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Balancing the Right of Exclusive Control and Public Interest: The Scope of Rights and Exceptions under the Nigerian Copyright Act

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Abstract

Copyright law confers monopoly to the owner of a protected work who thereby acquires the exclusive right to control a number of acts with respect to the work. These acts include publication, reproduction, commercial distribution and making of derivatives of the work. Any other person who does any of these acts dehors the copyright owner would be liable for infringement of copyright. In this way, the private right of the copyright owner is protected. However, copyright law recognizes that the monopoly conferred on the copyright owner must of necessity be tampered in public interest. Hence, the law provides a number of exceptions, notably that of fair dealing, to excuse unauthorized exploitation in the public interest. In this way, the purview of rights, direct infringement and exceptions under the Nigerian copyright law regime is about balancing the private right of the copyright owner and the public interest in the freer access to and exploitation of creative works. Using the doctrinal methodology, and a discursive and analytical research design, this study elucidates on the nature of rights, infringing activities and statutory exceptions to copyright infringement provided under the Nigerian Copyright Act.

Keywords: Copyright, Nigeria Copyright Act, nature of rights, exceptions to copyright infringement.

1. Introduction

Since copyright is essentially property right with economic value, it would be unfair to allow a person apart from the copyright owner, to take advantage of the economic benefit without the owner's authorization.[1] Indeed, copyright protection is grounded on the idea that the unauthorized exploitation of the intellectual labor of another person is an unfair activity which the law should not permit. In this regard, it is fitting to start this study with the rudimentary point of note that the right conferred on the copyright owner is a 'negative right' for excluding others. The essence of the right is to prevent unauthorized exploitation of the protected work by other persons, or at least to secure compensation where such unauthorized exploitation occurs. Stretching this rudimentary character, it becomes apparent that the private right of the copyright owner to exclusively control his work and reap its benefits would need to be delicately balanced with the need for a freer exploitation of protected works in the general public interest.

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[1] John Asien, *Nigerian Copyright: Law and Practice*, 2nd ed. (Abuja, Books and Gavel, 2012) p.193

In the light of the above, the Nigerian Copyright Act[2] ('the Act') recognizes some exceptions to the monopoly rights of the copyright owner.[3] The exceptions are basically concessions whereby the right of the owner to exclusive exploitation of the work is subjugated to the general public interest. The justification is the need to mitigate the effects of unqualified protection for the owner by striking a balance between the copyright owner's private rights and the general public interest. The need to strike this balance is not new, and has recurred through the evolution of copyright and was acknowledged in the negotiations of the Berne Convention.[4]

Centrally, this work appraises the nature of the rights conferred on a copyright owner under the Act and the statutory exceptions to copyright infringement, within the context of delineating the contours of infringing exploitation and excepted exploitation of works protected by copyright. In other words, the work attempts to set the parameters for balancing the private right of the copyright owner and the public interest. In this connection, the work has two main sections. The first main section explicates the nature of the rights conferred on the owner of copyright and what would amount to primary or direct infringement of those rights. Therefore, the section is about the nature of the private right of the copyright owner. The second main section discusses the statutory exceptions to copyright protection under the Act, thereby appraising the balance for public interest.

2. Scope of the Copyright Owner's Rights

The Act recognizes only six categories of subject matter or works as eligible for copyright protection.[5] These are literary works, musical works, artistic works, cinematograph films, sound recordings and, broadcasts. Furthermore, for a literary, musical or artistic work to be eligible for copyright, it must be original and fixed in a definite medium of expression from which it can be perceived, reproduced or otherwise communicated either directly or with the aid of any machine or device.[6] Once an eligible work qualifies, and is copyright protected, its owner is thereby conferred with the exclusive right to do or authorize the doing of certain acts (production, reproduction, publication, recording, distribution, translation, adaptation, performance, communication, and broadcasting) in relation to the protected work. Hence, copyright in such works would be directly infringed where another person exploits the protected work without the authorization of the copyright owner and dehors the provisions of the Act.[7]

