

# Theorizing and Practicing Fairness: Copyright Challenges for Africa's Higher Education

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## **Abstract**

The doctrinal basis for *fair use* and *fair dealing* in the copyright system is anything but clear. What constitutes *fair use* and *dealing* and the intent of the two doctrines remains contentious. Even when *fair use* and *dealing* is somewhat defined, courts still assess fairness on a case-by-case basis. The copyright system is premised on ability to access privately owned resources yet the reality in Africa is that majority cannot afford associated costs. *Fair use* and *dealing* notwithstanding, the contemporary copyright system privileges rights-holders in setting access terms. Africa's resource-constrained higher education system cannot accommodate the strict interpretation of the *fair use* and *fair dealing*. For instance, high demand levels for photocopying, occasioned by high costs of educational materials beyond what students and faculty can afford, lead to 'Petty Photocopying Businesses,' in some cases, outside 'conventional' *fair use*. How should Africa Higher education deliver educational content within acceptable copyright system? Does the 'conventional' interpretation of *fair use* and *dealing* work in Africa's context? These and more questions are raised to ponder Africa's option *vis-à-vis* copyright and education.

## Introduction

The copyright system attempts to strike a balance between private and public interests in knowledge products and services. The balance seems 'paradoxical' given that copyright creates monopolies in form of exclusive rights granted to authors or rights-holders<sup>1</sup> at the same time claiming to promote access to further creativity and innovation through a set of exceptions and limitations. The tension between access and monopolistic rights pits economic exploitation of knowledge products and services against free flow of information and freedom of expression. Of recent, expansion of economic rights in the copyright system and creation of new ones continue to erode free flow of information and freedom of expression/speech by shrinking the public domain and exceptions to exclusive rights. Erosion of public interests warrants careful analysis of the *fair use* and *fair dealing* doctrines, two fundamental building blocks of public interests in the copyright system. Indeed some scholars have taken interest in the perceived clash between copyright (exclusive rights) and constitutional free speech provisions in copyright laws of most jurisdictions.<sup>2</sup> By implication, this clash impacts public interest sectors like education and information services delivery. For poor African countries where socio-economic indicators factors are far below global standards, there is a critical need for wider access to content for educational purposes made possible through *fair use and dealing* safeguards.

*Fair use* and *dealing* defenses are part of broader limitations and exceptions integrated into the copyright system to safeguard public interests. Without limitations and exceptions, any access and use of copyrighted works by the publics would have to be sanctioned by the rights-holders. Whereas *fair use* and *dealing* attempt to create exceptions and limitations to exclusive rights, the two are grounded in different doctrines representing *civil* and *common* law countries respectively. In the contemporary settings,

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<sup>1</sup> Used broadly hereafter to include writers, composers, singer, publishers, producers and others related categories of knowledge creators and distributors. But a distinction is made between authors who actually create intellectual works and rights-holders who might have acquired rights not through creation but through transfers, inheritance, and other jurisdictionally permissible legal transfer mechanisms.

<sup>2</sup> Olson, K. Kathleen (2004). First Amendment values in Fair Use Analysis. *Journalism Communication Monographs*. Vol. 5 (4)161-202.

the distinction is disappearing to reflect changes in the international copyright systems towards balanced civil and common law approaches to copyright.<sup>3</sup>

*Fair use* is a judicially crafted doctrine first developed in US through case law as the *fair abridgement* doctrine.<sup>4</sup> The doctrine provides a relatively flexible range of exceptions and limitations including scholarship, news reporting, parody, criticism, etc. *Fair use* is pegged on four factors as a basis for courts to assess infringement in fair use cases. *Fair dealing* on the other hand is more explicit and less flexible *vis-à-vis* permissible exceptions and limitations to the author's exclusive rights. *Fair dealing* explicitly defines a set of defences against alleged infringements at times creating room for wide interpretation of permissible actions. Consequently *fair dealing* sometimes reverts to the *fair use* doctrine to assess infringement. Both *fair use* and *dealing* are discussed below. In addition, the paper explores the *fairness* doctrines in the African copyright contexts and the basis for their application.

