

IMPOSITION OF A COPYRIGHT LEVY IN NIGERIA: LEGAL JUSTIFICATIONS AND COMPARATIVE ANALYSIS

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ABSTRACT

Copyright owners have the exclusive right to control the reproduction of their works. Since the advent of recording and copying technology, reproducing copyright works has become easier. Cases such as *Sony Corp of America v. University City Studios, Inc* indicate that copyright owners cannot stop technological advancements since they have both infringing and non-infringing uses. The reality is that private copying/reproduction is damaging to the right of owners and the entire copyright industry. One of the ways this situation is addressed is the imposition of copyright/private copying levies in some jurisdictions. Different rationales have been advanced for the imposition of this levy such as harm/compensation rationale and the statutory licence rationale. Nigeria is joining other jurisdictions in imposing this levy as the Copyright Levy Order 2012 was recently signed into law.

This paper discusses the origin and justifications for the imposition of copyright levies. This practice is examined particularly in the light of the 'fair dealing for private use' exception under the Nigerian copyright law and in other jurisdictions such as the European Union, Germany, United Kingdom and the United States. It provides a detailed understanding of 'fair dealing for private use' and also a justification for the Nigerian Copyright Levy Order under the Nigerian legal system.

Keywords: copyright levy, fair use, fair dealing, private use

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1. INTRODUCTION

The Federal Government of Nigeria recently concluded plans to impose a two per cent levy on the values of mobile phones, computers, software, cameras, photocopiers, printing machines and compact disc (CD) players manufactured in the country or imported.¹ These are essentially devices that are likely to be used in infringing copyright. This sparked some debates in the society as some members of the public grumbled against such a levy.

Some countries other than Nigeria already have a system of private copying levy in place.² In countries where private copying levies exist, some question whether such a system is effective in achieving its purpose. More importantly, the question arises whether the imposition of such a levy is not a curtailment of the access granted to members of the public to copyright work through the popular fair dealing exception to copyright protection. This paper shall discuss the origin and justification of the imposition of copyright or private copying levies. It shall consider private copying levies in other jurisdictions and finally examine the implication of the fair dealing exception on this levy as well as other matters that arise under the Nigerian Copyright Levy Order.

The paper is divided into eight sections, this introduction being the first. Section two discusses the origin of the imposition of copyright or private copying levies, while section three examines the various justifications advanced for the imposition of this levy. Section four considers private copying levy in other jurisdictions particularly in civil law societies like Germany and the European Union and how this differs from the position in common law societies like the United Kingdom and Australia. Section five focuses on the Nigerian Copyright Levy Order and section six discusses the concept of fair dealing in various jurisdictions and its functions. Section seven explores key issues raised by the copyright levy order in Nigeria in the light of the fair use/fair dealing exception and finding a justification for the imposition of the levy. Section eight concludes the paper with recommendations.

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1. Everest Amaefule, 'FG Imposes 2% Tax on Phones, Computers, Others', *The Punch Newspaper* <<http://www.punchng.com/business/business-economy/fg-imposes-2-tax-on-phones-computers-others/>> accessed July 17, 2014.
 2. Argentina, Canada, Finland, Japan, Peru, Russia, Sweden, Switzerland, Turkey, United States and the European Union (except for UK, Ireland, Malta, Cyprus and Luxembourg). See World Law Group, *Quick Guide to Private-Copy Levy Systems* (2nd ed., Fall 2013) 8-9.

2. ORIGIN OF COPYRIGHT LEVY SYSTEM

One of the rights conferred on copyright owners under Nigerian law and international law is the right of reproduction. This is an exclusive right to authorize or control the reproduction of the copyright works in any manner or form.³ In principle, the author has a right to authorize or prohibit all kinds of acts of reproduction irrespective of whether it is temporary, virtual or private reproduction.⁴ Like many other rights granted by the law, there are exceptions to the right of reproduction. Every country can specify these exceptions in its national law; however this must be in accordance with the three step test established in the Berne Convention and the Agreement on the Trade Related Aspects of Intellectual Property Rights ('TRIPS Agreement'). That is, it should be in certain special cases provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.⁵

Some years ago, copyright owners could easily control the reproduction and dissemination of their works to the public. Without their consent, it was unlikely that anyone would carry out an unauthorised act with respect to their works. With technological advancements, which facilitated the making of copies of works protected by copyright, there was a challenge in the ability of copyright owners controlling the reproduction and distribution of their works. Private individuals could now make exact copies of creative works. This made it difficult for copyright owners to enforce their rights against private individuals since private copying is very difficult to monitor. This fact also means that the income that accrues to copyright owners began to dwindle as more private persons had access to their work and were no longer interested in purchasing from the authors or copyright owners.

