Ollscoil na hÉireann, Corcaigh
National University of Ireland, Cork

Examining the Role and Limits of Copyright Law and Policy in Facilitating Access to Education in Nigeria: A Development Inquiry

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for the degree of
Doctor of Philosophy

University College Cork
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May 2020

Declaration of originality

This is to certify that the work I am submitting is my own and has not been submitted for another degree, either at University College Cork or elsewhere. All external references and sources are clearly acknowledged and identified within the contents. I have read and understood the regulations of University College Cork concerning plagiarism.

SAMUEL WILBANKS UGWUMBA

ABSTRACT

This thesis examines the extent to which copyright law can facilitate access to education in Nigeria. Education is a developmental imperative and especially so for Nigeria, a developing country, where a combination of institutional failure and poverty has continuously impeded its realisation for a greater number of citizens. The sacrosanct importance of education and the socio-economic peculiarities of Nigeria require that serious panoramic attention be paid to the challenges—socio-economic, legal, institutional, and cultural—derailing the fulfilment of this developmental goal in Nigeria. Indeed, the commitment to achieving universal education, apart from finding lofty expression in several human rights treaties, is a fundamental part of ongoing global development programmes, thereby emphasising the non-negotiable value of education and that lack of it is potentially life-threatening.

In pursuing this inquiry, copyright law and access to education in Nigeria, the thesis takes as one of its principal tasks the examination of the institutional and normative limits of copyright law. Three critical conclusions, germane to the role and limits of copyright in facilitating access to education, are reached on this specific inquiry: (1) copyright exists to internalise economic values, thereby undermining social values; (2) copyright is not a transcendental moral idea; and (3) copyright as wealth-maximisation is infeasible and normatively unattractive. Accordingly, the thesis searches through the broad terrain of development discourse and studies with the goal of seeking for a normative framework that is conducive to the interests of access to education, ultimately found in a human development paradigm.

On the other hand, the thesis, in pressing forward with the principal objective of facilitating access to education through the regime of copyright, explores a novel strategy: whether copyright can be integrated with the constitutional right to education. This novel inquiry dovetails with the observation that education is a human right and access to it a developmental imperative. Given that the governance of copyright law is part of the global regime for governing creative works of the mind, manifested in the TRIPS Agreement and Berne Convention, the thesis investigates the extent to which the package of limitations and exceptions afforded by these global regimes facilitates access to education and whether Nigeria is utilising the flexibilities.

Aside these, the thesis, in line with its commitment to unpack foundational issues, investigates the policy aspects of copyright law that impede the development of a copyright law and policy that facilitates access to education.

LIST OF ABBREVIATIONS AND ACRONYMS

ABDR	Associação Brasileira de Direitos Reprográficos
ALM	Access to Learning Materials
A2E	Access to Education
A2K	Access to Knowledge
BC	Berne Convention for the Protection of Literary and Artistic Works of 1886
BNA	Basic Needs Approach
CA 2004	The Nigerian Copyright Act, 2004
CBA	Cost-Benefit Analysis
CESCR	Committee on Economic, Social and Cultural Rights
CMO	Collective Management Organisation
Copyright Bill	Nigerian Draft Copyright Bill 2015
DC	Developing Country
DG	Director General
DPSP	Directive Principles of State Policy
DS	Development Studies
EC	European Community
ECOWAS	Economic Community of West African States
GDP	Gross Domestic Product
HDA	Human Development Approach
HDI	Human Development Index
HDR	Human Development Report
ICT	Information Communication Technologies

IO	International Organisation
IoT	Internet of Things
IP	Intellectual Property
IPO	Intellectual Property Office
IRRO	Indian Reprographic Rights Organisation
KH	Kaldor-Hicks
L&E	Limitations & Exceptions
Law&Econ	Law & Economics
MDG	Millennium Development Goals
MVIP	Marrakesh VIP Treaty
NCC	Nigerian Copyright Commission
NCCL	Nigerian Copyright Council
NCP	National Copyright Policy
NGO	Non-Governmental Organisation
NIPRP	National Intellectual Property Rights Policy of India
OSC	Out-of-School Children
PBBA	Public Benefit Balancing Approach
PSA	Preference Satisfaction Account
RAPS	Rameshwari Photocopy Service
REPRONIG	The Reproduction Rights Society of Nigeria
Rome Convention	The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisation
SDGs	Sustainable Development Goals
The Copyright Act	The Nigerian Copyright Act, 2004
TRIPS	Agreement on Trade-Related Aspects of Intellectual

	Property Rights
UDHR	Universal Declaration of Human Rights
UIS	UNESCO Institute for Statistics
UN	United Nations
UNDP	United Nations Development Programme
UNESCO	The United Nations, Educational, Scientific and Cultural Organisation
UWE	Utilitarian Welfare Economics
VC	The Vienna Convention on the Law of Treaties
WCT	WIPO Copyright Treaty of 1996
WIPO	World Intellectual Property Organisation
WIPO-DA	WIPO Development Agenda
WM	Wealth-Maximisation
WPPT	WIPO Performers and Phonograms Treaty of 1996
WTO	World Trade Organisation

ACKNOWLEDGMENT

I dedicate this thesis to my late father, **Agwu Ugbo Ugwumba,** and late cousin, **Ngozi Stephen**. Even though he did not acquire formal education, my Dad always impressed upon me, in the brief moments I shared with him, the value of curiosity and education. The loss of my cousin to untimely death during the writing of this thesis proved to be a watershed moment in my life and an irreparable loss. Her countless messages of encouragements and unrivalled love are memories that will forever reside in the tenderest part of my heart.

I want to specially thank my supervisor, Dr. Darius Whelan. There is no way I could have completed this thesis without him. His encouragements and unwavering belief in me gave me the lifeline to pull through this. If I was to engage in another doctoral study, it will be him and if I cannot get him to supervise, I will happily pass it on. Thank you, Darius. I also want to thank the UCC School of Law for giving me this opportunity and for always providing the needed help even when I call in, as always, on the last minute.

The greatest thanks, of course, belongs to Jehovah whom I owe everything to.

INTRODUCTION

I

What is the Price of Knowledge?[1]

In 2015, the Swiss foundation, Anne Frank Fonds, that owns the copyright in Anne Frank's diary sought to prevent the work from entering the public domain on the basis that Otto Frank, Anne Frank's father, was a co-author of the work.[2] Since Otto Frank died in 1980, the implication of the foundation's argument is that Anne Frank's diary would only become part of the public domain in 2050 at least in Europe.[3] It is in this year, should the foundation's argument hold up before the courts, that Anne Frank's diary will be disentangled from copyright, and therefore be freely available for all to use in ways that copyright would have otherwise prohibited. Clearly, this is a long wait! In 2015, Elsevier brought a copyright infringement suit against Sci-Hub and Alexandra Elbakyan at the United States District Court for the Southern District of New York.[4] Elsevier's concern was that Sci-Hub provides free access to millions of books and research papers without regard to copyright. Sci-Hub was founded by Elbakyan in response to the high cost of accessing academic papers behind paywalls. On June 21, 2017, the US district court delivered a judgment in favour of Elsevier and awarded US$15 million in damages for copyright infringement by Sci-Hub. In 2019, it was estimated that Nigeria has the largest number of out-of-school children (OSC), a very worrying indicator of development setback. Although these cases seem different at a cursory level, on a closer look they are not because they strike at the core of a very important issue: access to knowledge.

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[1] All internet links in this thesis, unless otherwise stated, were last accessed on April 15, 2020.
[2] Doreen Carvajal, 'Anne Frank's Diary Gains 'Co-Author' in Copyright Move' *The New York Times,* November 13, 2015. https://www.nytimes.com/2015/11/14/books/anne-frank-has-a-co-as-diary-gains-co-author-in-legal-move.html?rref=collection%252Ftimestopic%252FFrank%252C%20Anne&action=click&contentCollection=timestopics&region=stream&module=stream_unit&version=latest&contentPlacement=2&pgtype=collection&_r=1
[3] Samuel Ugwumba, 'Copyright, Money and Abuse: Lessons from the Diary of Anne Frank' *CIPIT*, November 20, 2015. https://blog.cipit.org/2015/11/20/copyright-money-and-abuse-lessons-from-the-diary-of-anne-frank/#comments
[4] Quirin Schiermeier, 'Pirate Research-paper Sites Play Hide-and-seek with Publishers' *Nature*, December 4, 2015. https://www.nature.com/news/pirate-research-paper-sites-play-hide-and-seek-with-publishers-1.18876

The clichéd aphorism ‘knowledge is power’—although traceable to ancient times—may now be elevated to the lofty pedestal of a quasi-scientific law.[5] It is no longer a belief but a reality. Its veracity is verifiable and is valid for all societies and individuals. Whether knowledge of techniques, processes or events, the observable fact is that knowledge is empowering. In fact, the history and development of societies is traceable to and substantially a product of the stages of knowledge generation and advancement. This much is axiomatic even from time immemorial. As such, there is nothing new or revealing about the aphorism.

What is new rather is the renewed and elevated salience of this aphorism as a result of the third and fourth industrial revolutions. As a result of these socio-economic revolutions, knowledge and information take centre stage in the organisation of society and economy. It is both an input and an output in the production of cultural and economic goods. For example, the paradigmatic technology of the fourth industrial revolution, the Internet of things (IoT), feeds on data collection for its operation. Similarly, the third industrial revolution enabled by information communication technologies (ICT) facilitated a means of capitalist development that revolves around the production and distribution of information.[6] Crucially, the observable organising framework in our socio-economic fabric is the utilisation of knowledge as an indispensable component at each stage of the value chain—production, distribution and use or consumption. It is therefore not surprising that many social theorists and economists refer to the economy and society as a knowledge-based economy and an information society respectively.

These two observable facts—knowledge is power and that of an information/knowledge society—bring two critical issues to the fore. First, the importance of knowledge in our socio-economic fabric requires that any restriction on access to and dissemination of knowledge be carefully examined and soundly justified. Second, and owing to the first, they implicate a historical institution

[5] This statement is generally attributed to the British philosopher Francis Bacon. See J.M. Rodríguez García, ‘Scientia Potestas Est—Knowledge is Power: Francis Bacon to Michel Foucault’ (2001) 28(1) *Neohelicon* 109. But see Brian Vickers, ‘Francis Bacon and the Progress of Knowledge’ (1992) 53(3) *Journal of the History of Ideas* 495 at 512, fn.47 [Pointing out that the exact expression “knowledge is power” does not appear in the works of Bacon.]

[6] There are many books that discuss the third industrial revolution and its implications on society and economy. For a selection, see M.K. Gay, The New Information Revolution: A Reference Handbook (Contemporary World Issues; 1996); M.W. Hill, The Impact of Information on Society: An Examination of its Nature, *Value and Usage* (Bowker-Saur; 1999);

concerned with the governance of knowledge, copyright law, and thereby throw up new sets of issues.[7] The cases of Sci-Hub and Anne Frank fonds represent a tiny selection from a large pool that highlights these issues. Even upon a superficial examination, these issues are palpable and they raise concerns of development, justice, efficiency and human rights.[8] For example, the rules of copyright law determine who owns knowledge, who has access to knowledge, and who can participate in the production of knowledge as well as the *conditions* for such access and participation.[9] In the Anne Frank case, it is the foundation, by virtue of copyright law and subject to its rules, that determines the conditions of access to Anne Frank's diary. Similarly, the Sci-Hub case is an example of how copyright creates and demarcates zones of lawful and unlawful access to knowledge.

As will be observed throughout this work, three central features in the architecture of copyright law distinguish it and characterise its operation, thereby enabling it to lay claim to the processes of knowledge governance in the area of creative productions of the mind.[10] It is also these features that give rise to the various concerns of development, justice and efficiency. Equally important are the Western amalgam of legitimising narratives, history and culture that paves the way for the institution of copyright and thereby provides justification for its architectural features. For now, some brief comments on these features.

The first two—the exclusionary and proprietary model—are well recognised in the academic literature. The subject matters of copyright—i.e. the stuff protected by

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[7] Very few works frame copyright, or at least the issues it raises, as concerned with knowledge governance. But see Dana Beldiman, 'Introduction' in Dana Beldiman (ed.), *Access to Information and Knowledge: 21st Century* Challenges in Intellectual Property and Knowledge Governance (Edward Elgar; 2013); Burlamaqui, et.al. (eds.), Knowledge Governance: Reasserting the Public Interest (Anthem Press; 2012). The term 'knowledge governance' however is used mainly in the Knowledge Management literature where the focus is on organisational knowledge of the firm. Foss and Michailova (eds.), *Knowledge Governance: Processes and* Perspectives (OUP, 2009); R. Sanchez (ed), *Knowledge Management and Organizational Competence* (OUP, 2001). Nevertheless, no one would seriously contend that copyright is not concerned with the governance of knowledge for if scholars of organisational knowledge management can frame their issues as one of knowledge governance, then copyright which is concerned with a much larger universe of knowledge production, distribution and use is more so an institution of knowledge governance. Beyond framing, understanding copyright or IP as a knowledge governance institution is analytically revealing for it allows us amongst other things to look beyond copyright law as a regime for governing knowledge. On this, see Amy Kapcyznski, 'Order without Intellectual Property: Open Science in Influenza' (2017) 102 *Cornell* L.Rev. 1539.

[8] See Katz, et.al., Common Knowledge: How Access to Information and Ideas Can Drive *Development* < http://panoslondon.panosnetwork.org/resources/common-knowledge/ >; P. Drahos and J. Braithwaite, Information Feudalism: Who Owns the Knowledge Economy? (Earthscan, 2002).

[9] Drahos & Braithwaite, *Ibid*.

[10] By processes of knowledge governance, I mean the various levels or value chain of knowledge governance: creation, production, distribution, and use.

copyright— though intangible may be owned just like any tangible property. Whether it is a musical composition, sound recording, or treatise, copyright law grants ownership rights that remove these informational products from the realm of common property to that of private property. By granting this right, the rightsholder is able to exercise a bundle of rights that function essentially as the right to exclude, a right which is the kernel of the private property regime.[11] This is critically important for as Benkler notes, "enclosure of information through exclusive rights regimes locates the authority to act with and upon covered information and culture with the rights holder, rather than with whoever has the practical capacity and insight to do something useful and interesting with the information…"[12] The third feature—copyright as a market institution—is rarely discussed in the academic literature. Copyright as a private property right functions through the market system. The market is the primary site where value-exchanges in the production and use of knowledge occur, and copyright as a private property right governs these transactions. Given that markets are based on the price mechanism i.e. ability to pay, it is clear that the resource with which copyright deals with may not be accessible to a great number of people. And even when it is i.e. when they pass through the market hurdle of ability to pay, the bundle of rights granting copyright the status of private property may impede the full utilisation of this resource.

One key insight of this work is that it is this interaction between copyright as private property right and the market system that is mainly responsible for the demands of access to knowledge, a manifestation of the commitment to justice, development and efficiency in the governance of knowledge. Put differently, access to knowledge

[11] The right to exclude as the kernel of private property rights is well recognised in US academic commentaries and judgments. See T.W. Merrill, 'Property and the Right to Exclude' (1998) 77 *Neb. L. Rev*. 730 [Describing the right to exclude as the "*sine qua non*" of private property]; D.L. Callies and J.D. Breemer, 'The Right to Exclude Others from Private Property: A Fundamental Constitutional Right' (2000) 3 *Wash. U. J. L. & Pol'y* 39. But *Cf*. J.Y. Stern, 'What is the Right to Exclude and Why Does it Matter' in Otsuka and Penner (eds.), *Property Theory: Legal and Political Perspectives* (CUP, 2018). This is also the case in other jurisdictions. See J.G. Sparkling, *The International Law of Property* (OUP, 2014) 305 ["The right to exclude others is a core attribute of the global right to property"]

[12] Yochai Benkler, 'The Idea of Access to Knowledge and the Information Commons: Long-Term Trends and Basic Elements' in Gaëlle Krikorian and Amy Kapcyznski (eds.), *Access to Knowledge in the Age of Intellectual Property* (Zone Books, 2010). Since the right to exclude is a fundamental feature of private property regime, it may be questioned whether the two models—exclusionary or proprietary—are any different. The important point to note is that a private property regime necessitates the right to exclude and locates this authority on an individual. This is not necessarily the case with an exclusionary model. The difference is in the terms of exclusion and the location of the authority to exclude.

(A2K) is an issue of justice, development, efficiency.[13] The goal of A2K is to improve access to four kinds of knowledge in the knowledge economy:

1. Human knowledge e.g. education
2. Information e.g. news and data
3. Knowledge-embedded goods (KEG's) e.g. computer software, electronic hardware
4. Tools for the production of KEG's e.g. scientific and research tools, computer programs, and computer hardware.[14]

In light of these observations, one might quip: if knowledge is a commodity, then what is the price of a 'bottle' of knowledge? If this metaphor of a bottle of knowledge is disconcerting, then it is because the idea of copyright is less intuitive. Copyright operates to bottle up knowledge by creating an artificial scarcity, the more reason why it is imperative to examine its legitimising assumptions and narratives. In this regime, the price of knowledge is what the copyright holder charges in the marketplace given that copyright has the tendency to confer monopoly power. For many students in developing countries (DCs), this price is their development prospect.

This thesis is therefore concerned with the role of copyright law in facilitating access to education (A2E) as a human knowledge and developmental imperative. The focus is on Nigeria given its developmental setbacks in the area of A2E as indicated, amongst other indicators, by the number of OSC i.e. the principal objective is the examination of the role and challenges of copyright in facilitating A2E in Nigeria.

[13] A2K began as a social movement of diverse groups responding to different concerns in the information age—access to medicines, free-software, free culture, and farmer's rights—caused by the global expansion of IP rights. See Amy Kapcyznski, 'The Access to Knowledge Mobilization and the New Politics of Intellectual Property' (2008) 117 *Yale L.J.* 804; Gaëlle Krikorian and Amy Kapcyznski (eds.), *Ibid*. Substantial attempts have been made to place the A2K movement on a theoretical footing and to flesh out its theoretical commitments. For country-specific studies, see Lea Shaver (ed.) *Access to Knowledge in Brazil* (Bloomsbury, 2010); Rizk and Shaver (eds.), *Access to Knowledge in Egypt* (Bloomsbury, 2010).

[14] J.M. Balkin, 'What is Access to Knowledge' *Balkinization* (April 21, 2006) https://balkin.blogspot.com/2006/04/what-is-access-to-knowledge.html; See also Yochai Benkler, *The Wealth* of Networks: How Social Production Transforms Markets and Freedom (YUP, 2006)

II

Central Research Pursuits

The principal inquiry and leitmotif of this thesis is whether and to what extent copyright law can facilitate A2E in Nigeria. This is a pressing issue for the reasons highlighted above and further discussed in the subsequent sections. In order to facilitate the pursuit of this inquiry, this thesis will answer three questions that traverse the normative, theoretical, historical, practical and policy aspects of copyright law.

(i) *What legal and cultural norms inform the regime of copyright law, and what are the effects of these on A2E?*

In order to answer this question, this thesis will engage a historical and normative analysis. In examining the legal and cultural norms that inform copyright law, one of the issues posed is whether these norms are culturally neutral. This is important because if the norms informing copyright law are the product of a particular society or culture—in which case it is not culturally neutral—then it is questionable whether copyright advances the interests of all societies equally. Some interests might be undermined, and others promoted depending on how proximate they are to the cultural norm. The nature of these interests and how proximate or conducive they are to the concerns of A2E is critical to the issue of copyright and A2E which this thesis undertakes to examine. By tracing the origin and development of copyright law, it is then possible for this thesis to examine the norms and interests that have informed the development of copyright law as well as narratives that have been used to justify the regime. In order to aid this examination, the historical analysis will query the technologically deterministic account of copyright law that has led to the view that copyright is progress. Furthermore, the historical component will specifically account for the development of Nigerian copyright law, thereby providing insights into the concerns that have animated the evolution of Nigerian copyright law up till the present day.

On the normative side, the task of this thesis will be to proffer a normative framework that will better guide copyright law to promote development goals, in particular A2E. Given the plethora of normative accounts competing for copyright's justification and seeking to serve as organising frameworks, the normative focus/critique of this thesis is admittedly selective, though for solid reasons clearly outlined in chapter 2. In essence, the principal issue of the normative inquiry, which this thesis will answer, is whether the conception of copyright as an institution of wealth-maximisation informed by the efficiency theory of copyright law can give way on internal and external grounds to a normative account of copyright law as an institution of social change informed by a human development paradigm.

(ii) *Can Copyright Law be Integrated with the Constitutional Right to Education?*

In the preceding sections, the issue of institutional limits of copyright law was adverted to. Specifically, the concern is whether there are institutional limits necessitated by copyright as a market institution which impede copyright from facilitating social and development goals. This is important because if this is the case, then the reform of copyright law to promote development goals cannot effectively be achieved from within. In particular, the dominant legal approach of tinkering with copyright limitations and exceptions (L&Es) in order to facilitate social goals, although necessary, may not be sufficient. In this respect, one novel strategy explored in this thesis is the possibility of integrating copyright law with the constitutional right to education. The chief concern of this approach is whether the constitutional right to education as contained in the Nigerian Constitution can redraw the boundaries of copyright law and make it pervious to norms that are conducive to the issue of A2E. The advantages of this approach are obvious but there are also challenges, particularly whether the constitutional right to education under the Nigerian constitution is justiciable. This thesis will examine these challenges and whether it is feasible to integrate Nigerian copyright law with the constitutional right to education.

(iii) *What are the Legal and Policy Reforms Needed for a Development-oriented Copyright Law that Facilitates A2E in Nigeria?*

The principal inquiry of this thesis is not complete without an assessment of the package of rights and obligations afforded by Nigerian copyright law. It will examine the package of L&Es under Nigerian copyright law with the specific aim of ascertaining how they promote or impede the developmental goal of A2E. Since Nigeria is party to various international treaties that constrain the national policy space of copyright legislation, this thesis will as a primary issue navigate through the relevant treaties in an effort to map out the package of L&Es that are relevant to the issue of A2E. By touring the landscape and content of L&Es in the international regime, it is possible to find out if and to what extent Nigeria has taken advantage in the implementation of these L&Es and whether there is room for improvement.

Similarly, the objective of this thesis is hardly accomplished without a discussion of the policy aspects of Nigerian copyright law. Copyright policy is critical, but sadly this foundational aspect of copyright law is hardly adverted to in Nigerian copyright scholarship. The commitment to foundational issues in this project requires that a host of issues—revolving around and impacting on how Nigeria formulates a development-oriented copyright policy—be explored. For example, one important issue is the examination of the dominant understanding of copyright amongst Nigerian scholars and policymakers, and how this impacts copyright policy at a general level, and A2E specifically. If the understanding is narrow and uncritical, then it will obviously contract the copyright policy space. One of the ways this project will unpack these understandings is to examine the disposition of the NCC and its organisational framework. The chief concern of this analysis is whether Nigerian copyright policy makers are armed with a richer, descriptively accurate and normatively attractive, understanding of copyright that enables them to lay the foundation for a development-oriented copyright policy. In the quest for this richer understanding, this thesis will attend to two of its central insights which are that copyright works are sites for internalising social and economic values; and that cultural works, rather than information goods, are principally the subject matter of copyright law.

III
Copyright and A2K: Institutional and Thematic Linkage.

The terms “access to knowledge” and “copyright” have continued to gain increased salience simultaneously in academic and non-academic discourse. For example, an interesting result, displaying the increased simultaneous usage of these terms over time, is obtained when both terms are searched on Google Books Ngram Viewer (GBNV), which displays in a graph form the usage of phrases over time in a corpus of books.[15] The same is true for “access to education”.[16]

Many questions however arise given this increase in the usage of these terms. When we say copyright and access to knowledge, we know what we mean. At the basic descriptive level, we mean that copyright has an effect on access to knowledge. But we are also making a normative statement that copyright should have a role in facilitating access to knowledge. It is this latter sense that this thesis is concerned with. The question though is why should copyright law be burdened with the demands of access to knowledge *and* is it the appropriate institution for dealing with these demands? The preceding sections have assumed that copyright is the appropriate institution, or at least one of the institutions, for dealing with concerns of access to knowledge without any justifications.

However, the thematic linkage between copyright and access to knowledge as shown on GBNV is not sufficient to show that copyright should be concerned with the demands of access to knowledge. Nor do the concerns underpinning the demands of access to knowledge necessarily imply that copyright must be the institution for addressing them. There is an open case for insisting, as some suggest, that copyright is a market institution and as such should not be burdened with social and public concerns of access to knowledge. The goal of copyright, it is thought, as a private property regime is to maximise wealth. While such arguments need not be dismissed, they are erroneous. First, it does not follow that if an institution is market-

[15] Google Books Ngram Viewer, “access to knowledge, copyright” (Accessed 3 December, 2019)
[16] Google Books Ngram Viewer, “access to education” (Accessed 3 December, 2019)

centric then it should not be made to account for social and public concerns. The real issue should be in investigating about the limits of this market institution in addressing social issues, and in this copyright should be understood as a tool rather than a toolkit. Second, those who peddle such arguments seem committed to what I refer to as 'IP parochialism' i.e. creativity and innovation are simply about IP/copyright.[17] This is however a mistaken view because creativity and innovation require governance. And governance is neither market-centric nor government-centered. In fact, governance requires and involves the multiplicity of institutional mechanisms (market, government, public-private partnership etc.) and norms in addressing issues common to stakeholders. Similarly, issues of access to knowledge are about governance and require a mix of mechanisms, market and non-market, to address those concerns. The important point is this: access to knowledge concerns neither fall outside the domain of copyright nor are they only effectively dealt with by the copyright regime.

