

STATUTORY DEFENCES TO COPYRIGHT INFRINGEMENT IN NIGERIA: A CONTEXTUAL APPROACH.

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Abstract

Exceptions from copyright use can be said to be statutory defenses to direct infringements of copyright. Any action done within these exceptions are not infringement. These exceptions are to enable society to benefit from the talent or effort of its members bearing in mind that this will help a great deal in educational development of the nation as well as boost research activities. This discuss analyzed exceptions from copyright use under the Copyright Act and found as a fact that it is a welcomed development for it actually struck a balance between absolute protection for the author and the interest of the larger society thereby acting as statutory defences to infringements of copyright. It was also discovered that these defences are not commonly raised in Nigeria courts hence the use of many English authorities especially the case of Ashdown v. Telegraph Group Ltd.¹ in this discuss. The doctrinal method of research was adopted in this discussion and the following recommendations inter alia were made namely, that our Act should be amended to be explicit on what constitutes fair dealing in line with the three factors laid down in Ashdown's case and a distinction drawn between private research and commercially driven research.

Introduction

What appeared to be the unlimited powers or rights of the copyright owner as set out in the Copyright Act are not however absolute or sacrosanct². The said rights are but not limited to rights to the reproduce, publish, perform, produce, distribute, broadcast, make adaptation of the work and moral rights. However, there are restrictions by way of exceptions allowed by law. According to Okoroji,³ “these restrictions attempt to find a compromise between the following needs

- (a) The important desire to protect the rights of creators of intellectual property.
- (b) The need to ensure that the rules are not such that make life very inconvenient for the average person, and
- * (c) The desire to ensure that the creations of members of the society benefit the entire society”.

¹ Consequently the rationale for these exceptions is aimed at striking a balance between the
² protection of the private rights of copyright owners on one hand and safeguarding the interest
and freedom of the public to use and access information on the other.⁴ This balance is suggested

¹ (2002)CH 149

² See sections 6, 7, and 8 of the Copyright Act Cap C28 Laws of the Federation of Nigeria 2004. For the rights comprised in copyright. For lack of space the said sections will not be reproduced in this discuss.

³ Tony Okoroji, *Copyright, Neighbouring Rights and the New Millionaires (the twists and turns in Nigeria)* (Tops Ltd, .2009) 85

⁴ Adejoke, O. Onyewunme, *Nigerian Law of Intellectual Property* (University of Lagos Press and Bookshop Ltd 2015) 116.

should actually be seen to be balanced in words and deed and not just lip service. According to Morton J. in the case of *Johnstone v. Bernard Jones Publications Ltd*⁵ “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”. Generally these exception are by way of fair dealing for purposes of research, private use *et cetera*. Bruelheide, is of the opinion that “a dilemma concerning intellectual property occurs when owner’s rights collide with user’s rights and the public need to access and use resources”.⁶ The exceptions are aimed at averting the collusion feared by Bruelheide and others.

Analysis of Exceptions from Copyright Use

Exceptions under the Act are provided for in the second schedule and to a limited extent in the third schedule of the copyright Act. In the Act the definition of the nature and scope of the rights in a particular work subject to some or all the exceptions are provided for in the second schedule while special exceptions are provided for in the third schedule but rather have limited application to only sound recordings and musical works. It is of importance to note that while all the exceptions in the second schedule apply to literary, musical and artistic works as well as cinematograph films, sound recordings and broadcasts were excluded. The Act made provisions for separate exceptions that apply to sound recordings and broadcasts.⁷ As a result of the above by reason of *section 7*, sound recordings are only subject to paragraphs (a), (h), (k), (l) and (p) while broadcast are subject to paragraphs (a), (h), (k), (n), and (o) only.

Rights conferred on the copyright owners are not absolute this is as provided in the Act,⁸ the right conferred in respect of a work by *section 6* of this Act does not include the right to control-

- (a) The doing of any of the acts mentioned in the said *section 6* by way of fair dealing for purposes of research, private use, criticism or review or the reporting of current events, subject to the condition that, if the use is public, it shall be accompanied by an acknowledgment of the title of the work and its authorship except where the work is incidentally included in a broadcast;
- (b) The doing of any of the aforesaid acts by way of parody, pastiche, or caricature;
- (c) The inclusion in a film or a broadcast of an artistic work situated in a place where it can be viewed by the public;
- (d) The reproduction and distribution of copies of any artistic work permanently situated in a place where it can be viewed by the public;
- (e) The incidental inclusion of an artistic work in a film or broadcast;
- (f) The inclusion in a collection of literary or musical work which includes not more than two excerpts from the work, if the collection bears a statement that it is designed for educational use and includes an acknowledgment of the title and authorship of the work,
- (g) The broadcasting of a work if the broadcast is approved by the broadcasting authority as an educational broadcast;

⁵ (1938) 1 CH 599 at 603.