Since the invention of the audio cassettes, the law has been faced with two options in order to address the challenge raised by technological advancements.⁶ One solution was to protect the right of the authors by limiting or prohibiting private copying. The second was to allow private copying but provide compensation for right holders. It was impracticable to arrest technological advancements by legislation since they are generally a ben-

3 Berne Convention for the Protection of Literary and Artistic Works ('Berne Convention September 9, 1886, as revised at Stockholm on July 14, 1967, 828 U.N.T.S. 222. Article 9(1).

4 Jörg Reinbothe, 'Private Copying, Levies and DRMs against the Background of the EU Copyright Framework', (Paper presented at DRM Levies Conference organised by Rightscom Ltd., Brussels, 8 September 2003), p.1.

5 Berne Convention, Article 9(2), Agreement on the Trade Related Aspects of Intellectual Property Rights ('TRIPS Agreement' Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299; 33 I.L.M. 1197 (1994). Article 13.

6 World Law Group *Quick Guide to Private-Copy Levy Systems* (2nd ed., Fall 2013), 2.

efit for the society. At the same time, monitoring and enforcing copyright against private individuals by right owners is not always feasible. Therefore, the law in many countries resorted to imposing copyright or private copying levy on certain devices that could be used to copy or infringe on works protected by copyright by private individuals. Considering the practicality of getting this levy from individuals, many countries require it to be paid by manufacturers, importers and distributors of these devices.

3. JUSTIFICATIONS FOR A LEVY

Certain rationales have been given for the imposition of copyright levies. A group of scholars have argued that with increased technological developments, private copying has become easier.⁷ This would lead to reduction in the sale of copyright works especially literary and musical works as well as cinematograph films. If this trend is allowed to continue, these authors may run out of business or would be impoverished thus lacking the incentive to continue making creative works. Consequently, this will adversely affect production of cultural goods or creativity in the society. In order to avoid such a situation, copyright levies should be collected and distributed to them as a form of compensation for loss in sales and an incentive for future production of creative and cultural goods.

Another reason is that it is difficult or impracticable for a copyright owner to enforce his or her right in the domestic sphere. Ideally, since copyright is a private right, it is the duty of the right owners to identify cases of private copying and prosecute same, in order to enforce their rights or get remunerated for it. In practice, private copying is difficult to identify, prosecute and licence.⁸ Also, an attempt to enforce the rights of copyright owners by preventing private copying in the domestic sphere, especially with regards to the analogue environment, is likely to interfere with the privacy of consumers.⁹ Since this area is tedious to regulate, paying levies to the benefit of copyright owners is a way of enforcing the rights of copyright owners.

With increased development in devices and equipments that facilitate private copying, a new market has been created for the exploitation of copy-

7 Martin Kretschmer, 'Private Copying and Fair Compensation: An empirical study of copyright levies in Europe' (The UK Intellectual Property Office, 2011) 64.

8 Andrew F. Christie, 'Private Copying Licence and Levy Schemes: Resolving the Paradox of Civilian and Commonwealth Approaches', *Intellectual Property Research Institute of Australia*, (Occasional Paper No. 2/04) 4.

9 Mr. Jörg Reinbothe (n 4)3.

right and neighbouring rights.¹⁰ Those who benefit financially from this market are no longer necessarily the right owners themselves. Rather, it is the manufacturers of recording devices and storage devices who are reaping the financial benefits. Equipments that allow private copying take away the remuneration of copyright owners despite the fact that their works are what make these devices sell in the first place. In view of this, another reason given for the imposition of copyright levy is to enable copyright owners to have their own share of this new market that is created.¹¹

Similarly, it is argued that digital consumer electronics on which copyright protected works can be stored, uploaded or played has increased the value consumers place on copyright works.¹² This is the case even if such copyright works are already in the possession of the consumer. This increased social value of copyright protected works would ordinarily, be appropriated by only the consumers, while the industry producing these electronics and the creators of these works would remain uncompensated. This unfairness is corrected by the imposition of a levy, which allows creators (copyright owners) to also benefit from the increased value.

