

## Intellectual Property and Fair Use in Higher Education

Christopher Eje OGAR (CLN)<sup>1</sup>, Kayode Gboyega OYENIRAN (CLN)<sup>2</sup>

<sup>1</sup>Principal Librarian, Federal University Otuoke, Bayelsa State, Nigeria.

<sup>2</sup>Head, Reader Services, Federal University Otuoke, Bayelsa State, Nigeria.

**\*Corresponding Authors:** Kayode Gboyega OYENIRAN, Head, Reader Services, Federal University Otuoke, Bayelsa State, Nigeria.

### ABSTRACT

As the world of literary works in College and University campuses increase so also the higher institutions faced with all manners of Protection of Intellectual Property Right issue. In view of the problem and couple with the security consciousness, that the laws are formulated to serve as protection against any infringement. The paper examines the intellectual property right and fair use of higher education and ascertains the fundamental principles relating to the infringement by the institutional community. The conclusion is that, institution of higher learning has developed internal policies and procedure governing the use of copyright literary works, These policies spelt out interest of institutions in applying the copyright regulation and copyright owners, The paper recommends that education and training of staff, students and other members of academic community are important so as to prevent conspicuous misunderstanding from the adoption of copyright legislations. There should be sound policies to back up the right for adequate dissemination of information and stick enforcement of copyright legislation,

**Keywords:** Copyright, Intellectual property, copyright infringement, Fair use, Legislation, U.S.C United State Constitution.

### INTRODUCTION

Human beings are security conscious and will do everything to protect their right, liberty or freedom at any time and value. It is based on this security consciousness that laws are formulated to serve as protection against any infringement. All men and women, children, properties and facilities are protected through the public laws and ethics.

Likewise the literary works of authors, writers, illustrators, editors, actors, among others, as in a world of literary works increase on college and university campuses, higher institutions faced with all manner of protection of intellectual property right issues. Not only administrators of these institutions battle with law to protect institutional copyrights from unauthorized exploitation, they must also deal with how to prevent liability to the institutions from infringements by the campus community of copy rights belonging to others.

Again, adding more problems to the analysis and ability to reach a satisfactory resolution is that, an infringement in literary works by authors, especially in cyberspace adds more problem of instant worldwide distribution of the infringement. In views of this problem, the

analysis always focuses on the basic principles of copyright laws relating to protection of intellectual rights. All these are instructive and act as a guide in analyzing any copyright (Intellectual Right Protection) problems and attempt to find a workable solution. As an attempt to determine some fundamental principles relating to the infringements by institutional community, the study will focus on the following: Some basic intellectual property rights principle-namely-what does intellectual rights protection protect? What rights does intellectual rights protection provide? What constitute intellectual rights infringements?, Liability for intellectual rights and limitations on intellectual right holder's exclusive rights, for use or licensing in college or university community environment, challenge and solution to these principles relating to protection of intellectual rights to literary works by authors or writers.

### CONCEPTUAL DEFINITION OF BASIC CONCEPTS TO PROTECTION OF INTELLECTUAL RIGHTS PRINCIPLE

#### Protection

The Concept of protection can be defined in various ways. In a common sense it means

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providing security against danger or taken away or threatening the liberty (freedom) of anything or poison. Cambridge Advanced learners Dictionary (2008) defined protection as a noun, the act of protecting or state of being protected. Protect as a verb means to keep someone or something safe from injury, damage or loss.

### Intellectual Property

The Concept intellectual property is a legal term describing authorship and ownership of discoveries, inventive or literary works, (Turock and Friedrich (2010) observed that intellectual property refers to original works of authorship as contained in 1976 revision, copy right Act. From the above understanding it could be understandably defined as any original literary works either in manuscripts printing or internet whose authorship, artistic and literary creation researched to an individuals, corporations, institution or agencies such as colleges, polytechnics and universities. Anaeme (2014) sees intellectual property as species of intellectual property and defines intellectual property as human intelligent and literary creation. In a researcher's view intellectual property can be defined as an intelligent and creative original literary works with ownership and authorship ascribed to the owner of the work. Simply put, literary author of original writer of a work as author, editor, actor, illustrator and investor.