2.1 Literary, Musical and Artistic Works

Under section 6 (1) (a) of the Act, the owner of the copyright in a literary or musical work has the exclusive right to do or authorize the reproduction of the work in any material form; publication of the work; performance of the work in public; production, reproduction, performance or publication of any translation of the work; making of a cinematograph film or record in respect of the work; commercial distribution of copies of the work to the public by way of hire, rental, lease, loan or similar arrangement; broadcasting or communication of the work to

[2] Cap C28 LFN 2004
[3] The exceptions are contained in the second and third schedules to the Act.
[4] Berne Convention for the Protection of Literary and Artistic Works (1886)
[5] s.1(1) of the Act
[6] *Ibid*., s.1(2)
[7] John Asein, *op cit*. p.168

the public; making of any adaptation of the work, and; the publication or public performance of a translation or an adaptation of the work. For artistic works, section 6 (1) (b) of the Act, provides that the owner of the copyright in such work has the exclusive right to do or authorize the reproduction of the work in any material form; publication of the work; inclusion of the work in any cinematograph film; making of any adaptation of the work, and; the reproduction or publication of an adaptation of the work. From these provisions, the main ways by which the rights of copyright owner in literary, musical or artistic work can be infringed are by unauthorized reproduction, publication, performance, broadcast or communication to the public[8], exercise of derivative rights and, distribution. These infringing activities are discussed below.

2.1.1 Reproduction

Under section 6 (1) (a) (i) of the Act[9], which is in *pari materia* with section 6 (1) (b) (i) of the Act[10], it is an infringement of copyright for another person to reproduce a protected literary, musical or artistic work in any material form, without the authority of the copyright owner. Section 51(1) of the Act[11] defines 'reproduction' as 'the making of one or more copies of a literary, musical or artistic work, a cinematographic film or sound recording'. Apparently, the plank of this definition is the making of copies. The same section defines 'copy' as 'a reproduction in written form, in the form of a recording or cinematographic film, or in any other material form, so however that an object shall not be taken to be a copy of an architectural work unless the object is a building'. From the definition of 'copy', it is also apparent that the Act is concerned with expression of the infringement not much as the mode of that expression hence the use of 'any material form'.

If we understand that copyright does not exist to protect ideas *per se*, but the expression of those ideas, we would then appreciate the fact that independent expression of ideas would not amount to copyright infringement. This is because an alleged unauthorized reproduction of a copyright work may well be a product of a common source of idea or even a mere coincidence, and not necessarily a reproduction. It is in this regard that the central element in reproduction as infringement is the making copies and the material complained of as an infringing copy must necessarily be based on or derived from the protected work. In essence, there must always be that causal link between the copyright work and the alleged infringing work. Additionally, we must keep in mind that the reproduction must be in respect of the whole or a substantial part of the work either in its original form or in any form recognizably derived from the original.[12] The dictum of Diplock L.J in *Francis Day & Hunter Ltd. v Bron*[13]aptly captures the two salient issues in this paragraph:

> … It is well established that to constitute copyright infringement in any literary, dramatic or musical work, there must be present two elements. First, there must be sufficient objective similarity between the infringing work and the copyright

[8] Literary or musical works only
[9] With respect to literary and musical works
[10] With respect to artistic works
[11] s.51 is the interpretation section of the Act
[12] s.6 (2) of the Act
[13] [1963] Ch. 587, 623

> work or a substantial part thereof, for the former to be properly described, not necessarily as identical with but as a reproduction or adaptation of the latter. Secondly, the copyright work must be the source from which the infringing work is derived.