The imposition of copyright levies has also been argued to be a way to reduce transaction and administration costs of using copyright works.¹³ Copyright transaction costs may include (a) identifying and locating the owner, (b) negotiating a price (this includes information and time costs), (c) monitoring and enforcement costs.¹⁴ If a right owner were to enforce his rights against all private individuals, this would indeed be costly. According to the Grower's Review of Intellectual Property, 'one of the purposes of exceptions to copyright is to reduce burdensome transaction costs associated with having to negotiate licences'.¹⁵ Payment of copyright levies help to reduce this cost and make it easier to enforce copyright.

4. PRIVATE COPYING LEVY IN OTHER JURISDICTIONS

Copyright or private copying levies are common in civil law countries especially those in the European Union and are rarely present in common law countries such as UK and Australia.¹⁶ In Germany, the imposition of

10 *ibid.*

11 *ibid.*

12 Martin Kretschmer (n 7) 61.

13 *ibid.*, 59.

14 *ibid.*

15 Gowers Review of Intellectual Property (2006), London, HM Treasury, 47.

private copying levy started under the Copyright Law of 1965 (UrhG S.53) based on the decision of the *Bundesgerichtshof* (highest federal court), which also introduced the concept of ‘fair compensation’.¹⁷ The German legal system viewed the right to remuneration of an author to be derived from the enjoyment the audience had from the author’s work.¹⁸ Despite this, the privacy of individuals was protected by law therefore the author cannot control private copying taking place in the domestic realm, which were for non-commercial use without infringing on their privacy.¹⁹ The author could therefore only get remuneration from dissemination of his work to the audience.

The implication of allowing private copying was that there was no infringement or entitlement of the author to remuneration from acts of private copying.²⁰ Yet it was recognized that it was unfair to authors to allow the magnitude of private copying that was taking place in the domestic sphere without any form of remuneration to the authors. In resolving this absurdity, private copying was considered allowable under some form of statutory licence with the law also imposing private copying levy as remuneration or compensation to the authors.²¹ In the same vein, levies have been seen as a way of ensuring justice to copyright owners as well as ensuring equity to all copyright owners since everyone both big and small is remunerated through levies.²²

Furthermore, the European Union (EU) Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (‘EU Infosoc Directive’)²³ considered the question of copyright levy where it allowed private copying but takes into consideration providing a reasonable compensation for right owners.²⁴ The Directive encouraged the introduction or continuation of remuneration schemes by Member States. It clearly explains what the exception of private copying means (this shall be addressed later). In *Padawan SL v Sociedad General de Autores y Editores (SGAE)*,²⁵ the European Court of Justice (ECJ) held that the imposition of copyright levy is in conformity with the Infosoc Directive when it is charged

16 Andrew F. Christie, (n 8) 1.

17 Martin Kretschmer (n 7) 22-23.

18 Andrew F. Christie (n 8) 4.

19 *Gema v Grundig*, 1 ZR 8/54, 17 BGHZ 266, 271-1 [1955] GRUR 492.

20 Private copying was an exception to the author’s right by Article 15(2) of the *Literatururhebergesetz* 1901.

21 Andrew F. Christie (n 8)5-6.

22 Ibid.

23 DIRECTIVE 2001/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society.

24 *ibid*, Recital 38, Article 5(2)(b).

25 C-467/08.

on copying devices sold to individuals as it can reasonably be assumed that such equipments will be used for copying.

The common law countries rarely have a levy system mainly because there is no private copying exception in the first place. For instance, in the United Kingdom (UK) and Australia, no private copying is permitted and the exception of fair dealing is principally for research and review and does not extend to private copying.²⁶ Although private copying is not permitted by law in these countries, the difficulty of monitoring or enforcing authors' rights in the domestic sphere led to the same consequence - economic loss for the authors. Some common law countries are beginning to adopt copyright levies as a way to compensate authors for this loss of income such as Canada and recently Nigeria and this trend is likely to increase with increased incidence of private copying in the digital environment.²⁷ Some other countries that do not have the levy system consider the harm done by private copying to be minimal (of little or no consequence) to the right owners (*de minimis* rule).

The national law of each country determines the materials on which the levy is collected, the amount, the payers, the beneficiaries and the mode of distribution of the levy. Generally, collecting societies benefit from the levy in all jurisdictions and they in turn decide how the amount collected is shared among their members. In some countries, a percentage of the levy collected also goes to promoting the cultural industry or generally the enforcement of copyright.

