

Assessing the Limitations and Exceptions to Copyright Infringement: Nigeria in Perspective¹

Abstract

This article gives an analysis of the limitations and exceptions in the Copyright Law of Nigeria. The paper dwells on the excusable uses of a work that does not infringe on the creator's rights as well as examines the extent of these rights and how far they have been controlled or abused. The paper is divided into four distinct but interdependent parts. The first part consists of the introductory part, which includes the definition and meaning of copyright, as well as the nature of protection under copyright law of Nigeria. The second part of the paper is subdivided into two parts; the first subdivision discusses the limitation and exceptions to the Nigerian copyright laws as contained in paragraphs A, H, K, Q and S of the second schedule to the Nigeria Copyright Act (NCA). The third part of this paper is subdivided into parts, each part comprehensively discusses the limitations and exceptions to copyright infringement in Nigeria. The last part of the paper concludes that the issue of copyright limitation and exceptions carries a lot of weight; they are necessary in this part of the world where access to educational material can be a challenge.

1. Introduction

It is a popular saying that 'for every rule, there is always an exception. No rule which applies to man can be absolute and inflexible, else it becomes a 'draconian devil', resulting in a revolt by the people whose dealings and behaviour it is intended to guide. To this end, the rules guiding copyright works are not excluded.

It is an undisputed fact that 'the greatest heritage of a nation remains the creativity of its citizens, and therefore one of the primary functions of law is to protect the ingenuity, resourcefulness and innovation of the citizenry'.² This 'ingenuity, resourcefulness and innovation' exhibited by the citizens of a country go a long way in documentation and preservation of their legacy, as well as enhancing their socio-economic development. The purpose of copyright laws is essential to help these ingenuous, resourceful and innovative persons reap maximum profit and benefit from their creative works. In order to achieve this purpose, copyright laws generally restrict the unauthorized commercial reproduction of those works. However, as earlier mentioned, there are exceptions to this general rule. These limitations and exceptions look more or less alike in all legal jurisdictions, but there are inherent differences that accompany these similarities. Before focusing on limitations and exceptions the fundamental dynamics of copyrights should be explored.

2. Meaning of Copyright

The Black's Law Dictionary³ defines 'copyright' as

the right to copy; specifically, a property right in an original work of authorship (including literary, musical, dramatic, choreographic, pictorial, graphic, sculptural, and architectural works; motion pictures and other

¹ **Temitope OLOKO**, Department of Public and Private Law, Lagos State University.

²H Faga, 'Limits of Copyright Protection in Contemporary Nigeria: Re-Examining the Relevance of the Nigerian Copyright Act in Today's Digital and Computer Age' (2011) 2 *NAUJILJ* 211.

³ BA Garner, *Black's Law Dictionary* 9th ed (New York, West Publishers.) p.386.

audiovisual works; and sound recordings) fixed⁴ in any tangible medium of expression, giving the holder the exclusive right to reproduce, adapt, distribute, perform, and display the work.

The above definition attests to the popular assertion that 'copyright is a monopoly of limited duration,⁵ albeit 'unlike most monopolies, it is a legitimate monopoly created by the law and enjoyed by the author of an original work'.⁶ The scope of copyright extends to all the types of the medium into which a work can be put in a definite form. These rights include the right to do and the right to authorise permitted acts, thereby giving the owner the exclusive right to control the reproduction of the work.

The coverage of copyrights extends to rights, such as reproduction, publication, distribution, performance, translation, adaptation⁷ and moral rights⁸ are legal rights created by the law and granted to the creator of an original work.

The Nigerian Copyright Act did not define the term 'copyright' expressly. However, a working definition of the term may be drawn from section 6 of the Act and may be summed up as follows:

Copyright of an eligible work is the exclusive right to control, the doing of certain acts restricted to the copyright owner.