IV
Copyright, A2K and Education: The Nigerian Case

Much of the discussion so far has centred on access to knowledge without specifying why it is necessary i.e. what are the reasons for the pressing demand of access to knowledge? The answer is not because we want A2E since education is more of a content of A2K than a justification. In the following paragraphs, I outline briefly the concerns underpinning the commitment to access to knowledge and, specifically, why A2E in Nigeria is important.

The preceding discussion has centred around the language of access to knowledge, but this project is not informed by A2K theory.[18] More accurately, this thesis has more in common with the concerns animating A2K discourse than its theoretical

[17] This IP parochialism is evident in international conferences. For example, in a WIPO organised conference on the promotion of creativity and innovation in Africa, one cannot help but think, by looking at the conference programme, that all roads leading to creativity and innovation are paved with IP laws and institutions. See "African Ministerial Conference 2015: Intellectual Property for an Emerging Africa November 3-5 (Dakar, Senegal)" https://www.wipo.int/meetings/en/2015/african_ministerial_conference.html

[18] A2K and access to knowledge as used in this introductory part are not interchangeable. The former is used to signal the movement that gave birth to it and its theoretical commitments; whereas the latter signals nothing more than that access to knowledge is a value. In other words, the former is access to knowledge as a social movement and theory, and the latter, access to knowledge as a value.

commitments. For example, A2K still speaks in the dominant terms of IP, preferring to see the goal of copyright as efficiency.[19] For A2K theorists, access to knowledge is a matter of efficiency which can be achieved with a balanced copyright system. But as Okediji states, "[t]he critical question is not simply whether IP is balanced or mediated in ways that facilitate access to knowledge generated in the North, but whether the values embedded and reflected in the IP system can give way to cultural norms that differ in form and operation from those that have long characterised global IP lawmaking."[20] Given A2K's acceptance of the dominant normative vision informing copyright, it is not surprising that discourses of development are, if anything, ancillary to the movement's agenda.[21] And by resigning itself to the terms in which copyright law is packaged, particularly the efficiency theory of copyright, A2K is open to similar criticisms that plague economic analysis in general. Furthermore, and since A2K's main concern is for a balanced copyright system, the dominant strategy is to fine-tune copyright L&Es in order to generate an efficient copyright law. As pointed out above, a sound copyright that facilitates A2E requires more than tinkering with flexibilities. Finally, if the goal of efficiency is elusive then the achievement of A2K's concerns, no matter how praiseworthy, is already fraught with difficulties.

But more importantly, access to knowledge is not just a matter of efficiency i.e. we do not want access to knowledge simply because it will enable the production of more copyright works. Those who work under the A2K banner see access to knowledge in economic terms, as a matter of deadweight loss and dynamic efficiency. There are several issues with characterising access in this manner. First, copyright law impacts on the lives of people and so to see the issue of access to knowledge as a technical issue of efficiency trivialises the issues at stake and removes them from the web of human relations. Second, production of more copyright works does not improve the lives of individuals unless there is access. Lastly, this way of characterising the issue of access to knowledge is more helpful to

[19] See R.L. Okediji, 'IP Essentialism and Authority of the Firm' (2008) 117 *Yale L.J. Pocket Part* 274, 277; Amy Kapcyznski, 'Linking Ideas to Outcomes: A Response' (2008) 117 *Yale L.J. Pocket Part* 289, 291.
[20] Okediji, *Ibid*, at 279
[21] Kapcyznski, *Supra*. n.19, (Accepting that "A2K is oriented more towards the terms of IP law than to discourses of development."; *Cf.* Lea Shaver, 'Intellectual Property, Innovation and Development: The Access to Knowledge Approach' https://ssrn.com/abstract=1437274

developed countries than to DCs where the issue of access is more of a development imperative. Instead of understanding access to knowledge as an issue of efficiency, the approach which informs this thesis is that knowledge is a critical infrastructure for development[22], and particularly so for DCs with a host of development problems.

In Nigeria, A2E is a critical issue and a development concern. The number of OSC is on the rise coupled with poor performance in several human development indicators (HDI). This poor performance in HDI is correlated with poor A2E. And this is exacerbated by the fact that Nigeria has become the world poverty capital, surpassing India by the number of people on extreme poverty. While the issue of A2E requires a complex mix of solutions, the institution of copyright is certainly important in facilitating A2E. Nigerian copyright scholars and policy makers pay little attention to the role of copyright in facilitating or hindering this development imperative, instead preferring to adopt a parochial perspective of copyright that focuses on profit maximisation. The hope is that this thesis will contribute meaningfully to the growing work on the relationship between copyright and development by enabling Nigerian policy makers as well as copyright scholars understand the broader implications of copyright and specifically its role in facilitating A2E.

V
Methodological Framework: Beyond Law

This study is primarily a desk research relying on existing data and resources in order to address the issues posed by this research.

Apart from issues of interpretation, the subject of copyright law and A2E is inherently an interdisciplinary project. The discipline of law alone cannot provide answers to the difficult issues posed by copyright law. Accordingly, this project cuts across different disciplines in order to unravel the tangled issues implicated by this project: economics, development studies, and philosophy. This “mixing” of disciplines is a

[22] See Valentina Vadi, ‘Sapere Aude! Access to Knowledge as a Human Right and a Key Instrument to Development’ (2008) 12 International Journal of Communication Law and Policy 345.

key strength of this research because it enables the researcher or reader to switch vantage points that are otherwise not open to them. Interdisciplinarity offers a view that is not open to the lawyer qua lawyer. More fundamentally though, and as noted, this project *requires* interdisciplinarity. For example, in what sense is it possible to investigate the cultural norms informing copyright law without a critical historical account? Furthermore, the nature of this project and the issues it raises require a normative analysis. Chapter 2 is inherently normative and theoretical. In order to provide a richer normative frame that guides the reform of copyright law to better facilitate A2E, it is necessary that the normative critique exits the paradigm of law and interacts with other disciplines.

Interdisciplinarity however does not require that we dispense with legal methodology. As such, at the heart of this project is a doctrinal method relying on primary and secondary sources. At the primary level, national legislation and international treaties on copyright law are examined as well as case law. Specifically, chapter 4 is primarily doctrinal, examining and interpreting international treaties and national legislation on copyright that are germane to the issue of A2E. In other areas, a comparative approach to legal analysis is employed to examine issues, particularly where it is considered that other jurisdictions might provide a more illuminating analysis. Finally, the examination of legal literature and related materials, such as policy documents, as secondary sources is extensively utilised throughout the body of this project.

VI
Limitations

This study is not a comprehensive inquiry on copyright law and A2E in Nigeria. Aside the inevitable constraints that follow from a study of this nature, the limitations of this project follow mainly from its commitment to examine foundational issues which circumscribe the scope of this thesis, and the unavailability of resources.

Regarding scope of this thesis, some difficult decisions were made regarding the content. For example, some issues which impact on copyright law and A2E were either not discussed or only mentioned in passing. The open access regime and how it can be leveraged to facilitate A2E is only discussed in passing. One reason for this is the focus on copyright law in the analogue world in this project, also an unavoidable limitation due to the scope of the thesis. Clearly, this is not a suggestion in any way that digital copyright is less relevant to the issue of A2E but rather one of the limitations in this thesis that follow as a result of the socio-economic peculiarities of Nigeria. The other reason, as mentioned above, is the commitment to thrash out what this thesis considers the foundational issues. Proceeding from this standpoint, the OA regime is an application or outcome of the foundational ruminations. Also, this thesis leaves out discussions on the issue of collective licensing and how it can facilitate A2E, except where it was discussed in passing in the context of Nigerian universities. Not discussed, also, are institutions that facilitate A2E, in particular libraries, and the exceptions available to them. These specific issues would enlarge the scope of this thesis. The good news however is that there is still a lot of work to be done by researchers who wish to investigate the relationship between copyright law and A2E in Nigeria.

On the resources side, the major limitation has been the lack of Nigerian cases in this area of law in general and that are relevant to the issue of A2E. The jurisprudence on copyright law in Nigeria is only at a developing stage and for this reason many of the discussions had to rely on one's considered interpretation of the relevant legislation while taking into account relevant law in other jurisdictions. Finally, the difficulty in obtaining historical data and policy documents pertaining to copyright law is a limitation of this project.

VII
Structure

This project has six (6) chapters.

Chapter 1 is concerned with the historical evolution of copyright law and its development in Nigeria. It is not a comprehensive treatment on the history and

development of copyright law. The immediate objective rather was to investigate the validity of those assumptions and narratives that have underpinned copyright law, particularly the issues of incentive and progress. Chapter 2 on the other hand offers an internal critique of the law and economics of copyright as it provides the dominant justification and normative content of copyright law. By offering this critique, the chapter finally proceeds to articulate a development vision of copyright law.

Chapter 3 moves away from the foundational level in order to deal concretely with the issue of Nigerian copyright law and A2E. The crux of the chapter is whether it is possible to “exit” copyright law, given its institutional limits, and look for external norms at the national level that can inform it regarding the generation of rules and interpretation in order to facilitate A2E in Nigeria. The chapter also discusses the value of education and the socio-economic realities of Nigeria.

Chapter 4 proceeds further by examining the issue of A2E from the angle of international copyright law and whether the package of L&Es afforded by this regime has been properly implemented by Nigeria in order to facilitate A2E. Amongst other issues, it queries whether the package of L&Es under Nigerian copyright law allows for the creation of course packs, a significant resource for facilitating access to education in Nigerian tertiary institutions.

Chapter 5 returns to the foundational level by examining the policy landscape of Nigerian copyright law. It queries what can be done at this level to align Nigerian copyright law and policy with development.

Chapter 6 concludes.

Chapter 1: A Critical History of Copyright and its Evolution in Nigeria

The present contains nothing more than the past, and what is found in the effect is already in the cause.[*]

1. Introduction

This chapter will critically discuss the history and development of copyright in general and its evolution in the Nigerian legal system in particular. The principal aim of this inquiry is threefold: an investigation into the interests, ideas and concerns that have shaped and continue to shape the development of copyright law; the determinants of the origin of copyright and literary property; and, whether the development of copyright law is apolitical and/or acultural.

These questions matter significantly, especially so for an integral part of this thesis which focuses on copyright and A2E. For example, the narrative that copyright is necessary for the optimal production of cultural works becomes very shaky upon examination of the history of cultural production. Also, an inquiry into the history of copyright renders the dominant technologically deterministic account of literary property equally shaky. For if this unidimensional and technologically deterministic account of the origin of copyright is true, then the adoption of copyright laws in DCs is an issue of catch-up and progress i.e. it was only a matter of time before printing technologies reached these technologically backward countries and then literary property thereafter. A further implication is that any attempt to tinker with the trajectory of the existing copyright regime would be considered as backwardness since the emergence of copyright law is considered a natural result of the invention of the printing press. As we will see, such narratives not only are incorrect but also

[*] Henri Bergson, *Creative Evolution* (Henry Holt & Company, 1911).

devoid of cultural and social context. In fact, the story of the origin of copyright law is complex and cannot be hinged on a one-dimensional account. One thing is certain:

> Copyright grew out of a complex of social and political factors unique to Western Europe during the past thousand years. The decline of the Catholic church as the centre of social and political life, along with the corresponding rise of a merchant class during the early stages of capitalism, influenced the development of copyright as much as the economic implications of the printing press.[1]

On this brief but critical survey of the history and origin of literary property and production, several arguments will be canvassed. First, the regime of copyright law did not emerge because of the invention of the printing press. In fact, the first statutory copyright Act only came into force at the beginning of the 18th century, more than 200 years after the invention of the printing press in Europe. At this time several factors had converged—economic, technological, and cultural—to give rise to a nascent copyright regime. Important amongst these factors are the commodification of book production and the Western concept of the person enabled by the Enlightenment. Attention to these factors inevitably leads to the appreciation that copyright is a distinctively Western product. Second, the history of copyright and cultural production shows that the incentive rhetoric has largely been exaggerated. There has always been abundant cultural production without literary property. It therefore begs the question: if there has been evidence of abundant creativity prior to literary property, then why do we have copyright law?

The chapter proceeds as follows. The first section discusses through an imagined conversation, between a student and a professor, the idea of copyright law highlighting briefly its nature, how it operates, and some of the vexing issues it raises. It then progresses to discuss in more detail an issue highlighted in the conversation i.e. conceptions of ownership. Copyright law projects a particular conception of ownership. But underlying different conceptions of ownership are different conceptions of a person. By examining different conceptions of the person and their assumptions, the section forces us to realise that copyright law is a product of a particular culture which can be re-thought. The second section examines the

[1] Matt Jackson, 'From Private to Public: Reexamining the Technological Basis for Copyright' (2002) 52(2) Journal of Communication 416, 418.

history and origin of copyright law from before the invention of the printing press up to the period that ushered the decline of the Stationers' Company. The third section discusses the evolution of Nigerian copyright law. The last concludes.

2. Copyright Law: A Historical Development.

The tenor of academic and general commentaries on copyright law in Nigeria would seem to indicate that the idea of copyright, though historically and culturally contingent, is a given in the Nigerian legal system and philosophical tradition, or that copyright law constitutes a neutral set of rules i.e. the rules that constitute the regime of copyright are not culturally interwoven, not embedded with assumptions, or opaque to views about the creative process. Nothing could be further from the truth.[2] And this is because there are few studies that trace the historical development of Nigerian copyright law.[3] Many discussions in Nigerian copyright law follow a formalistic approach focusing on the internal logic of the law or gaps in copyright law. While this is a valuable approach to the study of copyright law, focusing on it might rob us of the benefits of understanding the dynamics, assumptions, interests and goals that have shaped copyright law. Many misunderstandings and policy formulations follow as a result of the misinterpretation of copyright history and development, particularly its aims and goals. For example, one author considers that "[c]opyright law has always, since its onset, included recognition of the objective of ensuring public access to works."[4] But it is not at all incontrovertible that the Statute of Anne, the first copyright statute, had this objective. What is clear is that the first copyright statute was a trade regulation promulgated to deal with the problem of monopoly.

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[2] Embedded in copyright are assumptions about the creative process and the nature of creativity. The narrative that emanates from copyright law is that monetary incentives are necessary to induce creativity and that the primary actor in the creative process is the individual genius who creates something from nothing. These assumptions are the products of a particular culture and in fact have been put into serious doubt even by artists. See Jerry Saltz, 'How to Be an Artist: 33 Rules to Take you From Clueless Amateur to Generational Talent.' *Vulture*, November 27, 2018 https://www.vulture.com/2018/11/jerry-saltz-how-to-be-an-artist.html

[3] For an exception, see Kunle Ola, 'Evolution and Future Trends of Copyright in Nigeria' (2014) 2 *Journal of Open Access to Law* 1. [Ola's study, though a description of the evolution of Nigerian copyright law, does not discuss in depth, except for standard narratives, the history and origin of copyright law.]

[4] Helen Chuma-Okoro, 'Nigerian Copyright Reform and Implications for Access to Teaching and Learning Materials' (2018) 22 African Journal of Information and Communication 1 at 6.

It is therefore important to examine carefully the origin and development of copyright law.

A. The Nature and Idea of Copyright

I. A Conversation.

The concern here is not to examine the goals or objectives of copyright law but rather to critically reflect on how the copyright regime operates. To set the stage, imagine a conversation between a copyright owner, Professor Bob, and a Nigerian student, Emeka, who purchases a textbook Bob holds the copyright to.

Emeka: I enjoyed reading your textbook on African philosophy.

Professor Bob: Thank you Emeka. Did you find anything interesting?

Emeka: The concept of ownership in African societies and the relationship between the individual and society.

Professor Bob: Alright! My concern was for students to understand that institutions of property are socially constructed and there exists different conceptions of ownership.

Emeka: I did grasp that. I am looking forward to hearing the thoughts of other students once they've read it.

Professor Bob: Certainly! They should purchase copies from the university bookshop with their university cards. There is a 10% discount.

Emeka: That is great! But as the course representative I think there will be no need for that. I will just make photocopies of relevant portions of the book and distribute it to the students. They will only pay for the cost of making copies.

Professor Bob: Well, you cannot do that because the book is copyright protected.

Emeka: I don't understand. I am the lawful owner of the book as I purchased it from the bookshop.

Professor Bob: Yes, I know. But what you are talking about is the material embodiment i.e. the paper which the text is written on. You own the paper but not the text. Copyright is not concerned with the material

embodiment; it is concerned with the immaterial although in its expressed form. You may however sell your copy to someone in the class if you are done with it. Or even choose to destroy your copy if you wish.[5]

Emeka: Well I can just ask your permission to make photocopies of the work?

Professor Bob: That's possible. But I can't legally grant you permission because even though I am the author, my publisher holds the copyright, having transferred it to them.

Emeka: So this copyright is a property right. But does it not prevent me from destroying the book? I am sure the law prevents you from destroying my wristwatch which I have ownership rights to.

Professor Bob: What you are destroying is your legally purchased *copy* of the text rather than the text itself. Put more accurately, it is the material embodiment of the text and not the text itself. In fact, given the immaterial nature of copyright's subject matter—in this instance the literary work—it is not possible to destroy the text. Once you have lawfully purchased a book you can do almost anything with it such as tearing it, destroying it or selling your copy but you cannot, amongst other things, make copies of the book as copyright is primarily the right to make copies of a work.

Emeka: I suppose the intangibility of this protected matter may cause problems for this area of law and particularly our notions of ownership and property.

Professor Bob: Well problems do arise in the application of the law to fact-specific situations, as is normal in other areas of law. But what do you mean when you say the intangible nature of the subject matter may cause problems for our notions of private property. Do you mean the intangibility is not a right fit for private property?

Emeka: Yes, when we apply the principles of private property we run into difficulties. You say you own the copyright to the text by which you mean a property right. But in what sense are you in possession of or in control of the text if, but for the law, you may not exclude me from making photocopies of this text and distributing it to my course mates, which also to point out doesn't subtract from your use. Suppose, for example, you are the author of a

[5] This principle was established in *Pope v. Curl* (1741) 2 Atk 342. It concerned the unauthorised publication of Alexander Pope's private correspondence by Edmund Curl, a bookseller. Pope argued that he had the right to publish the letters as the author even though he was not in possession of them. Curl retorted that being in lawful possession of the letters he had the right to publish it. Lord Chancellor Hardwicke found in favour of Pope, distinguishing between ownership of the physical document, which belonged to Curl, and the right to authorise the first publication of the letter, which remained with the author. For a discussion, see R. Deazley, 'Commentary on Pope v. Curl (1741)' (2008) in L. Bently & M. Kretschmer (eds.), *Primary Sources on Copyright (1450-1900)* http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_uk_1741a. The act of destroying a copyright work may however implicate the moral right of the author, specifically the right to integrity, if it is done in public. But even for those countries that have robust moral rights regime, the right of integrity will only be implicated if the work is altered or modified. On moral rights, see M.T. Rajan, *Moral* Rights: Principles, Practice and New Technology (OUP, 2011); Elizabeth Adeney, The Moral Rights of Authors and Performers: An International and Comparative Analysis (OUP, 2006)

manuscript on the sociology of technology and you have deposited the only copy in a local library. Suppose furthermore I break into the library and dash out with the copy. Applying your distinction between the material and the immaterial, to what extent can it be said I have possessed the text in exclusion of you given that you are still in possession of the original manuscript and even if you did not the ideas contained in the manuscript are still impressed in your mind? Certainly, I have not stolen your mind.

Professor Bob: I understand your concern. Indeed, many before you have expressed such concerns. It goes to the nature of the subject matter of copyright i.e. whether there can be private property rights in texts. As you can tell, the law already treats it as such so the question is whether there is a justifiable basis for that. I doubt the debates centring on this issue will be resolved anytime soon but a study of the history of copyright will help you understand the factors—technological, economic, cultural, philosophical, and social—that have shaped copyright law as we have it today.

Emeka: Granted the law treats it as such and we may also agree for the purposes of argument that it is possible to have exclusive ownership rights in texts. Can you specify the rights conferred by this copyright and if texts are exhaustive of the subject matter of copyright?

Professor Bob: Yes. As you have probably figured out, copyright is concerned with creative works of the human mind and so texts, which fall under the category of literary work, are only illustrative of the subject matter.[6] apart from literary works, examples include musical works, sound recordings, audio-visual works, and artistic works.[7] In regard to the exclusive rights granted by the copyright regime, it will depend on the country but in general most jurisdictions will grant the exclusive rights to authorise the reproduction, publication, distribution, translation and performance of the copyright work. These are economic rights and absent any exceptions, the doing of any of these acts without the authorisation of the copyright owner will constitute a copyright infringement. There are also moral rights based on the author's right tradition of civil law countries. The moral rights encompass the rights of attribution, integrity and divulgation.

Emeka: Alright. I think I am beginning to get the gist. I suppose it is an area of law that regulates information and I would argue that a strong case has to be made for private property rights in this area.

Professor Bob: There you go again. Why do you suppose a strong case has to be made for private property rights in the subject matter of copyright or

[6] Copyright protection is not available for works created by non-humans i.e. animals. See *Naruto v Slater* Case No. 16-15469 (9th Cir. April 23, 2018) in which the court held that animals cannot hold copyright, even though it was not disputed in the present case that the animal, a crested macaque, took the picture that was at issue. This does not apply to companies or corporations as in virtually all legal systems companies are recognised as legal persons.

[7] In some, especially civil law, jurisdictions sound recordings are protected as "neighbouring rights" rather than copyright. Under Nigerian and US copyright laws, they are protected as copyright.

information as you suggest?

Emeka: Well let us use your textbook as an example. Are you suggesting that you are the originator of every idea presented in the book?

Professor Bob: Certainly not. I have built on the ideas of others. As the late renowned scientist Sir Isaac Newton observed, "if I have seen further, it is by standing upon the shoulders of giants."[8]

Emeka: So how can you have a property right in your textbook if the ideas contained in it are not original? And even if some of the ideas are original how do you ascertain the boundary between your ideas and those that you have built on? The point I make is this: if one cannot sustain a property right in ideas, which are the building blocks of your textbook, then on what basis are you preventing me from making copies of your textbook that I have lawfully purchased? It seems to me however that the idea of copyright law is based on economic considerations. For instance, if I reproduce your book and distribute it to a number of students then I would have deprived you of some sales that should have happened had the students bought the book. In fact, the other rights you have mentioned indicate instances where the copyright owner can derive economic value from his work.

Professor Bob: You raise important issues Emeka. Let me quickly address a few of them. A fundamental principle in copyright law is that it does not protect ideas but rather the expression of ideas. And as you have rightly noted, this important principle is a recognition of the fact that ideas are building blocks for everyone's creativity and should remain free for all. So there is no property right in ideas but rather in the original expression of the idea.

Emeka: Interesting. It even gets much complex. Separating idea from its expression is like separating the body from the spirit. At what point does the idea lifted from the work not become mixed with the expression? It seems to me this fundamental principle of idea/expression is an attempt to salvage an area of law that has made it possible to have property rights in information.

Professor Bob: Are you saying there should not be private property rights in creative works of the mind?

Emeka: Well let me go back to an issue I have mentioned but you did not address. I stated earlier that copyright law seems to be based on economic considerations. To put it more precisely, the rights granted by copyright regime seem to be about capturing economic value. But it is also the case that there is social value to be captured when people engage in the acts regulated by copyright. In fact, it is precisely because the subject matters of copyright have social value—which may be captured via translation, reproduction, dissemination, performance etc.— that the copyright owner

[8] Isaac Newton, Letter to Robert Hooke (15 February 1676) 1686.

seeks to control these acts. Let me now restate my thoughts in several propositions. The subject matters of copyright have both economic and social value. The social value however precedes the economic value because even though the latter is the basis of copyright regime, the latter would not be possible without the former. There is a possibility that the social value of the copyright work may not be realised due to the rights conferred by copyright. How do we make sure that both values are captured?

Professor Bob: I don't think copyright law is based entirely on economic considerations. There are also moral arguments for the existence of copyright but I would agree that the development of copyright has been influenced substantially by economic considerations. Regarding the other issue you have raised concerning the economic and social values of copyright works, can you define what you mean by social value. In what way is it different from economic value?

Emeka: By social value I mean those values that may not be captured through the price system of the market. Essentially non-market values. On the other hand, economic value is captured in the price system through willingness and ability to pay.

Professor Bob: You seem to say that social value is the sum of non-economic values. Let's assume that we are able to separate economic value from social value, the issue you mention is solved by the exceptions and limitations provided in the copyright regime. For example, fair use an exception in copyright will enable the economic and social values of a copyright work to be realised. I think we would have to continue this discussion at another day as I have a class now.

Emeka: Alright. Thank you for your time on this and I will ask other students to buy a copy of your book unless we have the permission to make reproductions.

