that person will have copyright in his own photograph although the idea of taking the photograph was derived from his having seen the first photograph. Infringement of copyright would however arise if an artist were to sit down with the photograph in front of him and make a painting out of it. See, Babafemi, F.O. 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.

³ Quoted in a paper by Ekpo, M., at the one day Seminar as part of the 1993 National Broadcasting Commission Public Forum. Wed. Dec. 9th 1993, held at the Senate Chambers of the then National Assembly Complex, Tafawa Balewa Square, Lagos and reported in Copyright News.

⁴ Cap C28, Laws of the Federation of Nigeria, 2004.

⁵ Ibid, S.51(1).

⁶ Ugbe, R.O. 2002. Originality and Fixation as Basis for Copyright in Music. *University of Maiduguri Law Journal-U.Maid. L.J.*, Vol.V: 23-24.

⁷ Akpan, A.E. 2005. Copyright Protection in Nigeria: Prospect for National Growth and Development. *Fountain Quarterly Law Journal*, Vol.II, No. 2: at p.103.

⁸ Section 1(1) Copyright, Designs and Patents Act, 1988.

In what appears to be a more comprehensive definition, the World Intellectual Property Organization⁹ describes copyright thus:

Generally considered to be the exclusive right granted by law to the author of a work to disclose it as his own creation, to reproduce it and distribute or disseminate it to the public in any manner or by any means, and also to authorize others to use the work in specified ways...¹⁰

Asein 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 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.¹¹ In *Adenuga v. Ilesanmi Press Sons (Nig) Ltd.*¹² 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.

3. SCOPE OF PROTECTION AND RIGHTS OF OWNERS

Works eligible for copyright protection under the Nigerian Act are provided for as follows:¹³

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

- a. Literary works;
- b. Musical works;
- c. Artistic works;
- d. Cinematograph films;
- e. Sound recording; and
- f. Broadcasts.¹⁴

⁹ The United Nations specialised agency responsible for intellectual property (including copyright) matters.

¹⁰ WIPO. 1980. *Glossary of Terms of the Law of Copyright and Neighbouring Rights*. Geneva: WIPO.

¹¹ Asein, J.O. 2012. *Nigerian Copyright Law & Practice*. 2nd ed. Abuja: Books and Gavel Ltd.

¹² (1991) 5 NWLR (Pt. 189) 82.

¹³ Section 1(1).

¹⁴ Note that, a literary, musical or artistic work shall not be eligible for copyright unless – (a) sufficient effort has been expended on making the work to give it an original character; (b) the work has been fixed in any 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. See S.1(2) of the Nigerian Act.

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Literary work includes, irrespective of literary quality, any novel, stories and poetical works, plays, stage directions, film scenarios and broadcasting scripts, computer programmes, text books, treaties, lectures, sermons, among others. Musical work on the other hand means any musical work, irrespective of musical quality, and includes works composed for musical accompaniment. Whereas, Artistic Work includes irrespective of artistic quality, paintings, drawings, etchings, lithographs, maps, plans and diagrammes, photographs not comprised in a cinematograph film, works of architecture in the form of buildings, models, works of artistic craftsmanship. Cinematograph Film on its part includes the first fixation of a sequence of visual images capable of being shown as a moving picture and of being the subject of reproduction, and includes the recording of a sound track associated with the cinematograph film. While Sound Recording is the first fixation of a sequence of sound capable of being perceived aurally and of being reproduced but does not include a sound track associated with a cinematograph film. And finally, Broadcast is sound or television broadcast by wireless telegraphy or wire or both or by satellite or cable programmes and includes re-broadcast.¹⁵

Works must therefore fall within any of the above categories to be capable of attracting copyright protection.

Section 6(1) of the Nigerian Copyright Act confers rights on copyright owners to do and authorise *inter alia* the reproduction, publication, performance, distribution or communication to the public for commercial purposes, or to make an adaption of the work in which copyright subsists.

Any act done in violation of the above provisions of the Act amounts to an infringement of the right of the copyright owner.¹⁶

¹⁵ See Section 51 of the Nigerian Copyright Act. Note that to qualify for protection, Section 1(2) *ibid* provides that the work must be original and fixed in any definite medium of expression known or later to be developed from which it can be perceived, etc. though the provision excludes cinematograph film, sound recording and broadcast, it remains to be seen for the purpose of evidence how fixation is not applicable to those categories as well.

¹⁶ Section 15 of the Nigerian Act succinctly puts it as follows: Copyright is infringed by any person who without the licence or authorization of the owner of the copyright- (a) does, or causes any other person to do an act, the doing of which is controlled by copyright; (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 section of this Act; (c) exhibits in public any article in respect of which copyright is infringed under paragraph (a) of this subsection; (d) distributes by way of trade, offers for sale, hire or otherwise or for any purpose prejudicial to the owner of the copyright, any article in respect of which copyright is infringed under paragraph (a) of this subsection; (e) makes or has in his possession, plates, master tapes, machines, equipment or contrivances used for the purpose of making infringed copies of the work; (f) permits a place of public entertainment or of business to be used for a performance in the public of the work, where the performance constitutes an infringement of the copyright in the work, unless the person permitting the place to be so used was not aware, and had no reasonable ground for suspecting that the performance would be an infringement of the copyright; (g) performs or causes to be performed for the purposes of trade or business or as supporting facility to a trade or business, any work in which copyright subsists. (2) Notwithstanding subsection (1) of this section, or any other provision of this Act, where any work in which copyright subsists or a reproduction of any such works is comprised in- (a) the archives stored in

4. EXCEPTIONS TO COPYRIGHT PROTECTION

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 pleading asserting that no legal remedy exists for the Plaintiff’s alleged injury, that *res judicata* or prescription bars the claim, or that an indispensable party has not been included in the litigation. It also means something that is excluded from a rule’s operation. It could be a statutory exception in which case, it is a provision in a statute exempting certain persons or conduct from the statute’s operation.¹⁷ In the light of this assertion, “copyright is not one of those rights that admit of no exception”.¹⁸ The Act provides extensively for numerous exceptions to copyright;¹⁹ the purpose for these exceptions are to enable specified groups and, sometimes the entire society in general, to use creative works under certain conditions, without injuring the legal rights of the copyright owner. In the main, the exceptions are intended to aid research and scholarship, especially with regards to literary and artistic work.²⁰