Thus, copyright can be said to be the rights granted by the state or through an international instrument for the protection of creators of original works of authorship⁹ which in Nigerian jurisprudence operates to cover literary works, musical works, artistic works, cinematograph films, sound recordings, and broadcasts;¹⁰ on the other hand, the South African jurisprudence includes all the aforementioned categories of work,¹¹ and goes further to include programme-carrying signals, published editions, and computer programs.¹² Once this protection is granted, the author or creator of the creative work generally gets the exclusive right to reproduce the work, publish the work and perform in public, lease, hire, rent, loan, broadcast the work and

⁴ The Berne Convention allows member countries to decide whether creative works must be "fixed" to enjoy copyright. Article 2(2) of the Berne Convention states: "It shall be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form". Some countries do not require that a work be produced in a particular form to obtain copyright protection. For instance, Spain, France, and Australia do not require fixation for copyright protection. The United States, Nigeria and Canada, on the other hand, require that the work be "fixed in a tangible medium of expression" to obtain copyright protection. U.S. law requires that the fixation be stable and permanent enough to be "perceived, reproduced or communicated for a period of more than transitory duration". Nigeria Copyright act requires that a literary, musical and artistic work be "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". Similarly, Canadian courts consider fixation to require that the work be "expressed to some extent at least in some material form, capable of identification and having a more or less permanent endurance".

⁵ A Drone, *Treatise on the Law of Property in Intellectual Productions* 2nd ed (London, Butterworths Publishers 2000) 44.

⁶ H Faga, (n1) at 214.

⁷ NCA, sections 6-8 and SCA, sections 6-9.

⁸ NCA, section 12 and SCA, section 20.

⁹ H Faga (n3) at 214.

¹⁰ NCA, section 1(1) (a-f); also Berne Convention 1986, Article 1(1) (*Infra* note 16).

¹¹ NCA, section 2(1) (a-f).

¹² SCA, Section 2(1) (g-i).

make adaptations of the work and any translation of it.¹³ Having stated the works that are eligible for copyright protection and the rights that are granted, for any work which is eligible for the grant of protection under the copyright law, such work must satisfy the requirement of originality and fixation in a fixed medium of expression.¹⁴ An example is a provision under the NCA¹⁵ which provides 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.

These two elements which are simply called 'Originality' and 'Fixation' respectively, must exist in any literary, musical and artistic work before such work can gain full copyright protection under the Nigerian Copyright Act. The requirement for originality entails that sufficient efforts must have been put into the making of the work as to give it an original character,¹⁶ while the fixation requirement 'is of evidentiary value as works that are not fixed in any medium would be difficult to serve as evidence to compare with the infringing copy in a court of law'.¹⁷

A similar requirement as this also exists in the South African copyright law. Section 2(2) SCA provides as follows:

- (2) A work, except a broadcast or programme-carrying signal, shall not be eligible for copyright unless the work has been written down, recorded, represented in digital data or signals or otherwise reduced to a material form.
- (2A) A broadcast or a programme-carrying signal shall not be eligible for copyright until, in the case of a broadcast, it has been broadcast and, in the case of a programme-carrying signal, it has been transmitted by a satellite.

It becomes immediately noticeable that the provisions of the requirement for eligibility in the two statutory examples given above have some significant differences. Under the SCA, the law provides that all works “except a broadcast or programme-carrying signal” must be fixed in a definite medium of expression. However, under the NCA, only literary, musical and artistic works are required to be fixed in a definite medium of expression. Also, the second requirement of ‘originality’ is expressly required for a work to be eligible for copyright in the SCA,¹⁸ under the NCA the requirement is directly attached to literary, musical and artistic works. It thus seems that the first three sets of works in section 1 of the NCA require originality and fixation while the second set does not, this is a big lacuna in the law as it presupposes these vital requirements can be done away with for these set of works.

¹³ NCA, section 6(1) (a) (i-viii) and SCA, section 32 (a-f).

¹⁴ NCA, section 1(2).