⁶ Bruelheide, J.H., “Intellectual Property and Copyright: Protecting Educational Interests and Managing Changing Environments” available at <http://net.educase.edu/ir/library/html/edu99351edu9935.html>, assessed 4.19am 8/9/2012.

⁷ John O. Asein, *Nigeria Copyright Law & Practice* 2nd ed. (Books & Gavel publishing Ltd, 2012) 247.

⁸ See Second Schedule to the Copyright Act 2004 note also that *section 6* of the Act provides for rights in literary works, artistic works, musical works and cinematograph films.

- (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 a 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;
- (i) Subject to the third schedule to this Act, the making of a sound recording of a literary or musical work, and the reproduction of such a sound recording by the maker or under license from him, where the copies thereof are intended for retail sale in Nigeria and the work has already been previously recorded under license from the owner of the relevant part of the copyright whether in Nigeria or abroad, subject to such conditions and to the payment of such compensation as may be prescribed;
- (j) The reading or recitation in public or in a broadcast by any person of any reasonable extract from a published literary work if accompanied by a sufficient acknowledgment: Provided that such reading or recitation is not for commercial purpose;
- (k) Any use made of a work by or under the direction or control of the Government, or by such public libraries, non-commercial documentation centers and scientific or other institutions as may be prescribed, where the use is in the public interest, no revenue is derived there from and no admission fee is charged for the communication, if any, to the public of the work so used;
- (l) The reproduction of a work by or under the direction or control of a broadcasting authority where the reproduction or any copies thereof are intended exclusively for a lawful broadcast and are destroyed before the end of the period of six months immediately following the making of the reproduction or such longer period as may be agreed between the broadcasting authority and the owner of the relevant part of the copyright in the work, so however that any reproduction of a work made under this paragraph -
 - (i) May it is of an exceptional documentary character be preserved in the archives of the broadcasting authority (which shall for the purpose of this paragraph be deemed to be part of the National Archives) established under the Public Archives Act;
 - (ii) Subject to this Act, shall not be used for broadcasting or for any other purpose without the consent of the owner of the relevant part of the copyright in the work,
- (M) The broadcasting of a work already lawfully made accessible to the public and subject (without prejudice to the other provisions of this Schedule) to the condition that the owner of the broadcasting right in the work shall receive a fair compensation determined, in the absence of agreement, by the court;
- (n) News of the day publicly broadcast or publicly communicated by any other means;
- (o) The communication to the public of a work, in a place where no admission fee is charged in respect of the communication, by any club whose aim is not profit making;
- (p) Any use made of a work for the purpose of judicial proceeding or of any report of any such proceeding;
- (q) The making of not more than three copies of a book (including a pamphlet, sheet music, map, chart or plan) by or under the direction of the person in charge of a public library for the use of the library if such a book is not available for sale in Nigeria;
- (r) The reproduction for the purpose of research or private study of an unpublished literary or musical work kept in a library, museum or other institutions to which the public has access;

- (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.

The second schedule to the Copyright Act reproduced above for ease of reference provides for nineteen exceptions to copyright works of literary, artistic, musical, sound recording and broadcasting. The exception shall be examined in this discuss under five headings namely: Fair dealing, Parody, pastiche and caricature, Ephemeral use of artistic works use for educational purposes and other uses.

- (a) **Fair Dealing:** this is as provided for in the second schedule and applies to all works protected under *sections 6, 7 and 8* of the Act.

Fair Dealing appears to be one of the most significant and important exceptions. The exception of fair dealing is not an open ended exception. According to the provisions of the Act fair dealing is limited to use of the work in the four clearly stated-situations namely: research, private use, criticism and the review or reporting of current events. The exceptions of ‘fair dealing’ therefore, will not protect any user who is involved in infringement outside of the four mentioned situations.⁹ Okoroji¹⁰ is of the opinion and rightly so for instance, that it is doubtful if the exception of fair dealing will protect a social club in a university which holds a dance party at which gate fees are charged, unlicensed music is played and unlicensed poetry is recited. Indeed exception to fair dealing will not protect such, it is clearly outside what the Act contemplated.