2.1.2 Publication

Under section 6 (1) (a) (ii) of the Act[14], which is in *pari materia* with section 6 (1) (b) (ii) of the Act[15], it is an infringement of copyright for another person to publish a protected literary, musical or artistic work without the authority of the copyright owner. A work is deemed to have been published if copies of it have been made available in a manner sufficient to render the work accessible to the public.[16] Hence, the interlining element in publication is the making of the work available to the public[17] and the sense in which the Act uses 'publication' involves the entrepreneurial activity of producing and distributing copies of a work as in the sense of a 'music publisher' or 'book publisher'.[18]

2.1.3 Public Performance, Broadcast and Communication to the Public

This head relates only to literary and musical works, and not to artistic works. The Act provides that it is an infringement of copyright for another person to perform a literary or musical work in public without the authority of the copyright owner.[19] The Act similarly provides that it is copyright infringement for another person to broadcast or communicate a literary or musical work to the public by a loudspeaker or any other similar device without the authority of the owner.[20]

There is no definition of 'performance' under the Act. However, under the Copyright Act 1911, 'performance' was defined as 'any acoustic representation of a work and any visual representation of any dramatic in a work, including such representation made by means of any mechanical instrument'.[21] Similarly, section 48(1) of the English Copyright Act 1956 defined performance to include delivery, in relation to lectures, addresses, speeches and sermons, and includes any mode of visual or acoustic presentation, including any such representation by the operation of wireless telegraphy apparatus, or by the exhibition of a cinematograph film, or by use of a record, or by any other means. Similarly, the Act does not define what it means by 'public'. In consequence, the courts have recognized that public performance must necessarily be a question of fact in each case, the controlling element being the protection of the value of the work thereby making such factors as the making of profit, the size and character of the audience, the venue of the performance and its impact on the copyright owner, key factors.[22]

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[14] With respect to literary and musical works
[15] With respect to artistic works
[16] s.51(2) of the Act
[17] *Adenuga v. Ilesanmi Press & Sons* [1991] 5 NWLR 82
[18] John Asien, *op cit.*, p183
[19] s.6 (1) (a) (iii) of the Act
[20] *Ibid*, s.6 (1) (a) (vii),
[21] s.35(1) of the Copyright Act, 1911
[22] John Asein, *op.cit*., p.186

On the other hand, section 52(1) of the Nigerian Act defines 'broadcast' to mean sound or television broadcast by wireless telegraph or wire or both, or by satellite or cable programmes and includes re-broadcast. Section 52(1) of the Act similarly defines 'communication to the public' to include 'in addition to any live performance or delivery, any mode of visual or acoustic presentation, but does not include a broadcast or rebroadcast'. It follows therefore that the Act intends that 'public performance' or 'communication to public' should exclude broadcast. However, that there is no difference between the impact of the three (public performance, broadcast and communication to the public) under the Act, since what the Act prohibits in each case is the unauthorized dissemination of the work to the public.

2.1.4 Right to Derivatives

With respect to literary or musical work, it would amount to infringement of copyright for an unauthorized person to 'produce, reproduce, perform or publish any translation of the work',[23] or 'make any cinematograph film or record in respect of the work',[24] or 'make any adaptation of the work'[25]. With respect to artistic works, it amounts to infringement of copyright for an unauthorized person to 'make any adaptation of the work'.[26] Apparently, the two main methods of derivative rights are by adaptation and translation. An adaptation is the modification of a pre-existing work from one genre of work to another and consists in altering the work within the same genre to make it suitable for different conditions of exploitation, and may also involve altering the composition of the work.[27] The prohibition in respect of translations relate to literary and musical works only as it obviously would not fit for an artistic work. Simply put, translation means reproducing a copyrighted work in a different language.

2.1.5 Commercial Distribution

This applies to literary and musical works but not artistic works. Under section 6 (1) (a) (vi) of the Act, it is an infringement to for an unauthorized person to distribute to the public, for commercial purposes, copies of the work, by way of rental, lease, hire, loan or similar arrangement. There is a deemed authorization granted to distributors and retailers for the purpose of sale but this does not extend to commercial lease, rent, hire and loan of the work to the public. The commercial factor is vital to qualify a distribution as copyright infringement. Hence, lending and borrowing in libraries is not an infringement since that factor is missing. However, unauthorized lending and borrowing in rental shops would amount to infringement since they are done for commercial purposes.