¹⁵ NCA, section 1(2).

¹⁶ GN Okeke & K Uzor, ‘An Appraisal of the Protection of Copyright under International Law’ (2014) 6 (1) *JL&CR* 11.

¹⁷ *Ibid.*

¹⁸ SCA, section 2(1).

3. Limitations and Exceptions to Copyright

From the foregoing, the next issue to address is the extent of limitations and exceptions applicable to the exclusive rights granted to the author or creator of the work protected by the laws of the two countries. Copyright exceptions and limitations are especially essential for addressing the challenges and opportunities posed by the lack of access to learning materials for research and educational purposes. Limitations and exceptions serve as checks and balances for copyright protection. As pointed out by Okediji ‘the unlimited grant or exercise of rights without a corresponding and appropriate limitations and exceptions has serious adverse long-term implications not only for development priorities but indeed for the creative and innovation process itself.’¹⁹

Limitations and exceptions to copyright are provided for in both national and international laws,²⁰ which allows for copyrighted works to be used without consent or authorization license from the copyright owner. These limitations and exceptions are included in these laws for several important reasons²¹ such as freedom of speech,²² education and equality of access, particularly for the visually impaired.²³ This paper will proceed to discuss the exceptions and limitations to copyright, in Nigeria, examining the statutory provisions as contained in the extant law.

The Nigerian Copyright Act²⁴ is structured such that all the provisions relating to exceptions are contained in its second and third schedule. The exceptions do not have a general application to all the eligible works. Its application depends on the nature and type of work.²⁵ All the exceptions specified in the Second Schedule to the Act apply to literary, musical, artistic works and cinematograph films; they have limited application in respect of sound recordings and broadcasts. The second schedule is fairly long, containing various exceptions, the focus of this paper will however be on five key exceptions contained in the second schedule which are fair dealing,²⁶ educational purposes,²⁷ governmental direction,²⁸ unavailability for sale in Nigeria,²⁹ and equality of access.³⁰ The exceptions as contained in the second schedule to the NCA are

¹⁹ RL Okediji, Executive Summary) ‘Limitations, Exceptions and Public Interest Considerations for Developing Countries’ March 2006 I UNCTAD - ICTSD Project on IPRs and Sustainable Development Issue Paper No. 15.

²⁰ Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886. Completed at PARIS on May 4, 1896, revised at BERLIN on November 13, 1908, completed at BERNE on March 20, 1914, and revised at ROME on June 2, 1928, at BRUSSELS on June 26, 1948, at STOCKHOLM on July 14, 1967, and at PARIS on July 24, 1971.

²¹ Wikipedia, *Limitations and Exceptions to Copyright*. Available at https://en.wikipedia.org/wiki/Limitations_and_exceptions_to_copyright (Accessed 6 February 2022).

²² B Hugenholtz, *Copyright and Freedom of Expression in Europe* in RC Dreyfuss, et. al (eds.), *Expanding the Boundaries of Intellectual Property*. (Oxford University Press 2001).

²³ J Kouletakis, *A Critical Examination of Copyright Limitations and Exceptions for The Visually Impaired Pertaining to Literary Works in South Africa in The Local and Global*.

²⁴ Copyright Act 1988, Cap C. 28, Laws of the Federation of Nigeria 2004.

²⁵ C I Eze, ‘Fair Dealing Under the Nigerian Copyright Law’. Available at <https://naudigitalibrary.wordpress.com/2012/01/28/fair-dealing-under-the-nigerian-copyright-law/> (Accessed 11 February 2022).

²⁶ NCA, Paragraph (a) Second schedule.

²⁷ Ibid, Paragraph (h) Second schedule.

²⁸ Ibid, Paragraph (k) Second schedule.

²⁹ Ibid, Paragraph (q) Second schedule.