5. THE NIGERIAN COPYRIGHT LEVY ORDER

In Nigeria, Section 40 (1) of the Copyright Act provides that '*there shall be paid a levy on any material used or capable of being used to infringe copyright in a work*'.²⁸ The Minister is to determine the amount and mode of distribution of this levy from time to time and shall publish this in the Gazette.²⁹ The money collected goes to the Fund of the Nigerian Copyright Commission from where it is distributed to the collecting societies in accordance with the Regulation made by the Commission.³⁰ It is based on this authority that the Copyright (Levy On Materials) Order, 2012 was made,

26 Andrew F. Christie (n 8) 4.

27 *ibid*, 10.

28 Copyright Act, Cap C28, Laws of Federation of Nigeria, 2004.

29 *ibid*, Section 40(2).

30 *ibid*, Section 40(3).

which was recently signed by the Minister of Justice of the Federation.³¹

For storage media such as audio cassettes, Compact Disks (CDs), Digital Versatile Disks (DVDs), Blu-Ray, Universal Serial Bus (USB), Flash Drive, i-Pod, Mini Discs, the levy is three per cent while photocopying papers is two per cent.³² For equipment and devices such as music players, mobile phones, compact and digital video recorders, personal computers, camcorders, and decoder/signal receivers the levy is two percent while for photocopying machines and printers it is one per cent.³³ This percentage is calculated for imported materials to the totality of cost, insurance and freight (CIF) and for materials manufactured, produced or assembled in the country to the ex-factory cost.³⁴

The levy is to be paid in the case of materials imported into the country, at the point of entry, by the importer or in the case of materials manufactured or produced or assembled in Nigeria, at the point of manufacture, production or assembly, by the manufacturer, producer or person responsible for the assembling.³⁵ In practice, whether importers or producers would be able to pass across the burden of this payment to the final consumers would depend on the competition in the market.³⁶ Hence, where the producer or importer would be contesting for selling at a cheaper price to have an edge in the market, he may not be able to pass across the cost of the levy to the consumers.

The amount collected is to be distributed in the following way:³⁷ 10 per cent for promotion of creativity; 20 per cent for anti-piracy programme of the Nigerian Copyright Commission; 10 per cent for administrative purposes to be shared equally among all government agencies involved in the implementation of the Order; 60 per cent distributed equally among all approved collecting societies. Therefore, it is clear that the entire amount does not go to copyright owners since some percentage is used to aid copyright enforcement and creativity in the society.

In order to ensure compliance with the order, all persons engaged in the manufacture, assembling or importation of any material for which a levy

31 Everest Amaefule, 'FG Imposes 2% Tax on Phones, Computers, Others' *The Punch Newspaper* <<http://www.punchng.com/business/business-economy/fg-imposes-2-tax-on-phones-computers-others/>> accessed July 17, 2014.

32 Copyright (Levy on Materials) Order 2012, Schedule.

33 *ibid.*

34 *ibid.*

35 Copyright (Levy on Materials) Order 2012, Section 1(2).

36 professor Martin Kretschmer (n 7) 17.

37 Copyright (Levy on Materials) Order 2012, Section 4.

has been prescribed shall keep such books and make periodic returns as may be required by the Nigerian Copyright Commission.³⁸ These records are to be made available for inspection by Copyright Inspectors or any other persons authorised by the NCC.³⁹ Failure to comply with the provisions of the Order shall lead to the confiscation of the materials in question and where it deems it necessary, the commission can also seal up the premises where the manufacturing or assembling of these materials is taking place.⁴⁰

6. FAIR DEALING/USE EXCEPTION

The signing of the Nigerian Copyright Levy Order has raised certain questions with regards to the collection of copyright levy in Nigeria. The Second Schedule to the Copyright Act provides certain exceptions to the rights granted by the law to a copyright owner. These exceptions are provided as a way to balance the interests of copyright owners and that of the members of the public in enjoying creative and cultural goods. They are essential for the protection of public interests. Specifically, paragraph (a) provides for the exception of fair dealing for purposes of research, private use, criticism or review. It should be noted that the Nigerian Copyright Act does not have private copying as an exception; it however provides for ‘fair dealing for the purpose of private use’. Interestingly, the Act does not specify that the private use should be ‘non-commercial’ (usually designated ‘private non-commercial use’) as required in some other jurisdictions, although this could be inferred generally from the nature of fair dealing exception.

Fair dealing does not have a specific definition. It is not defined within the Act and the Nigerian courts have rarely made pronouncements on it.⁴¹ Although the defence of fair dealing was raised in *Peter Obe v. Grapevine Communications Ltd*,⁴² the court failed to take the opportunity to make a pronouncement on the defence. The defendant had argued that the copied photographs were used ‘to depict a story of a historical matter of importance and of high public interest’. The court rejected the defence on the ground that since the photograph was authored by the claimant, professional courtesy should have been given to the claimant. It also held that the al-

38 *ibid*, Section 3(1).