II. Beyond Conversations: A Third-Party Perspective.

a. Copyright's Nature

The conversation above has sought to highlight the workings of copyright law and some of its vexing issues. Copyright is an area of law that is concerned with artistic and literary property. In this area of law, creative works of the mind— such as novels, poems, music, paintings, photographs, films—and even informational works like maps and charts are protected. By protection, what is meant is that an owner of copyright in the types of work recognised under the law can exercise any of the

rights granted by the copyright regime in order to prevent the work from being used in the various ways stipulated by the law. As is clear from the above conversation, it is not necessarily the case that the author of a copyright work is also the owner of copyright since the legal rights may be alienated and ownership is divisible i.e. the author of a copyright work may limit the scope of the grant in her copyright interest to a particular territory, period, or time.[9] A work must be original for it to be protected.[10] The originality criterion however is low and requires only independent creation i.e. that the work is not copied, coupled with a showing of some creativity in some jurisdictions.[11] In reality, almost every work passes the originality threshold putting into question the meaningfulness of the originality requirement.[12] Coupled with the prohibition on formalities as a condition for the existence of copyright[13], it is therefore the case that any textbook or learning material is copyright protected unless the copyright term expires in which case the work becomes part of the public domain. Given that textbooks are constantly revised, thereby giving rise to another copyright in the revised editions, it is possible that they may never fall into the public domain and even when they do, the value to users would be very little due to the gaps in knowledge between the time the textbook was written and current knowledge. This brings in to focus the issue of what should be the appropriate copyright duration for literary works taking into account the concern of A2E.

b. Individualism and 'Ubuntuism': Concepts of the Person and Copyright.

Three important issues are touched upon in the above conversation between professor Bob and Emeka. First is the effect of copyright on access to learning materials (ALM) in higher institutions. Second, whether private property rights in the subject matter of copyright can be justified. And third, the issue of different

[9] For e.g., see s.10(1) of the Nigerian copyright Act C28 2004 and also s.10(2) which states that "[a]n assignment or testamentary disposition of copyright may be limited so as to apply to only some of the acts which the owner of the copyright has the exclusive right to control, or to a party only of the period of the copyright or to a specified country or other geographical area."

[10] See e.g. Section 1, Nigerian Copyright Act Caps C28, 2004.

[11] On the originality criterion in US, see *Feist Publications Inc. v Rural Telephone Service Co. Inc*. (1991) 499 US 340; CCH Canadian Ltd v Law Society of Upper Canada (2004) S.S.C 13 (In Canada); Infopaq International *A/S v Danske Dagblades Forening* (C-5/08) [2009] E.C.R. I-6569 (In Europe).

[12] See Elenora Rosati, 'Why Originality in Copyright is Not and Should Not be a Meaningless Requirement' (2018) 13(8) *JIPLP* 597.

[13] In line with the Berne convention of which Nigeria is party to, the only requirement for copyright eligibility is that the work be original and fixed in a definite medium of expression i.e. copyright protection is automatic. See Berne Convention for the Protection of Literary and Artistic Works (adopted September 9, 1886, entered into force on December 4, 1887, and revised July 24, 1971) 828 U.N.T.S 221, Art 5(2).

conceptions of ownership. The first issue will be dealt with extensively in two subsequent chapters. The two latter issues, though separate, are linked. Viewed together, they bring into sharp focus an understanding that the regime of private property rights is only but a conception of ownership, which has shaped the development of copyright, and accordingly leaves open the possibility that there exist alternative conceptions that could underpin the regulation of creative works of the mind. This is important. One of the principal debates in copyright is the issue of whether the extension of private property rights into the realm of creative works of the mind can be justified. Many academic commentaries on copyright can be seen as efforts to grapple with this issue. In these debates, liberal political theories have always dominated the discourse thereby defining and limiting the epistemic boundaries of our conceptions of ownership. Accordingly, it is rarely questioned whether other conceptions exist outside the liberal ontology. The reason is that at the core of liberalism is a unique conception of the person represented as universal and acultural. Underlying this unique conception are assumptions that necessarily presuppose a particular conception of ownership. Given the supposed universality of this conception, other conceptions of the person are buried outside the language of copyright discourse thereby entrenching a linear account on the development and trajectory of copyright. As we shall see, the African conception of the person advances one of the principal claims in this chapter that copyright, rather than being seen as progress, is a function and product of culture.

The other issue raised in the conversation of whether there can be a property right in the subject matter of copyright is as old as the institution of copyright and, given the nature and history of the debate, it is unlikely it will be resolved, if at all, in the near future.[14] As such, a more useful exercise, for present purposes, is to examine how the idea of copyright is bound up with a culture that prefers a specific conception of ownership underpinned by a particular conception of the person.

The idea of copyright law is not intuitive, and this is not surprising. The ideas informing copyright law are representative of a particular culture, particularly the

[14] Anonymous, An Enquiry into the Nature and Origin of Literary Property (Flexney/Hoburn, 1762); Anonymous, A *Vindication of the Rights of Authors* (Griffiths, 1762); Justin Hughes, 'A Short History of Intellectual Property in Relation to Copyright' (2012) 33 *Cardozo L.Rev.* 1294.

liberal world view or ontology founded on the Enlightenment tradition.[15] To think otherwise is to consider copyright law ahistorical and devoid of context. Specifically, inbuilt in the principles and regime of copyright law are statements about the concept of a person, his relationship to society, and the idea of ownership. These statements are not universal but rather embody a particular set of values and assumptions.[16] Furthermore, implicit in the copyright regime are assertions about creativity and the creative process. Viewed together, these statements and assumptions constitute what has been termed "possessive individualism."[17] According to Macpherson, who coined the term and provided a critical account of the theory running from the thoughts of Hobbes, and the Levellers and Harrington, to Locke, the core commitment of liberal theory is its possessive assumption which lay in "its conception of the individual as essentially the proprietor of his own person or capacities, owing nothing to society for them. The individual was seen neither as a moral whole, nor as part of a larger social whole, but as an owner of himself."[18] The main assumptions of possessive individualism amongst others, which the author identifies clearly and fully in the work of Hobbes, are (i)"[t]he individual is essentially the proprietor of his own person and capacities, for which he owes nothing to society"; (ii)"[h]uman society consists of a series of market relations"; and (iii) that "[p]olitical society is a human contrivance for the protection of individual's property in his person and goods, and (therefore) for the maintenance of orderly relations of exchange between individuals regarded as proprietors of themselves."[19] Proprietorship presupposes private property.[20] Indeed, this is evident from Locke's labour theory in which he identifies the possession of the self as the basis of private property rights. According to Locke, "every Man hath a Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are rightfully his."[21] As one commentator carefully notes,

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[15] On the Enlightenment see William Bristow, 'Enlightenment' in E.N. Zelta (ed.) *The Stanford Encyclopedia of Philosophy* (Fall 2017 Edition) https://plato.stanford.edu/entries/enlightenment/; Roy Porter, The Enlightenment (Macmillan Press Ltd.; 1990); Louis Dupre, The Enlightenment and Intellectual Foundations of Modern Culture (YUP, 2004).

[16] Alpana Roy, 'Copyright: A Colonial Doctrine in a Postcolonial Age' (2008) 26(4) *Copyright Reporter* 112; M.D. Birnhack, *Colonial Copyright: Intellectual Property in Mandate* Palestine (OUP, 2012). Daniel Burkitt, 'Copyrighting Culture-The History and Cultural Specificity of the Western Model of Copyright' (2001) 2 *IPQ* 146.This also extends to the international copyright regime. M.A. Hamilton, 'The TRIPS Agreement: Imperialistic, Outdated and Overprotective' (1996) 29 *Vand. J. Transnat'l L.* 613.

[17] C.B. Macpherson, The Political Theory of Possessive Individualism: Hobbes to Locke (OUP, 1962)

[18] *Ibid*. at 3

[19] *Ibid*. at 263-264

[20] Ibid.

[21] John Locke, *Second Treatise of Government* (ed. by C.B. Macpherson; Hackett Publishing Company, 1980)

"[f]rom ownership of the physical fruits of agricultural and other labours, it is not a long step to ownership of the incorporeal fruits of intellectual labour."[22] In a nutshell, the liberal commitment to the theory of possessive individualism provides the foundation for incorporeal property rights. In fact, one important commentator in his study of the history of British copyright law states that the literary-property question on one level *"was a contest about how far the ideology of possessive individualism should be extended into the realm of cultural production*.[23]

To be clear though, even though possessive individualism entails private property it does not follow that private property requires possessive individualism.[24] The point is that a different world view or ontology would most certainly generate a regime of property rights different from the one that springs forth from possessive individualism. In this respect, it is useful to point out that the African traditional thought on the conception of a person differs significantly from Western liberal individualism.[25] Mbiti sums up the African view of the person in the statement: "I am because we are, and since we are, therefore I am."[26] This statement is valid ontologically and epistemologically. The existence of the individual is not separable from the community. As Mbiti states:

> In traditional life, the individual does not and cannot exist alone except corporately. He owes his existence to other people, including those of past generations and his contemporaries. He is simply part of the whole… Whatever happens to the individual happens to the whole group, and whatever happens to the whole group happens to the individual.[27]

This interdependence between the individual and community is evident in different regions in Africa,[28] and is best captured in the Ubuntu concept which originates from

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[22] J.C. Ginsburg, 'Copyright' in Dreyfuss & Pila (eds.) *Oxford Handbook of Intellectual Property* (OUP, 2018); *Cf*. Justin Hughes, 'The Philosophy of Intellectual Property' (1988) 77 *Geo. L. J.* 287 [Discussing the Lockean justification for IP]

[23] Mark Rose, *Authors and Owners: The Invention of Copyright* (HUP; 1993) 92 [Emphasis added.]; Burkitt, Supra. n.16.

[24] See William N.R. Lucy & F.R. Barker, 'Justifying Property and Justifying Access' (1993) 6 *Can. J. L. &* Jurisprudence 287.

[25] For a more detailed discussion of the different conceptions of the person in different societies, see Julian Baggini, How the World Thinks: A Global History of Philosophy (Granta Books, 2018) Chapters 16-19.

[26] John Mbiti, *African Religions and Philosophy* (Heinemann, 1969; London). Contrast this statement with the dictum of French philosopher René Descartes, regarded as the midwife of the Enlightenment, translated as "I think, therefore I am." See Rene Descartes, *Discourse on Method*, trans. D.A. Cress (3rd ed. Hackett Publishing, 1998)

[27] *Ibid*. 108-9

[28] Chuka Okoye, 'Onwe: An Inquiry into the Igbo Concept of Self' (2011) 8 *OGIRISI: A New Journal of African Studies* 51. [The Igbos are one of the three main ethnic groups in Nigeria.]

a Nguni (isiZulu) expression: *Umuntu Ngumuntu Ngabantu*, meaning "a person is a person because of or through others."[29] And although the Ubuntu concept originates from South Africa, "the phenomenon contains a wider African reality enshrined in African humanism, communalism, and what Nkrumah calls 'consciencism.'"[30] According to Khoza, Ubuntu is an "African value system that means humanness or being human, a worldview characterised by such values as caring, sharing, compassion, communalism, communocracy and related predispositions."[31] This conception of the person and his relationship to the community clearly differs from that of possessive individualism in which the individual owes nothing to society. This distinction, amongst others, leads Ifeanyi to observe that:

> In the African understanding, priority is given to the duties which individuals owe to the collectivity, and their rights, whatever these may be, are seen as secondary to their exercise of their duties. In the West, on the other hand, we find a construal of things in which certain specified rights of individuals are seen as antecedent to the organisation of society; with the function of government viewed, consequently, as being the protection and defense of these individual rights.[32]

Indeed, the assumption of possessive individualism that human society consists of a series of market relations is reductive and denies the interdependence between individuals and community which is the basis of the duty-owing individual in the African conception of the person. In fact, the pervasive individualism inherent in the 'society as market relations' assumption necessarily means that whatever duty is owed by the individual, if any, is only for the purpose of enabling the smooth functioning of the capitalist market.

This brief exposition leads one to wonder whether a different regime for regulating creative works of the mind other than copyright would have developed in Nigeria and Africa generally. Copyright law bears the hallmarks of possessive individualism. The

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[29] On the Ubuntu concept see M.B. Ramose, 'The Philosophy of Ubuntu and Ubuntu as a Philosophy' in Coetzee & Roux (eds.), *Philosophy from Africa: A Text with Readings* (OUP, 2002); N.N. Mabovula, 'The Erosion of African Communal Values: A Reappraisal of the African Ubuntu Philosophy' (2011) 3(1) *Inkanyiso: Journal of Humanities and Social Sciences* 38. For an attempt to apply the Ubuntu concept to copyright theory, see C.B. Ncube, 'Calibrating Copyright for Creators and Consumers: Promoting Distributive Justice and Ubuntu' in Giblin & Weatherall (eds.), *What if We Could Reimagine Copyright* (ANU Press, 2017).

[30] M.P. More, 'Philosophy in South Africa Under and After Apartheid' in Kwasi Wiredu (ed.), *A Companion to African Philosophy* (Blackwell Publishing, 2004).

[31] R.J. Khoza, Let Africa Lead: African Transformational Leadership for 21st Century Business (Vezubuntu, 2006) 269.

[32] I.A. Menkiti, 'Person and Community in African Traditional Thought' in R.A. Wright (ed.), *African Philosophy: An Introduction* (3rd ed., NYU Press, 1984).

understanding that the individual is the creator and proprietor of creative works of the mind such as literary works for which she can exclude others from its use is emblematic of the assumption that the individual owes nothing to society, yet it is almost impossible to deny that knowledge is socially produced. This individualism is palpably manifest in the notion of 'authorship' in copyright law. Because copyright vests initially in the author of a work[33], the law presupposes that creative works are the product of a solitary author. But even in well-established forms of art, this is clearly not the case. Film and music production are collective enterprises which require collaborative effort involving different participants. Copyright law seeks to patch up this gap between assumptions and reality by insisting on an author even for these collectively produced works.[34] In so stipulating, copyright law turns a blind eye to the collective creativity that goes into the production of these works. For copyright law, it is either the creative efforts of others involved in the collective enterprise do not matter or they simply do not exist.

To be clear, the argument is not that copyright law as it currently exists is less normatively attractive than what would be the case if a regime for regulating creative works of the mind had developed independently in the regions with a different world view. Admittedly, the emphasis might have been on sharing rather than on exclusivity, given the sociocentric view of the person in the African world view. Indeed, there are modern day examples of collective creativity guided by a sharing norm such as Wikipedia and Quora, an indication that it is far from inconceivable that such a sharing regime would have developed in such regions though it is not a given, due to the fact that the origin of copyright law is as much the technological and economic factors as it is with the cultural determinants.[35] The point indeed is that the development of copyright law is not as a result of the natural progression of things. Different forces—Western culture, ideology, and technology—played huge roles in the development of this area of law. It may be the case that copyright law is indispensable to the functioning of a capitalist economy, but this only solidifies the position that it is the product of cultural and economic forces. An appreciation of this underscores the point that the idea of copyright is not intuitive. But of course, the fact

[33] See section 9(1), Nigerian Copyright Act Caps C28, 2004.
[34] See s.39(1) Nigerian Copyright Act.
[35] Elizabeth Eisenstein, The Printing Press as an Agent of Change: Communications and Cultural Transformation *in Early Modern Europe*, (2Vols. CUP, 1979; Cambridge); R.V. Bettig, 'Crititcal Perspectives on the History and Philosophy of Copyright' (1992) 9(2) *Critical Studies in Media Communication* 131.

that something is not intuitive does not mean it makes no sense. It instead calls for reasoned analysis.

B. History and Origin of Copyright Law

The official historiography of copyright law is one of technological determinism i.e. copyright law is singlehandedly as a result of the invention of the printing press.[36] Professor Patterson, a proponent of this view, captures it in his insightful account on the history of copyright law when he asserts that "[w]hen William Caxton introduced the printing press into England in 1476, the creation of a new form of property eventually to be called copyright, was inevitable."[37] The reason for this official narrative seems to be a misunderstanding of the printing privileges issued in Europe after the invention of the printing press and the stationers' copyright that developed in England, mainly as a result of the Company of Stationers' attempt to aid the Crown in stamping out unlicensed publications. In this narrative, printing privileges and the stationers' copyright are understood to have established copyright. Again, Patterson advances this narrative:

> The exact date of the origin of copyright in England we do not know but it may have been sometime between 1518 and 1542. The first of these dates is that of the first book printed with a privilege from the sovereign, and the second is that of the Brotherhood of Stationers to acquire a charter.[38]

As we shall see, these narratives are reductive and do not represent a correct interpretation of the history and origin of copyright law.[39] Furthermore, the assumptions underlying this official narrative are too simple to capture the relationship between law, society and technology. On this official account, copyright law is simply reactive to technology and both are completely exogenous to each

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[36] Technological determinism is the view that society's technology determines singlehandedly its social, cultural, political and economic forms. This view is no longer popular amongst sociologists and historians of technology who consider that technology does not determine society. See M.R. Smith and L. Marx (eds.), *Does* Technology Drive History? The Dilemma of Technological Determinism (MIT Press, 1994); Jill Lepore, 'Our Own Devices: Does Technology Drive History' *The New Yorker* (May 5, 2008) https://www.newyorker.com/magazine/2008/05/12/our-own-devices; M. Castells, *The Information Age:* Economy, Society, and Culture: The Rise of the Network Society (Vol. 1, 2nd ed., Blackwell 2000) 5-13

[37] L.R. Patterson, *Copyright in Historical Perspective* (Vanderbilt University Press, Nashville: 1968) 20

[38] *Ibid*. at 42

[39] Jackson, *Supra*. n.1; Also, Oren Bracha, 'Copyright History as History of Technology' (2013) 5 *WIPO* Journal 45.

other. Such accounts of copyright "strongly imply that given certain technological developments, copyright law had to become what it is."[40]

The most that can be said is that the invention of printing press in Europe changed the economics of book production and provided opportunities for the emergent capitalist class of publishers to trade in books i.e. to commodify books. This process of commodification began with the grant of printing privileges, but it did not establish literary property. It was only a step, though a very important one, in the development of copyright law.

I. Before the Printing Press: The First "Copyright Dispute" and Existence of Copyright in Ancient Times.

Prior to the invention of printing, the ancient Sumerians, Babylonians, Assyrians and Hittites wrote on tablets made from clay; the ancient Egyptians wrote on a papyrus roll, a writing material made from the water plant by the same name[41]; the Chinese made books from wood or bamboo strips bound together with chords; the Greeks adopted the papyrus roll referred to as *biblos* and then passed on to the Romans; and in the 4th century AD, parchment and vellum as writing materials along with their codex form of book production became dominant.[42] Whether a natural right of ownership existed in these civilisations prior to the invention of the printing press is debatable although some argue that the invention of printing is only another era in the development of copyright and that "since the beginning of written history, there has existed a moral or natural right of ownership to intellectual property…"[43] This is a bold assertion. The proponents of this view cite largely the first recorded "copyright dispute", the battle of cúl Dreimhne case, in support of their position.

The dispute arose in Ireland between Saint Columba (also known as Columbkill, Columcille, or Calumm Cille) and Saint Finnian of Movilla Abbey in approximately

[40] Bracha, *Ibid*. at 45.
[41] Papyrus in ancient Egypt was used for many purposes other than as a writing material. Indeed, the baby Moses was placed in a basket made of papyrus. See Exodus 2:3.
[42] For a history of book publishing, see D.H. Tucker *et.al*., *History of Publishing*, Encyclopedia Britannica (November 21, 2018) https://www.britannica.com/topic/publishing; Lucien Febvre and Henri-Jean Martin, The Coming of the Book: The Impact of Printing 1450-1800 (Verso, 1976; New York)
[43] H.C. Streibich, 'The Moral Right of Ownership to Intellectual Property: Part I—From Beginning to the Age of Printing' (1975) 6 *Mem. St. U.L. Rev.* 1

560AD. Saint Columba, an Irish Gaelic missionary, secretly and without permission copied a Latin psalter owned by St. Finnian who upon finding out insisted that St. Columba had no right to make a copy of the psalter and demanded that it be returned to him.[44] On the request of St. Finnian the matter was brought before Diarmait mac Cerbaill, the High King of Ireland. In what is reminiscent of today's access to knowledge wars, St. Columba gave a powerful statement expressing his concern that Finnian's actions would restrict access to knowledge:

> My friend's claim seeks to apply a worn out law to a new reality. Books are different to other chattels (possessions) and the law should recognise this. Learned men like us, who have received a new heritage of knowledge through books, have an obligation to spread that knowledge, by copying and distributing those books far and wide. I haven't used up Finnian's book by copying it. He still has the original and that original is none the worse for my having copied it. Nor has it decreased in value because I made a transcript of it. The knowledge in books should be available to anybody who wants to read them and has the skills or is worthy to do so; and it is wrong to hide such knowledge away or to attempt to extinguish the divine things that books contain.[45]

The King however did not entertain the argument of St. Columba and decided that "[t]o every cow its calf, to every book its child-book. The child-book belongs to Finnian."

This "battle of the book" case serves no more than to establish that the idea of property rights can be extended to creative works of the mind, independent of whether there is sound justification. But the view that this case could be cited as evidence that the origins of copyright extend far back before the printing press is problematic for several reasons. First, St. Finnian did not author the psalter or Vulgate nor was he the publisher so as to acquire a legal right in the book. In fact, book publishing as we know it today did not exist then due to the non-existent market for books, which in turn is substantially due to the fact that the process of making copies was arduous requiring the hand-copying of the originals onto a parchment or vellum. Accordingly, under existing copyright regime Finnian would not have a proprietary interest in the book and cannot legally prevent Columba from making copies. Secondly, some have argued that it would not have been possible for St.

[44] Some accounts state that what St. Columba secretly copied was a copy of the Vulgate, a Latin translation of the Bible. Ray Corrigan, 'Colmcille and the Battle of the Book: Technology, Law and Access to Knowledge in 6th Century Ireland' http://oro.open.ac.uk/10332/1/GIKII_Colmcille_final.pdf.
[45] Cited in *Ibid.*

Columba to have copied the psalter without utilising St. Finnian's property such as vellum or ink so that under general property law the material embodying the psalter would have been Finnian's property.[46] Lastly, it is difficult to separate legend from fact in this case given that the High Kings of Ireland were both historical and legendary figures.

Going further back in history, there is no evidence in ancient times that suggests the existence of copyright or literary property. Imperial China is an interesting case study in this instance because the existing technological and cultural conditions were favourable to the existence of literary property. Technologically, the material requirements for the reproductions of cultural works—paper and ink—were already being utilised in addition to the invention of wood-block printing for centuries prior to its advent in Europe.[47] Culturally, imperial China was a literate society which did not lack the production of cultural works. Yet Alford concludes that despite these technological and sophisticated cultural condition, imperial China did not develop a property system in literary works analogous to modern copyright law.[48] This conclusion is also true for ancient Greece and Rome in which there was substantial book trade. For classical Greece, Pinner states that:

> Nothing is known of the relations between the Greek author and his publisher. Nowhere is any indication found of the payment of author's fees, nowhere the slightest hint of copyright protection. From the extensive plagiarism found even among the greatest authors it is evident that the creator of a work had no exclusive right in it.[49]

Putnam also confirms this when he states that:

> The literature of Greece has become the property of the world, but of the existence of literary property—that is, of any system or practice of compensation to writers from their readers or hearers, either direct or indirect—the traces are very slight; so slight, in fact, that the weight of authority is against the probability of such practice having obtained at all.[50]

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[46] Stephan Kinsella, 'First Alleged "Copyright" Dispute: 560AD, Celtic Ireland; Battle Ensues; 3000 People Die', *Mises Institute*, https://mises.org/wire/first-alleged-"copyright"-dispute-560-ad-celtic-ireland-battle-ensues-3000-people-die

[47] See *infra.* n.56-58 and accompanying text.

[48] W.P. Alford, To Steal A Book is an Elegant Offense: Intellectual Property Law in Chinese Civilisation (Stanford University Press; 1995); *Cf.* A.C. Chen, Note, 'Climbing the Great Wall: A Guide to Intellectual Property Enforcement in the People's Republic of China' (1997) 25 *AIPLA Q.J.* 3, 8-17.

[49] H.L. Pinner, *The World of Books in Classical Antiquity* (A.W. Sijthoff; 1948) 25.

[50] G.H. Putnam, Authors and their Public in Ancient Times: A Sketch of Literary Conditions and of the Relations with the Public of Literary Producers, From the Earliest Times to the Invention of Printing (Putnam; 1893) 54.