³⁰ Ibid, Paragraph (s) Second schedule.

premised on a single foundation by the draftsman of the Act. The schedule provides that: ‘The right conferred in respect of a work by section 6 of this Act does not include the right to control’.

This refers to the provision of section 6 (1) NCA which provides 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 loudspeaker 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 a 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 soundtrack associated with the film by utilising such soundtrack,
- (iv) distribute to the public, for commercial purposes copies of the work, by way of rental, lease, hire, loan or similar arrangement.

This neatly encapsulates the key rights relating to the grant of copyright, this section showcases the bundle of rights available to the copyright owner, however, the exclusive rights granted to such work will be limited by the provisions contained in the second schedule to the Act.

3.1 Fair Dealing

Fair dealing³¹ is a limitation and exception to the exclusive right granted by copyright law to the author of creative work. Fair dealing is found in many of the common law jurisdictions of

³¹Also, known as ‘Fair Use’ under the United States law. ‘Fair Use’ is defined by the Black’s Law Dictionary (*Supra* note 4, Pg.676) as “a reasonable and limited use of a copyrighted work without the author’s permission,

the Commonwealth of Nations.³² Accordingly, it is regarded as a “universal limitation on the exclusive rights granted to copyright holders to safeguard socially important endeavours and to promote future development, especially regarding education and scientific progress”³³

.As regards ‘Fair Dealing’, the NCA provides that:

The right conferred in respect of work by section 5 of this Act does not include the right to control-

- (a) the doing of any of the acts mentioned in the said section 5 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,³⁴

By virtue of the above stated statutory provision, where a work is used for the purpose of research, private use, criticism or review of the copyrighted work or for reporting current events, such use will not be considered an infringement of the exclusive right of the author of the copyrighted work. However, where the research, review or criticism is for public use, the Act requires that the author of the copyrighted Work be properly acknowledged unless the work is “incidentally included in a broadcast”.³⁵ The NCA does not mention that the use has to be for a non-commercial public purpose, should it be presumed that use under this paragraph should not include for a commercial purpose which will be unfair to the author. Although the Act is not specific on this, the use for any commercial purpose could not have been intended by the drafter as this would not amount to fair dealing. Accordingly, the legal framework for the determination of what kind of dealing or use of a Copyrighted Work will be regarded as ‘fair’ in Nigeria has led in practice to certain grey areas, especially with the advancement in technology and the globalization of the world which has caused a breakdown of communication barriers and has, in a ripple effect, increased the volume of online resources, which sometimes makes it extremely difficult, if not impossible, to determine the original source of a particular material. An example is when a blogger in the middle-east posts a one-page short story on his website. A teenager in China, while surfing the internet on his Smartphone, sees the website and finds the story interesting. Without thinking, the teenager takes a single screenshot of the webpage containing the story.

The teenager in turn shows the screenshot page (now a PNG image) to his friends at school, who with file-sharing software, download the image on their Smartphones too. The image keeps spreading, and without realizing it, losing every trace of its original source. Ultimately,

such as quoting from a book in a book review or using parts of it in a parody”. “The concepts of fair use in the U.S. and fair dealing in other countries must not be confused. Both concepts share the same fundamental idea of permitting uses that are considered fair. However, the concept of fair use is, in general, much broader than the concept of fair dealing because it is not confined to specific purposes such as research, study, criticism and review or news reporting.”

³² Wikipedia, ‘Fair Dealing’. Available at https://en.wikipedia.org/wiki/Fair_dealing (Accessed 11 February 2022).

³³ Document for Commonwealth Countries on Copyright Matters in Education <http://oasis.col.org/bitstream/handle/11599/699/Copyright-Document.pdf?sequence=1&isAllowed=y> (Accessed 2 March 2022).

³⁴ NCA, Paragraph (a), Second Schedule.