39 *ibid*, section 3(2).

40 *ibid*, section 5.

41 John O. Asein, *Nigerian Copyright Law & Practice* (2nd ed., Books & Gavel Publishing, 2012) 251.

42 Suit No. FHC/LJCS/1247/97.

leged acknowledgment by the defendant did not meet the required standard. According to Asein, the most important issue the court should have considered was whether the act of the defendant constituted fair dealing with the work and it should have rejected the defence on the ground that there is no such fair dealing based on historical importance or high public interest.⁴³

Resort would therefore be had to other jurisdictions. Fair dealing is a question of facts based on the circumstances of each case. The dealing with the copyright work is required to be fair in that it is reasonable. The purpose must also be for research, private use (non-commercial), criticism, review, reporting of current events, parody, pastiche or caricature.⁴⁴ In deciding whether an act carried out with respect to a copyright work amounts to fair dealing or not, the court considers various factors. The statement of Lord Denning M.R in *Hubbard v. Vosper (1972) QB 84* is very pertinent:

It is impossible to define what is 'fair dealing'. It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as basis for comment, criticism or review, that may be fair dealing. If they are used to convey same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. Other consideration may be a matter of impression... The tribunal of fact must decide.

In *Ashdown v. Telegraph Group Ltd.*,⁴⁵ the following three factors were considered relevant in determining the defence of fair dealing:

1. Whether the alleged fair dealing is in commercial competition with the owner's work. Where it is the court is likely to reject the defence.
2. Whether the work is published (or otherwise exposed to the public) or not. Where the work is unpublished or the defendant got access to the work through some unscrupulous means, the court is more likely to reject this defence.

43 John O. Asein (n 41) 251-252.

44 Gluseppina D'Agostino, 'Healing Fair Dealing - A Comparative Copyright Analysis of Canada's Fair Dealing to U.K. Fair Dealing and U.S. Fair Use', (2008) 53 McGill L. J. 309.

3. The amount and importance of the part of the claimant's work taken by the defendant. Where the part taken is substantial or forms a crucial part of the claimant's work, the court may not uphold this defence.

Fair use⁴⁶ is an exemption from copyright infringement for uses that are fair and the question of what is fair depends on the facts of each case, hence it lacks generalization.⁴⁷ In the United States, the doctrine of fair use was entirely a judicial creation and not part of statutory enactment.⁴⁸ From the outset, it 'had the flavor of an equitable doctrine, importing, as its name indicates, considerations of fairness'.⁴⁹ Fair use is now codified in the US Copyright Act under Section 107.⁵⁰ Such use should be for purposes such as criticism, comment, news reporting, teaching, scholarship, or research. The Act expressly provides that such fair uses are not an infringement of copyright. The Act provides guidance to the court by including factors the court should consider in determining whether a use amounts to fair use. The court is not however required to be limited to just these factors as it uses the expression 'include'. The factors listed are:

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.

Fair use as an exemption to copyright protection performs certain social functions.⁵¹ It is a type of 'safety valve', which mediates between the strictures

45 [2002] Ch. 49.

46 The term 'fair use' is used in the USA and many other jurisdictions such as the UK. The Nigerian Copyright Act uses the expression 'fair dealing'.

47 Lloyd L. Weinreb, 'Fair's Fair: A Comment on the Fair Use Doctrine', (1990) Vol. 103, No. 5, Harvard Law Review, 1137, 1138.

48 *ibid*, 1141.

49 *ibid*.

50 17 USC.

51 Dan L. Burk & Julie E. Cohen, 'Fair Use Infrastructure for Rights Management Systems' (2001) 15 Harv. J.L. & Tech., 41.

of copyright and constitutional provisions, which provide for freedom of speech.⁵² Copyright in itself restrains others from using the expression of the copyright owner thereby amounting to some ‘type of restraint on speech’. Fair use seeks to strike a balance by preserving the proprietary interests of the copyright owner in his works while at the same time protecting public interests in encouraging advancement in open dialogue, deliberation and advancement in knowledge.⁵³

Fair use is also seen as a solution to a market failure that can occur for knowledge protected by copyright.⁵⁴ It facilitates worthwhile uses of copyright works where the value of the use exceeds the transaction costs of negotiating licenses. The user is not likely to undertake the task of locating the copyright owner in order to obtain a licence. Through fair use, such a user can copy the relevant portion needed without being frustrated with the need or requirement to obtain a licence.