In fact, it is well documented that Greek writers and authors wrote for fame rather than for money. Putnam considers it "fortunate for the literature of the world" that the Greek poets and historians wrote for fame. After the subjugation of Greece by Rome, it is not a stretch to conclude that the same motivations permeated the literary scene in Rome given the influence of Greek culture. As Pinner states, "the authors of Rome, no less than their colleagues in Greece, had to content themselves with what Juvenal calls 'empty fame.'"[51] And so the case is no different for ancient Rome as Pinner concludes that:

> Copyright protection is unknown even to Roman law, although this covers every other eventuality of life to the smallest detail. At any rate, not the slightest hint of it is to be found in the legal writings or indeed in any of the literature of antiquity… This omission and the silence of the jurists allow of no other explanation than that the law gave no help against such inroads on intellectual property.[52]

This is also the case when we go even further back to Judea.[53] In fact, it is difficult to make sense of the assertion that a natural right to ownership of IP has existed since the beginning of written history since in ancient times, and before the invention of printing, the mere possession of a manuscript was considered to include the right to make copies indefinitely.[54] Therefore, the evidence lies heavily in support of the view that literary property did not exist in ancient times or in civilisations prior to the invention of the printing press in Europe. The suggestion here of course is not to imply that the invention of the printing press determined the emergence of literary property but rather to emphasise its importance as a marker in the timeline of the history of copyright law.

One important point to note from this brief survey is that the absence of authors rights in Greece did not prevent the production of cultural works.[55] Perhaps, this important period in the history of cultural production should finally dispel the narrative that but for copyright there would be little or no cultural production. From Classical

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[51] Pinner, *Supra*. n.49 at 38.
[52] *Ibid*. at 38-39; E.S. Rogers, 'Some Historical Matter Concerning Literary Property' (1908) 7 *Mich. L. Rev. 101* ["One may search in vain through classical literature and Roman law to find anything in the nature of copyright. Hearty condemnation of plagiarism is to be found. Stealing another man's labour and passing it off as one's own was a literary crime, but neither that nor open piracy seems to have been a matter of which the law took cognizance."]
[53] Putnam, *Supra*. n.50 at 49-53
[54] Rogers, *Supra.* n.52.
[55] Putnam, *Supra*. n.50 at 54

Greece to ancient Chinese civilisation, we find abundant creativity and cultural production yet no hint of literary property.

II. Johannes Guttenberg: The Invention of Printing and the Origins of Copyright.

The consensus amongst copyright law and literary scholars is that the emergence of copyright law is linked to the invention of the printing press in Europe by Johannes Gutenberg. Printing however was not invented in Europe. The art of printing had existed in China long before Europe.[56] Various methods of printing existed in ancient China: wood-block printing and movable type.[57] As a matter of fact, the materials necessary for the art of printing had long existed before the invention of printing in Europe.[58] However, as a mechanised process the invention of printing has its origins from Europe.

Johannes Gutenberg, a German goldsmith and inventor, is credited with the invention of the movable type printing press in Europe in the 15th century. The exact year of this invention is unknown as very little is known of him, but different accounts place it between 1440-1450. The importance and effects of this invention can hardly be exaggerated. Prior to the invention of the printing press, access to knowledge was a privilege of the wealthy and the elite mainly because book production was through the manual process of copying texts onto parchment or vellum. For example, a parchment bible would have required the skins of 250 sheep.[59] Imagine if everyone in a sermon required a copy of the bible, that would be a lot of sheep slaughtering. In such a society, only the wealthy can afford to expend such resources to acquire knowledge through written text. In fact, in Europe before the invention of printing press, it was the monks who had access to make copies of manuscripts and this is primarily due to the fact that there were not too many books produced other than the bible. With the introduction of paper and the invention of the printing press, the

[56] T.F. Carter, The Invention of Printing in China and its Spread Westward (2nd ed. rev. L. Carrington Goodrich, Ronald Press Company; 1955)
[57] L.C. Goodrich, 'The Development of Printing in China and its Effects on the Renaissance under the Sung Dynasty (960-1279): A Lecture Delivered on 3 September, 1962' (1963) 3 *Journal of the Hong Kong* Branch of the Royal Asiatic Society 36.
[58] For example, ink had been used centuries before and paper existed during the manuscript age. Brian Richardson, Printing, Writers and Readers in Renaissance Italy (CUP, 1999) 7.
[59] Tim Harford, 'How the Invention of Paper Changed the World' *BBC World Service* (13 March, 2017) https://www.bbc.co.uk/news/the-reporters-38892687

obstacles to the broader dissemination of knowledge melted away thereby creating a book market and higher demand for books.[60] To put this in context, it is stated that:

> A man born in 1453, the year of the fall of Constantinople, could look back from his fiftieth year on a lifetime in which about eight million books had been printed, more perhaps than all the scribes of Europe had produced since Constantine founded his city in A.D. 330.[61]

Even though Eisenstein disputes the above statement solely on the ground that it is difficult to estimate the number of books produced by "all the scribes of Europe", she agrees that the invention of printing in Europe facilitated a far greater output of book production than existed in the scribal period.[62]

Aside these effects, it is well noted that printing ushered developments in Western Europe such as the Renaissance, Reformation and the scientific revolution.[63] The important point to note for the development of copyright is that as a result of the invention of printing in Europe, the cost of book production decreased and the demand for, including availability of, books increased. This created a market for books and knowledge. And it is this commoditisation of books and knowledge, rather than printing as such as some suggest, that led to the emergence of copyright law. As one author puts it:

> It is not so much printing as the existence of a market in books and ideas that introduced concepts of intellectual property. As the literary market increased in importance, authors, who might well be writing for a living and competing for recognition, began to stress the distinctiveness of their products, in other words their intellectual or literary originality. Printing encouraged the development of such a market and expanded the concept of a book as a commodity (selling object).[64]

The development of copyright though cannot be unidimensionally rendered. As we shall see, there were other factors that contributed to its development.

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[60] Although paper, introduced into Europe in the 14th century, reduced the cost of book production as it is less expensive to produce than parchment, it did not have similar effect as printing for "the same number of man-hours was still required to turn out a given text." E.L. Eisenstein, *The Printing Revolution in Modern Europe*, (2nd ed. CUP, 2005) 20. Tucker *et.al*., *Supra*. n.42

[61] Cited in Eisenstein, *Ibid*., 15.

[62] *Ibid*, at 15-6.

[63] Eisenstein, *Supra.* n.35

[64] Joanna Kostylo, 'Commentary on Johannes Speyer's Venetian Monopoly (1469)' (2008) in Bently & Kretschmer (eds.), *Supra.* n.5 http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_i_1469#_ednref12

III. Early Printing Privileges: Antecedents to Copyright.

It did not take time after Gutenberg's invention for printing presses to be established in different European states and cities. Hirsch notes that by 1500, printing had spread to more than 250 cities in Europe.[65] Venice, not long after Gutenberg's invention, became the leading publishing centre in Europe. Burke states that "[i]n the fifteenth century, more books were printed in Venice than in any other city in Europe (about 4,500 editions, which means something like 2,000,000 copies).[66]

Indeed, the first recorded printing privilege granted by a European government was in Venice. In 1469, the Venetian Collegio granted Johannes of Speyer, a German printer, a five-year monopoly over the entire art of printing in Venice and its dominions.[67] Although this monopoly grant, at its core, had the effect of excluding others from practicing the trade and inevitably from printing literary works, as a matter of law it is more related to patent law than it is to copyright law. The monopoly grant was for the purpose of rewarding Johannes of Speyer for bringing something new, the movable type printing press, to Venice. So, it was for the printing machine and not the literary works.[68]

Printing privileges however were also granted to authors, not just printers. It is this practice of granting printing privileges to authors that could be viewed as antecedents to copyright. The first recorded printing privilege granted to an author is to the historian Marco Antonio Sabellico. On September 1, 1486 the Venetian Collegio granted a privilege to Sabellico for his work on the history of Venice, *Decades rerum Venetarum*. It is stated that by "the terms of this privilege Sabellico was free to choose a printer who would publish the work at his own expense; anyone else who published it would be fined five hundred ducats."[69] Subsequently, similar

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[65] Rudolf Hirsch, *Printing, Selling and Reading: 1450*-1550 (Harrassowitz, 1967)
[66] Peter Burke, A Social History of Knowledge: From Gutenberg to Diderot (Polity Press, 2000) 162.
[67] Kostylo, 'Commentary on Johannes Speyer's Venetian Monopoly (1469)' *Supra*. n.64.
[68] *Ibid*. Author quoting a statement attributed to the Venetian councillors regarding the privilege granted to Johannes of Speyer that "such an innovation, unique and particular to our age and entirely unknown to the Ancients, must be supported and nourished with all our goodwill and resources."; Kostylo, 'From Gunpowder to Print: The Common Origins of Copyright and Patent' in Deazley, Kretschmer, and Bently (eds.), Privilege and Property: Essays on the History of Copyright (Open Book Publishers, Cambridge: 2010)
[69] J. Kostylo, 'Commentary on Marcantonio Sabelicco's Privilege (1486)' (2008) in Bently & Kretschmer (eds.), *Supra* n.5, http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_i_1486

privileges were granted to printers, and sometimes authors, by other nations.[70] Some consider the privilege to Sabellico to be the first recorded copyright.[71] However the better view is that early printing privileges were a form of reward, rather than as copyrights, extended to authors in consideration of the value of the work and the considerable expense required to print the work.[72] According to Kostylo:

> In the early years of printing, it was customary to grant privileges not just to printers but also directly to the authors. But it would be wrong to view this practice as an advancement of author's copyrights in the sense of the current intellectual property system, or to assume that contemporary authors acquired a particular authorial conscience and sense of artistic proprietorship. Rather, we ought to view the contemporary author as an individual with a specific interest (economic and otherwise) that had to be safeguarded.[73]

While it is the case that the technology of printing reduced the cost of making copies of literary works, the fact remained that the art of printing required a sizeable investment. Richardson provides an indication:

> Two legal texts printed in Modena in 1475 and 1476 in about 500 copies, consisting of 95 and 74 sheets respectively, cost 404 and 614 lire, equivalent to about 100 and 150 ducats; a Bible printed in Venice in 1478 (228 sheets, 930 copies) would have cost about 450-500 ducats for paper and labour; a Latin

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[70] For example, France granted a printing privilege to the author Eloy d'Amerval in 1507 for his poem Le Livre de la deablerie. In Spain, the first recorded printing privilege was to the author Antonio de Nebrija in 1506. See Bently & Kretschmer (eds.), *Supra. nx.* http://www.copyrighthistory.org/cam/index.php

[71] Burke, Supra. n.66 at 153.; H. R. F. Brown, The Venetian Printing Press: An Historical Study Based Upon Documents for the Most Part Hitherto Unpublished (G.P. Putnam's Sons; 1891)

[72] Christopher L.C.E Witcombe, Copyright in the Renaissance: Prints and the Privilegio in Sixteenth-century *Venice and Rome* (Brill, 2004); John Feather, *A History of British Publishing* (Routledge, 1991); Hirsch, *Supra.* n.65; Maurizo Borghi, 'Copyright and the Commodification of Authorship in 18th- and 19th- Century Europe' http://eprints.bournemouth.ac.uk/29935/; Frederic Rideau, 'Commentary on the Privilege Granted to Galliot Du Pré for the Grant of Costumier de France (1515)' (2008) in Bently & Kretschmer (eds.), *Supra.* n.5 http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_f_1515 ["At the time of Galliot Du Pré [16th century], rather than acknowledge an author's right (droit d'auteur) or a copyright assigned to the bookseller by the author, the favours of the royal administration were essentially meant to reward, with all due fairness, the daring and skilled pioneers of the new art of printing."; Frederic Rideau, 'Commentary on Eloy d'Amerval's Privilege (1507)' (2008) in Bently & Kretschmer (eds.), *Ibid*. http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_f_1507 [Concluding that the rationale for author's privileges were primarily economic factors and for the advancement of authorship.] A further evidence that printing privileges were not copyright is the statement that "[o]nly 5% of the books were protected by any privilege at all and that privilege prevented others only from printing the same work— handwritten copying was still permitted." Jackson, *Supra*. nx at 421.

[73] Kostylo, Marcantonio Sabelicco's Privilege, *Supra.* n.69. This conclusion extends even to Papal printing privileges. See J.C. Ginsburg, 'Proto-Property in Literary and Artistic Works: Sixteenth Century Papal Privileges' (2012) 36 *Colum. J.L. & Arts* 345, 347 ["While printing privileges, Papal or otherwise, established certain exclusive rights for a certain period, to call these rights 'property' in the sense of modern 'literary property' would be both anachronistic and overstated."] The main difference between Papal privilege and secular privilege is the territorial limitation. Secular privileges such as the one granted to Sabellico was only enforceable in Venice and its overseas territories whereas Papal privileges were valid in all Christendom. This wider territorial reach of Papal privileges was however circumscribed during the Protestant reformation as Protestant lands did not recognise Papal printing privileges. Another difference is that whereas printers and publishers were mainly the recipients of secular privileges, authors were the main beneficiaries of Papal privileges.

> translation of the works if Plato printed in Florence in 1483 (281 sheets, 1,025 copies) would have required about 250 florins for paper and labour; and a breviary of nearly 50 sheets printed in the same city in the following year in 300 copies required an investment of 284 florins. (To provide ourselves with a yardstick here, we can remember that a compositor might hope to earn 50 or 60 ducats in a year.)[74]

When printers or publishers supplicated for the printing privilege, they relied on economic considerations regarding the high costs of book production and the need to protect their investment. The grant of printing privileges was not a matter of legal entitlement for it was based on the sovereign's grace.[75] In fact, most of the early printing privileges were granted for works for which there was no living author i.e. works of ancient authors, classics, Latin grammars and almanacs. Apart from the fact that the authors of these class of works were long dead, under current copyright such works would become part of the public domain and therefore not eligible for copyright protection. Accordingly, neither did book privileges establish literary property nor were they for the purpose of advancing author's rights. As Netanel states, "[c]opyright law differs from book privileges in justification, legal foundation, and practical import…"[76] Even the rabbinical reprinting bans issued in Jewish communities around the 16th and 17th centuries were modelled on the secular book privileges and based on similar justifications.[77]

As time went on, printers and publishers began to regulate their affairs through guilds. One of the earliest guilds to have emerged for printers and booksellers was in Venice, the incorporation of which was decreed on 18 January 1549. Apart from regulating the printing trade, mercantilism, and granting monopolies, these guilds served political and religious purposes.[78] To appreciate the specific religious concerns which partly precipitated the emergence of these guilds, it is important to understand the social events taking place at the beginning of the 16th century. In

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[74] Richardson, *Supra.* n.58 at 25.
[75] This is not a suggestion though that the sovereign's grants of book privileges were arbitrary but rather to accentuate the fact that the supplicant did not have a legal right or even an expectation. N.W. Netanel, *From* Maimonides to Microsoft: The Jewish Law of Copyright Since the Birth of Print (OUP, 2016) 28.
[76] Netanel, *Ibid.*, 23
[77] Menachem Elon (ed.) *The Principles of Jewish Law* (Encyclopedia Judaica, 1975) 344-5 [Discussing the reprinting ban issued by the rabbinical Council of Venice in favour of Salamon Rossi for his work.]
[78] See J. Kostylo, 'The Decree of the Council of Ten Establishing the Guild of Printers and Booksellers' (2008) in Bently & Kretschmer (eds.) *Supra.* n.5. http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_i_1549

particular, the Protestant Reformation unarguably one of the great epochs of Western civilisation.[79]

When the art of printing arrived in Venice in the latter part of the 15th century, regulation of the trade was almost non-existent as a laissez-faire attitude was adopted. However, this was soon to change. The Catholic church establishment understood the power of the printing press in disseminating knowledge and its consequent effects in shaping opinion regarding established doctrines. Thereafter, as it feared the subversion of its authority, the Catholic church sought to control the content of publications. This effort at censoring the content of printed works only intensified following the beginning of the Reformation after the publication of Martin Luther's Ninety-five Theses. Territories, city-states, and nations were ordered on the basis of pro-Catholic or pro-Lutheran, and later Protestant, allegiances. And in this politically charged situation, monarchs were enlisted to censor cultural production for heretical content. The book privileges and the guilds regulating the printing trade served this function. As we shall see in the next section, copyright law is an outcome of the censorship laws enforced by the Stationers company in the 16th and 17th centuries.

In summary, the conclusion that can be reached from this period in the history of copyright is that early printing privileges introduced and enabled the idea of book as a commodity. Although book trade as we have seen was not insubstantial in ancient Rome and Greece, the printing press enabled the emerging capitalist class to accentuate and exploit the economic value of books. Books were no longer seen only as cultural works but also as objects, just like any other goods, that can be exchanged in the market for money value. That this is so is clear from the concerns relied upon by supplicants of printing privileges such as protection of financial investments. For the process of commodification to be complete, however, it was essential that property rights in literary works be established. With the interests of printers and publishers for monopoly grants aligned with those of monarchies and principalities in the censorship of cultural content, the stage was set for the

[79] See amongst many R.H. Bainton, *The Reformation of the Sixteenth Century* (Beacon Press, 1953); H.J. Hillerband, The Reformation: A Narrative History Related by Contemporary Observers and *Participants* (Harper & Row; 1964); H.J. Hillerband (ed.), *The Protestant Reformation* (Macmillan & Co. Ltd.; 1968)

development of property rights in literary work. It is this commodification of literary works, and by extension knowledge, which has remained a constant feature in the development of copyright law, that can partly be attributed to the expansion of copyright regime.

IV. The Stationers Company and the Development of Copyright in Britain.

Any serious attempt to sieve through the development of Nigerian copyright law is incomplete without an examination of the origins and development of copyright law in Britain for two reasons. Being a colony of Britain, Nigeria necessarily inherited its copyright law from its colonial master by way of legal transplant. Furthermore, Britain is home to the first statutory copyright, the Statute of Anne, which is the basis for the Copyright Act 1911 which was transplanted to Nigeria.

The introduction of the printing press in the British soil arrived much later than in Italy. Standard accounts credit William Caxton with the introduction of the first printing press in 1476 at Westminster. But despite the somewhat belated introduction of the printing press, Britain is the primary place for the origin of literary property. Of course, this is not to say that the introduction of the printing press in Britain singlehandedly and inevitably led to the emergence of literary property as the traditional account suggests, for if this was the case Italy, and particularly Venice, would have been the natural home for the origin of literary property. Furthermore, the emergence of literary property in Britain took more than two centuries after the introduction of the printing press. As we shall see, there were two models of regulating published works that prefigured the Statute of Anne: printing patents and stationers' copyright. In reviewing these models, as well as the conditions and circumstances that gave rise to their emergence, several conclusions, germane to the advancement of this chapter's principal claim, will be palpable. First is that whereas these models aided the development of our conception of copyright, they did not establish literary property. The printing patent and stationers' company were principally as a result of the crown's need to regulate printing for political and

religious purposes. Secondly, the development of British copyright shows that the copyright incentive rhetoric is a retrofitted rationale.[80]

a. Printing Patents and Literary Property in Britain

The history and development of copyright law in Britain are inseparable from the Crown's regulation of the press, especially the Tudor regime.[81] Neither the Crown prerogative in controlling the new art of printing nor the need for such control, at least for the copyright law historian, is debated. Regarding the former, it is based on the theory that printing was a royal prerogative since the King had imported the first press from abroad. [82] As for the latter, the spread of New Learning, fuelled by the printing press, and the Reformation gave rise to the Crown's need for suppressing dissenting opinions through the control of printing using different mechanisms, such as royal proclamations, printing patents, licenses and Star Chamber decrees. For the historian of copyright however what is important is how the censorship regime and trade regulation—manifestations of the mutual concern between, on the one hand, the interwoven relationship between the Church and the State and, on the other hand, the emergent entrepreneurial class bent on exploiting the book trade— aided the development of copyright law.

The printing patent is the first of two models that predated the first statutory copyright. It is considered by some to be the *first of two copyrights* prior to the Statue of Anne but as we shall see this is erroneous.[83] It is not until 1518 that we have a

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[80] Recent critiques of IP have shown the extent to which the incentive rhetoric of copyright is exaggerated. See C.J. Sprigman, 'Copyright and Creative Incentives: What do(n't) We Know?' In Dreyfuss & Siew-Kuan Ng (eds.), Framing Intellectual Property Law in the 21st Century: Integrating Incentives, Trade, Development, *Culture and Human Rights* (CUP, 2018); D.L. Zimmerman, 'Copyright as Incentives: Did We Just Imagine That?' (2011) 12 *Theoretical Inquiries in Law* 29; M.A. Lemley, 'IP in a World Without Scarcity' (2015) 90(2) *N.Y.U.L. Rev.* 460. Some studies have also shown that copyright has virtually non-existent day-to-day effect on the output of certain works: Aaron Perzanowski, 'Tattoos and IP Norms' (2013) 98 *Minn. L. Rev.* 511; Tina Piper, 'Putting Copyright in its Place' (2014) 29 *Can. J.L. & Soc.*345; L.J. Murray et.al., Putting Intellectual Property in its Place: Rights Discourses, Creative Labour and the Everyday (OUP, 2014)

[81] For a detailed treatment of press control under the Tudor and Stuart regimes of Britain, see F.S. Siebert, Freedom of the Press in England: 1476-1776: The Rise and Decline of Government Control (University of Illinois Press; 1965); W.S. Holdsworth, 'Press Control and Copyright in the 16th and 17th Centuries' (1919) 29 *Yale L.J.* 841. ["For the origins of the law of copyright we must look at the various methods of controlling the Press employed by the Tudors and early Stuarts."]

[82] Siebert, *Ibid.* Chap. 1, has examined the three propositions on which the royal prerogative to control printing is based but finds them lacking. To the historian of copyright law, though, the fact that the *de jure* basis for Crown's control of printing is obscure is inconsequential since the Crown *de facto* exercised absolute control of printing.

[83] See Patterson, *Supra.* n.37 at 78.

record of the first printing privilege granted to Richard Pynson, the King's printer. Although the printing privilege was enjoyed mostly by the official or King's printer in the early part of the introduction of the printing press in Britain, it was not long before non-official printers and booksellers began soliciting for the King's protection, an indication of the emergent capitalist class of book traders. The printing patent was a grant of the sovereign which gave the grantee the exclusive privilege of printing certain class of works or certain books for a period of time, with the latter referred to as a particular patent and the former a general patent or a patent of monopoly. Siebert explains the difference between these two types of patent with the useful example that "[w]hereas under a grant or privilege to Bankes, Berthelet was prohibited from re-issuing books first printed by Bankes; under a patent of monopoly, such as that of law books to Tottell, another printer could issue no new works on the law."[84] The author further points out that the patent of monopoly, or the general patent, came to replace the particular patents in the sixteenth century, an observation which is relevant to the inquiry whether printing patents were copyrights.

Some of the general patents granted by the Crown during this century were to: Richard Tottell for the exclusive printing during his lifetime for "all manner of books concerning the common laws of the realm"; William Seres, the lifetime privilege for primers and prayer books; John Jugge, the exclusive privilege for the printing of Bibles and Testaments; Thomas Vautroller, for Latin Books; and John Day, for the ABC's and catechisms.[85]

Several reasons suggest that printing patents, contrary to common belief, did not establish copyright. First, the practice of issuing printing privileges had long existed in the continent before the first recorded grant of printing privilege to Pynson in Britain.[86] Accordingly, the reasons for such grants were similar to those of the Venetian privileges i.e. protecting printer's financial investments. Furthermore, and as the religious and political controversies took hold, these privileges were granted as part of the Crown's attempt to censor published works.[87] For example, John

[84] Siebert, *supra*. n.81 at 38.
[85] Ibid.
[86] *Supra*. n.66-79, and accompanying texts
[87] See T.B. Morris Jnr., 'The Origins of the Statute of Anne' (1961) 12 *Copyright L. Symp.* 222, 237. [Noting that "[t]he claim of the royal prerogative, the use of the King's printer, and granting of the letters patent were not made in a vacuum" as the King used this medium of granting royal monopolies to control the press.]