### Intellectual Property Protection

The Concept intellectual property protection is associated with the legislative rights given to an author, editor or any individual or institution responsible for a creation of original literary works as to prevent any likely abuse of use. Anaeme (2014) clearly defined copy rights as legal rights a country grants an author of a work for a limited time.

It is further defined as a legal term used to describe the rights that creators have over their literary and artistic works. Anaeme (2014) described it as an intangible right protecting the products of human intelligence and creation.

It therefore defined as the legal rights granted to authors or writers for their creative and original literary, dramatic or musical works as the exclusive rights to do or authorize other persons to do certain acts in relation to that work.

Isiakpona (2012) defined copyrights as a set of exclusive rights granted by Government for a limited time to protect the particular form, or manner in which an idea or information is

expressed. Simply it is a legal right of protection granted an author of a work for a time limit as to guide against unauthorized use of the work except with permission from the owner. Cummings and Gunnels (2010) Observed that copyrights protection like patent protection is based on US constitution article 1, section 8 .The congress shall have power to promote the progress of science and useful arts by securing limited time to authors and investors of the exclusive rights to the respective writing and discoveries. "Under this provision a copyrights owner has exclusive rights to works authorship enacted by that owner"

### WORKS QUALITY FOR COPYRIGHT PROTECTION

In U.S.A Constitution, there are works that meet the criteria for copyright protection. There are eight (8) categories of copyrights (117) U.S.C sections 102 (a) available under which an author's work must fall to qualify for copyright protection – namely:

- Literary works (these categories include books, articles and software programs and their accompanying documentation.
- Musical works, including any accompanying works (this applies to music itself plus any lyrics).
- Dramatic work including any accompanying music (this applies to plays and any music that is included in the play).
- Pantomimes and Choreographic works.
- Pictorial, graphic and Sculpture works (this is the usual acts and graphics category
- Motion pictures and other audio visual works (this category cover most all multimedia work).
- Sound recording (this cover CD-ROM Cassettes e.t.c).
- Architectural works (this cover architectural plans) Cumming and Gunnels 2010).

It is noted that copyrights protection is limited purely to expression of idea and not idea itself. There can be numerous expression of the same idea, all of which can be subject to separate copyrights protection as long as the expression itself is original.

### RIGHTS COPYRIGHTS PROTECTION PROVIDE

In U.S.A Constitution as observed by Cumming and Gunnels (2010) Copyrights exists and begins to be effective as soon or from the

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moment a work of authorship is completed. No further action is necessary for an actor to claim that a work is protected by copyrights. However, registration of a work with the U.S copyright office is required before anyone can file a lawsuit against an infringer.

The US copyrights protection provide the following rights to the followings

- Only work with copyright symbol qualifies protection if it was produced prior to January 1, 1978. All work produced prior to January 1, 1978 is generally protected exception with copyright symbol.
- For works created on or after January 1, 1978. Copyright is valid from the moment of creation of the work until the death of the author plus seventy (70) years.
- Also if a work is for hire, that is, it was created by an employee in the scope of employment or by an independent contractor, who assign ownership to another party, the copyright protection is valid for ninety five (95) years from the date of first publication or one hundred and twenty (120) years from the date of creation of the work whichever expire first. (Cumming & Gunnels, 2010).
- Cummings and Gunnels (2010) further observed that in US Constitution 17 U.S.C. Section 106 it is stated that once copyright protection exists for a work, the owner has six exclusive rights which no one can grant a third party a license to all right as a whole or to one or more rights separately. The owner exclusive rights to control are:
  - The right to make copies;
  - The right to prepare derivative work (works based on and incorporating the original works in some way);
  - The right to distribute copies (this will include making copies available over the internet);
  - The right to perform the work publicly (which applies to musical and dramatic works, motion pictures e.t.c);
  - The right to display the work publicly (for audio visual works, sculptural works, pictorial and graphic works e.t.c); and in the case of a sound recording.
  - The right to perform the work publicly by means of a digital audio transmission.