As stated by Fox, Patents and Copyrights rest on the theory that the result of the original labour of the author or inventor are, both on the ground of justice and public policy, to be protected against piracy.²¹

Exceptions are acts that can be performed without attracting liability for copyright infringement, but without prejudice to other legal rights or obligations,²² thus other actions ranging from breach of confidence or tort of passing off may still stand in respect of such acts. 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. However, it must be pointed out that the onus of showing that a reproached act falls under one of the stated exception falls upon the defendant.²³ Thus, it was held in the case of *Johnston v. Bernard Jones Publications Ltd & Beau Champ*,²⁴ that, a defendant who proves that his act falls within the rules of exception is protected.

the National Archives established under the Public Archives Act; or (b) the public records of a State, being records for the storage or custody of which provision is made by law, the copyright in the work is not infringed by the making or the supplying to any person, of any reproduction of the work in pursuance of that Act or law.

¹⁷ Garner, B.A. (Editor in Chief), 1991. *Black’s Law Dictionary*, 7th Edition, USA: West Publishing Co. Pp.583-584.

¹⁸ Olueze, I.M. 1998. *Nigerian Copyright Law*, Lagos: Maglink Int’l Ltd, p. 75.

¹⁹ 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. See Ocheme, P. 2000. *The Law and Practice of Copyright in Nigeria*, Zaria: ABU Press Ltd, p. 118.

²⁰ Ocheme, P., *op cit*.

²¹ Fox (Harold George), 1967. *The Canadian Law of Copyright and Industrial Designs*, 2nd Ed., Toronto: Creswell, p.3.

²² Bainbridge, D. 1999. *Intellectual Property*, 4th Ed., Great Britain: Pitman Publishing, p.165.

²³ *Sillitoe v. McGraw-Hill Book Co. (UK) Ltd.* (1983) 9 FSR 545 Ch.D, per Davis J., at p. 558.

²⁴ (1938) 1 Ch. 559

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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, consideration 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.²⁵

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.²⁶ It is in this light that the United Nations Declaration of Human Rights provides that everyone has the right freely to participate in the cultural life of the community to enjoy the arts and to share in scientific advancement and its benefit. Everyone has the right to the protection of the moral and material interest resulting from any scientific, literary or artistic production of which he is the author.²⁷

The next section of this paper will examine the exceptions to copyright infringements, particularly, the fair dealing exception and how that has been or can be a clog in the wheel of effective enforcement of copyright claims in Nigeria and how precisely fair dealing could impair generally the interest of the author especially, his economic interest.

5. THE CONCEPT OF FAIR DEALING

Fair dealing is an enumerated set of possible defences against an action for infringement of an exclusive right of copyright. It is completely unrelated to the existence of consent or authorisation on behalf of the owner of the copyright. Fair dealing constitutes a defence to an infringement action therefore, even though the act has all the required elements to constitute infringement, the exception will avail the party and allow him to escape liability in the specific circumstances enumerated by the Act.

²⁵ Uvieghara, E.E. 1992. “Exceptions to Copyright Infringement: Rationale”, in *Essays on Copyright Law and Administration in Nigeria*, edited by Prof E.E. Uvieghara, Ibadan: Y-Books, p. 89.

²⁶ *Ibid.*

²⁷ Article 27(1) & (2).

The second schedule to the Nigerian Copyright Act²⁸ deals generally with exceptions to copyright infringement, particularly, paragraph (a)²⁹ provides for fair dealing as follows:

The doing of any of the acts mentioned in the said section 6³⁰ 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.

5.1 CATEGORIES OF FAIR DEALING

The Nigerian Copyright Act states certain purposes for which a work protected by copyright may be used without authorisation or license of the author, there are as itemised and addressed hereunder.

a. Research and Private Use

Fair dealing for the purpose of private use should be treated with caution. Contrasted with public use, it need not be accompanied by acknowledgement. There is however, nothing in the Act empowering a user to copy a work with reckless abandon under the guise of private use.³¹ Hence, Peterson, J. in *University of London Press v. University Tutorial Press Ltd*,³² was of opinion that the doctrine of fair dealing should not be used as engine of abuse when he stressed that:

It could not be contended that the mere republication of a copyright work was “fair dealing” because it was intended for purposes of private study; nor if an author produced a book of questions for the use of students, could another person with

²⁸ Copyright Act, CAP C28, Laws of the Federation of Nigeria (LFN), 2004.

²⁹ *Ibid.*

³⁰ Section 6 provides for the general nature of copyright, that is, the rights conferred on the owner as follows: Subject to the exceptions specified in the Second Schedule to this Act, copyright in a work shall be exclusive right to control the doing in Nigeria of any of the following acts, that is- (a) in the case of a literary or musical work, to do and authorise the doing of any of the following acts- (i) reproduce the work in any material form; (ii) publish the work; (iii) perform the work in public; (iv) produce, reproduce, perform or publish any translation of the work; (v) make any cinematograph film or a record in respect of the work; (vi) distribute to the public, for commercial purposes, copies of the work, by way of rental, lease, hire, loan or similar arrangement; (vii) broadcast or communicate the work to the public by a loud speaker or any other similar device; (viii) make an adaptation of the work; (ix) do in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-paragraphs (I) to (vii) of this paragraph; (b) in the case of an artistic work, to do or authorise the doing of any of the following acts, that is- (i) reproduce the work in any material form, (ii) publish the work. (iii) include the work in any cinematograph film, (iv) make an adaptation of the work, (v) do in relation to an adaptation of the work in subparagraphs (I) to (iii) of this paragraph; (c) in the case of cinematograph film, to do or authorise the doing of any of the following acts, that is- (i) make a copy of the film, (ii) cause the film, in so far as it consists of visual images to be seen in public and, in so far as it consists of sounds, to be heard in public, (iii) make any record embodying the recording in any part of the sound track associated with the film by utilising such sound track, (iv) distribute to the public, for commercial purposes copies of the work, by way of rental, lease, hire, loan or similar arrangement.