Gough's privilege was granted under the condition that his "Storyes or bokes being perused and overseen by two or three dyscrete learned persons."[88] In fact, one of the main reasons marshalled by the Company of Stationers on May 4 1586 for why printing privileges were necessary was that "if every man maie print, that is so disposed, it may be a meanes, that heresies, treasons, and seditious Libelles shall be too often dispersed, whereas if onlie knowne men do prynte this inconvenience is avoided."[89] Clearly, an indication that they were simply privileges and not rights. Second, these privileges were issued mostly to printers and booksellers although there were instances of them being granted to authors. But this was an exception and even in such cases it is unlikely that authors would have obtained such privilege without the aid of a printer or publisher as was the case with Linacre, the first author to have been granted a privilege.[90] Nevertheless the general patents, which later replaced the grant of particular privileges, were granted mainly to printers who were also members of the stationers' company, discussed below. In fact, these privileges were monopoly grants and principally for the benefit of book traders rather than authors. As Rogers states:

> These royal grants of privileges to print certain books were not copyrights; they were not granted to encourage learning or for the benefit of authors; they were simply commercial monopolies. They are frequently adduced in the attempt to show that copyright existed in England from the date of the introduction of printing but they fail utterly to establish anything of the sort. They were not grants to an author protecting him in his own works; they were licenses to tradesmen to follow their calling.[91]

It was precisely because the general patents were monopoly grants enjoyed by a few tradesmen—principally the Queen's printers who were also senior members of the stationers' company— that the poorer and unprivileged members of the stationers' company were dissatisfied with the monopoly grants. In 1577 the unprivileged printers had complained that the privileges granted "will be the overthrowe of the Printers and Stationers within this Cittie…[b]esides their wyves Children Apprentices and families, and thereby th[e] excessive prices of bookes preiudiciall to the state of the whole Realme besides the false printinge of the

[88] Siebert, *supra*. n.81 at 37
[89] Cited by R. Deazley 'Commentary on Star Chamber Decree 1586' (2008) in Bently & Kretschmer (eds.), Supra. n.5*http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_uk_1586#_ednref31*
[90] See Peter W. M. Blayney, *The Stationers Company and the Printers of London*, 1501-1557 (CUP, 2013) 109.
[91] Rogers, Supra. n.52 at 106.; Oren Bracha, Owning Ideas: The Intellectual Origins of American Intellectual Property, 1790-1909 (CUP, 2016) 33.

same."[92] This dissatisfaction, along with the religious controversy in the Elizabethan period, led to the passage of the Star Chamber Decree of 1586.[93]

Lastly, in the early stages of the development of privileges printing patents were part of the broader framework for issuing monopolies for mechanical inventions such that they were not distinguishable.[94] In fact, there was hardly any distinction between literary and industrial inventions, and the supplicants had to rely on the same reasons for literary works as with mechanical inventions when soliciting for privileges.[95] As discussed above, Speyer's privilege was in fact a grant for the introduction of the printing press in Venice rather than any printed literary work. The primary purpose for granting these monopolies was to encourage the development of new art or inventions and it was in the best interest of European nations who sought to attract foreigners with technological and industrial competence. In fact, in Britain the idea of using royal privileges to encourage innovations was recorded as early as 1331 when Edward III granted a privilege to John Kempe, a Flemish weaver, as part of the wider effort to encourage foreign craftsmen to settle in England.[96]

At the early stages, the grant of monopolies—whether in the form of printing privileges or monopolies for mechanical inventions— was to encourage the development of new inventions and art. Furthermore, the establishment of literary property would have required the understanding that literary inventions were different from mechanical inventions which, as we have seen, was not the case in the early stages of the development of privileges. Nothing suggests that the case was any different in Britain. After the introduction of the printing press in 1476, the existing regulatory policy was liberal, encouraging and allowing foreign printers and book traders to establish their trades in Britain. The Act of 1484 during the reign of Richard III, which enabled the development and growth of the printing trade by giving exemption to foreign printers, captures this liberal policy.[97] It was only in the Act of 1534 during the reign of Henry VIII that the favourable treatment towards foreign

[92] Deazley, *Supra.* n.89.
[93] Ibid.
[94] See Kostylo, From Gunpowder to Print, *Supra*. n.68
[95] Ibid.
[96] H.G. Fox, Monopolies and Patents: A Study of the History and Future of the Patent Monopoly (University of Toronto Press; 1947)
[97] Siebert, *supra*. n.81 at 25.

printers was repealed. At this time, the religious and political controversies had firmly taken hold: Pope Clement VII had denied Henry's request for annulment of marriage to Catherine of Aragon in 1533 and a year after Henry passed the Act of Supremacy making him and his successors the supreme head of the Church of England thereby replacing the Pope. The combined effect of these events enabled the start of the English reformation which led to a regulatory volte-face vis-à-vis the growing printing industry in order to suppress dissenting opinions.[98] On the other hand, these events were favourable to the English printers who sought protection for their printed works. The Crown's need in the suppression of dissenting opinions met at the juncture of book traders' private interests in protecting their investments.

Having established that no copyright existed in Britain after the introduction of the printing press by William Caxton in 1476, the next section turns to the stationers' company to examine the nature of stationers' copyright, the second model which predated the Statute of Anne.

b. The Stationers' Company and Copyright

The form of protection for literary works which emerged during the zenith of the stationers' company (1557-1695)[99] is often referred to as stationers' copyright but as we shall see this was no copyright according to our modern conception of copyright. Rather, as the term suggests, it was a 'copyright' for the benefit of the members of the stationers' company.

The Stationers' company ("the company") was a guild of London book traders comprised of bookbinders, booksellers, and printers. Although the rise of the company dates from 1557 when it was granted a royal charter, its existence can be traced back to the middle of the 14th century. In 1357, there is evidence of the existence of a society of writers of court hand and text letters. At this time, the participants in the book trade—parchminers, text writers, limners, bookbinders, and booksellers— had their own craft guilds, but in 1403 the Mayor and Aldermen of

[98] For a brief account of these events and the attitude of Henry VIII in regulating the press, see R. Deazley, 'Commentary on Henrican Proclamation 1538' (2008) in Bently & Kretschmer (eds.), *Supra. n.*5 *http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_uk_1538*

[99] The lapse of the Licensing Act in 1695 represented the end of the stationers' copyright and monopolistic control of the book trade. R. Deazley, 'Commentary on the Licensing Act 1662' (2008) in Bently & Kretschmer (eds.), Supra. n.5 *http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_uk_1662*

London granted a petition by the participants to form a guild. During this period i.e. 1400s, they were generally referred to as the Mistery of Stationers. One commentator states that the implications of the formation of a single craft guild suggest that "by the turn of the century, the trade was already sufficiently developed and competitive to make its regulation desirable, if not essential"[100], and that "the community of book artisans and sellers had grown to a critical size."[101] As an aside, this reinforces the assertion that literary production had always been plenteous even before the invention of the printing press and in the absence of literary property, for there is no evidence that copyright existed in Britain prior to the introduction of the printing press.[102]

Although a charter was sought by the Mistery of Stationers as early as 1542, it was not until 1557 that a royal charter was granted to them by the Catholic Queen Mary thereby conferring the guild with a corporate legal status. The incorporation of the stationers is a watershed moment in the history of the development of copyright for several reasons. First, by gaining corporate status the company became a juridical entity, thereby enjoying all the advantages associated with that legal classification such as: the rights to own property, enter into contracts, self-regulate, and be granted privileges. Second, the incorporation marks the beginning of the mutually reinforcing interests between government in censoring the press and the company's private interests in monopolising the production of printed works. Indeed, the widely accepted view is that the stationers were incorporated in order to control the press which the charter's preamble confirms.[103] The charter was confirmed in 1559 without amendment by the Protestant Queen Elizabeth; and in 1566, by virtue of the first Star Chamber Decree regulating printed works, the relationship between government and the company was formalised with "the former providing the authority and the latter the local knowledge and the executive ability, the former being vulnerable to

[100] C.P. Christianson, 'The Rise of London's Book Trade' in Lotte Hellinga and J.B. Trapp (eds.), *The* Cambridge History of the Book in Britain (Vol 3., CUP, 2008) 128.
[101] *Ibid*. at 129
[102] Morris Jnr., *Supra*. n.87 at 228 ["There seems to be general agreement, but for differing reasons, that no such right was debated before Caxton's innovation."]
[103] For this view, see Patterson, *Supra*. n.37 at 29. ["There is little reason to doubt that the preamble expressed the true reasons for granting of the charter…"]; Harry Ransom, *The First Copyright Statute: An Essay on an* Act for the Encouragement of Learning, 1710 (University of Texas, Press 1956); Holdsworth, Supra. n.81. The preamble states that the purpose is "[t]o satisfy the desire of the Crown for an effective remedy against the publishing of seditious and heretical books…"

printed criticism and the latter to invasion of private property."[104] According to one author the importance of this relationship is that:

> This alliance of government, established Church, and stationer provided the framework in which the law of copyright was to develop for 150 years. Or perhaps it should be better said that this alliance was the framework which would impede the development of copyright law for 150 years.[105]

Third, and most importantly to the development of stationers' copyright, the charter granted the company the exclusive right of printing any book in England.[106] In effect, no one had the right to print unless he was a member of the company—membership being reserved to participants of the book trade— or had a printing privilege from the Crown. As the Crown's campaign against seditious and heretical works intensified so did the company's powers become enhanced and legitimised which was achieved through the Star Chamber Decrees regulating the printing trade.[107]

It is in this specific history—i.e. the mutually reinforcing relationship between the Crown and the company— that the stationers' copyright is born. Perhaps, it is more accurate to say that this relationship rather than give birth to the stationers' copyright enabled its development for professor Patterson gives evidence of the existence of the stationers' copyright prior to the incorporation of the company.[108] The generally accepted view however is that the origin and development of the stationers' copyright followed the efforts of the Company to carry out its functions dutifully in preventing unlicensed printing.[109] Following the royal injunctions of 1559, no book

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[104] Cyprian Blagden, 'Book Trade Control in 1566' (1958) 13(4) *The Library,* 5th *Ser.* 287, 289.
[105] Morris Jnr., *Supra.* n.87 at 240.
[106] The charter states that:

> no person within this our realm of England or the dominions of the same shall practise or exercise, by himself or by his subordinates, his servants, or by any other person, the art or mistery of impressing or printing any book or anything for sale or traffic within this our realm of England or the dominions of the same, unless the same person at the time of his aforesaid impressing or printing is or shall be one of the company of the foresaid mistery or art of stationery for the foresaid city, or has license for it from us or the heirs or successors of us the foresaid queen by letters patent from us or the heirs or successors of us the foresaid queen.

[107] Prior to the abolition of the Star Chamber in 1641, a total of three Star Chamber decrees were passed for the purpose of regulating the printing trade: 1566,1586, and 1637. Each of these decrees enhanced the powers of the company. But the Star Chamber Decree of 1637 is regarded as representing the high point of the company. R. Deazley, 'Commentary on Star Chamber Decree 1637' (2008) in Bently & Kretschmer (eds.), Supra. n.5 *http://www.copyrighthistory.org/cam/tools/request/showRecord?id=commentary_uk_1637*
[108] Patterson, *Supra.* n.37. The main advantage of the charter for the stationers is that it made printing an exclusive trade i.e. only members of the company had the right to print having been granted a monopoly over the printing trade. So even if the stationers' copyright existed prior to the charter it could not be enforced against those engaged in the printing trade but were not members of the company. Whereas post-1557, it was compulsory for every printer to be part of the company. Accordingly, every person engaged in the book trade was subject to the ordinances of the company including the stationers' copyright.
[109] John Feather, Publishing, Piracy and Politics: An Historical Study of Copyright in Britain (Mansell Publishing

was to be published in England unless properly licensed by the licensors appointed by the Crown. The Company provided a record of publications and at times even served as official licensors. This record of publications was contained in the Company's Register also known as the 'Hall Book' or 'Entry Book.' The original purpose of entries in the stationers' Register is that "it was a record of the fact that, in the opinion of the Master and Wardens, the book had been properly licensed, or that it could be printed without giving offence."[110] Clearly, this registration was useful to the Crown in controlling the press. But it is the advantage to the Company of the registration that is more relevant to the development of the stationers' copyright. As Holdsworth states, "[b]y registration the printer or publisher got an incontestable title to the book registered in his name."[111] This is the basis of the stationers' copyright. Precisely, the stationers' copyright was a right only available to a member of the company that entitled him to prevent unauthorised printing of a work for which the member has published. Once a book or copy had been entered in the register thereby serving as evidence of permission from the wardens of the Company, "it was the sole and perpetual property of the person or persons who had registered it."[112] Penalties were imposed upon those who infringed the stationers' copyright i.e. printing another man's copy or work.[113] Furthermore, like property rights the rights in copies conferred by the stationers' copyright could be transferred, assigned, or held in trust.[114]

The nature of the stationers' copyright is further unpacked by looking at the differences between it and the printing patent. The first difference is the duration. Whereas it was possible for a grant under the printing patent monopoly to extend to the life of the grantee, it was certainly not a perpetual grant. On the contrary, the stationers' copyright was perpetual. Furthermore, the printing patent was a government grant whereas the stationers' copyright was a private arrangement

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Limited, 1994) 15-16; Holdsworth, *Supra*. n.81.

[110] Feather, *Ibid.* at 17

[111] Holdsworth, *Supra*. n.81 at 844. It was not until the Star Chamber Decree of 1637 that it was provided that all printed works be "first entered into the Registers Booke of the Company of Stationers" but before then it was the established practice that printed works were first entered into the Company's Register. In other words, the Star Chamber Decree gave official sanction to an established practice.

[112] Feather, *Supra*. n.109 at 18.

[113] Examples, amongst many others, are: "Receved of owyn Rogers for his fine that he prynted William pekerynges copyes"; and "Receved of Alexandre layce for his fine for that he prented *ballettes* which was other mens copyes." See Edward Arber, *A Transcript of the Company of Stationers of London*, 1554-1640 AD (Vol 1. London; 1875) 121b-122.

[114] *Ibid*.

subsequently sanctioned by law for the benefit of the members of the Company. This is important. Referring to the stationers' copyright as copyright in the modern sense of the term is a misnomer. It was a publishers' monopoly or, for lack of a better word, a publishers' copyright for only members of the book trade could avail of it. Unlike the printing patent, it was not available to authors. Its purpose was not to advance authorship or any authorial interests in creative works. Rather, it was to advance the monopoly interests of the Company.[115]

3. The Development of Nigerian Copyright Law: A Brief History.

A. Copyright in Pre-colonial Nigeria.

The origins of literary property and copyright in Nigeria are not in any way as complicated or convoluted as it was in Britain. The reason is simple. Once the techno-economic, political and cultural conditions converged to give rise to a new property regime in the creative works of the mind in Britain, copyright law was thereafter simply transplanted to Nigeria, then a colony of Britain i.e. copyright law and its underlying philosophy are foreign to Nigeria. To be clear, this is not a suggestion that there was little or no creativity in pre-colonial Nigeria. On the contrary, the Benin Kingdom in what is now southern Nigeria is known to have produced one of the most intricate sculptures made of bronze plaques as far back as the 16th century which astounded the Europeans. Speaking of these sculptures, Professor Felix von Luschan admiringly states that "Benvenuto Celini could not have cast them better, nor could anyone else before or after him. Technically, these bronzes represent the very highest possible achievement."[116] And it has been suggested that the Benin bronzes represent the work of master brass casters.[117] There are over 900 Benin plaques in various museums around Europe and America.

[115] Bracha, *Supra.* n.91 at 33-37
[116] Quoted in Mawuna Koutonin, 'Story of Cities #5: Benin City, the Mighty Medieval Capital Now Lost Without Trace' *The Guardian* (18 March 2016) https://www.theguardian.com/cities/2016/mar/18/story-of-cities-5-benin-city-edo-nigeria-mighty-medieval-capital-lost-without-trace
[117] W.B. Fagg, *Nigerian Images* (Lund Humphries; 1967)

Given that there were other forms of creativity besides artistic works in pre-colonial Nigeria, a legitimate inquiry is why there was no property right in creative works of the mind in pre-colonial Nigeria. While one copyright commentator finds traces of the origins of copyright from pre-colonial Nigeria based on the practice where singers and dancers pay homage to their ancestors and predecessors in the trade before they commence their performances[118], the better view, and indeed one which there is a broad consensus, is that no property right in creative works of the mind existed in pre-colonial Nigeria. The practice of paying homage to ancestors is a longstanding tradition in Nigeria, and in general African societies, which represents the revered importance of ancestors in African cosmology, and has nothing to do with copyright.[119] Furthermore, copyright as we understand it today could not have developed in pre-colonial Nigeria given the absence of the conditions, described above, that were germane to the development of copyright in Europe. For example, many of the works that would fall under the subject matter of copyright were collective creations. If there was any property right at all, such right would have vested in the community and not the individual. Accordingly, the suggestion that copyright did exist in pre-colonial Nigeria is at best an attempt to conjure up something that was at variance with the prevailing values.

B. Imperial Copyright Act 1911 and Nigeria.

Once Britain began its consolidation in 1861 of what it would later refer to as the colony of Nigeria with the annexation of Lagos, it was simply a matter of time before its legal system was transplanted to Nigeria. Pre-colonial Nigeria comprised of different kingdoms and empires that were separate as well as having different cultures and legal traditions. So it made sense as one of the strategies in consolidating its hold on this newly formed colony that it transports its laws and legal system to Nigeria.

[118] Adebambo Adewopo, Nigerian Copyright System: Principles and Perspectives (Odade Publishers; 2012).
[119] See Igor Kopytoff, 'Ancestors as Elders in Africa' (1971) 41(2) *Journal of the International African Institute* 129.

It is still open to debate amongst Nigerian IP commentators when British copyright law became part of Nigerian law. The first view is that the 1710 Statute of Anne applied to Nigeria during colonisation until 1912 by virtue of the statues of general application in Nigeria.[120] The second view is that the Statue of Anne and subsequent copyright acts were not of general application and as such did not apply to Nigeria.[121] Given the vexed issue of determining whether the Statute of Anne is a statute of general application, the latter opinion is the better view. Accordingly, the official account is that the history of copyright in Nigeria starts from the enactment of the Imperial Copyright Act 1911 on 16 December, 1911. The CA 1911 was extended to Nigeria by Order-in-Council No. 912 dated 24th June, 1912 by virtue of s. 25(1) which provides that "[t]his Act… shall extend throughout His Majesty's dominions." Prior to the enactment of CA 1911, British copyright law was confusing as it was contained in separate laws. For example, it was difficult to determine whether an unpublished work enjoyed copyright protection as the existing acts before CA 1911 were silent on this issue. Non-textual works such as paintings and drawings were protected under a separate legislation, Fine Art Copyright Act 1862. The purpose of CA 1911, aside its obvious imperial objective, was to consolidate the law on copyright. Under CA 1911, copyright protection was available for both published and unpublished original literary, dramatic, musical and artistic work.[122] The rights conferred by CA 1911 included the rights of production, reproduction, public performance, publishing, and translation.[123] Also included are adaptation rights for dramatic and non-dramatic works.[124] The CA 1911 also contained the defence of fair dealing.[125] The term of copyright is life of author plus fifty years after death.[126] Under the CA 1911, a regime of compulsory licensing is available for published works for which the author is no longer alive but which the owner of the copyright in the work

[120] Peter Ocheme, *The Law and Practice of Copyright in Nigeria* (Ahmadu Bello University Press, 2000) 9. Sources of Nigerian law include the common law of England, doctrines of equity and the statutes of general application. The statues of general application with regard to Nigeria refers to those statues of general application that were in force in England on 1st January 1900. See s.32(1) Interpretation Act, Laws of the Federation of Nigeria, 1990. However, determining what/which is a statue of general application is a vexed juridical issue.

[121] Egherton Uvieghara, 'Copyright Protection in Nigeria: New Trends and Prospects' in Bankole Sodipo and Bunmi Fagbemi (eds.), Nigeria's Foreign Investment and Intellectual Property Rights (Centre of Commercial Law Studies, Queen Mary University, 1994) 158.

[122] S.1 CA 1911

[123] S.1(2)(a) CA 1911

[124] S.1(2)(b)(c) CA 1911

[125] S.2(1)(i)

[126] S.3 CA 1911

has refused to republish or allow the republication of the work.[127] CA 1911 was however silent on collective management and administration of rights.

It has been noted by some commentators that the extension of CA 1911 did not have much impact in the Nigerian society and this is so for several reasons.[128] First the cultural differences between Nigeria and Britain were clearly obvious in that the former emphasised communal ownership whereas the latter emphasised individualism. Second, the extension of copyright to Nigeria was based on economic, political and ideological considerations. As one author points out, the transplanting of British copyright law was based on the economic interest in protecting British authors which was "accompanied with an ideological motivation to spread copyright law, as it served progress, just like the enlightened version of the imperial project at large."[129] As English language spread quickly beyond the borders of Britain due to colonisation and the art of writing developed into a trade, it was a foreseeable development that Britain would ensure the economic protection of British authors through its regime of copyright. In fact, copyright as transplanted to Nigeria was neither designed to take into account and facilitate local creativity nor did it recognise local needs. In short, copyright law was, and is, not a transcendent moral idea.

C. Indigenous Copyright Legislation in Nigeria: 1970-2004

CA 1911 continued to be the operative copyright legislation in Nigeria even after its political independence on October 31, 1960. This was so even though CA 1911 no longer applied in Britain as it had been repealed by the British Copyright Act, 1956.The first indigenous copyright legislation came only in 1970, a decade after Nigeria's independence. The Copyright Act 1970 (CA 1970) was originally promulgated as a decree on the 24th of December, 1970 under the military government of General Gowon. It is not clear why it took quite long for Nigeria, given it gained its independence in 1960, for it to pass an indigenous legislation on copyright. My own sense is that the delay must have been as a result of the time it

[127] S.4 CA 1911
[128] Ola, *Supra.* n.3 at 8; Uvieghara, *Supra*.n.121 at 158.
[129] Birnhack, *Supra.* n.16 at 80.

took for those creative practices recognised under copyright law to have developed substantially to the form of what is now referred to as the 'creative industry.'

Putting this aside, CA 1970 had twenty sections and three Schedules. Section 16 abrogated the subsistence of copyright other than through CA 1970. Henceforth, copyright could not subsist in common law. Six categories of works were eligible for copyright protection under CA 1970: literary works; musical works; artistic works; cinematograph films; sound recordings; and broadcasts.[130] The term of copyright was cut down from 50 years under the CA 1911 to 25 years after the life of the author for literary, artistic and musical works.[131] For cinematographic works and sound recordings, CA 1970 provided for 25 years after the work was first published; whereas, for sound recordings and broadcasts the term was further reduced to 20 years after the recording was made or the broadcast took place. The Second Schedule provided for exceptions from copyright control and in particular the fair dealing defence. CA 1970 was also silent on collective management and administration of rights except for s.13 which provided for the "appointment and powers of competent authority." The function of this competent authority, made up of three persons appointed by a Commissioner, was to prevent abusive practices by licensing bodies.

It has however been pointed out by several commentators that CA 1970 failed to offer effective protection to copyright owners.[132] For example, criminal proceedings could only be initiated on the basis of the weak provisions in ss.491-493 of the Criminal Code which were very inadequate.[133] Unlike CA 1911, CA 1970 did not include dramatic works as subject matter for copyright protection. And neither did it include a performance right which was available under CA 1911. Given that, in addition, the term of protection was limited to 25 years, it was inevitable that copyright owners would seek new legislation. These gaps, amongst other concerns, led to the 1988 Copyright Act (CA 1988).

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[130] s.1 CA 1970
[131] First Schedule, CA 1970
[132] Folarin Shyllon, 'Copyright Law and its Administration in Nigeria' (1998) 29 IIC 173; Tony Okoroji, *Copyright, Neighbouring Rights and the New Millionaires* (The Twists and Turns in Nigeria) (Top Limited; 2008)
[133] Shyllon, *Ibid*., at 173; Ola, *Supra.* n.3 at 10; R.L. Gana, 'Two Steps Forward: Reconciling Nigeria's Accession to the Berne Convention and the TRIPS Agreement' (1996) 4 IIC 476, 479.

CA 1988 was originally passed as Copyright Decree No. 47 of 1988 as it was promulgated under a military administration. In order to remove the drawbacks of CA 1970, it provided for civil and criminal liabilities. The former were contained in ss.14-17, whereas the latter were in ss.18-20 and 27. It expanded the categories of protectible subject matter. However, it did not provide for a regulatory body to implement and administer the provisions of the Act. CA 1988 has been amended twice by the Copyright (Amendment) Decree No. 98 of 1992 and the Copyright (Amendment) Decree No. 42 of 1999. One of the main amendments introduced by the former was the setting up of a regulatory body named the Nigerian Copyright Council (NCCL) by s.30. The 1992 Act also gave the NCCL the power to make regulations pursuant to its mandate and the authority to appoint copyright inspectors for the purpose of enforcing the Act. On the basis of this, the Appointment of Copyright Inspectors Notice SI No. 12 of 1997 was issued. Additionally, the compulsory licensing mechanism that was touched upon in CA 1970 was expanded by the 1992 Act which gave the NCCL the power to grant compulsory licenses. Finally, the 1992 Act also provided for the setting up of collecting societies now referred to as collective management organisations (CMOs). The 1999 amendment Act on the other hand regulated the activities of CMOs. By virtue of the 1999 Act, it was no longer possible for organisations operating as CMOs to bring an infringement suit against users unless said organisation is approved to be a CMO or granted an exemption by Nigerian Copyright Commission (NCC). It was also in the 1999 Act that it was approved that the NCCL be referred to as the NCC instead of the NCCL.

The 1988 Copyright Act and the following amendments constitute the principal legislation governing copyright law in Nigeria. In 2004, the laws were re-codified and now referred to as the Nigerian Copyright Act Cap. 28 Laws of the Federation of Nigeria, 2004 (CA 2004 or the Copyright Act).