2.2 Cinematograph Films

Under section 6 (1) (c) of the Act, the owner of the copyright in a cinematograph film has the exclusive right to do or authorize the making of a copy of the film (reproduction); causing of visual images of the film to be seen in public, or causing of the sounds of the film to be heard in public (publication); making of any record embodying the recording in any part or the sound

[23] s.6 (1) (a)(iv) of the Act
[24] *Ibid*., s.6 (1) (a) (v)
[25] *Ibid*., s.6 (1) (a) (viii)
[26] *Ibid*., s.6 (1) (b) (iv)
[27] *Ibid*., s.51(1)

track associated with the film by utilizing such sound track (derivatives) and; commercial distribution of copies of the work to the public (commercial distribution). It is noteworthy that there is no prohibition of adaptations of cinematograph films under the Act.

2.3 Sound Recordings

Under section 7 of the Act, the owner of the copyright in a sound recording has the exclusive right to control in Nigeria, the direct or indirect reproduction, broadcasting or communication to the public of the whole or a substantial part of the recording either in its original form or in any form recognizably derived from the original, and; the commercial distribution of copies of the work to the public by way of rental, lease, hire, loan or similar arrangement. From the above, infringement of sound recording comprises in the unauthorized reproduction, broadcasting or communication to the public, and commercial distribution of the work. There is no prohibition of adaptations. It is important to clarify that the provisions of section 7 applies to sound recording[28] and not live performance. As one writer points out, an infringement of the right in the sound recording occurs only where the work had been fixed in a format although it would still amount to an infringement even where the illicit reproduction is made from a broadcast of the sound recording as against a live broadcast.[29]

2.4 Broadcasts

Under section 8 (1) of the Act, the owner of the copyright in a broadcast has the exclusive right to control the doing in Nigeria, of the recording and re-broadcasting of the whole or a substantial part of the broadcast; the communication to the public of the whole or a substantial part of a television broadcast, either in its original form or in any form recognizably derived from the original; the distribution to the public for commercial purposes, of copies of the work, by way of rental, lease, loan, hire or similar arrangement. By section 8(2) of the Act, the copyright in a television broadcast shall include the right to control the taking of still photographs from the broadcast. As with sound recordings, there is no prohibition of derivatives such as adaptations.

3. Exceptions to Copyright Infringement

As stated in the introduction, copyright must aim to balance the competing interests of the owner of protected work on the one hand, and of the general public who are the users of the work, on the other hand. The court in *Theberge v Galerie d'Art du Petiti*[30] puts it succinctly thus:

> The Copyright Act is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator… The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature.

On the above basis, the rights of the copyright owner as identified in the preceding section are not immutable but are subject to the various exceptions provided under the Act. The exceptions,

[28] s.51 of the Act defines 'sound recording' as 'the first fixation of a sequence of sound capable of being perceived aurally and of being reproduced but does not include a sound track associated with a cinematographic film'.
[29] John Asein, *op. cit.* p.207
[30] (2002) SCR 336

which are in a bid to mitigate the effect of protection granted the owner, and to accord protection to the general public interest, are justified on the grounds of public policy.[31] Hence, under the exceptions, acts that would otherwise constitute copyright infringement are allowed in specified instances. In this regard, while sections 6, 7 and 8 of the Act provide for the scope of the copyright owner's rights, the Second Schedule and Third Schedule to the Act provides exceptions thereto.

Actually section 6(1) of the Act expressly provides that the exclusive right of the owner of copyright in literary, musical, artistic or cinematograph films, to control the enumerated acts is 'subject to the exceptions specified in the Second Schedule to this Act.'[32] In essence, all the exceptions in the Second Schedule to the Act apply equally to literary works, musical works, artistic works, and cinematograph films. The exceptions contained in the Third Schedule to the Act are more restrictive as they apply only to musical works, in addition to those already set out in the Second Schedule to the Act.[33] It should also be noted that with respect to sound recordings and broadcasts, it is not all the exceptions in the Second Schedule to the Act that apply. While for sound recordings, only the exceptions specified in paragraphs (a), (h), (k), (l), and (p) of the Second Schedule to the Act that applies,[34] for broadcasts, it is only the exceptions specified in paragraphs (a), (h), (k), (n) and (o) of the Second Schedule to the Act that applies.[35]