## **The Fairness Doctrines**

The *fair use* and *fair dealing* doctrines attempt to create fairness in the production, access, distribution and consumption or utilization of copyrightable knowledge products and services. In so doing, the *fairness* doctrines seek to ameliorate tensions in the copyright system by providing the necessary breaks to enable public access and use of copyrighted works without prior permission from rights-holders. Originally, the copyright system was premised on and built around private access and use of protected works on terms and conditions<sup>5</sup> set by the rights-holders. Introduction of the doctrines recognized anomalies in the system *vis-à-vis* public access and use of copyrighted works. The fundamental assumptions and justifications for the doctrines are first, not all end users are in position to access and use copyrighted works through market mechanisms stipulated as exclusive rights of rights-holders. Secondly, rights-holders cannot be trusted to allow non-economic public uses of their works without explicit public policy

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<sup>3</sup> Generally true for the entire intellectual property rights system.

<sup>4</sup> See note 2. Allowed abridgment, translations and/or digestion (digest) of one's work (164) without his/her permission.

<sup>5</sup> Mainly economic

interventions inherent in the *fairness* doctrines. However some commentators argue that by creating exclusive rights and the resultant rewards to creative individuals, the system enables the dissemination of ideas that would otherwise not make it to the market.<sup>6</sup> This school asserts that creators of knowledge are primarily motivated by economic incentives, guaranteeing of which, facilitates open distribution of knowledge products or their creation in the first place. This utilitarian approach to copyright casts the *fairness* doctrines as added safeguards to a rights system already seeking to disseminate knowledge through economic incentives. As we explore the two doctrines below, it's important to acknowledge existence of competing perspectives on the intent of the *fairness* doctrines.

The *fair use* doctrine is often cited as the most complicated and controversial provision in copyright due, in part, to lack of explicit language guiding judicial decision in *fair use* cases. Consequently court rulings in countries like US reflect legislative failure to explicitly define *fair use*. However some contend that it was never the intent for *fair use* to be a rigid and fixed doctrine but a flexible set of guidelines applicable to facts and circumstances of each case.<sup>7</sup> Hence the historical judgments that provide little guidance as to what actions constitute *fair use* should not be surprising.

*Fair use* codified in the US 1976 Copyright Act § 107 outlines four factors to be considered by courts in assessing fairness. To find *fair use*, courts must determine:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work; and

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<sup>6</sup> See note 2. Quotes Justice Sandra J. O'Connor of the US Supreme Court thus: "In our haste to disseminate news, it should not be forgotten that that the Framers [of the US Constitution] intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas" (174).

<sup>7</sup> Lloyd, L. Rich (1996). Fair Use: Interpretations and Guidelines - The Fair Use Doctrine Part II. Available from: <http://www.publaw.com/fairuse.html>

4. the effect of the use upon the potential market for or value of the copyrighted work.<sup>8</sup>

Different '*fair use* countries' carry variations of the above factors oftentimes with minor changes to the language but retaining the intent of the US factors. Theoretically each factor is carefully considered in *fair use* cases. Practically, some factors are invoked and/or emphasized more than others depending on the specifics of the case in question. Courts have tended to weigh against commercially oriented actions often finding *fair use* in non-commercial educational use. Detailed analysis of judicial application of the fair use factors has been sufficiently done elsewhere.<sup>9</sup> However, suffice to note that *fair use* factors as codified and applied in *western* jurisdictions where economic considerations outweigh public interests, cannot apply to Africa's desperate socio-economic circumstances and political contexts. Attempts to do so can only create disconnect between copyright laws on one hand and practices on the other. Worse still this can lead to dysfunctional copyright systems due to the mismatch between socioeconomic realities and copyright *fair use* provisions. This position is elaborated later in the paper.