D. *The Landscape of Copyright Legislation in Nigeria: 2004 and Beyond.*

I. *Some Aspects of the Copyright Act 2004, Cap. 28.*

CA 2004 is the principal legislation governing copyright law in Nigeria. It has four (4) parts, fifty-three (53) sections and five (5) Schedules. Below, I discuss some relevant parts of CA 2004.

a. *Protected Works*

Section 1 of the Copyright Act provides for works eligible for copyright protection: literary works; musical works; artistic works; cinematograph films; sound recordings and broadcasts. Section 1(2)(a) goes on to provide that for a literary, musical or artistic work to be eligible for copyright protection, it is required that "sufficient effort has been expended on making the work to give it an original character." Furthermore, the work must satisfy the requirement of fixation i.e. it must be fixed in any definite medium of expression for it to enjoy protection.[134] For example, if Emeka *extempore* composes a song and sings it to an audience, the work is neither protected as a musical work nor a sound recording unless the composition is written down or its performance is recorded.[135] S.1(3) further lays down the condition for the protection of artistic works in providing that "an artistic work shall not be eligible for copyright, if at the time when the work is made, it is intended by the author to be used as a model or pattern to be multiplied by an industrial process." This condition on the protection of artistic works is a recognition of the principle that copyright protects creative works rather than functional or utilitarian works which would be the domain of patents or industrial designs.[136]

Lastly, although the Copyright Act does not explicitly mention dramatic works in the category of works eligible for copyright protection, it is safe to say that dramatic works are protected under the Copyright Act for several reasons. First, dramatic

[134] S.1(2)(b). While the condition of fixation is not obligatory under the Berne Convention, many countries require that for a work to enjoy copyright protection it must be fixed. See Berne Convention, Supra. n.13, Art 2(2).
[135] It is not necessary that Emeka personally records the song as the recording of the song by a member of the audience will satisfy the fixation requirement.
[136] This is also the case under US Copyright Law. See 17 U.S.C § 101 and 113.

works are mentioned in other parts of the Copyright Act though not mentioned explicitly in s.1 under works eligible for copyright protection. For example, under the fourth Schedule, any qualified person may apply for a compulsory license to "produce and publish a translation of a literary or dramatic work…" Secondly, the definition of literary work under the Copyright Act encompasses dramatic works.[137]

The Copyright Act does not exempt copyright protection for works made by the Government, State authority or international body provided the work is a work eligible for copyright protection as discussed above.[138] Finally, understanding the different categories of works eligible for copyright protection is important not just because they define the universe of protectible works but also because the different categories are not subject to uniform limitations and rights. One example, as we shall see below, is the term of duration that applies to the different categories. Another concerns the ownership implications of certain categories of works that are collectively produced.[139]

b. Economic and Moral Rights.

Section 15(1)(a) of the Copyright Act provides that:

> Copyright is infringed by any person who without the license or authorisation of the owner of the copyright does, or causes any other person to do an act, the doing of which is controlled by copyright.

Section 6 confers a set of exclusive economic rights which grant the copyright owner the power to control the use of copyright works. Some of the rights recognised are the right to: reproduce the work in a material form; publish the work; perform the work in public; produce, reproduce, perform or publish any translation of the work; make a cinematograph film or record of the work; distribute copies of the work; broadcast or communicate the work to the public; make any adaptation of the work; exercise these rights in relation to an adaptation or translation of a work. The exceptions to these exclusive rights are contained in the Second Schedule of the Copyright Act. Principal amongst these exceptions is the fair dealing defence. The

[137] S.39(1) Copyright Act [Interpreting literary works as constituting plays and choreographic works which are examples of dramatic works.]
[138] Sec. 4 Copyright Act.
[139] See s.39(1) Copyright Act.

fair dealing defense under the Copyright Act allows the doing of any of the acts mentioned in s.6 provided it is only “for purposes of research, private use, criticism or review or the reporting of current events” and that where 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.”

Moral rights which have their roots in civil law tradition are recognised under s.12 of the Copyright Act. It provides for the rights of paternity and attribution,[140] and also the right “to object and to seek relief in connection with any distortion, mutilation, or other modification of and any other derogatory action in relation to his work, where such action would be or is prejudicial to his honour or reputation.”[141] Furthermore, these recognised moral rights, unlike the economic rights above, are “perpetual, inalienable and imprescriptible.”[142]

c. Neighbouring Rights

Neighbouring or related rights, as they are sometimes called, have no precise definition in academic treatise and commentary, but they are rights granted for works which are based on or build on literary, artistic or musical works, the traditional subject matter of copyright law. On this understanding, sound recordings and broadcasts will be classified as neighbouring rights but this is not necessarily the case as the demarcation between copyright and neighbouring rights is primarily a product of legal tradition, with civil law tradition insisting on the demarcation between the two while common law countries are satisfied with, for the most part, treating both as the same. For example, sound recording and broadcasts as discussed above are treated as copyright under the Copyright Act. The major treaties that govern neighbouring rights at the international level are the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisation (Rome Convention), Article 14 of the TRIPS Agreement, and the WIPO Performance and Phonograms Treaty (WPPT).

[140] s.12(a)
[141] s.12(b)
[142] s.12(2)

Part 2 of the Copyright Act deals with two neighbouring rights: performers and folklore. The exclusive rights granted to a performer are in relation to the following acts: "performing; recording; broadcasting live; reproducing in any material form; and adaptation of the performance."[143] The exclusive right of a performer also extends to unfixed performances. It is an infringement of the performer's right for someone to record or fix his unfixed performance, such as a live performance.[144] The rights however granted to performers under the Copyright Act fall short of those in the WPPT. For example, the right of making available of fixed performances and the right of rental which are all available under the WPPT are not provided for under the Copyright Act.[145] Furthermore, there is no provision regarding performer's moral right under the Copyright Act.[146]

As regards folklore, the Copyright Act grants exclusive rights against "reproduction; communication to the public by performance, broadcasting, distribution by cable or other means; adaptations, translations and other transformations, when such expressions are made either for commercial purposes or outside their traditional or customary context."[147] Given that folklore is a group-based creation, the NCC is vested with the right to authorise acts prohibited by the grant of exclusive rights.[148] The exclusive rights for expressions of folklore are however subject to exceptions, such as the fair dealing defence and utilisation for educational purposes.[149] This is however not the case for performer's rights as the Copyright Act does not provide for an exception for this neighbouring right.

[143] s.26
[144] Arts. 7(1)(b) and 6 of the Rome Convention and WPPT respectively provide as a minimum right that performers have the exclusive right to authorise "the fixation of their unfixed performances". The Copyright Act does not expressly provide such but s.28(a) states that a performer's right is infringed by a person who without the performer's consent "makes a recording of the whole or a substantial part of a live performance." While it is arguable that this provision might satisfy the minimum right to unfixed performances, in order to comply with the Rome Convention and WPPT the Copyright Act should be clearly worded to show that rights afforded to a performer includes the right to prohibit the fixation of unfixed performances.
[145] See Arts. 9 and 10, WPPT
[146] Art.5 WPPT [Providing for performer's moral rights.]
[147] s.31(1)
[148] s.31(4)
[149] s.31(2)

d. Term of Copyright Protection

The First Schedule of the Copyright Act provides for the duration of copyright. In the case of literary, musical or artistic works other than photographs, the term is life of the author plus 70 years. Where the work is by a government or corporate entity, it is seventy years after the end of the year in which the work was first published. For cinematograph films or photographs it is 50 years post publication. Similarly, for sound recordings and broadcasts it is 50 years after the end of the year in which the recording was first published or broadcast first took place.

As regards the neighbouring right of performers, s. 27 provides that it is 50 years following the end of the year in which the performance took place. Regarding expressions of folklore, it does not make sense to limit it to a term of protection given that, aside from the difficulty of ascertaining when it was created, it is an intergenerational communal creation. This is the approach taken by the Copyright Act.

II. The Draft Copyright Bill 2015.

It is quite obvious from the brief overview of the principal legislation governing copyright in Nigeria that the Copyright Act needs to be updated. In particular, as noted above, the last revision on the Copyright Act was the 1999 Amendment Act and given technological developments as well as international obligations the Copyright Act is overdue for revision.

In November 2012, the NCC launched the Reform of the Copyright System. According to NCC:

> The key objective of the reform was to reposition Nigeria's creative industries for greater growth; strengthen their capacity to compete more effectively in the global marketplace, and also enable Nigeria to fully satisfy its obligations under the various International Copyright Instruments, which it has either ratified or indicated interest to ratify.[150]

[150] Document on file with author. See chapter 5 for a discussion of the development implications of NCC policy.

This reform led to the Draft Copyright Bill 2015 (Copyright Bill). The Copyright Bill is an attempt to align Nigerian copyright law with international obligations, particularly the so-called Internet treaties— WIPO Copyright Treaty (WCT) and WPPT— and the Marrakesh VIP Treaty.[151] The Copyright Bill has 11 parts and 88 sections. Some of the provisions that reflect Nigeria's commitment to align its copyright legislation with international obligations are the provisions on moral rights for performers[152], visually impaired persons[153], technological protection measures[154], and online content and internet service providers.[155]

The Copyright Bill since 2015 is yet to be passed as law by the legislature. As at the time of writing, the Copyright Bill has not yet been presented in the National Assembly (NASS), as constitutionally required[156], in order for the Copyright Bill to be passed as law.[157] The reason for delaying the passage of the Copyright Bill is not entirely clear but it would seem to be more of a political and bureaucratic nature than any disagreements amongst the stakeholders. In 2017, the Federal Executive Council presided by President Muhammadu Buhari approved the Copyright Bill[158], the next step being its presentation to the NASS. However, the Copyright Bill has not made its way to the NASS possibly due to the dissolution of the 8th NASS.[159]

4. Conclusion

The aim of this chapter so far has been to examine several narratives dominating the discourse of copyright, principally the view that the regime of copyright law is as a result of the invention of the printing press, through a historical analysis. Unpacking

[151] On October 4, 2017 Nigeria deposited the instrument of ratification of these treaties, including the Beijing Treaty on Audiovisual Performances which is yet to enter into force upon the ratification by at least thirty (30) parties.
[152] Copyright Bill, part VIII
[153] *Ibid*. s.2
[154] *Ibid*., Part VI.
[155] *Ibid*., Part VII
[156] Constitution of the Federal Republic of Nigeria 1999, s.58.
[157] https://www.nassnig.org/documents/bills
[158] Afro Leo, 'Nigeria: Copyright Progress' *AFRO-IP* (July 11, 2019) http://afro-ip.blogspot.com/2019/07/nigeria-copyright-progress.html
[159] On whether the Copyright Bill advances development concerns peculiar to Nigeria, see chapter 4, section 4 and chapter 5, section 5.

this technologically deterministic account of copyright law has further revealed some assumptions and narratives that structure our understanding of this area of law. First, implicit in this technologically deterministic narrative is the idea of progress. It is difficult to miss out the syllogism implied by this narrative: the invention of the printing press by revolutionising in positive ways book production and distribution is progress; copyright is a natural development of the invention of printing press; therefore, copyright is progress. There are too many issues raised here but critical to this inquiry is one: whether the emergence of copyright law is acultural, for if it is then the view that copyright is progress is universally valid. This view is particularly bookended by the technologically deterministic account. Technology is generally neutral and so the view that copyright is progress must be universally valid for all societies. In querying these narratives, a bottom-top and top-bottom approach have been employed. With the latter, the finding is that copyright projects a particular conception of the person known as possessive individualism or what one author describes as the 'atomistic individual'.[160] As noted, this view of the person is by no means universal. What then follows from the top-down analysis is that the view that copyright is progress is only valid if progress is understood under the Enlightenment banner.

With the bottom-top analysis, it was necessary to look briefly at the idea of copyright as it currently operates and to juxtapose it with a particular period in the development of copyright, specifically the period following the invention of printing press. This period marked the beginning of the grant of printing privileges. As we have seen, rather than an establishment of literary property or copyright, these privileges are at most precursors to copyright law. They were grants conditioned on sovereign's grace and issued as a reward for the considerable financial investments in the printing of cultural works. They did not advance authorship or authorial interests in creative works. Furthermore, and specifically under the Tudor regime in England, these privileges were granted based on the Crown's interests in censoring printed works. And neither did the stationers' copyright which developed in the 16th century in England establish copyright law for it was, amongst other reasons, available only to the members of the book trade. This account therefore clearly puts aside the

[160] Baggini, *Supra.* n.25.

dominant account which treats the emergence of copyright law *as a result* of the invention of the printing press.

The printing privileges however tell of another story which has been important in the development of copyright law and the propertisation of knowledge: the commodification of books and by extension knowledge. Once books entered the market place their exchange and economic value took priority over their cultural value. The monopolies enabled by the book privileges provided a means for the emerging capitalist class to capture this value. It is this feature, the commodification of knowledge, which one can trace to the first recorded printing privilege that has been instrumental to the expansion of copyright law to the detriment of developmental goals such as A2E. And it is this commodification that has enabled the incentive theory. Put differently, the incentive theory rather than a product of reality is a result of the commodification of books. As we have seen, the history of cultural production prior to the invention of the printing press does not support the view that monetary incentives are necessary for the production of cultural works. The societies of ancient Greece, Rome and China produced abundant cultural works despite the broad consensus on the absence of any established literary property regime. After the invention of the printing press and the rise of the capitalist class of book traders, who saw opportunities to treat the printed book as a commodity, arguments were fashioned to facilitate the process of commodification. In 1586**,** the Company of Stationers first articulated the economic argument underlying many copyright regimes when it stated:

> And further if privileges be revoked no bookes at all should be prynted, within shorte tyme for commonlie the first prynter is at charge for the Authors paynes, and somme other suche like extraordinarie cost, where an other that will print it after hym, commeth to the Copie gratis, and so maie he sell better cheaper than the first prynter, and then the first prynter shall never vtter [sell] his bookes.[161]

Once the printed book became commodified, it was only a matter of time before the capitalist class of book traders proffered the incentive argument in support of their claim for printing privileges which sustained the commodification of books. So, "copyright is not a transcendent moral idea, but a specifically modern formation

[161] Cited in Patterson, *Supra.* n.37 at 105

produced by printing technology, marketplace economics, and the classical liberal culture of possessive individualism."[162]

That this is so is also clear from the brief discussion on the development of copyright law in Nigeria. There is broad consensus, of which the examples abound even till the present day, that pre-colonial Nigeria produced some of the finest artistic and cultural works. Yet this creativity was not supported by a property regime in creative works of the mind nor did they see a need for it. It was only during colonialism that copyright law was introduced to Nigeria by the British. Even at that, the transplanted copyright law did not accommodate the needs of Nigerian society and culture but instead sought to advance the interests of British authors. What is clear then is that copyright law is a social and cultural construct. But one implication of this observation is that the legal institution can be re-thought and adapted to accommodate the needs of a DC like Nigeria. Indeed, as we have seen, the protection of expressions of folklore in the development Nigerian copyright law is an example of adapting copyright law to accommodate the cultural realities in parts of Nigeria.

[162] Rose, *Supra.* n.23 at 142; *Cf.* Bracha, *Supra.* n.91 at 32; Burkitt, *Supra.* n.16.

CHAPTER 2: COPYRIGHT AS WEALTH MAXIMISATION: AN INTERNAL CRITIQUE OF THE LAW AND ECONOMICS OF COPYRIGHT

> In its Greek origins, historia meant inquiry, and from Thucydides onwards, the past has been studied to understand its connections with the present.*

1. Introduction

Given the dominance of economic theories and analyses in copyright law and policy, it is exigent to examine whether this paramountcy can be justified in its own terms. It is important that the search for this justification be carried out *within* the economic paradigm because it is not uncommon for commentators to assert the pre-eminence of economic analysis in IP on the basis of its supposed capacity to resolve issues at any level of specificity.[1] This might be true in theory but, as this chapter argues, economic analysis of copyright is often able to do no more than only *identify* at a general level the attendant costs and benefits of the copyright institution.

Accordingly, this chapter offers an 'internal' critique for why the neoclassical economic theory of copyright law should be rejected. By internal criticism, I mean one that accepts the assumptions underlying the economic theory of copyright law. In the academic literature, the general trend is to critique the economic theory of copyright law by challenging some of its assumptions. For example, one could question whether all informational works are non-excludable[2] or refute the

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* Simon Schama, 'Hot-Wired History…Unplugged' *Forbes ASAPA* (December 2, 1996)

[1] For instance, L.C. Becker, 'Deserving to Own Intellectual Property' (1992) 68 *Chi.-Kent. L. Rev*. 609, 620, comments that economic arguments "address property rights questions at any level of specificity… [and that] [n]ot every classic argument for private property rights has this sort of applicability 'all the way down.'" See also Australian Productivity Commission, *Intellectual Property Arrangements*, (Draft Report; Canberra, 2016) [Adopting an economic framework to assess the different dimensions of the IP system.]

[2] See Amy Kapcyznski and Talha Syed, 'The Continuum of Excludability and the Limits of Patents' (2013) 122 *Yale L.J.* 1900 (Arguing that some informational goods are more excludable than others and as such the conventional account of public goods which regards excludability as binary is wrong). I use informational works and copyright works interchangeably in this chapter.

assumption that financial interests motivate creators.[3] Additionally, the normative issue of whether wealth-maximisation (WM) is an ethical value worthy of pursuit, and the extent to which such value conflicts with distributive equity are all general critiques of the economic analysis of law and also copyright in particular.[4] I go beyond these critiques in this chapter by accepting these assumptions and that WM is ethically desirable. The argument is that even if one accepts these assumptions, the normative application of the efficiency theory to copyright law is infeasible because in most cases it cannot yield a clear answer. In order to buttress this argument, the approach and the original insight of this chapter is to show the philosophical and methodological connections between utilitarian welfare economics (UWE) and normative economic analysis of law and to map them onto copyright theory. In short, it is argued that the displacement of UWE ('old') by Paretian economics ('new') is due to informational difficulties which also plague the efficiency theory of copyright law. Furthermore, it is suggested that even absent informational difficulties, economic analysis of copyright law in whatever paradigm it is packaged is flawed and as such may not be able to provide concrete policy guidance.

Section **2** shows the linkages between on the one hand utilitarianism and welfare economics and on the other hand between the latter and normative economic analysis of law, and then proceeds to point out that it is no surprise that some of the flaws that plague the former two are also applicable to normative economic analysis of law. Specifically, it argues that the movement from utilitarian economics to Paretian economics in standard welfare economics owing to the feasibility concerns of measurement and interpersonal comparability of utility also characterise the normative economic analysis of law project. In particular, measurement difficulties make it difficult to ascertain whether any legal policy is efficient or maximises social welfare. The point is that if the informational/measurability advantages of using WM in formulating optimal legal policy are only illusory, then one must reject it considering that it is a poor surrogate for welfare or well-being.[5] In short, if the abandonment of UWE was justified by measurement difficulties, then *a fortiori*

[3] See D.L. Zimmerman, 'Copyright as Incentives: Did We Just Imagine That?' (2011) 12 *Theoretical Inquiries in Law* 29; G.N. Mendel, 'To Promote the Creative Process: Intellectual Property Law and the Psychology of Creativity' (2011) 86 *Notre Dame L. Rev.* 1999.
[4] R.M. Dworkin, 'Is Wealth A Value?' (1980) 9 (2) *J.Leg. Stud.*191; Lea Shaver, 'Copyright and Inequality' (2014) 92 *Wash. U. L. Rev.* 117.
[5] See Herbert Hovenkamp, 'Legislation, Well-Being, and Public Choice' (1990) 57 *U. Chi. L. Rev.* 63.

Kaldor-Hicks/WM as applied in the efficiency theory of copyright law and policy must also be abandoned. In fact, the case for the rejection of efficiency theory in copyright law is even stronger because the subject matters of copyright law are subject to significant positive externalities that are either ignored or difficult to capture in economic models. Accordingly, the issue is not just that informational difficulties characterise the operationalisation of copyright economic analysis but also that economic models are inadequate and, inevitably, *ignore* costs and benefits not cognisable in the market paradigm.

To be clear, the argument is not that the WM notion of efficiency is interpersonally incomparable[6]; rather, it is that it is no more different to claim that WM should be rejected because of informational difficulties that prevent a policy maker from ascertaining whether a policy is wealth maximising than asserting that UWE was rightly rejected because of the informational difficulties in computing utilities. Both are informational constraints (or feasibility concerns)[7] that impede the operationalisation of the guiding norm. Additionally, if economists must reject UWE because interpersonal comparisons of utility are not *wertfrei* (i.e. unscientific), then it is no more *wertfrei* for economists and by extension lawyer-economists to insist that legal policy be evaluated according to a norm that faces informational difficulties in its implementation. Speculation fills the gap between incomplete and complete information, and it is no less a value judgment for which its *wertfreiheit* status must be deemed questionable.

This concern with feasibility is a distinct way of normative thinking in economics and is characteristic of economic analysis in general.[8] For the normative economist then, it is certainly not enough to identify an ideal norm and to state what the

[6] Of course, wealth is comparable and aggregable across persons because like weight or height there is a common metric of measurement— Dollar, Euros or any currency— and it is observable.

[7] Feasibility, as I use the term, means that a theory cannot yield *any* satisfactory or unique answer. This is an internal argument insofar it is not predicated on a rejection any of the assumptions.

[8] For example, in analysing consumer demand the positive economist assumes that consumer choice is determined by her budget set i.e. the set of things that she can *afford* to buy, and her preferences. In other words, a consumer's individual demand is not simply what she *wants* but rather what she wants *out of her feasible options*. H. Gravelle & R. Rees, *Microeconomics* (3rd ed. Pearson Education, Edinburgh 2004) 11. Another area economists pay attention to feasibility is the specification of the perfectly competitive model as an efficient state of affairs. It might be argued in this instance that economists are obsessively concerned with an ideal norm that is not achievable. But the positive economist recognises this and uses the ideal norm only as a standard in comparing different real institutional arrangements. In other words, the issue is not whether any of these institutional arrangements can reach the ideal norm; rather, it is the extent they can cheaply and closely approximate the ideal norm in our imperfect world. This is the 'market paradigm'.

implementation would institutionally require if the implementation is infeasible.[9] One must 'cut his coat according to his size.' Accordingly, the desirability of a norm must be constrained by feasibility concerns. This is generally achieved by selecting a norm that is feasible. That is, the 'richness' or 'robustness' of a norm might be determined by its feasibility or, if you will, the extent to which informational constraints, amongst other things, allow the usage of that norm as a guide.[10] For example, a welfare conception that is based on weight or educational achievement is feasible for policy analysis but clearly diminishes the richness of welfare as an ethical norm. One might say in such instances that there is a trade-off between feasibility and desirability. But it might equally be argued, however, that there is no trade-off if the desirable norm is not feasible. Whatever be the case, the argument is that a norm predicated wholly or partly on feasibility should be rejected if its operationalisation is illusory, particularly if there are more ethically desirable norms that are no less feasible. The movement from 'old' to 'new' welfare economics is, in my interpretation, an example of such feasibility concerns in normative economics. This concern for feasibility is replicated in the normative economic analysis of law. Viewed from this perspective, this work argues that the concern for efficiency in the normative economic analysis of copyright law—whether in the form of WM or utility maximisation—is precarious at best because it is infeasible.

Section **3** develops this argument further by examining and critiquing two paradigms associated with the law and economics (Law&Econ) of copyright. I conclude that whatever merits there are to an efficiency analysis, it simply cannot tell us whether a particular legal policy without speculation maximises incentives in excess of access costs. In examining the second paradigm, I consider thoughtful criticisms mounted on it by those faithful to the Law&Econ project but argue that, although the paradigm is flawed, such criticisms offer no way out precisely because it reflects the limits of economic analysis.

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[9] This concern with feasibility in economic analyses is in contrast to political philosophy where theories of justice are concerned with the identification of perfectly just institutions. See John Rawls, *A Theory of Justice* (HUP, Cambridge 1971); Robert Nozick, *Anarchy, State and Utopia* (Basic Books, New York 1974). But *Cf.* Amartya Sen, *The Idea of Justice*, (Penguin Books, London 2010) (Developing an approach to justice that incorporates feasibility concerns.)

[10] See Gary Lawson, 'Efficiency and Individualism' (1992) 42 *Duke Law Journal* 53,65 at fn. 36 ["[t]he degree of precision affects the usefulness of a conception of welfare…"]

Section **4** considers the implications of these observations for a re-characterisation of copyright as an institution of social and cultural change.

Section **5** concludes.

2. Normative Economics, Law and the Market Paradigm

A. Utilitarianism and Welfare Economics

The statements that "utilitarianism … is so similar to standard welfare economics"[11] and that "standard welfare economics is still largely utilitarian"[12] are both correct.[13] Hence, it is worthwhile to re-state briefly the theory of utilitarianism.

Utilitarianism has been referred to as a species of 'welfarist consequentialism' plus the added quality of sum ranking.[14] Put differently, utilitarianism is a composite theory that is constitutive of or combines three separate elements: consequentialism, welfarism, and sum-ranking. Consequentialism requires that any action or policy be judged solely on the basis of its consequent state of affairs. This is in contrast to non-consequentialism, a defining characteristic of deontological theories, which asserts that an action should be judged solely according to its 'rightness', irrespective of its consequences on maximisation of the 'good.' Welfarism is the view that the correct basis of assessing a state of affairs is welfare. With the elements of consequentialism and welfarism, utilitarianism as a theory of public policy might be rephrased as requiring that a law or legal policy be judged according

[11] D.M. Hausman & M.S. McPherson, *Economic Analysis, Moral Philosophy & Public Policy,* (2nd ed. CUP, 2006) 116.

[12] Amartya Sen, 'On the Foundations of Welfare Economics: Utility, Capability, and Practical Reason' in L.A. Fennell & R.H. McAdams (eds.), *Fairness in Law and Economics* (Edward Elgar, 2013); J.M. Buchanan, 'Positive Economics, Welfare Economics, and Political Economy' (1959) 2 *Journal of Law and Economics* 124 ("Economic theory, as we know it, was developed largely by utilitarians.")