³⁵ NCA, Para (a) Second schedule.

one of the recipients of the image uploads it to his Instagram page and a friend of his in Nigeria downloads the image. The upload and download cycle keeps on until the story gets used by a researcher in one of his research works that were made public, without properly acknowledging the original author because he heard the story from his 12 years old daughter who could not remember where she got the image as she has over a thousand such images on her phone. A case like this creates a problem in determining whether there was fair use of the middle-east blogger's copyrighted work in the research work. Also, the 'internet revolution, new media interaction and online journalism have made it next to impossible to create relevant content without using other people's Copyrighted work'.³⁶

Due to the limited number of litigation in areas of copyright in Nigeria, there is a corresponding limited number of judicial pronouncements on the issue of determination of what amounts to fair dealing. In *Okediji v Osanyin*³⁷ the issue of fair dealing was raised as a defense by one of the defendants, which included Obafemi Awolowo University, for the translation of a Yoruba book *Rere Run* into English titled *The Shattered Bridge* which was subsequently performed by the second defendant. The court held, subject to the exception listed in paragraph (a) of the Second Schedule to the Decree, that it is an infringement of copyright under section 5(1)(a)(iv) of the Copyright Act 1970 to publish any translation of the work in whatever language in Nigeria. Although the issue of fair dealing came up for consideration, as the performance took place in Obafemi Awolowo University, the court did not rule on the issue of fair dealing, consequently, factors that may constitute fair dealing in Nigeria were not laid out. The same pattern was followed in the case of *Obe v Grapevine Communication*³⁸ where the issue of fair dealing was raised as a defense. The courts again did not address the issue of whether the use was fair or not. This might have been a result of the fact that, in this particular case, the infringement was a flagrant one. However, other developed countries have a wide array of judicial authorities in the field of copyright concerning fair dealing or fair use, in the United States section 107 of the U.S. Copyright Act specifically provides to avoid confusion and developing rebuttable assumptions or presumptions including an explicit number of factors to create an acceptable presumption. These factors can be summarized into four points, namely:

1. Purpose and character of the use - Was the use for commercial or nonprofit educational purposes?³⁹
2. Nature of the copyrighted work - Was the copyrighted material used factual or creative; published or unpublished?⁴⁰

³⁶ A Adeyemo, 'When you can use a Copyrighted Work without Permission'. Available at <http://ayoadeyemo.com/?p=23> (Accessed on 11 March 2022).

³⁷ *Ladejo Okediji v. Bode Osanyin, Obafemi Awolowo University, Dr Olu Akomolafe FHC/IB/12/90.*

³⁸ [2003 – 2007] 5 IPLR.

³⁹ In the English case of *University of London Press Ltd v. University Tutorial Press Ltd* [1916] 2 Ch 601, a *locus classicus*, Defendant copied and published the Plaintiff's published past examination papers for students. Though Defendant's purpose was educational, the Chancery Division, per Peterson J, decided that Defendant's unauthorized use amounted to copyright infringement because they were not just produced for public use but also for commercial purposes.

⁴⁰ The nature of work usually weighs in the copyright owner's favour where the work copied is a fictional { *Twin Peaks Production Inc v. Publications International Ltd* [1993] 996 F.2d, 1366, 1376 (2nd Circuit)} and unpublished { *New Era Publications International APS v. Henry Holt & Co* [1989] 873 F.2d (2nd Circuit)} work. On the other hand, the defendant is more favoured where the work copied is factual { *National Rifle Association v. Handgun Control Federation* [1994] 15 F.3d 559, 562 (6th Circuit)} and published { *New Era Publications International ApS v Carol Publishing Group* [1990] 904 F.2d 152, 157 (2nd Circuit)}. See also Bruce A Allen, *Intellectual Property and the National Information Infrastructure- The Report of the Working Group of Intellectual Property Rights*, Information Infrastructure Task Force, (September 1995).78.