It is also provided in the constitution that, if a copyrights owner grants a right to create derivative works of an original works, the user

creating the derivative works will own the copyright in the derivative work. Those rights in the derivative work, however, extend only to the material contributed by the users creating material.

### Copyrights Infringement

Copyrights Infringement refers to a violation of a copyright owner (or license) or who impact works into the country against a country contribution relating to copyright laws. An infringement can be criminal and civil and each has an associated penalties associated with it.

### Liability of Copyright Infringement

The Infringement analysis begins with the preliminary assumption that someone other than the proposed user owns the copyright of the work. The most obvious infringement of a copyright is direct coping. To proof the infringement there must be clear evidence to establish the fact that:

- Substantial similarity between the original and the alleging infringement work
- Access by the alleged infringe to the original work means that thorough investigation and clarification relating to the copyright laws must be carried out to actively authenticate evidence before any penalty is carry out on the infringer of copyright protector.

### EXCEPTIONAL OR LIMITATION ON A COPYRIGHT HOLDER'S EXECUTIVE RIGHTS

The constitution of a country has provision and sections guiding the enforcement of in fragment and otherwise of copyright laws. These laws or states allow educational institutions to use copyright materials in their education programs and activities. The most widely used exception is:

**Libraries and Achieves:** Libraries and Achieves are allowed certain production rights under 17 U.S. Constitution sections 108. The Section provides that it is not an infringement for a library or achieve to reproduce or distribute a copy or photocopy of a work if:

- The coping and distribution is made without any purpose of direct or indirect commercial advantages;
- The collection of the library and achieve are either open to the public or available to other persons not affiliated with library or achieve but who are doing research specialized field.

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- The notice of copyright is retained on the copy or such a copy include a legend stating that the work may be protected by copyright if there is no such notice on the version from which the copy is made.
  - Performance or displaying of a work by instructors or pupils in the course of face-to-face teaching activities of non-profit educational institutions, in a classroom or similar place devoted to instruction.
  - Performance of nondramatic literary or musical work or display of a work by or in the course of the transmission.
  - Performance of nondramatic literary and musical work or of a dramatic musical work of a religious nature or display of a work in the course of services at a place of worship or other religious assembly.
  - Performance of a nondramatic literary or musical work otherwise than in transmission to the public, without any purpose of direct or indirect commercial advantage and without any payment of any fees or compensation for the performance if there is no admission charge are used exclusively for educational, religious or charitable purposes and not for private financial gain.
  - Communication of transmission embodying a performance or displaying of a work by public reception of the transmission on a single receiving apparatus of a kind commonly use in private home.
  - Performance of nondramatic musical work by a Government body or nonprofit agricultural or horticultural organization, in the course of an annual fair or exhibition conducted by such organization, this exemption protects that body or organization from liability for copyright infringement that it might be subject for a performance by concessionaire, business establishment, or other person performing at the fair or exhibition.
  - Performance of a vending establishment open to the public without any admission charge where the sole purpose of the performance is to promote the retail sales of copies phone-records of the work and the performance is not transmitted of the establishment and is within the immediate area of the sale is occurring.
  - Performance of nondramatic literary work by or in the course of transmission specifically designs for and primarily directed to blind or other handicapped persons who are unable to read normal printed material as a result of their handicap and the like, if the performance is made without any purpose of direct or indirect commercial advantage and the transmission is made through the facilities of either governmental body, a non commercial educational broadcast station radio sub carrier authorization or a cable system (as defined in section III (1)).
- Performance on a single of a dramatic literary work published at least 10 years before the date of the performance by or in the course of transmission specifically designed for a primarily directed to blind or other handicapped persons who are unable to read normal printed material as a result of their handicap and the like, if the performance is made without any purpose of direct or indirect commercial advantage and the transmission is made through the facilities of either a governmental body or a noncommercial educational broadcast station, a radio sub carrier authorization or a cable system (as defined in section III (I)), provided that this provision does not apply to more than one performance of the same work by the same performers or under auspices of the same organization.
- Performance of nondramatic literary work or musical work in the course of a social function which is organized and promoted by nonprofit vitreous organization or a nonprofit fractional organization to which the general public is not invited, but not including the invitees of the organization, if the proceeds from the performance are used exclusively for charitable purposes and not for financial gain.