[13] On works discussing the link between utilitarianism and welfare economics, see Geoffrey Brennan, 'Economics' in R.E. Goodin *et.al.* (eds.), *A Companion to Contemporary Political Philosophy*, (Vol.1, 2nd ed. Blackwell, 2007) (Identifying the collapse of utilitarianism in welfare economics as an example of the application and constraints, in economic methodology, of 'feasibility' considerations in choosing an ethically desirable norm.); W.J. Baumol & C.A. Wilson (eds.), Welfare Economics: The International Library of Critical Writings in Welfare Economics 126 (Vol.1; Edward Elgar, 2001); Roger Backhouse, A History of Modern *Economic Analysis*, (Basil Blackwell, 1985) 160-9; Amartya Sen & Bernard Williams (eds.), *Utilitariansim & Beyond* (CUP, 1982); I.M.D. Little, *A Critique of Welfare Economics*, (2nd ed. OUP, 1952)

[14] Sen & Williams, 'Introduction: Utilitarianism and Beyond' in Sen & Williams *Ibid.*

to its consequences on welfare. Sum ranking is the aggregation of individual welfares by summing them up together without paying attention to distributional consequences across population. So, utilitarianism is concerned with the maximisation of welfare or its surrogate. As will be shown in the subsequent section, these three elements—consequentialism, welfarism, sum-ranking—form the frameworks of utilitarian and Paretian welfare economics, although the latter drops the element of sum-ranking due to measurement and comparability problems of utility. In short, the framework of welfare economics is similar to utilitarianism because it is concerned with economic outcomes rather than processes and those outcomes are judged according to their consequences on the welfare of individuals.

Several criticisms have been levelled against utilitarianism which are equally applicable to standard welfare economics and normative economic analysis of law. It has been pointed out that utilitarianism is process-insensitive and only concerned with outcomes, unless the process has an effect on the outcome. The problem is that the same outcome might be reached through different processes whose effects on fundamental values differ and utilitarianism does not care about this insofar as the outcome on the sum total of individual welfare is the same. As Sen puts it, “one of the major limitations of this approach lies in the fact that the same collection of individual welfares may go with very different social arrangements, opportunities, freedoms and consequences.”[15] This tendency to neglect processes is characteristic of welfare theories, such as WM which underpins the normative economic analysis of law. Another criticism of utilitarianism is its distributional indifference. What is important for utilitarianism is welfare-maximisation or the sum total of individual utilities. It does not care about how these utilities are distributed. This is almost peculiar to maximisation theories insofar as what they are concerned about is maximising a particular attribute, be it wealth, utility, or preference satisfaction. In particular, the two efficiency notions— Pareto and Kaldor-Hicks— are concerned with enlarging the size of the ‘pie’ rather than distribution. Another criticism centres on a central feature shared by utilitarianism, welfare economics, and normative economic analysis of law—the basis on which outcomes are appraised. Welfarism operates as an informational constraint in the assessment of a state of affairs i.e. the only relevant information required to appraise an outcome is welfare. And it is only

[15] Sen, *Supra* n.12.

individual welfare that matters although this particular facet is debatable for utilitarianism. For example, the boundary problem of whether hedonic calculus extends to all sentient beings or just to humans is relevant here. In normative economics, welfare is measured according to the extent of individual preference satisfaction. This is also the case with economic analysis of law. Aside from the inherent individualism in both theories (and arguably utilitarianism), the concern is that a focus on welfare neglects other fundamental values. Accordingly, Hausman and McPherson state that "[w]elfare economics depends not only on a specific view of welfare but also on the view that inquiries into welfare can be separated from inquiries into freedom, rights, equality and justice."[16]

The link between utilitarianism and standard welfare economics becomes even more obvious when one appreciates the connection between neoclassical economics assumptions and utilitarianism. In turn, these assumptions play an important role in standard welfare economics. For example, the standard assumption in neoclassical economic theory is that individuals behave so as to maximise their utility. This assumption in economic theory about how humans behave has Epicurean roots although in modern philosophy this can be associated with the utilitarianism of Bentham. According to Bentham, "[N]ature has placed mankind under the governance of two sovereign masters, pain and pleasure."[17] This is referred to as psychological hedonism, a species of psychological egoism. The former asserts that humans behave in order to maximise pleasure in excess of pain, whereas the latter is broader, asserting the predominance of self-interest in human motivation. In fact Jevons, a utilitarian, thought "the object of Economics is to maximize happiness by purchasing pleasure, as it were, at the lowest cost of pain."[18] The main point however—be it psychological hedonism or egoism—is that humans behave in order to maximise what is in their self-interest, whether pleasure, happiness, wealth or some other value. This maximising behaviour pervades economic theory. As Becker states, "the combined assumptions of *maximizing behaviour*, market equilibrium, and stable preferences, used relentlessly… form the heart of the economic approach as I

[16] D.M. Hausman & M.S. McPherson, 'The Philosophical Foundations of Mainstream Normative Economics' in D.M. Hausman (ed.) *The Philosophy of* Economics: *An Anthology* (3rd ed. CUP, 2008); *Cf.* Amartya Sen, *Development as Freedom* (OUP, 1999 reprint ed. 2013) 62.
[17] J.H. Burns & H.L.A Hart (eds.), Collected Works of Jeremy Bentham: An Introduction to the Principles of Morals and Legislation (Athlone, 1970) 11
[18] W.S. Jevons, *The Theory of Political Economy* (3rd ed. Macmillan, 1888) 29.

see it."[19] And in standard welfare economics, Pareto optimal outcomes are reached through the pursuit of self-interest under certain conditions, an issue discussed later. In fact, the preference satisfaction account (PSA) of utility, discussed below, is premised on the behavioural assumptions of rationality and self-interest.

I. Preference Satisfaction Theory of Utility

Although there are different approaches to welfare that determine its constitutive element or content[20], welfare in utilitarianism is utility. Utility could either be experiential or choice-based.[21] The former is concerned with mental states such as satisfaction or happiness whereas the latter's focus is on preference satisfaction in the sense that what counts is the satisfaction of individual preferences as revealed through their choices (e.g. in the market or questionnaires). In the PSA, what is being maximised is the satisfaction of individual preferences or, put differently, the maximisation of private values. Preference satisfaction is a surrogate for welfare such that if A's preference is satisfied, it is assumed that there will also be a consequent improvement in A's welfare. A policy is then judged according to how well it satisfies individual preferences. The more preferences are satisfied, the better the policy i.e. policy A is better than policy B if it maximises preference satisfaction. Of course, this requires interpersonal comparisons of utility, but I leave out of now the discussion of this issue. The immediate objective is to briefly consider the arguments for why the PSA of utility is generally the preferred one amongst modern economists.

The view that preference satisfaction is equivalent to welfare is of course a controversial one at best. Very few would entertain such claims. To name a few, issues of adaptive preference[22], limited information, and irrational beliefs all plague the PSA. Moreover, it is not true that our choices always reveal our true preferences. As one commentator argues, "[s]trategic behavior, framing, the wealth effect, and the

[19] G.S. Becker, *The Economic Approach to Human Behaviour* (University of Chicago Press, 1978) 5. Emphasis added

[20] See generally Keith Dowding, 'What is Welfare and How Can We Measure it' in Don Ross & Harold Kincaid (eds.) *The Oxford Handbook of Philosophy and Economics* (OUP, 2009)

[21] Ibid.

[22] On adaptive preferences, see Jon Elster, 'Sour Grapes—Utilitarianism and the Genesis of Wants' in Sen and Williams, *supra*. n.13.

endowment effect create illusions and undermine the link between choice and preference."[23] In fact, it is important to emphasise that these criticisms are not peculiar to utilitarianism for they apply equally to economic analysis of law. If an efficient legal policy is based on the maximum satisfaction of individual preferences, then there should be a reliable way of ascertaining these preferences. Otherwise, the claim that a law is efficient or maximises social welfare would be merely speculative. Nevertheless, welfare economists wedded to the PSA of utility have responded in defence of it by arguing that it is anti-paternalistic[24] and also tightening the account further by demanding that a person's *true* and manifest preferences be distinguished; and that only the former be counted.[25]

II. Interpersonal Comparisons: From Utilitarian to Paretian Welfare Economics.[26]

The consensus in the academic literature regarding the movement from UWE to Paretian welfare economics seems to be that it was largely due to the difficulties with the measurement and comparability of utilities across persons.[27] The argument was(is) that it is not possible to measure the utility one person derived from a particular good and compare it with what another person derived from same good or another good. This is because utility is defined subjectively and there is no common metric of measurement. To engage in such interpersonal comparisons of unobservable utilities is unscientific. I slightly re-characterise or rephrase this argument to assert that the real reason for the rejection of UWE is because its

[23] J.L. Harrison, 'Egoism, Altruisim, and Market Illusions: The Limits of Law and Economics' (1986) 33 *UCLA L. Rev.* 1309, 1361.

[24] J.C. Harsanyi, 'Morality and the Theory of Rational Behaviour' in Sen and Williams, *supra*. n.13 ("preference utilitarianism is the only form of utilitarianism consistent with the important philosophical principle of *preference autonomy*…") Emphasis original.

[25] J.C. Harsanyi, *Ethics out of Economics*, (CUP, 1999) 55 ("social utility must be defined in terms of people's true preferences rather than in terms of their manifest preferences"). My view is that this tightened or modified version of PSA is unsatisfactory on the grounds that it smuggles paternalism through the backdoor and the informational difficulties for its implementation are severe.

[26] The content of this section is taken mostly from the following works: Robert Cooter & Peter Rappoport, 'Were the Ordinalists Wrong About Welfare Economics?' (1984) 22 *Journal of Economic Literature* 507 (Arguing that the 'ordinalist revolution' represented change, not progress, in economics because according to them the ordinalists asked questions different from the 'material welfare school' and did not provide answers to the latter's issues.); Herbert Hovenkamp, 'The First Great Law and Economics Movement' (1989) 42 *Stan. L. Rev* 993 (Examining the 'material welfare school' as part of what he calls the 'first great law & economics movement'); Jon Mulberg, *Social Limits to Economic Theory* (Routledge, 1995) 39-77 (Chronicling the trajectory of welfare economics from its utilitarian foundations).

[27] Little, *Supra* n.13 at 13; Buchanan, *Supra*. n.12 at 124 ("The 'new' welfare economics was born in response to the challenge posed by the positivist revolution… [and that] The intellectual source of this subdiscipline is Pareto…"); *Cf*. Hovenkamp, *ibid*., at 1047.

operationalisation is infeasible i.e. UWE cannot tell us whether a policy is utility maximising.[28] If welfare is utility and utility maximisation requires the aggregation of individual utilities, how is one to say that a policy is utility maximising if interpersonal comparison of utility is not feasible due to informational difficulties? As Mulberg states, "[t]he price of denying interpersonal comparisons is the failure to operationalize utilitarianism."[29] Consequently, the "social optimum becomes indeterminate."[30] Saying that interpersonal comparison of utility is unscientific is another way of saying that the operationalisation of UWE is infeasible. If a method is scientific, it means it could yield observable and testable results such that one could verify whether a supposition or assertion is true or false. If the method—in this instance, measuring and comparing utility across persons—is not scientific, then whatever conclusions that follow from such method are no less a value-judgment. One cannot objectively verify whether the conclusions are true or false. Accordingly, it is not *feasible* to say, without relying on value judgments, that a policy would be utility maximising. In the paragraphs that follow, I recount briefly the movement from UWE to Paretian welfare economics.

In Jeremy Bentham's utilitarianism, the task of utilitarianism could be seen as how to operationalise a social theory using a 'felicific calculus.' It was concerned with deriving a social maximum of utility from the maximisation of individual utilities. This "would require the summation of the net utility of each individual."[31] Without the possibility of measuring utilities of different people, the search for the social maximum had to be either abandoned or continued by improvising ways to measure utility. The 'utilitarian marginalists' or 'marginalists school' chose the latter course.

The marginalists are notable, in an attempt to measure utility, for developing the concepts of marginal utility and diminishing marginal utility; and as will be shown, these concepts are central to the framework of UWE. Marginal utility theory grew out of a response to the labour theory of value i.e. the view that the price or economic value of a good is determined by the cost of production. It was Stanley Jevons who linked price to utility by linking price with the 'final degree of utility' or marginal utility

[28] For a similar argument, see Brennan, 'Economics', *Supra.* n.13 at 132 ("The economist's line has been that utilitarianism is *infeasible* because it requires information that is inaccessible.") Emphasis original.
[29] Mulberg, *Supra*. n.26 at 46
[30] *ibid.*
[31] *ibid.*

rather than its total utility.[32] Armed with the further concept of diminishing marginal utility[33], it was possible for the marginalists to establish the connection between price and marginal utility. This enabled the resolution of the 'paradox of value': diamonds having a low use value but very high price whereas the reverse applied to water. The marginalists were able to explain this by saying that diamonds have greater marginal utility while water has greater total utility.

Acceptance of these concepts appeared to have made the calculation of the social maximum feasible for the marginalists. The concept of diminishing marginal utility, however, meant that interpersonal comparison was necessary and that egalitarian distributions might be required in order to maximise social utility.[34]

According to Hovenkamp, the marginal utility school with these concepts of marginal utility and diminishing marginal utility gave rise to the 'material welfare school.' He states:

> The material welfare school believed that some involuntary transfers of wealth could make society as a whole better off. They derived this notion from two things: the law of diminishing returns and the concept of marginal utility. The law of diminishing returns suggested that a person obtained less pleasure from his tenth dollar than his first and much less pleasure from his millionth dollar than his tenth one. The concept of marginal utility suggested that society's utility would be maximized when individual marginal utilities were equalized. Thus, a forced transfer from the millionaire to the pauper would improve total welfare...[35]

Obviously, the statement that an involuntary transfer from a millionaire to a pauper would improve welfare requires interpersonal comparison of utility. Such interpersonal comparison of utility is impossible due to informational difficulties unless one were to define utility objectively.

Cooter and Rappoport, who coined the term material welfare school, state that the conceptual framework of this school was distinguished by three elements: "a material welfare definition of economics, an interpersonal conception of utility and an

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[32] Cooter & Rappoport, *Supra.* n.26 at 510; *Cf*. Mulberg, *Supra.* n.26 *at* 42
[33] *Ibid.*
[34] F.Y. Edgeworth, *Mathematical Psychics* (Kelly, 1967 reprint; 1881) 8 [Stating that "[s]uch comparison can no longer be shirked, if there is to be any systematic morality at all."]
[35] Hovenkamp, *Supra.* n.26 at 1001.

empiricist methodology."[36] According to them, this school evaluated social welfare on the basis of how the organisation of the economy satisfied the basic material needs of the people, understood as what "people need for the sake of physical and mental well-being."[37] With the concept of diminishing marginal utility, these economists endorsed egalitarian policies that would favour the poor in the distribution of wealth. To be sure, redistributional goals were endorsed because of their suggested connection to social welfare or efficiency.[38] Clearly, the operationalisation of this redistribution would require interpersonal comparisons of utility. While Cooter and Rappoport argue that the material welfare school conceived of utility objectively thereby making it possible to compare utility across persons[39], this is not relevant to my thesis. If utility was defined objectively by the material welfare school, then that is a charge against the 'ordinalists'[40] for misunderstanding or misrepresenting the claims of the former. It certainly does not undermine any argument predicated on the assertion that any norm whose operationalisation is dependent on interpersonal comparisons of subjective utility is infeasible owing to informational difficulties. And this is how the ordinalists presented their critique, arguing that utility conceived subjectively is interpersonally incomparable. Again, I quote in full the statement of Lionel Robbins, which is representative of the ordinalist critique of the material welfare school:

> …suppose that A and B fall into conversation about their respective enjoyments and A says to B, "Of course I get more satisfaction than you out of music," and B vigorously asserts the contrary. Needless to say, you and I as outsiders can form our own judgments. But these are essentially subjective, not objectively ascertainable fact. There is no available way in which we can measure and compare the satisfactions which A and B derive from music. Intelligent talk? But that may be misleading. Facial expression? That too may be deceptive. . . . We are left with the ultimate difficulty of interpersonal comparisons that, as Jevons put it, "Every mind is thus inscrutable to every other mind, and no common denominator of feeling seems to be possible."[41]

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[36] Cooter & Rappoport, *Supra*. n.26 at 528
[37] Cooter & Rappoport, *Ibid.* at 521; *Cf*. Peter Rappoport, 'Reply to Professor Hennipman' (1988) 26 Journal of Economic Literature 86, 87
[38] A.C. Pigou, *The Economics of Welfare*, (4th edn. Macmillan, 1932) 89
[39] Cooter & Rappoport, *Supra.* n.26.
[40] According to Cooter & Rappoport, *Ibid.* at 508, the ordinalists had a different conceptual framework that distinguished it from the material welfare school: a scarcity definition of economics, an ordinal conception of utility, and a positivist methodology.
[41] Lionel Robbins, 'Economics and Political Economy' (1981) 71 *Amer. Econ. Rev.* 1, at 9

This briefly concludes the reason(s) why UWE was overthrown. Interpersonal comparison of utility was deemed a value judgment and not *wertfrei*. Consequently, UWE was considered infeasible. But the rejection of UWE without an alternative would create a vacuum. The normative economist must then come up with an alternative criterion of welfare assessment that respects the individualism and subjectivism inherent in economic analysis. This insistence on individualism and subjectivism would require respectively that any alternative criterion has the individual as the object of analysis and that interpersonal comparison of utility be avoided. Lastly, and more importantly in my view, the alternative criterion must be feasible for it is useless if its real-world application is impossible or greatly limited.

The next section discusses the notions of efficiency that have been developed post-UWE and that are used in Law&Econ scholarship. In particular, it addresses what it means for legal rules to be evaluated or assessed according to the norm of economic efficiency.

B. Economic Efficiency and Law[42]

I. What is Efficiency About?

The concept of economic efficiency in Law&Econ is elusive. It is used inconsistently in the academic literature.[43] This is even more disturbing in copyright law analysis where the terms utilitarianism and efficiency are used arbitrarily and interchangeably without a clear specification of what these terms are and how they differ. Additionally, there are at least three different versions of efficiency theory as applied

[42] For an examination of the relationship between law and economic efficiency as a normative guide to the former, see generally, 'Symposium: Efficiency as a Legal Concern' (1980) 3 *Hofstra Law Review* 485; J.L. Coleman, *Markets, Morals, and the Law*, (OUP, 1998). The literature is voluminous and will make no sense to list them. For works I have found useful, see: F.I. Michelman, 'Norms and Normativity in the Economic Theory of Law' (1978) 62 *Minn. L. Rev.* 1015; C.G. Veljanovski 'The Economic Approach to Law: A Critical Introduction' (1980) *British Journal of Law and Society* 158; A.T. Kronman, 'Wealth Maximization as a Normative Principle' (1980) 9 *J.Leg.Stud*. 227; Duncan Kennedy, 'Cost-Benefit Analysis of Entitlement Problems: A Critique' (1981) 33 *Stan. L. Rev* 387; T.C. Armitage, 'Economic Efficiency as a Legal Norm' in R.O. Zerbe Jr. (ed.) *Research in Law and Economics* Vol. 7 (Jai Press, 1985); R.P. Malloy, 'Invisible Hand or Sleight of Hand? Adam Smith, Richard Posner and the Philosophy of Law and Economics' (1988) 36 U. Kan. L. Rev 1988; R.O. Zerbe Jr., Economic Efficiency in Law and Economics (Edward Elgar, 2001); Jurgen Backhaus (ed.), *The Elgar Companion to Law and Economics* (2nd ed. Edward Elgar, 2005)

[43] See C.G. Veljanovski, 'The Role of Economics in the Common Law' in R.O. Zerbe Jr. (ed.) *Research in Law and Economics* Vol. 7 (Jai Press 1985); *Cf*. Lawson, *Supra*. n.10.

in copyright analysis. The 'market simulation', 'cost-benefit', and 'incentive effects' versions.[44] Perhaps, it would be best to clarify briefly what efficiency is *about*.

Efficiency, as used in Law&Econ, is a value maximisation criterion, whichever way one defines 'value.' It is a criterion for maximising the value of preferences realised in society.[45] In a world with conflicting preferences and in which there are scarce resources to realise or satisfy those preferences, efficiency instructs us to satisfy those preferences that would yield the highest 'value'. Of course, where resources are not scarce it makes little sense from an efficiency point of view to satisfy only those preferences that would yield the highest value. (This point has an implication for the public goods analysis of copyright law.[46]) In measuring the value of preferences, wealth, utility or some other standard may be used. But in conventional Law&Econ, the value of preferences is measured—not as per the utility derived from the satisfaction of such preferences—according to willingness and ability to pay money. In order to promote efficiency, the standard method in conventional Law&Econ is to allocate resources or legal rights to those who value it most according to willingness and ability to pay or to facilitate the efficient operation of the market using law. In the presence of a 'market failure', the former approach (moving resources to its highest valued use) requires a cost-benefit analysis (CBA). This is essentially a 'market approach' to law whereby law is used instrumentally to simulate, cheaply and proximately, the outcome of a perfectively competitive market.[47]

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[44] *Cf.* Veljanovski, *Ibid.* (Critiquing Posner's efficiency-of-law theory and stating that there "at least three versions" of it.) While Veljanovski considers that "the effects and cost-benefit versions of the theory are closely related but not identical", he dismisses the market simulation version as an "inaccurate shorthand of the cost-benefit version." I agree with the latter statement although lawyer-economists in copyright analysis, as I show below, think they are not involved in cost-benefit analysis when they employ the market approach. For a seminal application of the market simulation approach to property law, see F.I. Michelman, 'Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law (1967) 80 *Harv. L. Rev*. 1165.

[45] See Robert Cooter, 'Liberty, Efficiency, and Law' (1988) 50 *Law and Contemporary Problems* 141-2 ("The efficiency analysis of law, as the present author understands it, takes as its objective maximizing the value of these normative resources [referring to rights and duties] as measured by the preferences of the people to whom they are initially allocated."); *Cf.* C.E. Baker, 'Starting Points in Economic Analysis of Law' (1980) 8 *Hofstra L. Rev*. 939 fn.1 (Stating that the Kaldor-Hicks test is "a version of the value-maximizing concept that gives a particular interpretation of value."); Also Michelman, *Supra*. n.42 at 1024 (Economic efficiency is "directed to the question of maximizing private values across some social group."); Armitage, *Supra*. n.42 at 21, fn.6.

[46] See section 3, *infra*.

[47] R.A. Posner, 'Some Uses and Abuses of Economics in Law' (1979) 46 *U. Chi. L. Rev* 281, 288-9 (Stating that the positive economic analysis of law hypothesis is that the "law brings the economic system closer to producing the results that effective competition— a free market operating without significant externality, monopoly or information problems— produce."); *Cf.* Guido Calabresi, 'Transaction Costs, Resource Allocation and Liability Rules' (1968) 11 *J.L. & Econ*. 67.

Briefly, this is the approach in the standard economic theory of copyright law.[48] In general the theory first identifies a source of market failure, public goods, as a reason for markets in informational works not functioning efficiently. Second, the law is used to the extent possible to simulate the outcome that would have been reached by a perfectly competitive market, provided the gains of legal intervention exceed its costs. This is done by allocating entitlements to the use of informational works according to where it would maximise economic surplus[49], since markets would allocate resources to their value-maximising use. This is where the efficiency analysis of copyright law breaks down, as I will show in more detail below. In short, the fundamental problem is that in imagining the outcome of a hypothetical market, the decision maker will use a CBA. This is problematic because where the legal interests implicated are non-monetisable or not subject to market transactions—as are most legal interests—the computation of costs and benefits in monetary terms becomes inherently subjective. As professor Priest states, in "efficiency-of-the-law literature, costs and benefits are determined by hunch or assumption."[50] Additionally, the variables to be included in a CBA will invariably depend on the predetermined outcome favoured by the decision maker. If CBA, which generates an efficiency judgment, is subject to the assumptions and subjective assessments of a decision maker, then the claim that copyright law should be guided by an efficiency norm is infeasible; it cannot produce an answer. Put differently, there is no way to be sure whether the recognition of a new right, strengthening of an existing right, or limitations/exceptions to an existing right is value-maximising since any outcome can be rationalised as 'efficient.' Admittedly, there would be instances in which the choice between conflicting interests at stake is so clear vis-à-vis the costs and benefits. But in such cases, the same outcome will be reached by the conventional legal method of 'balancing the interests' at stake. In short, the use of efficiency as a normative guide to copyright law is no more scientific than the goal of maximising utility. If UWE was rejected because it is not *wertfrei*, then it is equally a good reason to reject efficiency as a normative guide to copyright law. To be sure, the claim is not that other normative theories as applied to copyright law yield scientific and value-free

[48] For more detailed analysis, see section 3, *Infra*.
[49] See *infra*. n.71-80 and accompanying text for the definition of economic surplus.
[50] G.L. Priest, 'Michael Trebilcock and the Past and Future of Law and Economics' (2010) 60 *U. Tor. LJ.* 155, 164.

answers; rather, it is that if the attractiveness of the efficiency norm is premised on its objectivity and ability to yield 'scientifically' correct answers, then it should be rejected where such attractions are a mirage.