The exceptions under the Second Schedule to the Act are enumerated from paragraph (a) through to paragraph (s). For clarity and ease of discussion, the exceptions discussed in this work are clustered into eight headings: fair dealing; parody, pastiche and caricature; ephemeral use of artistic work; use for educational purposes; use for literary enjoyment and documentation; public interest broadcasts; use in judicial proceedings, and; the exception contained in the Third Schedule to the Act with respect to musical works.

3.1 Fair Dealing

Under paragraph (a) of the Second Schedule to the Act, the right conferred in respect of a literary work, musical work, artistic work or a cinematographic film, 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 acknowledgement of the title of the work and its authorship except where the work is incidentally included in a broadcast.

Fair dealing is a well-established limitation on the monopoly enjoyed by owner of a work protected by copyright. Asein explains that its significance and venerability is because of its potentially wide application, and its high dependencies on the opinion of the judge.[36] He further

[31] John Asein, *op.cit.,* p.246
[32] In the same manner, the introductory sentence in the Second Schedule to the Act provides that 'The right conferred in respect of a work by section 6 of this Act does not include the right to control-…'
[33] s.6 (4) of the Act
[34] *Ibid*., s.7 (2)
[35] *Ibid*., s.8 (3)
[36] Asein p.256

observes that the fair dealing provisions is essentially a codification of a long standing common law principle permitting the 'fair use' of a work either for the purposes of illustration, review or criticism, presumably on the understanding that the portion taken would not unreasonably prejudice the interests of the copyright owner. Indeed, we can justify fair dealing on the basis of Article 27 of the Universal Declaration of Human Rights, which provides that:

1. Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts, and to share in scientific advancement and its benefit.
2. Everyone has the right to the protection of the moral, literary or artistic production of which he is the author.

For a better appreciation of fair dealing under the Act, we break the provision into three questions: a.) what constitutes fair dealing? b.) what are the permitted purposes for fair dealing? c.) What is the caveat on acknowledgement for public use about? First, we discuss what fair dealing entails. The Act did not define the term 'fair dealing'. Asein reports that there is no clear consensus on the rules to be adopted in determining fair dealing under the Nigerian law.[37] Indeed, exasperated with the quest for precision as to what acts constitute fair dealing, Lord Denning, M.R., in *Hubbard v. Vasper*[38] suggested that it is impossible to arrive at such precision as each case would be determined by its peculiar facts. In the case of criticism or review, Lord Denning M.R., suggested that the factors to consider would include (i) the number and extent of the quotations and extracts; (ii) the use made of the quotation and extracts; (iii) the proportions of the quotation and extracts. The learned judge concluded that 'But, after all is said and done, it must be a matter of impression.'

In *Ashdown v. Telegraph Group Ltd.*[39], the court, judicially endorsing the formulation by the learned authors of Laddie, Prescott and Vitoria *Modern Law of Copyright and Designs,*[40] held that in ascertaining whether an act constitutes fair dealing or not, the court should be guided by three considerations:

(i) Whether there is some commercial competition between the defendant's act in issue and the interest of the copyright owner. This is a crucial factor, for where it is established that the alleged fair dealing is in commercial competition with the owner's exploitation of the work, the dealing would not be termed as 'fair' but deemed an infringement;

(ii) Prior publication in the sense of whether the work was already published or otherwise exposed to the public. If the work was never published or exposed to the public, a claim in fair dealing would be difficult to sustain;

(iii)Whether the quantum and importance of the work taken is, in the circumstances, so substantial as to make it unfair.