There is however one condition to this exception, if the work is used in public, such use shall be accompanied by an acknowledgment of the title of the work and its authorship, except where the work is incidentally included in a broadcast.

Asein opined that fair dealing provisions have been described variously as “perhaps the most significant, and the most venerable limitation on the copyright holder’s prerogatives.”¹¹ This he said probably is because of the potentially wide application of this exception and its high dependence on the opinion of the judge.

He further stated that it is essentially a codification of a long standing common law principle permitting the “fair use” of a work either for purposes of illustration, review or criticism, presumably on the understanding that the portion take would not unreasonably prejudice the interest of the copyright owner.¹² In considering the issues of fair use Lakhan and Khurana¹³ had this to say:

It is absolutely critical to understand the concept of fair use, especially in the context of education. Far too many educators view almost any material as fair game, simply because it is being used in an education setting. Fair use therefore, attempts to

⁹ Tony Okoroji, *Copyright, Neighbouring Rights and the New Millionaires (the twists and turns in Nigeria) Op.cit.*, 88.

¹⁰ *Ibid.*

¹¹ John O. Asein, *Nigeria Copyright Law and Practice op.cit.*, 250.

¹² *Ibid.*

¹³ Lakhan, S.E., Khurana, M.K., “Intellectual Property, Copyright, and Fair Use in Education in Academic Leadership Live. The online Journal, available at <http://www.academicleadershiporg/article/intellectualpropsty-copyright....as...assessed> 10.00pm

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establish certain uses that, in specified and limited ways are justifiable in order to achieve a greater goal.

The courts, in developing this exception, permit certain unauthorized but excusable uses which are considered to be in the interest of the larger society. The fair dealing exception applies to all works protected under sections 6, 7 and 8. From its formulation, it is clear that it is not open-ended. The determination of whether the act complained of was done by way of fair dealing has to be in the context of at least one of the four activities specifically mentioned in that paragraph, that is research, private use, criticism or review, and the reporting of current events. This means that the reproduction, translation, performance or other acts in respect of a work would not constitute infringement where such use falls within the scope of these purposes provided under the Act.

There is no clear definition of what fair dealing means the Act failed to define it. The courts in Nigeria are divided on the rules to be adopted in determining fair dealing, because this defence of fair dealing is not usually raised in Nigerian courts. In *Obe v Grapevine Communication Ltd*,¹⁴ the only known case where the defence has been raised, 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 under the 1970, Copyright Act (the language of which is the same as the present Act). No further elaboration was offered to justify the claim but the defendant drew the attention of the court to the fact that sufficient acknowledgement was included describing the work as: "Biafra photos, courtesy Daily Times of Nigeria". In responding to the point raised by the defendant, the court merely considered the text of the acknowledgment and came to the conclusion that it fell short of what was required. In a rather incoherent manner, the court held that since the photograph was authored by the plaintiff and not Daily Times, the professional courtesy should have been given to the former. The court also made an issue of the fact that the title of the work was not acknowledged.

With due respect to the learned judge, it is the view of learned authors which view is shared in this discuss 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 it is suggested 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.¹⁵

It is suggested that in approaching the application of this defence, Nigerian courts should be guided by English authorities (from where Nigeria inherited the concept of fair dealing) and exercise more restraint in accepting cases from the United State of America. (where the concept of fair use holds sway.

Lord Denning in *Hubbard v Vasper*¹⁶ attempted to answer the question of what fair dealing is by stating thus: "It is impossible to define in precise terms what would constitute "fair dealing", so

¹⁴ "Unreported" Suit No. FHC/L/CS/1247/97. .

¹⁵ John O. Asein, *Nigerian Copyright Law and Practice*. *op.cit*, 251.

¹⁶ (1972) 2QB 84& (1972) 1 All ER 1023.

the facts of each case would have to be approached separately and with caution". Lord Denning then went on to suggest a general approach in the case of criticism or review.

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 a basis for comments, 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 make long extracts and attach short comments may be unfair. Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression.

It is quite agreeable that it is not possible to lay down any acceptable definition of what fair dealing is, the Act as mentioned earlier also failed to defined fair dealing or that what amount to fairness for it depends on the fact, degree impression, and circumstances of each particular case but reference may be made to the decision of the court in *Ashdown v Telegraph Group Ltd*,¹⁷ in this particular case the court endorsed the following three factors which should be considered in determining if there was indeed a fair dealing, that is,

- (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 exposed to the public; and
- (c) The amount and importance of the work which has been taken.