Furthermore, certain things such as criticism, parody, education, research are not necessarily beneficial or wholly beneficial to the user of a copyright work. They are mainly for the benefit of the public in order to foster public debate, have an informed and enlightened populace as well as serve as basis for the creation of future works of authorship.⁵⁵ If the user is required to go through the hassles of obtaining a licence or pay wholly for this, such a user may choose not to use the copyright work at all, thereby hampering public interest in the long run.

Fair use is also a mechanism that allows the law to cope and adapt to the new technologies that pose challenges to the traditional copyright framework.⁵⁶ An example is that the reverse engineering of computer programs is considered as fair use and not copyright infringement. This would allow the development of complementing programs and also further technological advancements. Another instance is the use of fair use to limit liability for contributory infringement in order to allow the development of markets that are related to the copyright work. One of such is the ‘dual purpose’ defence for technologies as decided in *Sony Corp of America v. University City Studios, Inc.*,⁵⁷ where the court held that the sale of Betamax video recorder was not contributory infringement since it also had non-infringing uses.⁵⁸

52 *ibid*, 43.

53 *Ibid*.

54 *ibid*, 44.

55 *ibid*, 44-45.

56 *ibid*, 46-47.

57 464 U.S 417, 442 (1984).

7. ISSUES RAISED BY THE IMPOSITION OF A COPYRIGHT LEVY IN NIGERIA

The Nigerian Copyright Act does not define what private use means. The scope of private use can be wide in the current digital environment. It could include photocopying, scanning, sharing music with friends and family, time shifting, recording or changing the format of a content, e.g. from a CD to a music file on a phone, iPod, laptop *etc.* The lack of definition or pronouncement on what actually amounts to private use in the context of the Nigerian law can make it a very wide exception considering what happens in a digital environment.

For instance, in *University of London Press Ltd v. University Tutorial Press Ltd*,⁵⁹ private study was held to be limited to use by the student himself and does not extend to circulation to a group of students. Similarly, in *Sillitoe v McGraw Hill Book Co. Ltd*,⁶⁰ the defendants were the importers of a series of study notes sued by the claimant, the author of a well known O'level literature studies series. The defendants argued that their acts were not infringing as they fell within the exception of fair dealing for research, private study, criticism or review. The court rejected this defence and held with regards to private study that the defendants could not avail themselves of the exception of fair dealing since they were not engaged in private study or research but were merely facilitating the private study of others.

There is a need for the *Nigerian Copyright Act* to be more specific in what it means by private use. For instance, the EU Infosoc directive specified that the private copying exception, is with respect to only the right of reproduction.⁶¹ It does not extend to other rights granted by copyright such as distribution or communication to the public. In order to ensure that the right persons for whom it is meant are the ones who benefit from this exception, the reproduction must be with respect to audio, visual and audio-visual materials for private use.⁶² It is to be by natural persons (not corporate) and should be neither directly nor indirectly for commercial use.

58 Dan L. Burk & Julie E. Cohen (n 51) 46-47.

59 [1916] 2 Ch. 601.

60 [1983] F.S.R 545.

61 EU Infosoc Directive Article 5(2)(b) 'Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases: ... b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject matter concerned'.

62 *ibid*, recital 38.

Kreshmer identified seven types of copying that now take place in the private sphere.⁶³ These are: (i) Making back-up copies / archiving / time shifting / format shifting (ii) Passing copies to family / friends (iii) Downloading for personal use (iv) Uploading to digital storage facilities (v) File sharing in digital networks (vi) Online publication, performance and distribution within networks of friends (vii) User generated content / mixing / mash-up (private activities made public). According to him, the private copying exception in the EU was aimed only at activities (i) and (ii). Within the current digital environment, the dividing line between private and public spheres is blurred; hence activities (iii) – (vii) now pose a problem. It is because of such that the question of imposing a levy on online or digital activities is now an active debate and consideration in various jurisdictions.