³¹ Olueze, I.M., *Nigerian Copyright Law, op cit.*

³² (1916) 2 Ch. At 608-609.

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impunity republish the book with the answers to the questions. Neither case could, in my judgment, come within the description of fair dealing.

Likewise, it was held in *Mickle & Ors v. Maufe & Ors*,³³ that a developer cannot rely on “fair dealing” for copying architectural drawings and using same in the construction of a building.

One British authority argues 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...³⁴

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 the factors to be considered in accepting the defence³⁵, 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?

The most important instance of “fair dealing” in connection with the photocopying of books is that for the purposes of research or private study. Here, fair dealing is what the person using the book for the purposes of research or in the course of reading the work for private study may fairly be expected to do with it in the course of reading the work. This is interpreted by the British Copyright Council to mean that the reader may fairly copy out extracts for his or her own relation, as the Act contemplates, that copying may reasonably be done, to a fair extent by photocopying for the reader’s strictly personal use.³⁶

To assist users, the Society of Authors, the Writer’s Guild and the Publishers’ Association have indicated that, for the purposes of fair dealing for research or private study only, they would normally regard the following as fair dealing, if in all other respects the photocopying is within the scope of S.29 of the 1988 Act:³⁷

Photocopying by the reader for his or her own use of: one copy of a maximum of a complete single chapter in a book, or one copy of a maximum otherwise of 5% of a literary work.³⁸

³³ (1941) 3 All ER 144.

³⁴ Philips (Jeremy) et al, 1993. *Whale on Copyright* 4th Ed., London: Sweet & Maxwell, p.79.

³⁵ The definition of what is “fair dealing” is subject to the court to determine considering the circumstances of each case brought before it. The Act does not define “Fair Dealing”.

³⁶ Groves, P.J. 1997. *Source Book on Intellectual Property*, London: Cavendish Publishing Ltd, p. 420.

³⁷ English Copyright Act, 1988.

³⁸ See also Groves, P.J., *Source Book on Intellectual Property*, *op cit.*

In the same light, Reproductive Rights of Nigeria (REPRONIG),³⁹ a Copyright Collective Society,⁴⁰ made a startling disclosure at a press briefing through its Chairman Otunba Lawal-Solarin,⁴¹ after conducting a study that, authors are losing an estimated ₦4.55bn per academic year because Nigerian students will rather photocopy books than buy original copies. He affirmed that the indiscriminate photocopying of copyright-protected materials in Nigeria is being carried out primarily at centres of learning including universities, polytechnics and other places where students, staff and stakeholders photocopy materials that are in short supply.⁴² In other cases, as a matter of routine to facilitate the learning process, and yet in other cases, out of ignorance. The Chairman further stated that all publications, including newspapers, are not supposed to be copied by secondary users without permission.⁴³

According to Lawal-Solarin,

This indiscriminate, unauthorized and unremunerated photocopying of copyright-protected materials for whatever reasons, constitute clear violation of the right of the copyright owners and holders of the works being exploited. This explains partially the gradual decline and decay in Nigerian's cultural industry and sector.

We recognize that students cannot but make photocopies. We will make concession for students by licensing them to make photocopies of portions of books rather than entirely photocopying the whole book. Photocopying a whole book is illegal. That is piracy.⁴⁴

REPRONIG is currently soliciting partnership with school heads and Vice-Chancellors whereby each student is levied a token of ₦200 per session as premium to be paid to REPRONIG in lieu of all photocopies made during the session. The money will be distributed accordingly, among the authors whose books are used in the course of the year. The licensing can extend to business centres operating in and around these tertiary institutions engaged in photocopying. Whatever

³⁹ Licensed by Nigerian Copyright Commission to operate as a Copyright Collective Management Organization in the literary print medium in Nigeria. It was licensed in late 2000, and commenced operations in late 2003 and since then, has been working to protect the rights of its members who are publishers, authors, etc. The Organization has sub-organizations like Association of Nigerian Authors and Nigerian Publishers Association partnering with it. REPRONIG while acknowledging that people do not photocopy merely for economic reason, they preach 'fair dealing' on the part of whoever wants to photocopy books.

⁴⁰ It is provided for under section 39 of the Act and it is defined in subsection 8 as "an association of copyright owners which has as its principal objectives the negotiating and granting of licenses, collecting and distributing of royalties in respect of copyright works".

⁴¹ on the occasion of the World Copyright/Book Day, marked on 26 April, 2009.

⁴² In most cases, not necessarily because the materials are in short supply but because the students, staff, etc consider the materials to be expensive.

⁴³ Abimbola A., *Authors lose N4.55bn annually to Nigerian Students – Study*, PUNCH on the web, available at <http://www.punchng.com/Article-print2.aspx?theartic=Art200904072525176>, published 7th April 2009. visited on 5 May 2009.

⁴⁴ *Id.* See also Edukugho E. 2009. *Varsity Students Photocopy 4.5bn pages of books yearly-study*, Vanguard Online Edition, available at <http://www.vanguardngr.com/content/view/34662/> published 30 April 2009. visited 5/5/09.

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they get from these firms licensed to make photocopies of portions of books is given to authors. “That way, authors are not deprived of their rights and creativity shortchanged”. Some of the schools approached argue that the books are photocopied for educational purposes⁴⁵ and are reluctant to impose the premium on students. But, they must see that the students use it for their own advancement and should pay for it. Education is not free and we should not encourage people to eat into the creativity and intellectual ability of the country.⁴⁶

b. Criticism or Review

It would seem that the word ‘review’ in the sense in which it is to be understood is cognate with the word ‘criticism’. It may be said that one is the process and the other is the result of the critical application of mental faculties.⁴⁷ Lord Haterley in a lucid illustration, in the case of *Chatterton v. Cave*,⁴⁸ remarked:

Books are published with an expectation, if not a desire, that they will be criticized in reviews, and if deemed valuable that part of them will be useful as affording illustrations by way of quotations, or the like and if the quantity taken be neither substantial nor material, if as it has been expressed by some judges, a “fair use” only be made of the publication, no wrong is done and no action can be brought.