3. How substantial is the amount of the portion used in relation to the copyrighted work as a whole?⁴¹
4. What is the effect of the use upon the potential market value of the copyrighted work? Does it negatively affect the copyright owner's pecuniary interest?⁴²

All these factors put together with help the court in making a better decision in cases where fair dealing comes into question. The absence of clear cut boundaries for the use may bring about conflict with a normal exploitation of the work in a way that will prejudice the legitimate interests of the right holder. For example, a class of 200 students making photocopies of a textbook for research and private use goes beyond what is permitted.

3.2 Educational Purposes

It will be observed that from this point on, all other exceptions that will be discussed will seem like an extension of the previously discussed one, which is 'fair dealing'. This is so because they are offshoots of the fair dealing exception.

It has been observed all over the world that copies of media documents are regularly used by schools, colleges and universities and students alike, these instances include photocopying extracts from books as part of class handouts or showing recorded television programmes in a class.⁴³ Going by the strict application and enforcement of the exclusivity of the rights granted to copyright owners by the NCA, educational institutions will not be able to take advantage of such works for educational benefits without first obtaining permission from the owner of the copyright of the book which is intended to be used for teaching purposes. This will constitute a clog and another level of difficulty for the development of the educational institution and access to knowledge. In order to mitigate this potential hardship, the law provides that:

The right conferred in respect of work by section 6 of this Act does not include the right to control-

- (h) any use made of a work in an approved educational institution for the educational purposes of that institution, subject to the condition that, if reproduction is made for any such purpose it shall be destroyed before the end of the prescribed period, or if there is no prescribed period, before the end of the period of twelve months after it was made;⁴⁴

Thus, educational institutions are granted the liberty to use copyrighted materials for educational purposes of such institution. There is however a proviso that such an educational institution must be an approved one. In addition to that, the reproduced copy of the copyrighted work must be destroyed before the end of the prescribed period, and if there is no prescribed period, it must be destroyed before the expiration of the period of one year after the reproduction was made. How does the government or the owner regulate the destruction of the book? This provision is quite wide as it may even include making a number of copies of a whole book. The reprographic process is not prohibited. Copying, performing, playing or

⁴¹MB Nimmer, *Nimmer on Copyright: A Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas*, *Stanford Law Review*, July 1964, Volume 16, No. 4, Pg.1146-1150,

⁴²*Stewart v. Abend* [1990] US 495, 207, 216.

⁴³Intellectual Property Office, *Exceptions to Copyright: Education and Teaching*. (October 2014) Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/375951/Exception_and_Teaching.pdf (Accessed on 15 July 2021).

⁴⁴Paragraph (h), Second Schedule. NCA 2004.

showing and recording any work is allowed under this section. This provision is hailed as it does not unduly restrict education and teaching uses. On the other hand, it may undermine incentives to create.

The purpose of this wide provision is to make it easier for copyright works to be used in the educational sector to enrich and enhance the learning environment. Most schools in Nigeria engage in and encourage flagrantly⁴⁵ copying of textbooks by providing 'unmonitored copying centres' owned by private business people whose aim is to make a profit without thinking they are depriving some other person of the fruit of his labour.⁴⁶ The challenge lies in the fact that they do not even know that what they are doing is an infringement of somebody else's rights which they can be liable for.⁴⁷ The reason for this flagrant copying is not obscure as most libraries are ill-equipped with essential books, current journals and magazines. Some libraries have only one copy of an essential book.⁴⁸ In addition, there are limited publishers, books are expensive and beyond the reach of many students and very few books are in circulation.⁴⁹

'The socio-economic development of a country depends to a large extent on the creativity of her people and creative works cannot be encouraged without effective administration of copyright laws'.⁵⁰ If the scope of permitted uses under the copyright law is legally restrictive and, yet, there is no strict enforcement mechanism in place an imbalance is created by the law. The NCA further provides that where a copyrighted work is used by or under the direction or control of the government, or by a public library, a non-commercial documentation center, a scientific institution, or any other such institution whose services serve the interest of the public, such use will not be limited by the exclusivity of the rights granted to the creator of such work so long as the no revenue is derived from the use of the copyrighted work by the institution using it and no admission fee is charged to the public for the communication of the work.⁵¹

This exception begs the question, what is the meaning of 'public interest'? Public interest simply means beneficial to all concerned. However, the provision suggests that private libraries, research institutions and documentation centres that are for commercial purposes cannot benefit from this exception, even though they are beneficial to the public.