Again in the case of *Ashdown v Telegraph Group Ltd*,¹⁸ the court after considering the facts before it refused the plea of fair dealing because the use complained of was neither for the purpose of criticism and review nor the reporting of "current events." The three factor endorsed by the court in the above case raised the following issues:

- (a) Whether there is commercial competition between the activity of the defendant which is claimed to be fair dealing and the copyright owners own exploitation of the work in question. If answer is yes, then the plea of fair dealing will fail.
- (b) Prior Publication also was partly the issue for determination in the *Ashdown* case where the court held that the fact that the work had never been published and that it was obtained in breach of confidence were material considerations in refusing the defence.
- (c) The amount and importance of the work that had been taken is described as the third most important element in fair dealing. Where the amount of work taken from the work complained of is important, substantial and excessive in the circumstance it will work against fair dealing.
- (d) The Permitted Purposes was also one of the issues raised. A plea of fair dealing must fall within one or more of the approved purposes. In *Beloff v Pressdram Ltd*,¹⁹ the court *inter alia* held that apart from the requirement that the use to which a work is put by the defendant must constitute fair dealing, it must also be for the purpose of research, private use, criticism, review or for reporting of current event.

¹⁷ (2002) CH149.

¹⁸ *Supra*.

¹⁹ (1973) All ER.241 at 262.

- (e) Research was also one of the issues raised. Research was defined in the case of *DeGaris v Neville Jeffress Pidler Property Ltd*²⁰ “as a diligent and systematic enquiry or investigation into a subject in order to discover facts or principles”. For the purpose of the Act there is no distinction between private research and a commercially driven research. But the activity in question must be for the purpose of eliciting facts or principles.²¹
- (f) The issue of private use was also raised in the case under review. Unlike the English Act that talks of “private study”, the exception under the Nigerian Act relates to private use. It is obvious that private use if construed wider will include private study, “private” could also mean “personal.” This was the decision of the court in *University of London Press Ltd v University Tutorial Press Ltd*,²² where the court stated that private study is limited to use by the student himself and does not cover the circulation of the offending materials to a group of students. Such use will not qualify as private. Again in *Sillitoe v McGraw Hill Book Co Ltd*,²³ the court considered the issue of private study in this case. The author and publishers of a series of well known O’ level literature studies had sued the importer of a series of study notes which they alleged infringed their copyright. The defendants argued that the notes fell within the “fair dealing” provisions of the Act being for research and private study or for criticism or review. The defence of fair dealing was rejected. On the particular head of private study, the court held that the defendants could not avail themselves of that exception since they were not engaged in private study or research but were merely facilitating this for others. In other words it is commercially motivated. The plea of fair dealing for the purpose of criticism was also refused on the ground that the summaries in the notes were not for the purposes of criticism but an exposition of the contents of the works with little critical content.
- (g) Another issued raised on Ashdown’s case was that of criticism or review where it is shown that the purpose for using the copyright work is for criticism or review then it would not constitute infringement but can fall within freedom of speech guaranteed under the constitution. In *Banier v New Group Newspaper Ltd*,²⁴ the plaintiff took a photograph which was published in a newspaper. The defendant had tried to obtain a license for the use of the same photograph but was unable to do so before its publication deadline whereupon it went ahead and published it without permission. In an action for infringement, the defendant argued, among other things, that the publishing of the photograph and the accompanying article amounted to fair dealing for the purpose of criticism or review and was allowed on that ground. This claim was rejected by the court, noting that it was totally unreal to suggest that the objective of the publication of the photograph was to illustrate any review or criticism of the copyright work. In the case of *Independent Television Publisher Ltd v Time out Ltd*²⁵ already discussed earlier it become obvious that the exception is designing to prefect the critic or reviewer who use the copyright material, in good faith to illustrate his review or criticism. It follows that not every

²⁰ (1990)18 1: P.R 292.

²¹For further reading on the Issue of Research and Private Use see Itanyi, N., and Anya, S.N., ‘Mitigating the copyright Law and Policy for Wide Access to Knowledge in the Twenty Century’ [2012] *Journal of Contemporary Law*, (Vol. 1), 194-210.

²² (1916) 2Ch 601.