Fair dealing for the purpose of criticism or review applies to any form of work or a performance of a work and does not infringe copyright provided a sufficient acknowledgment is given.⁴⁹ Fair dealing for purpose of review “requires as a minimum some dealing with the work other than simply condensing it into an abridged version and reproducing it under the author’s name”.⁵⁰ The purpose of “criticism” is not limited to criticism of the style or manner of expression of a work, but can extend to the ideas or theories contained therein.⁵¹ Also, it cannot be “fair” to publish an unpublished work for this purpose, at least if it is known to have been improperly obtained.⁵² And the courts will not permit wholesale borrowing to be dressed up as critical quotations.⁵³

⁴⁵ Use for educational purpose is covered by the defence of fair dealing.

⁴⁶ It was disclosed that Covenant University signed the first license agreement. The reprographic license will enable CU students pay N200 each per session for the right to photocopy copyright-protected materials and books. The license allows for photocopying of between 30% and 40% of the book and not the entire book (or 100%). See Vanguard Online Edition *supra* note 36. See also Latest News, CU signs copyright agreement, available at http://www.covenantuniversity.com/news/memo_understanding.html visited on 5 May 2009.

⁴⁷ *New Era Publications Int’l APS v. Key-Porter Books Ltd* (1987), 18 CIPR (3d) 569 (FCTD-Interlocutory) per Cullen J., at p.568.

⁴⁸ (1878) 3 App Cas. 483.

⁴⁹ Bainbridge, D., *Intellectual Property*, op cit. p.174.

⁵⁰ *The Queen v. James Lorimer & Co. Ltd.* 77 CPR (2d) 262 at 272.

⁵¹ *Hubbard v. Vosper* (*supra*).

⁵² *British Oxygen v. Liquid Air* (1925) Ch. 383 at 393.

⁵³ *Mawman v. Tegg* (1826) 2 Russ. 385.

The fair dealing defence is equally available to one who criticizes the work itself as it is to one who criticizes the subject matter of the work. Based on this, one is free to make use of excerpts of a work in order to criticize the views expressed by the author as well as the manner in which those views are expressed. Therefore, by virtue of the fair dealing exception provided for the purpose of criticism, one can reproduce excerpts from writings of an author in order to criticize both his poor mastery of the English language and the moronic views which are the subject of the work. Criticism, as a purpose within the context of the Act, is not confined to literary criticism.⁵⁴

It must be mentioned that the defence is available in cases of copyright infringement pertaining to all varieties of works eligible and so protected by copyright, even though history has demonstrated that the vast majority of cases where the defence is raised are regarding literary works.

Fair dealing with respect to criticism, is a question of fact. In this regard, whether the limits of lawful quotation have been exceeded is a question governed by the circumstances of each case. It is to be determined not by the intention of the critic or reviewer, but by the character of its publication and the purposes which it serves. The controlling inquiries will be, whether the extracts are of such extent, importance, or value that the publication complained of will supersede to an injurious extent of the original work. Is a material and valuable part of the contents of the original communicated by the compilation? Will the latter tend to diminish the sale of the former, by reason of being wholly or partly a substitute? If so, the results of the original author's labour are appropriated to his injury, and his rights are invaded.⁵⁵

In essence, to reproduce in totality an article from a literary journal for the purpose of reviewing it was held not to be fair dealing. The court in *Zamacois v. Douville (1943)*,⁵⁶ per Angers J., perceived such dealing as being excessive, and therefore unfair for the purpose of the case, because the defendant had reproduced the entire work without the authorization of the author.

c. Reporting of Current News

⁵⁴ *Sillitoe v. McGraw-Hill Book Co. (supra)*.

⁵⁵ Drone, (Eaton S.). 1979. *A Treaty on the Law of Property in Intellectual Productions in Great Britain and the United States*, Boston: Little, Brown & Co., at p. 388.

⁵⁶ (1944) Ex. CR 208 (Ex. Ct.)

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This exception permits all works, other than photographs, to be used for reporting current events.⁵⁷ It is common practice for newspapers to copy extracts from stories in other newspapers. For example, one newspaper may have an ‘exclusive’ in its early morning issue and other newspapers carry the story in their later editions giving, of course, a sufficient acknowledgement. This they may do, without including or copying a photograph alongside, without permission.⁵⁸ In *Banier v. News Group Newspapers Ltd*,⁵⁹ Lightman J confirmed that the practice of newspapers of copying a photograph from another newspaper with the intention of obtaining a license retrospectively was clearly unlawful.

For the defence to succeed, the event itself must be seen to be, and indeed current and not the pretext for reviving historical information. Hence, in *Associated Newspapers v. News Group*,⁶⁰ it was held that the death of Duchess of Windsor did not justify an exchange of letters between her and Duke being published without copyright license.⁶¹

The fair dealing provision in this respect is quite wide, this is because, apart from the exception of photographs, they are not limited to any particular type of work and can, therefore, apply to broadcasts and cable programmes.⁶² In *BBC v. British Satellite Broadcasting Ltd*,⁶³ Scott J held that, this fair dealing provision is not limited to general news bulletins and could apply to a major sporting event such as the World Cup football competition. In this case, there had been an acknowledgment given by BSB as to the source of the film, but according to the Act, there is no need to give an acknowledgment in the case of reporting current events by means of a sound recording, film, broadcast or cable programme.

On the whole, the defendant, in order to benefit from or succeed in raising the defence of fair dealing, must show that:

1. the dealing is “fair” with regards to the purpose in question;
2. the dealing is for the purpose of either research or private use, criticism or review, or for reporting current news; and

⁵⁷ Cornish W.R. 1999. *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, 4th Ed., London: Sweet & Maxwell, at p. 435.

⁵⁸ Bainbridge, D., *Intellectual Property, op cit.*

⁵⁹ (1997) FSR 812.

⁶⁰ (1986) RPC 515.

⁶¹ See also *Newspaper Licensing Agency v. Marks & Spencer* (1999) EMLR 369, where it was held that, current events do not include life-style articles, etc.