[37] Ibid., p.251
[38] [1972] 2 Q.B 84
[39] [2002] Ch. 149
[40] 3rd edition, Butterworths, 2000

In similar vein, the Canadian Supreme Court in the case of *CCH Canadian Ltd. v. Law Society of Upper Canada*[41] formulated six principles to consider when evaluating whether an alleged infringement would be excepted as fair dealing:

(i.) The purpose of the dealing. Is the purpose of the dealing statutorily recognized?
(ii.) The character of the dealing. Was it a single or multiple copying? Was there wide or limited distribution? Where the copies destroyed after use?
(iii.) The amount of the dealing. How much of the original work was used?
(iv.) The alternatives to the dealing. Was the dealing reasonably necessary?
(v.) The nature of the copyrighted work. Was it published or unpublished?
(vi.) The effect of the dealing on the copyright work. Would the dealing affect the market of the copyrighted work?

However, the court recognized that its list is not exhaustive, acknowledging that particular cases would require particular factors.

The second question to be answered in considering paragraph (a) of the Second Schedule to the Act is: What are the permitted purposes for fair dealing under the Act? There are only four recognized or statutorily permitted purposes of fair dealing under the Nigerian copyright law regime. We must note that whereas the definition of what entails fair dealing would be liberally approached, the categories of purposes recognized are closed and would be strictly interpreted. However, the question of whether an alleged infringing act falls under any of the permitted purposes would also be liberally approached.

The four recognized purposes are research, private use, criticism or review and reporting of current events. Research is the 'diligent and systematic inquiry or investigation into a subject in order to discover or revise facts, theories, applications, etc.'[42] The Act did not differentiate between private and commercial research so it is safe to assume that commercially driven research comes within the purview. The second permitted purpose of fair dealing is private use meaning that the use should be personal rather than public. It should also be appreciated that the terminology 'private use' is broader than 'private study' as in the English Copyright Act. The third permitted fair dealing purpose is use for criticism or review. Criticism is 'the act or art of analyzing and evaluating or judging the quality of a literary or artistic work, musical performance, art exhibit, dramatic production, etc.'[43] On the other hand, review is 'a formal assessment or examination of something with the possibility or intention of instituting change if necessary.'[44] Obviously, the two are related. This purpose can be appreciated from the context of the constitutionally guaranteed freedom of speech. Hence, in order that free speech is not stifled, a bona fide critic or reviewer is permitted to use copyrighted materials to advance his criticism or review. Importantly, the courts in Nigeria may borrow a leaf from England where the English

[41] [2004] 1 SCR 339. Also available at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2125/index.do accessed December 10, 2020
[42]Dictionary.com 'Research' Retrieved December 12, 2020 from https://www.dictionary.com/browse/research?s=t
[43] https://www.dictionary.com/browse/criticism?s=t
[44] Lexico Dictionary 'Review' Retrieved December 12, 2020 from https://www.lexico.com/en/definition/review

Court of Appeal in *Prosiben Media v Carlton UK Television*[45] held that criticism of a work extends to the ideas found in the work, the style of the work, and the socio-moral implications of the work. The fourth permitted purpose of fair dealing is reporting of current events. But, we must note the warning given by the English Court of Appeal *Hyde Park Residence v. Yelland*[46] that the test of what is fair is an objective one considering what a reasonable, fair minded and honest person would have done in the same circumstances for the purpose of reporting current events.

The third question to be considered with respect to paragraph (a) of the Second Schedule to the Act is the caveat for acknowledgement if use is public. Here, the Act stipulates that where the use of the work is in public, the Defendant should accompany the use with an acknowledgement of the title of the work and its authorship, except where the work is incidentally included in a broadcast. This proviso though straightforward, can be better appreciated when broken down:

(i.) The proviso only applies if the use sought to be excluded is in public
(ii.) Acknowledgement of both title of the work and the author should accompany such public use
(iii.) An incidental inclusion in a broadcast without such acknowledgement as in (b) above is not contrary to the proviso.