²³ (1983) FSR 545.

²⁴(1997) F.S.R 515.

²⁵ (1984) F.S.R 64

claim or criticism or review will be upheld as fair dealing as was the case in the issue of *Banier v New group Newspapers Ltd.*²⁶

In *Ashdown v Telegraph Group Ltd.*,²⁷ already discussed earlier the plaintiff who was the leader of a major political party had, in strict confidence, shown some materials including a minute of a particularly important political meeting which were from entries in his diaries to representatives of the press and publishing houses. The defendant's newspaper published articles about the minute, quoting verbatim from a substantial part of it. The present action was against the defendant for breach of confidence and copyright infringement. The court held that the copying of the plaintiff's exact words did not come within the fair dealing exceptions since they were not copied to criticize or review the confidential minute as a work but merely to criticize or review the actions described in it.

(h) Finally, the issue of Acknowledgement was also raised and considered that the case where a work in which copyright subsists is used in public title of the work and its authorizing should be acknowledged except where the work is merely an incidental inclusion in a broadcast.²⁸ The English court in *Johstone v Bernard Jones Publications Ltd.*,²⁹ in relation to the 1911 Act, took the view that the omission of the author's name did not of itself defeat a plea of fair dealing. According to the court in that case, if part of a work is reproduced and criticisms are offered upon that part, it is not necessary in order to bring the case within the proviso, that the name of the author should be referred to.

Parody, Pastiche or Caricature: These exceptions are provided for in paragraph (b) of the second schedule and apply only to literary musical and artistic work as well as cinematograph films and not to sound recording and broad casts. A Parody has been defined as a transformative use of a well – known work for purposes of satirizing, ridiculing, criticizing or commenting on the original work, as apposed to merely alluding to the original to draw attention to the later work.³⁰ Pastiche is the work of an art, piece of writing, *et cetera* that is created by deliberately copying the style of some body/something else³¹ similarly caricature “is a funny drawing or picture of somebody that exaggerates some of their features or a description of a person or thing that makes them seen ridiculous by exaggerating some of their characteristics”.³²

Asien is of the opinion and rightly so that

General justification for the exclusion of these categories of dealings from copyright infringement is that the light-hearted use of a work is not presented to the audience as a totally new original but as deriving from another work which is often identified or well known to the audience of the parody or caricature.³³

²⁶ *Supra.*

²⁷ (2002) Ch 149

²⁸ See para (e) of the second schedule

²⁹ *Supra*

³⁰ Garner B.A., *Blacks Law Dictionary*, 9th ed., (West Publishing Co. 2009) 1226.

³¹ Hornby A.S., *Oxford Advance Learners Dictionary of Current English*, 8th ed., (Oxford University Press), 1024.

³² *Ibid*, 213 .

³³ John O, Asien, *op.cit.*, 263.

Where a protected work is used by way of parody, pastiche or caricature, it may not constitute an infringement of copyright. In other words, consequently as observed by Okoroji that Nigeria's new generation of stand up comedians like Ali baba, Basketmouth, Gbenga Adeyinka, Klint Da Drunk, Okey Bakassi, Mandi Uzonicha, Julius Agwu, and others who use bits and pieces of protected songs in their rib cracking jokes may not have too much to worry about. This is because their hilarious acts may indeed qualify as exceptions to copyright infringement under parody.³⁴

Also, in *William Music Ltd v. Pearson Partnership Ltd*³⁵ in considering whether a parody of a literary work constitutes an infringement of the copyright in that work. The court considered whether the writer had bestowed such mental labour upon the material he had taken and had subjected it to such revision and alteration so as to produce an original work and whether the parody made use of a substantial part of the expression of the original work. In *Joy Music Ltd v Sunday Pictorial Newspaper (1920) Ltd*³⁶ a special newspaper feature article contained a parody of a popular song titled "Rock-a-Billy". The plaintiff's version had "Rock-a-Billy, Rock-a-Billy, Rock-a-Billy, Rock" while the parody was "Rock-a-Philip, Rock-a-Philip, Rock-a-Philip, rock!" repeated the same way as the original chorus. The parody was accompanied by an acknowledgment of the plaintiff as owner of the copyright. The court held that although the parody had its origin in the song "Rock-a-Billy," it had been produced by sufficient independent new work to be in itself nor a reproduction of the words the original song but an original work that was only derived from it.