In furtherance of its objective to limit the hindrances likely to be caused by the strict application of the exclusive rights of an owner of a copyrighted work, the NCA provides for another

⁴⁵CA 1988, Cap 28 LFN 2004, sec14.

⁴⁶Even though there is a Reprographic Rights Organization of Nigeria (REPRONIG), REPRONIG is a licensed collecting society for reprographic rights since 2003 with funding support from KOPINOR, the Reprographic Rights Organization of Norway. The organization is however only available on paper and does not affect the massive copying of textbooks going on the all educational institutions.

⁴⁷CA 1988, Cap 28 LFN 2004, sec 14.

⁴⁸ I Olawale, 'Challenges Currently Facing the Educational Sector in Nigeria' *The Frontiers Post Economic Policy & Financial Markets* April 08, 2010.

⁴⁹ C Štraba, *International Copyright Law and Access to Education in Developing Countries Exploring Multilateral Legal and Quasi-Legal Solutions*, Martinus Nijhoff publishers 2012 p.35; see also Basic Learning Materials Initiative - UNESCO available at http://www.unesco.org/education/blm/blmobjectives_en.php accessed 11 March 2021.

⁵⁰ BA Fabunmi, 'The Roles of Librarians in Copyright Protection in Nigeria' *International Journal of African & African American Studies* Vol. VI, No. 1, Jan 2007 pp. 84-93.

⁵¹Paragraph (k), Second Schedule. NCA 1990.

exception which relates to information and education in paragraph (q) of the Second Schedule to the Act.

The paragraph provides that where a book is not available for sale in Nigeria, the person in charge of a public library may direct that copies of such book be made, so long as it does not exceed three such copies.⁵² From the provision of the Act, it is clear that the only condition under which such a directive may be made is where *such a book is not available for sale in Nigeria*; even in such circumstances, the copies that will be made must not be *more than three copies of a book*, and the copies must be made “*by or under the direction of the person in charge*” of the public library.

Although, the intent of paragraph q relates to the reproduction of works by libraries which may entail reproduction of the entire work. It is worrisome that libraries have been used as an avenue to enable infringement since the work is put at everyone’s disposal for free reproduction, as is commonly done in most libraries in Nigeria. This practice may lead to repeated reproduction on separate, unrelated occasions, meaning that multiple copies can be made of the same work. Although, the very essence of a library is to make copies of books and related educational material that are either too expensive for people to buy or are not in circulation, in order to promote knowledge, inform people and enrich lives, reproduction of copyright works should not be done in such a way as to encourage flagrant copying.

3.3 Equality of Access

Jade Katherine Kouletakis,⁵³ in her dissertation paper gave an insightful description that 'demonstrates the unfair discrepancy in the situation between the visually impaired community and the able-bodied community with regards to accessing literary works protected by copyright.'⁵⁴ She notes that there is a condition that the visually impaired has to meet to access copyright works, a condition that does not exist with those not visually impaired. The analogy of the books being 'locked away in a dark vault' brings out the selfish nature of most writers and publishers who consistently do not make provision for persons that are visually impaired, also, the vivid description clearly illustrates the challenges a strict adherence to the exclusivity of the rights granted to creators of copyrighted works will pose to the physically impaired community. It is in contemplation of this, and to mitigate the potential hardship that may be faced by disabled persons that prompted the NCA provides in paragraph (s) of the Second Schedule to the Act that:

The right conferred in respect of work by section 5 of this Act does not include the right to control-

- (s) reproduction of published work in Braille for the exclusive use of the blind, and sound recordings made by institutions or other establishments approved by the Government for the promotion of the welfare of other disabled persons for the exclusive use of such blind or disabled persons.