In the EU, private copying exception is applicable only to individuals (i.e natural persons) and not to professionals or companies. The ECJ held that the levy constitutes a fair compensation only where it is applied to devices used for private copying and an indiscriminate application of the levy to all kinds of devices including those acquired for professional persons or companies would be contrary to Article 5(2)(b) of the *Infosoc Directive*.⁶⁴ In this respect, the challenge of differentiating between copying by natural persons on the one hand and professional bodies/companies on the other hand for the purpose of imposing levies has been identified. In order to combat this challenge, some have suggested that the devices sold to the latter group should be differentiated based on size, speed and price.⁶⁵ Bonadio and Cantore suggested that instead of the above, a method of declaration by buyers should be adopted at the point of purchase wherein the buyer states the purpose to which the device shall be put and there should be penalty for false declaration.⁶⁶ Respectfully, as good as this suggestion is, it would be difficult, time consuming and almost not feasible to follow up on the declarations made by people in order to determine whether the declaration was false or true after all.

Now to the consideration that a copyright levy is necessary in order to compensate the copyright owner for harm caused or losses made due to private copying. The concept of harm in this context would pose a prob-

63 Martin Kretschmer (n 7) 9-10.

64 Enrico Bonadio & Carlo Maria Cantore, 'The ECJ Rules on the Private Copying Levy: *Padawan SL v Sociedad General de Autores y Editores* (SGAE) (C-467/08)' [2011] European Intellectual Property Review, Issue 4,260; *Padawan SL v Sociedad General de Autores y Editores* (SGAE) (C-467/08).

65 Enrico Bonadio & Carlo Maria Cantore (n 64).

66 *ibid*, 263.

lem. It is likely to be interpreted to mean that private copying amounts to a lost licensing opportunity for the copyright owner hence the need to pay a levy in order to cover this situation.⁶⁷ In the same vein, if viewed from an economic perspective, harm can be interpreted as a lost sale in that private copying replaces a purchase that would otherwise have been made by these individuals.⁶⁸ Notably, since copying for private use is allowed, it may be argued that there is no infringement of copyright in the first place, therefore no harm has been done to the author; consequently the question of compensation does not arise.

Another perspective is viewing copyright levies as a form of fee/royalty for a statutory licence granted by the law, which permits private copying. This argument would also be defeated if as an exception to copyright, private use of works amounts to an allowable act and therefore there is no need to have a licence in order to take advantage of that exception. A jurisdiction where the concept of a statutory licence in this respect is well known is Germany. The reasoning in this jurisdiction is observably different from the argument earlier stated in this paragraph. The German copyright law does not recognise a right to private copying, rather the law is simply saying that in order to protect the privacy of individuals, 'the right owner must tolerate copying for private use and in return participate in a collective remuneration scheme' hence the rule is 'protection where you can protect; remuneration where you cannot protect'.⁶⁹

Also, the imposition of copyright levies already assumes that all copyright owners/authors are interested in exploiting their works for money. Some authors make creative works for the simple fact that they enjoy it. Some allow some private copying and level of infringement on their rights in order to increase their popularity and reputation, which consequently affects the value of their works. Others are in it just to inform or educate the public.

In addition, by imposing a copyright levy, it may imply that the order imposing this levy has already made everyone an infringer of some sort especially since it cannot be determined as a general rule that all purchasers of these devices would actually infringe on the rights of others. This question of the fairness of private copying levies was addressed by the ECJ in

67 Martin Kretschmer (n 7) 17.

68 *ibid.*

69 Brigitte Zypries, then Minister of Justice, discussed this in an interview about the implementation of the 2001 Information Society Directive, quoted in Professor Martin Kretschmer (n 7) 60.

Padawan where the court held that the levy constitutes a fair compensation pursuant to the Infosoc Directive and it really does not matter whether the user actually uses the device for copying. Users are assumed to benefit just from having equipment with its copying potentialities available to them. There is therefore a presumption that in all probability, the purchaser will make use of the device for making copies of copyrighted works.⁷⁰ Copyright owners are remunerated not on the basis of actual enjoyment of the work but a legal possibility of that enjoyment.⁷¹

Officials of NCC have stated that the imposition of a copyright levy ‘will make it more costly for pirates to engage in piracy’.⁷² The Commission believes that the imposition of this levy would deter pirates and copyright violators from carrying out their illegal activities. The writer humbly disagrees with this opinion. The main essence of a copyright levy is to compensate copyright owners for acts of private copying since they cannot feasibly enforce their rights in these instances. The fact that a levy is imposed does not mean that piracy would become more expensive especially in a sector where the levy paid can be easily passed to the consumers. More so, everyone in the society would be paying this levy whether an individual benefitting from the fair dealing exception for private use or a person whose copying amounts to an infringement. The levy would therefore not make so much difference to copyright violators.