⁶² Bainbridge, D., *Intellectual Property, op cit.*

⁶³ (1991) 3 WLR 174.

3. the appropriate acknowledgments are made, where the use is public.⁶⁴

A defendant who is able to prove that the nature and circumstances of his action come within any of the exceptions would be absolved from liability.⁶⁵

The most important element that must be considered is the competitive nature between the use made of the copied and the original work protected by copyright. Thus, in *Bradbury v. Hotten*,⁶⁶ a case about a publication entitled “The man of his Time.” The object of the publication was to illustrate the career of Napoleon III by caricatures taken from leading English and foreign illustrated papers. Nine caricatures of much reduced size but with their original headings were copied from nine members of a magazine. It was established that the selections had been taken for the sole purpose of illustrating the career of Napoleon.

While admitting that limited extracts might be taken from copyright work for a fair purpose of this kind, the court found that the defendant had published the caricatures for the same purpose as they were originally published, namely, to excite the amusement of readers. It was held that the defendant had gone beyond the privilege of fair quotation and therefore a case of piracy was made out.⁶⁷

Again, for the defence to avail a defendant, courts will look at whether an objective viewer would⁶⁸ consider that, the person is genuinely using the material for one of the purposes set out in the Act; and their use of it is fair in that context. Factors that may be taken into account in working out whether a use is “fair” include whether the person using the material is doing so for commercial purposes, and whether the copyright owner is out of pocket from the use.⁶⁹ The mere fact that the person using the material is not making a profit does not make it fair.

⁶⁴ See generally schedule 2(a) of the Act. It must however, be observed that generally speaking, the defence of fair dealing seem to be more associated with literary works than it is with other eligible works for copyright protection. Aside, there are no readily available case law in Nigeria where the defence was successfully raised. Hence, it was observed that “in Nigeria, the operation of this concept as well as the concept of copyright as a whole has not been properly articulated either by case law or by copyright owners.” See Guobadia, D. 1989. *Fair Dealing and Copyright in Nigeria*, The Gravitas Review of Business and Property Law, March, 1989, at p.45.

⁶⁵ See *Johnstone v. Bernard Jones Publications Ltd.* (1938) 1 ch. 599 at 603.

⁶⁶ (1872) L.R Ex. 1.

⁶⁷ See also *Leslie v. Young (J) & Sons* (1894) AC 335.

⁶⁸ This simply means that fair dealing exception is a reasonable man’s test. The jurisprudence of reason is a very wide one. It therefore means that even when the dealing should qualify as fair, that the objectivity of the men (as well as the court) is not to the extent that it is fair, defeats the defence and vice versa. In other words, the objective man’s test, in the humble but strongly held opinion of this writer, as a criterion for the application of the defence of fair dealing, more often than not, is likely to obstruct the rights of the copyright owners in the success of the defence. The legislature should define “fair dealing” in an unequivocal terms.

⁶⁹ For example, where a person copies the whole of a work that is available for sale.

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Fair dealing provisions have been described variously as “perhaps the most significant and the most venerable limitation on copyright holder’s prerogative.⁷⁰ This is because of the potentially wide application of this exception and its high dependence on the opinion of the Judge.⁷¹

There is no clear definition of what fair dealing means in the first place neither is there a consensus on the rules to be adopted in determining fair dealing under Nigerian Law.⁷²

Whether an act falls within any of the above mentioned categories of purposes,⁷³ the fairness or otherwise of such act, is left for the courts to interpret based on the facts of each case.⁷⁴ By taking this approach the legislator has avoided the difficult task of having to arrive at a definition which could likely be either too rigid to apply to the multiple of scenarios which are bound to arise, or too accommodating to be effective. The courts are given the freedom to tailor their decisions to the facts which are placed before them without having to work their way around an impractical definition.⁷⁵

To adequately discharge this onerous task, the courts have established some factors which must be considered in determining whether a dealing is fair. Hence, Lord Denning M.R. gave a good description of the scope of fair dealing when he held in *Hubbard v. Vosper*,⁷⁶ that,

It is impossible to define what is ‘fair dealing’, you must first consider the number and the extent of the quotations. ... then you must consider the use made of them. If they are used as a basis of 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, they 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 come to mind also. But it must be a matter of impression.

The factors that must be considered in determining whether a dealing is fair include the length of the excerpts which have been appropriated from the work, the relative importance of the excerpts in relation to the critic’s or journalist’s own comments, the use made of the work, and the nature of the use, be it criticism, review or summary. In *Independent Television Publications Ltd. v.*

⁷⁰ Asein, J.O. 2012. *Nigerian Copyright Law and Practice*, op cit. p.250, citing Latman, A., et al., (1989), *Copyright in the Nineties*, 3rd ed., Charlottesville Virginia: Michie Co., p.626.

⁷¹ Asein, J.O. *ibid*.

⁷² *Ibid* p.251.

⁷³ For research, for private use, for criticism or review or the reporting of current events.

⁷⁴ This writer is of the view that leaving the definition of such an important exception to copyright to the Judge is dangerous as what is reasonably fair to one Judge may not be to another giving the same or similar cases.

⁷⁵ Hugues, G.R. *Fair Dealing: Criticism, Review and Newspaper Summaries*, available at <http://www.robic.ca/publications/pdf/146-HGR.pdf>. visited on 5 May 2009.

⁷⁶ (1972) 2 Q.B. 84

Time Out Ltd.,⁷⁷ Whitford J., held that, indeed, once the conclusion is reached that the whole or a substantial part of the copyright work has been taken, a defence ... is likely to succeed.

This position was seriously criticized by David Bainbridge, stressing that the whole purpose of the fair dealing provision is to permit, in appropriate circumstances, the taking of a substantial part of a copyright work.⁷⁸

With due respect, we entirely disagree with this position and subscribe to that held by the Learned Justice Whitford, for holding to contrary will negate the overriding essence of protection of Intellectual Property; “he who works must eat” and “thou shall not steal”.