3.2 Parody, Pastiche or Caricature

Paragraph (b) of the Second Schedule to the Act excludes parodies, pastiches and caricatures from copyright infringement. But this exception is restricted to literary works, musical works, artistic works and cinematograph films; it does not extend to sound recordings or broadcasts. A parody is 'an imitation of the style of a particular writer, artist, or genre with deliberate exaggeration for comic effect'.[47] A pastiche is an artistic work in a style that imitates that of another work. The usual point of contrast between parody and pastiche is that pastiche celebrates rather than mocks the work it imitates.[48] A caricature is a simple 'a picture, description, or imitation of a person in which certain striking characteristics are exaggerated in order to create a comic or grotesque effect.'[49]

It is apparent that the unifying band of the three acts under this exception (parody, pastiche and caricature) is the fact that they all involve light-hearted use of a work for comic purposes. Hence, the Nigerian copyright law regime is mindful not to stifle the public interest in encouraging the art of creating humor. Additionally, this exception is needed, especially in the case of parody, because the copyright owner would hardly grant authorization to the parodist. In any case, the new work is always presented as a derivative of the original work with a different style for comic purpose. In that way, the identity of the original is assured and there is no direct economic competition between the original work and the subsequent work. However, where the parody,

[45] [1999] FSR 610
[46] [2011] Ch. 143
[47] Lexico Dictionary 'Parody" Retrieved January 10, 2021 from https://www.lexico.com/en/definition/parody
[48] Lexico Dictionary 'Pastiche' Retrieved January 10, 2021 from https://www.lexico.com/en/definition/pastiche
[49] Lexico Dictionary 'Caricature' Retrieved January 10, 2021 from https://www.lexico.com/en/definition/caricature

pastiche or caricature does not disclose enough independent style but is merely a substantial reproduction or copying of the original work, it would hardly be allowed under this exception.[50]

3.3 Ephemeral or Incidental Use of Artistic Work

This exception applies to artistic works only. Ephemeral or incidental use of artistic work covers situations where the work in question only occurs by chance and is not the principal aim of the use. Hence, whenever the use of artistic work is tangential, inessential or casual, it is excepted as incidental use. However, the fact that artistic work was intentionally used in a work, does not thereby deprive the use of protection under this heading, as it is the circumstances of each case that would determine whether use of artistic work is incidental or not.[51]

The incidental or ephemeral use of artistic works are contained under paragraphs (c), (d) and (e) of the Second Schedule to the Act. Under those paragraphs, the right of the owner of copyright in an artistic work does not include the right to control the:

(i) The inclusion in a film or a broadcast of an artistic work situated in a place where it can be viewed by the public;[52]

(ii) The reproduction and distribution of copies of any artistic work permanently situated in a place where it can be viewed by the public;[53]

(iii) The incidental inclusion of an artistic work in a film or broadcast.[54]

3.4 Use for Educational Purposes:

The exceptions in paragraphs (f), (g) and (h) of the Second Schedule to the Act can be broadly categorized as educational or institutional in nature:

(i) the inclusion of a work protected by copyright, in a collection of literary or musical work, provided it does not exceed two excerpts, bears a statement that it is designed for educational use, and includes an acknowledgement of the title and authorship of the work;[55]

(ii) the broadcasting of a work if the broadcast is approved by the broadcasting authority as an educational use;[56]

(iii) any use of made of a work in an approved educational institution for the purpose of that institution provided that if reproduction is thereby made, it shall be destroyed within twelve months or any prescribed period.[57]

[50] *Williamson Music Ltd v the Pearson Partnership Ltd* [1978] FSR 97
[51] *The Football Association Premier League v. Panini UK Ltd* [2003] E.C.D.R 36
[52] Second Schedule to the Act, para.(c)
[53] *Ibid*., para (d)
[54] *Ibid*., para (e)
[55] *Ibid*., para (f)
[56] *Ibid*., para (g)
[57] *Ibid*., para (h)