Similarly, in *Fisher v Dees*,³⁷ the plaintiffs' musical work was parodied by the defendants who copied the first six of the song's thirty-eight bars which was considered to be the main theme of the music. The court agreed that - the defendant's action was excusable under the U.S. Copyright Act as fair use for the purpose of parody contrary to the plaintiffs' argument that the parody was not targeted at their work and therefore, not excusable, the court found that the defendants' version was intended to poke fun at the plaintiffs' and not merely a vehicle for achieving a comedic objective related to the song.

Ephemeral Use of Artistic Work: This means using artistic work for a short period in order words incidental use of artistic works. The English Court of Appeal considered this in the case of *The United Football Association Premier League Ltd v Parini UK Ltd.*,³⁸ and held that what constitutes an "incidental" or inclusion depends on the circumstances of the case and that it did not mean "unintentional" In that case, the inclusion of a photograph of footballers wearing shirts bearing badges and logos was held not to be incidental as it was essential to the object for which the image was created.

It was also held that in order to test if the use of a work in another was incidental, the question would be "why the one had been included in the other, considering the commercial as well as

³⁴ Tony Okoroji, *Copyright Neighbouring Rights and the New Millionaries (the twists and turns in Nigeria)* *op.cit.*, 89

³⁵ (1987) F.S.R. 97.

³⁶ (1960) 2 Q.B 60

³⁷ 794 F.2d (9th Cir. 1986) cited in Asein, J.O., *op.cit.*, 265.

³⁸ (2003) E.C.D.R 36

any artistic reasons³⁹ “incidental.” Applying that test in this case, the court held that the artistic work was integral where it appeared in a photograph because it was part of the setting in which the photographer found his subject but that this conclusion did not determine whether the inclusion was incidental.

Ephemeral uses of artistic works are exempted from copyright control in the following instances inclusion in film or broadcast of artistic work situated in a place that is viewable by the public,⁴⁰ reproduction and distribution of copies of any artistic work permanently situated in a place viewable by the public,⁴¹ incidental inclusion in a film or broadcast of artistic work situated in place viewable by the public.⁴²

In *Fraser -Woodward Ltd v BBC*⁴³ the defendant’s broadcast of a programme showing images of newspaper pages containing the plaintiff’s celebrity photograph was held not to be incidental inclusion since the juxtaposition of the photograph in question had been deliberate and was part of the criticism and review carried out in the programme. However, the court found that there was no infringement as the use otherwise qualified as fair dealing for purposes of criticism and review.

Use for Educational Purposes and Other Uses: The exceptions contained in the second schedule of the Act is also for certain uses which are education or instructional in nature. These include, collection of short excerpts of work,⁴⁴ approved educational broadcasts,⁴⁵ their educational institutions,⁴⁶ reading or recitation of reasonable extracts,⁴⁷ use by government, public libraries and non-commercial documentation centres⁴⁸ archival use,⁴⁹ library copying⁵⁰ reproduction of unpublished works,⁵¹ reproduction on Braille for disabled persons⁵² These exceptions are as it affects broadcasting of works that have already been made available to the public, news of the day and the communication to the public of a work in places when no admission fees are charged.⁵³ These include, broadcasting of work already lawfully available to the public,⁵⁴ reproduction by broadcasting authority⁵⁵ and news of the day.⁵⁶ This is different from the provision on fair dealing by way of communication by dub free of charge.⁵⁷

³⁹ *Ibid.*, at 402.

⁴⁰ Copyright Act second Schedule, para(c)

⁴¹ *Ibid.*, para(d)

⁴² *Ibid.*, para(e)

⁴³ (2005) F.S.R. 36.

⁴⁴ Second Schedule of the Copyright Act, para(f).

⁴⁵ *Ibid.*, para(g)

⁴⁶ *Ibid.*, para(h)

⁴⁷ *Ibid.*, para(j)

⁴⁸ *Ibid.*, para(k)

⁴⁹ Copyright Act, Section 15(2)

⁵⁰ Second Schedule of the Copyright Act, para(q)

⁵¹ *Ibid.*, para(r)

⁵² *Ibid.*, para(s)

⁵³ *Ibid* para (o).

⁵⁴ Second Schedule of the Copyright Act, para(m)

⁵⁵ *Ibid.*, para(l)

⁵⁶ *Ibid.*, para(n)

⁵⁷ *Ibid.*, para(o) That is communication to the Public where no admission fee is charged.