The 2004 ruling by the Supreme Court of Canada in the case of *CCH Canadian Ltd. v. Law Society of Upper Canada*⁷⁹ has gone far in clarifying the concept of fair dealing in Canada. The Supreme Court makes the following general observation in the consideration of fair dealing:

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 exception will not be an infringement of copyright. The fair dealing exception, like other exceptions in the copyright Act, is user's right. In order to maintain the proper balance between the rights of a copyright owner and user's interest, it must not be interpreted restrictively. ... User rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation.

While the taking of a substantial part of a work does not automatically exclude the possibility of recourse to the defence of fair dealing, it is a very revealing factor. Since substantiality as to both quantity and quality must be considered, even very short excerpt may not qualify as a fair dealing if it consists of the “vital” part of the initial work.⁸⁰

Laddie,⁸¹ summarized the concept of substantiality as follows, for, although it is permissible to take a substantial part of the work (if not, there could be no question of infringement in the first place), in some circumstances, the taking of an excessive amount would negate fair dealing. So, if the defence alleged is fair dealing for the purposes of criticism of the work, the taking of large

⁷⁷ (1984) FSR 64.

⁷⁸ Bainbridge, D., *Intellectual Property (supra)* at p. 170.

⁷⁹ Available at http://en.wikipedia.org/wiki/fair_dealing. visited on 5 May 2009.

⁸⁰ *Johnston v. Bernard Jones Publications (supra)*, *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd* (1980) RPC 539 CA.

⁸¹ Laddie, (Hugh) et al. 1980. *The Modern Law of Copyright*, London: Butterworth, at No. 2.110.

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amount of the work and the addition of brief critical notes would not presage a successful defence, and vice versa. On the other hand, there can exist circumstances where it would be proper to quote the entire work, particularly if it is a short one. Perhaps the most important factor to be taken into account is whether the alleged fair dealing is in fact competing with or rivaling the copyright work. The learned author further opined that, as to unpublished work, the courts have been reluctant to accept something involving the publication of an unpublished work as fair dealing, unless the copyright work has had some significant private circulation, but the fact that it was unpublished does not necessarily destroy the defence; so, in *Fraser v. Evans*,⁸² where the defendants proposed to print short extracts from a confidential report for the purpose of reporting current events in the newspaper, the court declined to prejudge whether that would be fair dealing and refused to grant an interlocutory injunction. And the point has much less force where it is a dramatic or musical work which is being criticized if, although unpublished, it has been performed in public.

Another factor which the courts would consider in determining fair dealing is the value of the portion taken relative to the work from which it is taken. Substantiality is in relation not only to the quantity taken but also in relation to the value of the portion taken to the work. Thus the degree to which it affects or may affect the competitiveness of the work may prove not only useful but, perhaps, a crucial consideration.⁸³

The defence of fair dealing has rarely been raised in Nigeria.⁸⁴ The opportunity to draw a basis for the success or failure of the defence under the Nigerian Law came up in the case of *Peter Obe v. Grapevine Communications Ltd.*,⁸⁵ where the Defendants had published one of the pictures from the Plaintiff's photo documentary of the Nigerian Civil War. In raising the defence of fair dealing, the defendant argued that the photographs were used “to depict a story of a historical matter of importance and of high public interest” and should be exempted from copyright control as fair dealing. The defendant drew the attention of the court without more, to the fact that sufficient acknowledgment was included describing the work as: “Biafra photos, courtesy Daily Times of Nigeria.” The court merely considered the text of the acknowledgment and came to the conclusion that it fell short of what was required. The court held that⁸⁶ since the

⁸² (1969) 1 QB 349 CA.

⁸³ Uvieghara, E.E. op cit. at p. 95.

⁸⁴ Asein, J.O., supra, p.251.

⁸⁵ Suit No. FHC/L/CS/1247/97.

⁸⁶ A decision which Asein, J.O. described as been “in a rather incoherent manner”. See Asein, J.O. 2012. op cit. p.251.

photograph was authored by the plaintiff and not Daily Times, the professional courtesy should have been given to the former. The court further made an issue of the fact that the title of the work was not acknowledged and held that the defence of fair dealing would have availed the defendant if it was shown that they accompanied the photograph with an acknowledgment of the title of the work and its authorship.

Asein vehemently criticized this decision and opined that “the fundamental issue of whether the defendant’s use qualified, in the first place as fair dealing should have been the paramount issue for consideration; the question of adequate acknowledgment being only of secondary importance. The court should have pronounced that there is no such defence as fair dealing based on historical importance or high public interest and that the defendants did not establish use of the photograph under any of the four activities specifically mentioned in that paragraph.”⁸⁷

We cannot agree less with the Learned Author. What the court should have considered as a matter of law is whether the use is for research, private use, for criticism or review, or for the reporting of current events.⁸⁸

It is further opined that it is impossible to lay down any hard and fast definition of what is fair dealing, for it is a matter of fact, degree and impression.⁸⁹ The author however seem to adopt the factors to be considered in determining if there was indeed a fair dealing endorsed by the court in *Ashdown v. Telegraph Group Ltd.*,⁹⁰ where a plea of fair dealing was refused as the use complained of was neither for the purpose of criticism and review nor the reporting of current events as follows:

- a. Whether the alleged fair dealing is in commercial competition with the owner’s exploitation of the work;
- b. Whether the work has already been published or otherwise expressed to the public; and
- c. The amount and importance of the work which has been taken.

While we agree that it might be impossible or difficult to define what amounts to “fair dealing”, we submit that a statutory adoption of the above indices in *Ashdown* and *CCH Canadian* cases in the Nigerian Act alongside the permitted purposes contained in the Act *ab initio* will not be out of place. This, in our humble view will prevent the kind of decision handed down in *Obe’s* case

⁸⁷ Ibid, p.252. the categories under the Nigerian Act qualifying as fair dealing are: research and private use, criticism or review, and reporting of current news.

⁸⁸ See Second Schedule to the Copyright Act.

⁸⁹ Asein, J.O. 2012. op cit. p.252.

⁹⁰ (2002) Ch. 149.

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above which the Learned Author is obviously dissatisfied with. A codified definition or at least, an all encompassing description of what may amount to fair dealing and in what manner it will qualify as such is essential as what may be fair to one Judge may be unfair to another given the same subject matter.