Like the *fair use* doctrine, *fair dealing* attempts to outline, rather in explicit terms, permissible exceptions and limitations to exclusive rights of copyrights holders. *Fair dealing* narrowly defines a set of actions, which constitute fairness and therefore requiring no prior permission from rights-holders for use. As such where *fair use* has been found in cases involving different amount of copying from originals,<sup>10</sup> *fair dealing* explicitly defines the amount of copying that constitute fairness.<sup>11</sup> However as noted earlier, increasingly *fairness* doctrines are borrowing language from each other to guide decision making in *fairness* cases. That is the case in the Singapore *fair dealing* copyright provision, which adopts language similar to the *fair use* doctrine.<sup>12</sup> Otherwise *fair dealing*

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<sup>8</sup>17 U.S.C. § 107 (1994)

<sup>9</sup>See note 7

<sup>10</sup> Ibid

<sup>11</sup>Wikipedia (2006) Fair Dealing. Available from: [http://en.wikipedia.org/wiki/Fair\\_dealing](http://en.wikipedia.org/wiki/Fair_dealing) . Stipulates such as “not more than one chapter or less than 10% of a book or journal” in the Australian jurisdiction. Other common law countries like South Africa carry similar *fair dealing* provisions explicitly defining fairness.

<sup>12</sup>Ibid. Factors to consider in determining fair dealing uses:

identifies specific exceptions, for Australia including: research and study; review and criticism; reporting the news, and legal advice.<sup>13</sup>

Taken together, the *fairness* doctrines provide safety valves for public access to and use of protected works. But are fairness doctrines sufficient, or for that matter appropriate, in the African contexts? Subsequent discussions focus on this critical question.

## Copyright and Africa

The copyright situation in Africa has been characterized as a crisis. The western copyright system is a recent development on the African continent in most cases a result of the colonial legacy. For post-colonial Africa, international agreements are the main avenue for introducing western oriented copyrights systems in Africa. By implication, the notion of *fairness* in copyright terms is a recent addition to Africa's knowledge system. For a predominantly oral society with a tradition of sharing, the notion of fairness of knowledge and information is not foreign to Africa.<sup>14</sup> The copyright debate and narrower question of *fairness* for public access in Africa, happens in economically deprived contexts and societies looking to education as a remedy to long-term development challenges. Elsewhere in a comprehensive study of impact of copyright on access to learning materials in Southern Africa, we provide snapshots of Africa's dismal education rank indices<sup>15</sup> which when cast in copyright terms point to the need for unique copyright

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- purpose and character of the dealing, including whether such dealing is of a commercial nature or is for non-profit educational purposes;
  - nature of the work or adaptation
  - amount copied, relative to the whole work;
  - effect of the dealing upon the potential market for the work, and effect upon its value.
  - the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price.

<sup>13</sup> Ibid.

<sup>14</sup> Kawooya, Dick (2006). Copyright, Indigenous Knowledge and Africa's University Libraries: the case of Uganda. Elsewhere note the

<sup>15</sup> Rens, Andrew, Prabhala, Achal & Kawooya, Dick. Intellectual Property, Education and Access to Knowledge in Southern Africa. Paper commissioned by Trade Law Centre for Southern Africa for paper for UNCTA and ICTSD. Available from: <http://www.iprsonline.org/unctadictsd/docs/06%2005%2031%20tralac%20amended-pdf.pdf>. Out of 177 countries of the UNDP Education Ranking, South Africa ranks 119, Namibia 126, Botswana 128, Swaziland 138 and Lesotho 145 (pg. 9).