Thus, where a published work is reproduced in Braille and sound recordings it is for the *exclusive* use and promotion of the welfare of blind persons and other disabled persons by an institution or establishment *approved by the government*, such use will not be regarded as an infringement of the copyright of the creator of the work. This eliminates other visually impaired persons and print disabled persons. Notably, in 2013, the WIPO adopted a landmark Treaty in Marrakesh.⁵⁵ This

⁵²Paragraph (q) Second Schedule. NCA 1990.

⁵³Kouletakis, n 23above at 6-7.

⁵⁴Id at 7.

⁵⁵WIPO Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired, or Otherwise Print Disabled was adopted by the Diplomatic Conference in Marrakesh, June 17 to 28, 2013VIP/DC/8 REV. (Hereinafter referred to as the Marrakesh Treaty).

Treaty aims to facilitate access to published works for persons who are blind, visually impaired, or otherwise print disabled. In article 4 Contracting Parties shall provide in their national copyright laws for a limitation or exception to the right of reproduction, the right of distribution, and the right of making available to the public as provided by the WIPO Copyright Treaty (WCT), to facilitate the availability of works in accessible format copies for beneficiary persons. Also, article 7 of the Marrakesh Treaty requires that Contracting Parties shall take appropriate measures, as necessary, to ensure that adequate legal protection and effective legal remedies are provided against the circumvention of effective technological measures and that this legal protection does not prevent beneficiary persons from enjoying the limitations and exceptions provided for in this Treaty. Accordingly, digital rights owners cannot use technologies that would prohibit access to the work. The Treaty is laudable and should be embraced.

There is an acute shortage of learning material for the blind, even though the NCA allows published works to be reproduced and adapted into Braille format for the exclusive use of the blind.

The provision does not require the consent of the copyright owner before the work is adapted into braille or other suitable forms. Similarly, the Act does not make a distinction between personal use for private study or commercial purposes and there are no restrictions whatsoever on the sharing, export or import of such materials. It is not clear when the exhaustion of the distribution right takes place.⁵⁶

Besides, there is no requirement for the acknowledgement of the author, publisher and the work itself. There is no mention of whether or not the provision can be overridden by contract. Also, there are no provisions regarding the interplay with digital rights management (DRM) which is very important in these times of ever-changing technology.

Putting the copyrighted work in an accessible format for the blind, visually impaired, or otherwise print disabled is a special case as photocopying is not even an option for accessing the work. It is doubtful if braille can be said to be normal exploitation of the work by the copyright owner. Though the copyright owner has the right to adaptation, creating the work in braille format or other accessible formats would not seem to infringe on the copyright owners' rights as the use of the work will not cause a market displacement and, accordingly, will not prejudice the legitimate interests of the right holder.

Conclusion

This section examined the Nigerian aspect of the comparative study which is in two parts. However, the initial discussion outlines the fundamental dynamics of copyrights in both Nigeria and South Africa and was examined to lay the foundation for the discussion of limitations and exceptions that guarantee access to copyright works. This section discussed the limitations and exceptions provided by the NCA in the second and third schedules analysing the key exceptions such as fair dealing, educational purposes and equality of access. One of the major pinpoints is the lack of distinct frontiers with the normal exploitation of the work in a way that will not prejudice the legitimate interests of the right holder and also allow for the propagation of knowledge and creative art. The paper in essence recognises the interest of the right holder and the developmental uses that create a realistic copyright system.

⁵⁶ A Sullivan, 'WIPO Study on Copyright Limitations and Exceptions for the Visually Impaired to Standing Committee on Copyright and Related Rights' Fifteenth Session Geneva, September 11 to 13, 2006.