In this light, the provision of the United State of America’s Copyright Code is instructive where it states *inter alia* that:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, 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.⁹¹

The specific wording of the above law as it now stands is the result of a process of accretion, resulting from the long controversy over the related problems of fair use and the reproduction (mostly by photocopying) of copyrighted material for educational and scholarly purposes. For example, the reference to fair use “by reproduction in copies or phonorecords or by any other means” is mainly intended to make clear that the doctrine has as much application to photocopying and taping as to older forms of use; it is not intended to give these kinds of reproduction any special status under the fair use provision or to sanction any reproduction beyond the normal and reasonable limits of fair use. Similarly, the newly-added reference to “multiple copies for classroom use” is a recognition that, under the proper circumstances of fairness, the doctrine can be applied to reproductions of multiple copies for the members of a class.⁹²

⁹¹ Section 107 thereof.

⁹² See <http://www.law.cornell.edu/uscode/uscpint.html>. p.42. retrieved on 15/6/2013.

In furtherance of the above provisions, the United States of America's Ad Hoc Committee on Copyright Law Revision agreed, setting out some guidelines to the application of the fair use doctrine as follows⁹³:

I. Single Copying for Teachers

A single copy may be made of any of the following by or for a teacher at his or her individual request for his or her scholarly research or use in teaching or preparation to teach a class:

- A. A chapter from a book;*
- B. An article from a periodical or newspaper;*
- C. A short story, short essay or short poem, whether or not from a collective work;*
- D. A chart, graph, diagram, drawing, cartoon or picture from a book, periodical, or newspaper;*

II. Multiple Copies for Classroom Use

Multiple copies (not to exceed in any event more than one copy per pupil in a course) may be made by or for the teacher giving the course for classroom use or discussion; provided that:

- A. The copying meets the tests of brevity and spontaneity as defined below; and,*
- B. Meets the cumulative effect test as defined below; and*
- C. Each copy includes a notice of copyright.⁹⁴*

III. Prohibitions as to I and II Above

Notwithstanding any of the above, the following shall be prohibited:

- (A) Copying shall not be used to create or to replace or substitute for anthologies, compilations or collective works. Such replacement or substitution may occur whether copies of various*

⁹³ Ibid at p.43. This agreement was reached on March 19, 1976.

⁹⁴ Under the guidelines, terms were defined as follows: **Brevity:** (i) Poetry: (a) A complete poem if less than 250 words and if printed on not more than two pages or, (b) from a longer poem, an excerpt of not more than 250 words. (ii) Prose: (a) Either a complete article, story or essay of less than 2,500 words, or (b) an excerpt from any prose work of not more than 1,000 words or 10% of the work, whichever is less, but in any event a minimum of 500 words. [Each of the numerical limits stated in "i" and "ii" above may be expanded to permit the completion of an unfinished line of a poem or of an unfinished prose paragraph.] (iii) Illustration: One chart, graph, diagram, drawing, cartoon or picture per book or per periodical issue. (iv) "Special" works: Certain works in poetry, prose or in "poetic prose" which often combine language with illustrations and which are intended sometimes for children and at other times for a more general audience fall short of 2,500 words in their entirety. Paragraph "ii" above notwithstanding such "special works" may not be reproduced in their entirety; however, an excerpt comprising not more than two of the published pages of such special work and containing not more than 10% of the words found in the text thereof, may be reproduced. **Spontaneity:** (i) The copying is at the instance and inspiration of the individual teacher, and (ii) The inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission. **Cumulative Effect:** (i) The copying of the material is for only one course in the school in which the copies are made. (ii) Not more than one short poem, article, story, essay or two excerpts may be copied from the same author, nor more than three from the same collective work or periodical volume during one class term. (iii) There shall not be more than nine instances of such multiple copying for one course during one class term. [The limitations stated in "ii" and "iii" above shall not apply to current news periodicals and newspapers and current news sections of other periodicals.]

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works or excerpts therefrom are accumulated or reproduced and used separately.

(B) There shall be no copying of or from works intended to be “consumable” in the course of study or of teaching. These include workbooks, exercises, standardized tests and test booklets and answer sheets and like consumable material.

(C) Copying shall not:

(i) substitute for the purchase of books, publishers’ reprints or periodicals;

(ii) be directed by higher authority;

(iii) be repeated with respect to the same item by the same teacher from term to term.

(iv) No charge shall be made to the student beyond the actual cost of the photocopying.

6. CONCLUSION

It is humbly submitted that from critical observations, the defence of fair dealing the purpose of which is to adequately provide for the balanced interest of the individual author; the interest of the creator of a literary or other works in reaping the economic and other benefits which derive from his skill, talent or effort and the interest of the society which the creator lives and thrives to preserve and promote its arts and interest in the growth and development of its culture,⁹⁵ is rather substantially one-sided. This is evident in the fact that what actually amounts to fair dealing is not defined any where in our statute nor the parameters for determining same set hence, it is at the mercy of whoever sees an act as falling within the confines of fair dealing. In this case, the defendant argues that his act is fair and for the court to based on the circumstances of the case, adjudge such act as fair or unfair. This can in the strict sense, be taken that the author or claimant, is really left with no option more so that the onus of proof that the act of the defendant was indeed unfair lies squarely on the claimant.

The authority of *Mickle & Ors v. Maufe & Ors*⁹⁶ was that, a developer cannot rely on fair dealing for copying architectural drawings and using same in the construction of a building. However, the Act is express that the copying of a copyrighted work without prior permission of the author for research or private use is fair dealing. Photocopying of an entire work is now common practice and no action can lie, better still, succeed in the light of fair dealing. We submit that

⁹⁵ Art 27 (1) & (2) of the United Nations Declaration on Human Rights.

⁹⁶ (1941) 3 All ER 144.

*Miekle & Ors v. Maufe & Ors*⁹⁷ is good law and should be extended to cover photocopying for research or private study in that the infringer does so for building his knowledge in an area of interest and for his personal development. Should he not pay for the food he eats in order to grow?