**Copyright Programs:** The 17. U.S. Constitution 117 provides that “it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program” Such creation of such copy was essential in the utilization of the computer program in conjunction with a machine and it is not used in any other manner; or the copy is for archival purposes only and if, when the right to possess the computer program lawfully terminated the archival copies are destroyed. The exact copies made for these purposes may be leased or sold or transferred along with the original copy from which the new copies were

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made, but only as part of the lease, sale or transfer of rights in the program.

Section 117 also provides that it is not an infringement to make a copy of a computer program when such copy is made to solely by virtue of the operation of a machine containing an authorized of the program, for purpose of maintenance and repair of the machine, so long as the new copy is not used in any other way and is destroyed when the repair is completed and no other program or part is accessed or used other than as necessary to make a new copy by virtue of the activation of the machine.

**Disabilities:** Under the provision of 17 U.S. Constitution section 121 the reproduction or distribution of copies of previously published nondramatic literary works in special format exclusively for use by blind or other persons of disabilities is not an infringement of copyright.

The copies made in accordance with this section must bear a copyright notice indicating the date of the original publication and the copyright owner not be reproduced or distributed in a format other than a specialized format is an infringement.

**Fair use:** In cases where the user does not hold a license to copy or there is not a specific statute to provide an exception from infringement and substantial similarity are conceded, for use/ or parody may be used as a defense.

Fair use was first written into law in the 1976 revision of the copyright act (17) U.S. Constitution section 107 and is generally conceded to be the most complicated area of copyright law, with issues relating to music being particularly problematic.

The fair use statute basically that use of copyright work is not an infringement if one's use of the work is for purpose such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research and the following factors are resolved in favor of the person using the copyright works.

- The purpose and character of the use including whether the use is of a commercial nature or for nonprofit educational purpose (criticism and comment is one of the most widely accepted example of fair use.
- The nature of the copyright work (use of portion of copyrighted material in informational works involves a better chance of a finding of fair use than use in a creative works).

- Amount and substantiality of the portion used in relation to the copyrighted work as whole (the greater the copyrighted work used, the less likely it will be deemed to be a fair use –also counts will consider whether a parta party copied the ‘heart’ of the copy righted work or less distinctive parts).
- Effect of the use on the potential market for or value of the copyrighted work. (This is the most important element. The Supreme Court has ruled that the plaintiff in a copyright case only needs to demonstrate the likelihood of future harm). (Encyclopedia of Library and Information Science, 2010).

## FAIR USE IN A COLLEGE OR UNIVERSITY SETTING

Fair use in college and university setting refers to the utilization of libraries materials either in traditional or electronic format within the provision of copyright law relating to the authorized and ownership of literary works. It relates to the granting of some limited rights and privileges to the use of library materials based on author permission provided in the copyright legislation.

In traditional classroom, cyberspace, the research laboratory, bookstore, dormitory student centers, among other questions are asked on what copyright are governed by statutory exemption or which copyrighted materials are governed by fair use or must permission be sought. In College or university stings faculty members and students used all types of copyrighted in the teaching, learning, research and form variety of materials and resources including textbooks, journals, articles, dissertation, theses, and other classroom materials. For proper use of all these materials against any legislation, it is necessary for college or university libraries to conduct fair use analysis of their desire use of copyrighted works. Understanding a specific statutory exception governing a particular use of a copyrighted works, Libraries and Information Centers will supply and obtain licenses right for application in their libraries and information centers. Fair use principles basically are applicable on commercial profitable and educational – non-profitable use materials. However, if the institution will be using the copyrighted work for commercial purposes, then it is more likely that institution's use would not qualify as fair use. On the other hands an educational institution's use should come closer to qualifying as a fair use when the use is for non-profit educational purposes. Other factors

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that can be taken into consideration in qualifying a copyrighted works as fair use are:

- The nature of the copyrighted work. These include:
  - Is the work to be used as a creative work, an information work or some other types of work?
  - The less creative and more factual a work, the greater the chance of finding of fair use of the work
  - Is the amount and substantiality of the portion of the work are in relation to the copyrighted work as a whole, along with whether or not the “heart” of the work will be used (in cases where small portions are copied). The less of work that is used (other than the “heart” of a work), the greater the likelihood of a finding of fair use.
  - Is the effect of the proposed use of the work on the market for or the value of the original work?