8. CONCLUSION

This paper examined the origin of the imposition of copyright levies and its justifications. The rationale advanced includes the fact that such levies provide compensation to copyright owners for loss in sales and is an incentive for future production of creative and cultural goods. Further, it is a means of copyright owners having their own share of the new market created by digital technological devices/electronics that use copyright works. It is also a technique of effective enforcement of their rights and a way to reduce the transaction and administrative costs involved in enforcing their rights in the private sphere.

70 Enrico Bonadio & Carlo Maria Cantore (n 64).

71 *Padawan* AGs Opinion of May 11, 2010 at 90 and *SGAE v Rafael Hoteles* C 306/05 [2006] ECR I-11519.

72 Mr Aderemi Adewusi, Head Corporate Affairs, NCC in: Kingsley Okoye, ‘Boosting the creative industry through Copyright Levy’ <<http://sundiatapost.com/boosting-the-creative-industry-through-copyright-levy/>> accessed July 17 2014.

The imposition of a private copyright levy has been analysed in light of the fair use or fair dealing exception provided by law. The Nigerian copyright law also provides for the fair dealing exception (in this case) for private use. The law does not define what 'private use' means. It is unclear whether it is limited to only copying by private individuals or it can include companies, professional bodies, an association or organisation. It does not also specify that such private use must be for non-commercial purposes. It is suggested that the term 'private use' should be well defined or explained. A cue can be taken from the EU Infosoc Directive where the exception of private copying is limited to just the right of reproduction and not communication to the public or distribution. In the absence of such specific exclusions, it may mean that private use could be argued to cover unintended cases such as where a person that obtains a music cd shares it with friends, colleagues and also uploads it online. Although this may be a non-commercial use, yet it adversely affects the market for copyright owners. It is therefore important that these issues are made clear either through a policy statement, the Nigerian Copyright Commission or the Copyright Levy Order itself or the court or the Copyright Act.

Part of the functions of fair dealing is to balance the public interests with that of the copyright owner. It also serves as a mechanism for dealing with technological advancements that pose a challenge to the traditional copyright concept. It is therefore important for the concept of fair dealing to be flexible in order for it to fulfill its functions. A precise definition of fair dealing would probably not be apt for the Nigerian legal system. However, the factors listed by the UK courts in *Hubbard v. Vosper* and *Ashdown v. Telegraph Group Ltd* would be of persuasive effect in Nigerian courts. These same factors, though couched differently, are similarly contained in section 107 of the US Copyright Act. Nigeria may therefore benefit from following similar guidelines in assessing whether the act of an alleged infringer amounts to fair dealing or not. Having such guiding factors would enable the court to make decisions on a case by case basis while preserving the certainty of the law. Such guiding factors must also not be exhaustive, therefore leaving the court room to address the dynamic situations before it and adapt to technological advancements in the fast changing society we are today.

The act of private copying cannot be denied in the digital and knowledge driven society in which we live today. This area of law is still murky and highly unclear. Does the expression 'private use' include private copying? Since this is an exception to copyright, it means the author has no right in the first place and the acts of people do not amount to an infringement.

It may therefore be difficult to find a justification for imposing copyright levies on a harm or compensation principle.

Irrespective of whether one considers private copying as an infringement or not, the consequence remains the same which is a loss of income to the copyright owners. If copyright owners were to enforce their rights in the private sphere, this would be costly in terms of time and money. An attempt to grant licences to individuals would also be impracticable to administer. If private copying is allowed to continue without any reward going to copyright owners, they may lack the incentive to continue to create cultural and creative goods and also lose the investments they made in the creation of such works. A better justification for the imposition of a copyright levy may be the German concept of a statutory licence. Copyright owners are required to tolerate private copying in order not to infringe on the privacy of individuals and in the light of the difficulty of enforcing their rights in the private sphere. The law therefore grants a statutory licence to private individuals to copy. However, in return for this licence and for the losses incurred by copyright owners, copyright levies are imposed as a means of compensating copyright owners. It is therefore seen as some form of fees paid for having the statutory licence to copy.

Furthermore, although the history of the imposition of copyright levy is based on analogue reproduction or copying, copying also takes place in the digital environment. It is therefore suggested that copyright levies should not only be imposed, copyright owners should also make use of technological protection measures (TPM) and digital right management (DRM) in order to protect their interests. This is pertinent in order to effectively enforce their rights in the private or domestic sphere.⁷³

73 Jörg Reinbothe(n 4): *'Digital Rights Management (DRM) systems enable digital solutions to license rights and administer payments of royalty on an individual scale. They are the basis to develop new (electronic) business models aiming at making available digital content to users and also to receive remuneration for it'*.