Again, it is immaterial that the defendant makes no profit from the acts of infringement, what matters is that the author; the creator of the work is out of pocket from such use of his work. In this light, a study, as indicated earlier has revealed that authors in Nigeria loose up to ₦4.55 billion per academic year because Nigerian students would rather photocopy books than buy original copies.⁹⁸ May we note emphatically that education is not free, so, people should not be encouraged to eat into the creativity and intellectual ability of the country free of charge thereby discouraging creativity.⁹⁹

Equally worth noting at this point is that, to a very a large extent, the provisions of the Act on fair dealing with regards to criticism or review and reporting of current events is for all intent and purpose, fair enough.

It must be pointed for the umpteenth time that, fair dealing or what amounts to it is at the discretion of the court from the circumstances of each case.¹⁰⁰ Discretion is defined as an action of a judge which is bounded by rules and principles of law and not arbitrary, capricious or restrained, it is not the indulgence of judicial whims but in exercise of judicial judgment based on facts and guided by law or equitable decision of what is just and proper under the circumstances. It is a legal discretion to be exercised in discerning the course prescribed by law and is not to give effect to the will of the judge but to that of the law. It is a liberty or privilege to decide and act in accordance with what is fair and equitable under particular circumstances of the particular case guided by the spirit and principles of the law.¹⁰¹

The exercise of judicial discretion needs judicial courage to say yes when your conscience tells you so, the courage to read and interpret the law to the best of the judge's knowledge and ability.¹⁰²

⁹⁷ *Supra*.

⁹⁸ Reported by REPRONIG on the occasion of the World Copyright/Book Day on 26 April, 2009.

⁹⁹ There is a popular saying that "if you say education is expensive, try ignorance."

¹⁰⁰ See the case of *Hubbard v. Vosper* (1972) 2 Q.B. 84 per Lord Denning MR.

¹⁰¹ Garner, B.A. (Editor in Chief), (2004), *Black's Law Dictionary*, 8th Edition, USA: West Publishing Co.

¹⁰² Olong, A.M. 2006. The Exercise of Judicial Discretion in Granting Bail: The Criminal Procedure Act and the Criminal Procedure Code in Perspective. *Fountain Quarterly Law Journal (FQLJ)*, Vol.3, February 2006, p.51.

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The question is, how many judges with due respect and without prejudice to the recent giant strides in the Nigerian judiciary, will exercise discretion in accordance with the above tenets? A reference point is the decision of the trial court who gave impossible conditions for bail, refused to vary the conditions sequel to a motion by the appellants/accused, without reasons all in exercise of discretion, the decision that was unanimously set aside by the Court of Appeal.¹⁰³

Lord Denning MR¹⁰⁴ laid down conditions to be considered in accepting fair dealing as follows:

... you must first consider the number and the extent of the quotations ... then you must consider the use made of them. If they are used as a basis of 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, they 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.

As laudable as these conditions may appear, note must be taken of the choice of words of the Learned Master of Rules – he was consistent in the use of the words “may be fair” and “may be unfair”. This in our humble opinion is one of the biggest challenges with the exercise of discretion, what may be fair to one judge may be unfair to another and this can even extend to where there are similar facts and figures. Aside this, Udo Udoma JSC (as he then was) held in *Odusete v. Odusete*¹⁰⁵ that, in the exercise of matters of discretion, no one case can be authority for another; and the court cannot be bound by a previous decision to exercise its discretion. Hence, no matter how acceptable the decision of a court in upholding or rejecting fair dealing is, no court is bound by that laudable decision, individual reasons must be given in each case and this can lead to miscarriage of justice especially as similar facts may not produce the same result. Discretion is exercised on the rule of reason (even though) and justice, what is reasonable with one man certainly may be unreasonable with another.

It is therefore humbly submitted that, to leave the definition of fair dealing at the mercy of the courts, worse still, the defendant, leaves nothing to be desired. Authors are practically left without an option *strictu sensu* and where an action for copyright infringement is instituted, once

¹⁰³ See *Obioma v. FRN* (2005) 4 FWLR (Pt. 282) Pp. 537-538.

¹⁰⁴ In *Hubbard v. Vosper* (supra).

¹⁰⁵ (1971) 1 NWLR 231 & 232.

the defence of fair dealing is raised, the action we submit, may just be window dressing to go on with. This in all renders the enormous rights granted by the Act “unenforceable”. In the light of this, one can unequivocally argue that the Nigerian Copyright Act is like the proverbial devil that gives a thing with one hand and takes it back with the other.

7. RECOMMENDATIONS

Sequel to our observation, and in the bid to keep and encourage the creative ability in Nigerians and not to impoverish the society in the place of information, we advocate the following:

The amendment of the Copyright Act to particularly reflect or expressly define the concept of fair dealing better still, to expressly state the factors to be considered in determining fair dealing as a defence.

We also suggest a legislation that will insist on certain amount of money being paid as royalty to authors of creative works for the photocopy of an entire work in whatever guise. In furtherance of this, we propose a legislation that will provide for compulsory licensing of tertiary institutions and other institutions prone to massive photocopying of creative works; this will enable payment of royalties to the authors. REPRONIG – a copyright collective society for authors of literary works or any other collective societies under the Act, could by this legislation, be mandated to take on the issuance of this license and onward delivery of the proceeds to authors – members of the society. This means that, the issuance of the license is consequent upon payment of a legal fee on the license renewable after a set period of time. We therefore align with the reasoning in *CCH Canadian Ltd. v. Law Society of Upper Canada*¹⁰⁶, that

“...The fair dealing exception, like other exceptions in the copyright Act, is user’s right. In order to maintain the proper balance between the rights of a copyright owner and user’s interest, ... Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation.

Again, we advocate for a possible adoption of the provisions of the American Act as well as the guidelines set out by the Ad Hoc Committee on Copyright Law Review highlighted earlier in this paper.

Furthermore, there should be increased public enlightenment as to the existence of copyright.

¹⁰⁶ *Supra.*

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Taking into account as well as effecting these suggestions, we believe, Nigeria is up for a better copyright and ultimately Intellectual Property Law regime and the society will be the richer for it.