exceptions for the continent. In the same report, we note contributory factors other than copyright, which either hinder<sup>16</sup> or enhance access<sup>17</sup> to knowledge for educational purposes. Here I take interest in the enhancers particularly photocopying for educational purposes in African institutions of higher learning. In the said report we note reliance on photocopying by both students and faculty to access learning materials at Makerere University, Uganda's leading public university.<sup>18</sup> Strict interpretation of the *fair use* provision by court of the Ugandan copyright law would likely find some uses outside *fair use* yet the reality of most students and faculty is that purchasing own materials is beyond what they can afford. Coupled with under funded library systems, the acute nature of the problem points to a possible copyright crisis cited by scholars and commentators across the continent.<sup>19</sup>

Besides the *fair* doctrines and other exceptions, copyright laws generally provide for collective rights management, which can be fronted as a remedy to the above reproduction situation also prevalent in most African institutions. Collective rights management (CRM) entails an organization, private, semi-private or public, managing rights (exclusive) on behalf and with the mandate of rights-holders. CRM licenses often allow the kind of copying described above and give licensed entities leeway on permissible actions. CRM is seemingly an extension of the *fairness* breaks although that is difficult to determine given the imprecise nature of the doctrines themselves. However, CRM like the western interpretation of *fairness* privileges economics interests of rights-holders through rent fees to public interests despite talk of a balance of the two.<sup>20</sup>

Against desperate economic situations majority of African students and institutions find

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<sup>16</sup> Ibid pgs 10-20. Such as excessive pricing; unavailability of materials and unsuitability of content, government resource constraints, etc.

<sup>17</sup> Including informal activities involving reproduction for educational purposes mainly through petty photocopying enterprises in and around educational institutions.

<sup>18</sup> A total of 76 photocopying machines (mostly petty photocopying enterprises) put out an average of 43,400 copies every day (a conservative estimate). Figures were based on an informal non-scientific survey of photocopying at Makerere.

<sup>19</sup> Scholars such as Denise Nicholson and Nwauche Enyinna have written and lectured extensively on the copyright (and Intellectual Property Rights) crisis in Africa *vis-à-vis* access for education is concerned.

<sup>20</sup> Gérard Robinson, Executive Director, Dramatic, Artistic and Literary Rights Organisation (DALRO). Legal Access – The Mediating Role Of The RROs In Copyright Licensing. Available from: <http://ibt.afrihost.com/accessof/files/robinson.doc>.

themselves in, talk of fair use and dealing as a safe guard for public interests in the copyright systems misses important contextual realities. On the flipside, dismantling the copyright system is also detrimental to Africa in the sense that the continent's fragile indigenous content industry will remain underdeveloped and Africa net consumer of western content. The question then is what should fairness mean in the African context so as to arrive at the balance in the copyright system?

### **Fairness in the African context**

*Fairness* in the African context presents moral and economic interests which must be carefully balanced but preferably tilting in the interest of the public or wide access. Africa's long term goals should be and are tailored around education and training of human resource to foster socio-economic development. Access to content is critical to the success of the education and training goals of the continent.

A fair copyright environment should acknowledge the desperate situation in which most African institutions of higher learning find themselves. Fairness then should uniquely acknowledge these institutions rather than general uses regardless of institutional frameworks. Like the imprecise *fair use* and *dealing* doctrines, here I offer no specific guidelines or principles but appeal for blanket coverage of specific institutions. At the risk of appearing to advocate for total dismantling of the copyright system, I strongly advocate for blanket breaks for public and private institutions of higher learning for certain uses particularly photocopying or duplication, reprinting and translation even for physically challenged individuals. Enterprises around these uses should be found to be fair play for as long as their services and activities are limited to institutional settings and spheres of influence. The obligations of the institution then should be ensuring that such breaks are not abused by using the institution as the venue for commercial distribution to off-campus clients such as business enterprises.

Uses outside educational settings can be subjected to conventional *fairness* doctrines and other limitations and exceptions to allow for exploitation of copyrighted works in non-educational contexts for legitimate fair uses. This approach to *fairness* with the

institutional bias (for education), is in line with Africa's long term development goals through human capacity building at the same time recognizing the need to grow copyright and intellectual property rights culture to benefit local content creation.