The greater the negative impact of the use on the market for or value of the work, the lesser the chance of a finding a fair use in conducting an analysis as to whether an institution has a right to use a particular work without a license, there will be instance in which a work is out of print or the copyright owner cannot be identified or located, the issue of market of the copyrighted works must be considered. In traditional non-profit educational institutions, the following conditions indicate some basic circumstances in which fair analysis can be applied in an absence of statutory exception or specific contractual (licensing) to use the copyrighted materials.

**Classroom:** Use of copyrighted materials for face-to-face instruction in a classroom generally will be found to be fair use.

**Distance Education Instruction:** In this case the institutions determine through analysis of each type of aspect of classroom instruction to ascertain if the broadcast of that part of the class is limited to students enrolled in the class vs being made available to a public audience and if materials are available in general over the internet or only the through a password protected site. It will be more correct if the copyrighted material is limited to students and likely for fair use than for public audience outside the school settings.

**Arenas, theaters, and Public Performance Venue:** The instruction may have a sport arena, theater or other types of facilities where athletic,

artistic and other public events are held. The playing of music, displaying of video or presentation of plays or other dramatic works at these venues all require appropriate analysis, particularly if any of the performance are to be broadcast outside of the venue. The performance of a play by students under instruction of a professor who is coordinating face-to-face instruction with regular students in the campus theater should be a fair use, so long as performance is not open to non-class members.

**Other Campus Facilities:** Use of copyrighted materials in a cafeteria (background music for dining) dormitories (movies in students lounge), students center (classes in ballroom dancing, music in bowling alley, campus theater showings), on campus radio stations, all require a fair use analysis and most will require a license to use the work. Licensing organizations such as Broadcast Music International and (the American Society of Composers, Authors and Publishers (ASCAP) can grant broad licenses for a fee to cover these uses.

Presentation, Publications, and Web sites: Use of copyrighted materials by faculty, staff and students in public presentations, conference, journal articles, textbooks or websites will require the analysis whether the amount used exceeds fair use standards and a license is required. In many cases portion of a work may be used, so long as proper contribution is given to the source. In some cases a license will be required but the copyright owner will provide it at no cost. In other cases a fee might be assessed.

**Commissioned Work and Work for Hire:** Creation of software deliverable under sponsored research contracts and other intellectual property created by faculty, staff, students and contractors of an institution may include copyrighted materials own by third parties.

When determine an institution’s right to use any specific copyrighted works, the institution should seek to identify the source of the particular work if it is interested in using.

If the work to be used by the institution was not created for the institution pursuant to a written contract that specifically addresses the ownership of the copyright or the scope of the license (the permissible used of the work) then a fair use of analysis should always be conducted and license acquired if necessary (Encyclopedia of Library and Information Science, 2010).

### CONCLUSION

It is really important that institutions of higher learning develop and observe internal policies and procedures governing use of copyright literary works. These policies should take into cognizance a well spelt out interest of the institutions applying the copyright regulations and copyright owners. Notably, it is obvious that the adoption of these policies and notices is very crucial and should be managed appropriately in order to prevent confusion and misunderstanding in the academic community.

Education and training of staff and students among other members of academic community should be considered as an essential necessity. Adequate training should be given to all members of the academic community as to their right and responsibilities. Creation of sound policies should be backed up by adequate dissemination of information and stick enforcement of copyright legislation.

The need for institutions to have expert to advice, assist and answer some basic questions relating to fair use analysis and obtaining appropriate license should be taken into consideration. All these measures among others will prevent against any arising conspicuous misunderstanding arising from the adoption of copyrights legislation, hence keep or maintain order and other concerns in the application of

fair use of literary works in institutions of higher learning.

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