3.5 Use for Literary Enjoyment and Documentation

A number of exceptions in the Second Schedule to the Act can be conveniently sectioned as use for literary enjoyment and documentation as they all relate to routine or common-place use of copyright works for enjoyment and documentation by members of the public. Moreover, the acts or use under this heading are not malevolent, and would hardly compete with the economic interests of the owner of copyright. This type of use includes:

i. 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 acknowledgement and provided that such reading or recitation is not for commercial purposes;[58]
ii. any use made of a work by or under government authorization, or by public libraries, non-commercial documentation centres and scientific or other institutions, provided they use is in public interest, no revenue is derived there from, and no admission fee is charged for the communication of the work;[59]
iii. 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 use of the library where such book is not available for sale in Nigeria;[60]
iv. the reproduction, for the purpose of research or private study, of an unpublished literary or musical work kept in a library, museum or other institution to which the public has access;[61]
v. the reproduction of published works in braille for the exclusive use of the blind, and sound recordings made by the institutions or other establishments approved by government for the promotion of the welfare of other disabled persons, for the exclusive use of such blind or disabled persons.

3.6 Public Interest Broadcasts

The exceptions that fall under this category are:

i. The reproduction of a work by or under the direction or control of a broadcasting authority where same is intended exclusively for a lawful broadcast, and provided that such copies are destroyed before the end of the period of six months immediately following the making or such longer period as may be agreed with the copyright owner.[62] However, any reproduction that is of exceptional documentary character may be preserved in the archives of the broadcasting authority.
ii. The broadcasting of an underlying work (such as a sound recording) in a broadcast.[63] Such underlying work must have been already lawfully made accessible to the public. Additionally, the owner of the broadcasting right in the underlying work is entitled to receive a fair compensation determined, in the absence of an agreement, by the court.
iii. News of the day publicly broadcast or publicly communicated by any other means.[64]

[58] *Ibid*., para (j)
[59] *Ibid*., para (k)
[60] *Ibid*., para (q)
[61] *Ibid*., para (r)
[62] *Ibid*.,para (l)
[63] *Ibid*., para (m)
[64] *Ibid*., para (n)

iv. Communication to the public of a work, in a place where no admission fee is charged in respect thereof, by any not-for-profit club.[65]

3.7 Use in Judicial Proceedings

The Second Schedule of the Act also excepts the use made of a work for the purpose of judicial proceeding or of any report of such proceeding.[66] Provided that the use is in good faith, this exception would extend to use before the initiation of judicial proceedings so far as the acts are for the purpose of the judicial proceedings.[67]

3.8 Third Schedule Exceptions

In addition to the exceptions in the Second Schedule to the Act, the Third Schedule makes further provisions on exceptions in respect of sound recordings of musical works. By section 6(4) of the Act, these further exceptions are to apply to musical works. Under the Third Schedule to the Act, copyright in a musical work is not infringed by a record producer, who makes a recording or an adaptation of a work 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 purpose of retail sale, and were so made or imported by, or with the license 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;
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 the schedule.

4. Conclusion

Copyright grants the owner of an eligible work (literary work, musical work, artistic work, cinematograph film, sound recording, or broadcast), the exclusivity or monopoly of exploitation of the work and therefore, the right to control the exploitation of the work. The rights of the copyright owner cover acts such reproduction, publication, and making of derivatives. This study has proceeded from the general understanding of the rights conferred on the copyright owner and what constitutes direct infringement of those rights, to an appreciation of the various exceptions under the Second Schedule and Third Schedule to the Act.

The main plank of this discussion is that the copyright regime should aim to delicately balance the private interest of the copyright owner to monopoly of exploitation with the general public interest for freer exploitation. In consequence, the exceptions to copyright infringement are aimed at affording the public freer access to use of creative works. The most notable of the exceptions is that of fair dealing. Notwithstanding, it is our recommendation that the courts in

[65] *Ibid*., para (o)
[66] *Ibid*., para (p)
[67] *A v B* [2000] EMLR 1007 (Ch.D.)

adjudicating copyright claims should ensure that the economic interests of the copyright owner is protected by sanctioning any unfair dealing as infringement. However, where there is no real threat to the creative and economic interest of the owner of the copyright and the use of the work is in the circumstances fair, reasonable and excusable under any of the exceptions, the interest of the copyright owner in perpetuating a monopoly must be punctured for the greater good.