Materials used in the judicial proceeding are also exempted.⁵⁸ The use in question must be *bona fide* for the purpose of judicial proceedings. It will extend to use before the commencement of actual proceedings, for example, if it is anticipated that judicial proceedings may take place and the documents may be relevant in evidence on a point which might be in issue in such proceedings.⁵⁹ In *A v B*,⁶⁰ the applicant and respondent were married and the husband made photocopies of the wife's personal diary after she informed him that she wanted a divorce. Copies of the two pages were subsequently exhibited in an affidavit sworn to by the husband in divorce proceedings. In his defence to a claim of copyright infringement, he pleaded that the copies were made for purposes of judicial proceedings. On this point, the court noted that the defence was not limited to copies made after the issuance of the originating process. In the view of the court, there was a realistic prospect of establishing the defence, given that the copying was done after the applicant had told the respondent that she wanted a divorce, so that it could be foreseen that proceedings were likely, and the documents would or might provide evidence on a point which might be in issue in such proceedings.

Finally in the Second Schedule of the Copyright Act under review making of sound recordings against payment of compensation is also exempted.⁶¹

Similarly the Third Schedule contains special exceptions in respect of sound recording of a musical work. That schedule states thus:

1. The copyright in a musical work is not infringed by a person (in this Schedule referred to as "the record producer") who makes a recording of the work or of an adaptation thereof in Nigeria, if-
 - (a) records of the work, or, as the case may be, of a similar adaptation of the work, have previously been made in, or imported into Nigeria for the purposes of retail sale, and were so made or imported by or with the licence of, the owner of the copyright in the work,
 - (b) before making the recording, the record producer gave to the owner of the copyright the prescribed notice of his intention to make it;
 - (c) the record producer intends to sell the record by retail, or to supply it for the purpose of its being sold by retail by another person, or intends to use it for making other records which are to be sold or supplied; and
 - (d) in the case of a record which is sold by retail, the record producer pays the owner of the copyright in the prescribed manner and at the prescribed time, a royalty of an amount ascertained in accordance with the provisions of this Schedule.
2. Subject to the following provisions of this Schedule, the royalty mentioned in *sub-paragraph (d) of paragraph 1* of this Schedule shall be of an amount equal to a percentage of the ordinary retail selling price of the record calculated in the prescribed manner.

The exception provided in the Third Schedule does not authorize the importation of records which could otherwise not have been lawfully imported. It is also expressly provided in the schedule that the determination of whether the making of a record outside Nigeria would have

⁵⁸ *Ibid.*, para(p)

⁵⁹ John O. Asein, *Nigeria Copyright Law and Practice. op.cit.*, 275

⁶⁰ (2000) E.M.L.R. 1007 (Ch. D)

⁶¹ Second Schedule of the Copyright Act, para(i)

constituted an infringement of copyright if it had been made in Nigeria should not be influenced by the provision of this schedule.⁶²

Conclusion

In this discuss exceptions from copyright control was examined. The purpose of copyright is to protect works that are protected by copyright from copying by others without authorization. The rationale for copyright protection is to ensure that anyone who has put in efforts to create a work will benefit from the fruit of his labour. However, the law in certain circumstances limits the control of the right holder in order to strike a fair and balanced deal between the right of the owner and freedom of the user especially in cases already discussed above. Having considered exceptions from copyright use as stated in the Copyright Act it is realized that they act as statutory defences to infringements of copyright. Again in considering exceptions as provided for in para(p) of the second schedule which relates to judicial proceedings, it is suggested that it should be extended to relate to other official uses, for example in parliamentary proceedings. It is also recommended that our Copyright Act should be amended to be explicit on what constitutes fair dealing or fairness instead of leaving it to the courts. It is further recommended that the amendment of the Act should be in line with the three factors laid down in Ashdowns case discussed extensively in this article. Finally it is recommended that the Act should also be amended to draw a distinction between private research and commercially driven research to make it easier for the courts to interpret so that justice will be served in all cases. Copyright in conclusion therefore, is a monopoly in which the owner has complete control of the work from use of others, like every monopoly if not for the exceptions it will grow into a monster. So the exceptions are a welcome development provided as already discussed a fair balance is struck between the private right of the copyright owners and the right of the public to benefit from copyright works especially as it affects educational advancement of the public as well as boost research activities. Finally the exception as already discussed is a perfect means of waging a collusion between the users rights and public need to access and use resources.

⁶²*Ibid. para (9).*