The following sections explain in more detail the relevant notions of efficiency highlighting their technical and ethical limitations.

II. The Uselessness, Infeasibility and Indeterminacy of Pareto Criteria.

The first notion of efficiency in Law&Econ is expressed by the Pareto criteria.[51] There are two Pareto concepts: Pareto superiority and Pareto optimality. Pareto superiority criterion is used to compare two states of affairs. S_2 is Pareto superior to S_1 if and only if in moving from S_1 to S_2 no one is worse off than in S_1 (or are indifferent between S_2 and S_1) and at least one person is better off in the move to S_2. But the fact that S_2 is Pareto superior to S_1 does not mean that S_2 is Pareto optimal. S_2 is Pareto optimal or Pareto efficient if and only if there are no states Pareto superior to it. In other words, S_2 is Pareto optimal if it is not possible to move to another state without making someone worse off. The limitations of these Pareto criteria are clear.

As is obvious, Pareto superiority does not require interpersonal comparisons of utility for the simple reason that if the test is satisfied there will be an increase in total utility. There are simply no losers and at least someone gains. Furthermore, the criterion is consistent with methodological and ethical individualism. The focus of analysis is on the individual and one is better off according to the satisfaction of *her own* preferences. The Pareto criterion employs an ordinal conception of utility. It is sufficient if A and B can rank their preferences on a scale of good, better, best etc. The fact that A prefers x to y and B, y to x does not mean that A values x more than B values x. This is clear from the table below. It just means that the conception of utility in the Pareto criterion does not require cardinality for its operationalisation. In the below table, B values x more than A does but values x less than y. What is relevant, however, for the Pareto criterion is whether A prefers x to y, not how much

[51] Named after the Italian economist Vilfredo Pareto. See Vilfredo Pareto, *Manuale di Economia Politica* Societa Editrice Libraria (Milano: Italy, 1906) [translated by A.S. Schwier *Manual of Political Economy* (New York: A.M. Kelley (1971)]

A prefers it. But without cardinal utility and interpersonal comparison, the Pareto criterion is unable to tell us *how much* utility has been gained in a move from one state of affairs to another; it only tells us that there has been an *increase* in utility.

	A	B
X	20	22
Y	17	25

FIGURE 1

The Pareto superior criterion is ethically attractive for the reason that it requires unanimity.[52] But the Pareto superior criterion is virtually useless as a norm to evaluate legal rules or guide policy makers. [53] That this is so is obvious. Pareto superiority requires no losers for no one can be made better off at the expense of another person. In the real world, there are always bound to be losers no matter how praiseworthy and moral a legal policy or rule is. This unanimity principle further highlights the fact that the Pareto superiority criterion would hardly be useful as an assignment criterion of legal rights i.e. as between persons, it cannot select or generate a legal right which would serve as a starting point.[54] Say as between A and B, the issue is whether to assign to A the right to freely use information produced by B or to the latter the right to prohibit the use of information by A without payment. It is clear that no initial assignment will be Pareto superior for an assignment to B would make A worse off and vice-versa.

To be sure, the issue of starting points is not just a matter of mere academic interest; it has serious implications for copyright theory. The main problem is that the Pareto criterion cannot generate a theory of rights unless it is able to specify a starting point or initial entitlement. And it cannot specify such a starting point without the risk of circularity.[55] Put differently, starting points determine Pareto superiority and not vice-

[52] Kronman, *Supra*. n.42 at 235.
[53] see G. Calabresi, 'The Pointlessness of Pareto: Carrying Coase Further' (1991) 100 *Yale L.J.* 1211
[54] On the relevance and implications of starting points for economic analysis of law, see Baker, *Supra*. n.45.
[55] See A.T. Kronman, 'Contract Law and Distributive Justice' (1980) 89 *Yale L.J.* 472, 483-4

versa. The implication is that there is no such thing as an 'efficiency theory of copyright.' If the Paretian principle cannot determine an initial entitlement, then a theory of copyright must be based—not on the Paretian notion of efficiency— on the value or norm that determines the antecedent specification of rights, although the *structure* or *form* of the ensuing rights will be influenced by the Pareto norm. Let me further elaborate on this.

Assume that in a city Aladinma east of Alaocha land, the issue for the local judge is whether to start off with 'copyright' or 'copy-free' as between Chike, a consumer of cultural works, and Ozioma, a creator. What should the judge start off with and on what basis? In comparison with the period the right to information had been unallocated i.e. neither 'copy-free' nor 'copyright', the decision to either start with copyright or copy-free is indefensible on Paretian grounds. The crucial point is that the Pareto criterion cannot tell us whether to start with copy-free or copyright and we need to know this to have a theory of right to information. The judge needs to appeal to some other grounds for starting points. Once again, the Paretian notion of efficiency is useless and infeasible. But suppose a staunch supporter of the Pareto criterion argues that once the issue of initial entitlements is agreed upon, the use of Pareto criterion to formulate legal policies will yield clear answers. Let's assume that the normative intuitions of the judge, Chike, and Ozioma overlap and that this leads to an initial entitlement of copy-free. Is copyright Pareto superior to copy-free? In other words, the crucial question is whether in moving from copy-free to copyright, is Chike and others in similar position made worse off? The answer is not clear. Even if we accept the economic theory of incentives that authors will underproduce informational works in the absence of an exclusionary mechanism because they fear they will not be able to recoup the costs of their expressions due to free-rider problems, there will still be some authors/works for which recouping the costs is irrelevant i.e. either recouping the costs in the absence of copyright will not be a problem or the author is not motivated by financial interests. In these cases, the cultural works would have been created without the incentives of copyright. If Chike values the cultural works that would not have been created without copyright (i.e. willing and able to pay for the costs of expression), then the move from copy-free to copyright is Pareto superior and *also* maximises economic surplus. For this class of

works, the move to copyright satisfies the preference of Chike for cultural works and makes Ozioma better off. Never mind that there are those who value the works positively in terms of derived utility but are unable to reveal the strength of their preferences through willingness and ability to pay. For these people, call them 'Ifeoma', their situation remains unchanged by the move from copy-free to copyright because the cultural works would not have been created in the copy-free state of affairs and so they are neither worse-off nor better off. Whatever moral objections they have are irrelevant to the Paretian lawyer-economist or judge. Different considerations apply to works that would have been created without copyright. Such cases make both Chike and Ifeoma worse off. Chike and Ifeoma would have been free to use these works since they would have been created in the copy-free Aladinma. It therefore cannot be said, without controversy, that for this class of works that copyright is not Pareto inferior to copy-free. The question becomes whether the benefits conferred by those works generated by copyright incentive exceed the losses consequent upon those works that would have been generated without copyright, such that overall Chike and Ifeoma are better off. The answer is not clear, but it is likely that it will be negative given that it seems Ifeoma would be net worse off. The crucial point however is that the Pareto criterion would not provide clear answers. Now again a staunch supporter of the Paretian approach might say that it is not due to a defect in the criterion itself but rather because of informational problems. But that is precisely the point. Informational difficulties make it infeasible to operationalise the Paretian principle.

As noted above, Pareto superiority and Pareto optimality are analytically connected. The exhaustion of Pareto superior moves creates a Pareto optimal state of affairs, although it is possible to reach a Pareto optimal state through a mixture of non-Pareto superior and Pareto superior moves.[56] The problem, however, is that if Pareto superior moves are difficult to reach in the real world, then whatever is is Pareto optimal i.e. efficient. In this world then, every state of affairs would be Pareto optimal. Is the existing combination of entitlements in present copyright law Pareto optimal? Yes, because in changing it we would be making some people worse off. Pareto optimality is therefore useless because it cannot guide the judge or policy maker. What it does is to legitimise the status quo.

[56] Coleman, *Supra*. n.42 at 72.

III. Kaldor-Hicks and Wealth Maximisation

Given the practical uselessness and infeasibility of the Paretian economic approach to legal policy, Law&Econ scholars generally use efficiency in the Kaldor-Hicks (KH) sense[57] with the substantive normative standard being WM.[58] According to KH criterion, one state of affairs X is KH superior to another Y if and only if those who prefer a move to X (the winners) can compensate those who prefer Y (the losers) to make them indifferent between X and Y and still be better off (i.e. the winners) than in Y. In KH-WM, the value of preferences is measured according to willingness and ability to pay.[59] This is essentially CBA.[60] Phrased in a KH-WM sense, one legal policy (say Copyright) is KH superior to another (Copy-free) if those who gain by the move to copyright according to monetary value as measured by willingness and ability to pay can compensate those who lose and still be better off. This is also known as the 'potential Pareto superiority' test because, as is obvious, the losers are no longer worse off once the compensation is made. But the compensation is only *hypothetical* and there is no requirement that it be made. From moral and distributive justice perspectives, this might create concerns in copyright law as to why one group has to bear the burden for the benefit of another. Colloquially, we would ask why we should 'rob Peter to pay Paul?' For example, should creators not be rewarded for their creations because they would have created the work without copyright? To what extent should certain consumers bear the burden on restriction of access in order to increase the welfare of society? I put aside these issues.

KH-WM, however, like Paretian efficiency is unable to provide an independent justification for copyright. This is so because KH-WM depends on price and price depends on the distribution of resources, a part of what people are entitled to.[61]

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[57] Kaldor-Hicks efficiency is named after those who introduced it, J.R. Hicks and Nicholas Kaldor. Nicholas Kaldor, "Welfare Propositions of Economic and Interpersonal Comparisons of Utility," (1939) 49 *Economic Journal* 549; J.R. Hicks, 'The Rehabilitation of Consumer's Surplus' (1941) 8 *Review of Economic Studies* 108.

[58] For a clear explanation of KH as an *efficiency criterion* and WM as a *characteristic* for ranking those states, see J.L. Coleman, 'Efficiency, Utility, and Wealth Maximization' (1980) 8 *Hofstra L.Rev.* 509.

[59] Posner defines wealth as "the value in dollars or dollar equivalents… of everything in society. It is measured by what people are willing to pay for something, or if they already own it, what they demand in money to give it up." R.A. Posner, 'Utilitarianism, Economics and Legal Theory' (1979) 8 *The J. Legal Stud*. 103, 119.

[60] For the relationship between CBA and KH efficiency, see R.O. Zerbe Jr., 'Legal Foundation of Cost-Benefit Analysis' (2007) 2 *Charleston L. Rev.* 93.

[61] Coleman, *supra.* n.42 at 109.

Professor Gordon agrees with this and doubts whether WM can justify copyright because it "cannot serve as an acceptable foundation for an initial assignment of rights."[62] To be clear, this argument is different from whether having specified an initial entitlement, copy-free, the move to a different entitlement, say copyright, is wealth-maximising. In such cases, KH-WM might provide answers subject to informational difficulties.

One last issue with KH-WM which is particularly important for copyright law due to the nature of its subject matter, as will be commented on in subsequent sections, is the inadequacy of efficiency analysis to capture spillover effects due to its partial-equilibrium focus.[63]

IV. Conclusion

The goal of this section has been first to show the philosophical and methodological connections between utilitarianism and UWE on the one hand and the normative economic analysis of law, on the other hand, which evaluates law according to the norm of efficiency, understood as either Paretian efficiency or KH-WM efficiency. In showing these connections, I have argued that the rejection of UWE was mainly due to its inadequacy or infeasibility to yield 'scientifically' correct answers free from value judgments. The main reason for this was due to the informational difficulties encountered in measuring and comparing utility across persons. This formed the departure of the main argument: The view that copyright law should be guided by the efficiency norm has serious technical and moral implications. From a technical point of view, which will be further shown in the subsequent section, there are difficulties with operationalising the criterion in an objective manner. This alone is not fatal to

[62] W.J. Gordon, 'An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory' (1989) 41 *Stan. L. Rev.* 1343, 1351.

[63] M.J. Rizzo, 'The Mirage of Efficiency' (1980) 8 *Hofstra L. Rev.* 641, 653. [Stating that WM in the general equilibrium sense is unattainable due to third-party effects and so the normative case for efficiency, if any, must rest on partial-equilibrium.] While Rizzo is concerned with the efficiency of common law, the same is very applicable to statutory law. Although he seems to consider that the reason why efficiency analysis cannot capture spillover effects is due to informational difficulties, it goes beyond the practical difficulty of information. As a matter of principle, economic analysis in which the efficiency analysis is packaged lacks the tools to capture many spillover effects. See *infra*. sections 3(B) and 4(A). To be fair, Rizzo implicitly acknowledges this when he discusses what he terms 'moralisms.'

WM considering that other normative criteria have similar difficulties. But if the dominance of the efficiency norm over other norms is premised on a claim to objectivity and neutrality, then it is fatal. Other norms that might be used to govern the creation and distribution of knowledge in the 21st century may be more ethically attractive than the efficiency norm.

Finally, although much focus has been accorded to the informational difficulties of the efficiency analysis as a practical issue in generating scientific answers, the issue is much more than practical. Economic analysis in which the efficiency theory is packaged has limits in *principle* and especially so for copyright law. In particular, the spillover effects generated by the subject matters of copyright law may not be accounted for by an efficiency analysis.

3. Law and Economics of Copyright– A Critique[64]

Unlike deontological justifications of copyright law, the utilitarian (and in its economic rendition) basis for copyright law is consequential and premised on the maximisation of social welfare.[65] The core of the economic theory of copyright law is the theory of

[64] I make no attempt in this paper to review the Law&Econ theories of copyright. Law&Econ of copyright and IP in general encompass a panoply of theories, justifications, explanations at both the existential and doctrinal levels of copyright. See D.L. Burk, 'Law and Economics of Intellectual Property: In Search of First Principles' UC. Irvine School Law Research Paper 2012-60 ("Economic models additionally inform the analysis of doctrine at a level of finer granularity.") https://ssrn.com/abstract=2113975; Additionally, the methodological approaches differ. See F.S. Kieff, 'The Case Against Copyright: A Comparative Institutional Analysis of Intellectual Property Regimes' (2004) Stanford Law and Economics Olin Working Paper No. 297 (Using tools from the New Institutional Economics school to compare IP regimes) https://ssrn.com/abstract=600802 In general, the three dominant justifications are the 'reward', 'commercialisation', and 'prospect' theories. The 'incentive' arguments (to create, distribute or disclose) are generally grouped under the reward theory, although at its core the reward theory is deontologically, rather than consequentially, premised. L. Bently & B. Sherman, *Intellectual Property Law* (4th ed. OUP, 2014) 37. For an attempt to ground copyright solely on an incentive to distribute, see J. Barnett, 'Copyright Without Creators'(2013) 9 *Review of Law & Economics* 389. For the prospect and commercialisation theories of IP respectively, see E.W. Kitch, 'The Nature and Function of the Patent System' (1977) 20 *J.L. &Econ 265*; S. Kieff, 'Property Rights and Property Rules for Commercializing Inventions' (2001) 85 *Minn. L. Rev*. 697. Even though there are different approaches and justifications for copyright, what unites the Law&Econ of copyright is the relentless focus to achieve economic efficiency.

[65] According to deontological ethics, the rightness or wrongness of an act or of a law is assessed according to its intrinsic moral quality without regard to its consequences. Roger Crisp, 'Deontological Ethics' in Ted Honderich (ed.), *The Oxford Companion to Philosophy* (OUP, 2005). Two deontological theories of copyright law are the labour-desert and personality theories. The former is premised on a Lockean theory of property rights, whereas the latter is based on Kantian philosophy. For an early discussion of how labour-desert and personality theories justify IP rights, see Justin Hughes, 'The Philosophy of Intellectual Property'(1988) 77 Geo. L.J. 287. For a relatively recent review of the theories of intellectual property, see W.W. Fisher III, 'Theories of Intellectual Property' in Stephen Munzer, (ed.), *New Essays in the Legal and Political Theory of Property* (CUP, 2001). For early works on the economic theory of copyright law, see R.M. Hurt & R.N. Schuchman, 'The Economic Rationale of Copyright' (1966) 56 *American Economic Review* 421; W.M. Landes & R.A. Posner, 'An Economic Analysis of Copyright Law' (1989) 18 *J.Leg. Stud.* 325.

incentives and its normative goal is WM. The problem, as economists see it, is the need to solve a market failure stemming from the public goods nature of informational works.

A. The Incentive-Access Framework

Whereas it is possible to analyse the problem of incentivising the production of informational works from an externality perspective[66], the standard approach in the economic analysis of copyright law is to approach the issue as a public goods type of market failure. Public goods, as economists define them, have two characteristics: non-excludability and non-rivalry.[67] Informational works (i.e. the information and idea embedded in them) are non-excludable and non-rivalrous.

The source of the problem in innovation policy is the non-excludability of informational works.[68] A good is non-excludable if it is impossible to exclude non-payers or the marginal cost of exclusion exceeds the marginal cost of provision. In the latter case, it would be inefficient to exclude non-payers. Think of traffic lights. Assuming there is a system in place that required all motorists and pedestrians to pay for the usage of traffic lights, it would be impossible to exclude non-payers from enjoying the benefit of the traffic lights. Although in principle it would be possible to design a system that would charge all passers-by for the usage of the traffic lights, the seismic cost of such a system would have a significant impact on the daily lives of people with a consequent effect on economic productivity. With copyright works, it is difficult to exclude persons from consuming the good once it is produced and disseminated because it is easily reproducible. Put differently, the marginal cost of production (i.e. the cost of producing an additional item of the good) is near zero. This non-excludable feature of copyright works arises from the fact that, apart from

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[66] See *Infra.* Section 3(B)

[67] On public goods, see generally Richard Cornes and Todd Sandler, *The Theory of Externalities, Public Goods and Club Goods* (2nd ed. CUP, 2006).

[68] N. Elkin-Koren & E.M. Salzberger, The Law and Economics of Intellectual Property in the Digital Age: The *Limits of Analysis* (Routledge, New York 2013) 75 ("the non-excludability character of informational goods justifies central intervention in order to secure incentives for further investment in producing new works"); Oren Bracha & Talha Syed, 'Beyond Efficiency: Consequence Sensitive Theories of Copyright' (2014) 29 *Berkeley Tech L.J.* 229, 238 ("The source of the innovation policy problem is the nonexcludable character of the work…"); G.S. Lunney, Jnr., 'Re-examining Copyright's Incentives-Access Paradigm' (1996) 49 *Vand. L. Rev.* 485, 493. See also chapter 5.

the materials embodying them, they have no physical boundaries. Absent an efficient means to exclude, private returns will not align with social value. Potential users will free ride on the goods and competitors will avoid the fixed cost of producing the original work. The economic model hypothesises that in such a market, competition will drive price of goods to the marginal cost of production, almost zero. Since the creator of the goods would not be able to recoup his fixed costs, the economic model further predicts that the rational profit-maximising economic actor will not produce copyright works at all. If consumers value the works that would otherwise have been produced but for the absence of the means to exclude free-riders (i.e. they are willing and able to pay a price that exceeds the cost of producing the copyright work), then the market by failing to allocate resources efficiently would not satisfy consumers' preferences and would therefore lead to a loss in social welfare. From the economist's perspective, the inability to exclude non-purchasers at negligible costs has two effects on allocative efficiency. First, creators/producers will not allocate the resources needed to produce copyright works at optimal levels fearing that they will not recoup their fixed costs. Giving creators incentives to invest in the creation of copyright works through the grant of exclusionary or property rights that will exclude non-purchasers from the use of copyright works can solve this dynamic inefficiency.

But if producers are given property rights in their intellectual creations, then they will be able to restrict competition and as such charge a monopoly price that exceeds the marginal cost of production. This is so because in the absence of competition, a producer will only produce works at that quantity (below that obtainable in a competitive model) and price that is profit maximising.[69] In neoclassical economic theory, the price of a good in a perfectly competitive market is equal to its marginal cost.[70] Where this is not obtainable (due to monopoly etc.), there will be allocative inefficiency leading to under-consumption of the goods. In short, the ability to charge a monopoly price will have two economic consequences.[71] First, producers will reap a monopoly profit because consumers who are able to access the work at its monopoly price will transfer excess monies to producers that would have remained in their pockets as consumer surplus had the work been priced at its marginal cost.

[69] J.M. Perloff, *Microeconomics* (8th ed. Addison Wesley-Pearson, 2012)
[70] Ibid.
[71] See W.W. Fisher III, 'Reconstructing the Fair Use Doctrine' (1988) 101 *Harv. L. Rev*. 1659, 1701-02; *Cf.* Lunney, Jnr., *Supra*. n.68 at 497.

Second, those who are willing to pay a price above the marginal cost but below the monopoly price will not be able to access the cultural work. This leads to a "deadweight loss,"[72] measured by the foregone surpluses (consumer surplus plus producer surplus) that would have been reaped had the goods been sold to these consumers. In the absence of perfect price discrimination (i.e. the ability to charge each consumer the maximum amount they are willing and able to pay), there will always be deadweight loss.[73] From a static viewpoint, this deadweight loss, due to lack of access to the copyright work, is inefficient because information is non-rival. A good is said to be non-rival if one person's consumption of the good does not deprive another person of the ability to consume the good. So, in the above example of the traffic light, my consumption of the traffic light (i.e. reliance on the traffic light to signal my movement) does not prevent another person from consuming it. This means that there is no allocational problem i.e. no need to allocate the consumption of traffic light according to who is willing and able to pay because the signal from the traffic light is not scarce. The same applies to information contained in copyright works. By charging a positive price for the use of copyright works, there would be underutilisation and a loss in consumer welfare,[74] since the marginal cost of additional consumption of information contained in copyright works is zero.[75] In short, "[t]he free rider problem necessitates monopoly grants to authors… but marginal cost pricing requires free access by the public."[76]

But static costs are not the only costs associated with the creation of property rights in intellectual creations. Because information is an input into the production of copyright works, there is also a dynamic cost.[77] From a Law&Econ perspective, the

[72] S.J. Liebowitz, 'Copyright, Photocopying, and Price Discrimination' https://www.utdallas.edu/~liebowit/knowledge_goods/rle/rle1986.html ("Profit-maximizing behavior implies that the output of the work will occur at a level of production below that which maximizes the value of the production to society causing a deadweight loss")

[73] Perfect price discrimination is costly to implement, and it is questionable whether it will eliminate deadweight loss. Yochai Benkler, 'An Unhurried View of Private Ordering in Information Transactions' (2000) 53 *Vand. L.Rev.* 2063; W.J. Gordon, 'Intellectual Property as Price Discrimination: Implications for Contract' (1998) 73 Chi.-Kent L. Rev. 1367.

[74] R.S. Brown Jr., 'Eligibility for Copyright Protection: A Search for Principled Standards' (1985) 70 *Minn. L. Rev.* 581, 596.

[75] John Cirace,'When Does Complete Copying of Copyrighted Works for Purposes Other Than for Profit or Sale Constitute Fair Use? An Economic Analysis of the Sony Betamax and Williams & Wilkins Cases' (1984) 28 *St. Louis U. L.J.* 647, 657 ("[D]efining public goods as those whose consumption by one person does not preclude consumption by others is another way of saying that the extra or marginal cost of additional consumption is zero").

[76] Ibid.

[77] See Yochai Benkler, 'Intellectual Property and the Organization of Information Production' (2002) 22 *Int'l Rev. L. & Econ* 81, 82 ("This tradeoff is often seen as involving static losses… and dynamic

goal of copyright law is to maximise social welfare by balancing off the gains from granting copyright (creation of copyright works valuable to customers) against the attendant welfare losses (static and dynamic costs). In order to operationalise this normative goal, the standard framework in Law&Econ is to replace welfare maximisation with WM, due to measurement difficulties, as the standard, with KH still remaining the efficiency criterion.[78] Under the WM formalisation, what is at stake is maximising the incentive gains measured in monetary value according to willingness and ability to pay in excess of the access losses. Graphically, the areas of consumer surplus for those who are able to access the copyright works and that of producer surplus represent the economic gains[79], while that of deadweight loss represents the economic losses.[80]

Additionally, the incentive-access trade off is not within a particular work but rather across different categories of works i.e. as between works that are on the one hand supramarginal and, on the other hand, either inframarginal or marginal.[81] Put differently, the crux of the incentive-access paradigm is as between the creation of incentives for supramarginal works and the attendant access costs that follow, due to the increase in protection, from works that were before the increase in protection inframarginal and marginal. Alternatively, the issue can be phrased differently if the objective is to reduce protection: whether the welfare gains of increased access or decreased deadweight loss from curbed protection of inframarginal works exceed the welfare losses from supramarginal and marginal works due to foregone generation of copyright works.[82]

In standard economic analysis of copyright law, this is what is generally referred to as the incentive-access paradigm and the objective of the judge or policy maker is to balance the incentive benefits and access costs.[83] This objective requires that

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gains… but the effects on second generation producers who use information as an input into their own productive enterprise adds a dynamic loss as well"); *Cf.* Lunney Jnr., *Supra* n.68 at 485.

[78] See *Supra*. ns.57-60 and accompanying texts.

[79] In Liebowitz, *Supra* n.72, these surpluses are represented graphically by the areas of Q, R, S, and T in figure 1.

[80] See Liebowitz, *ibid*

[81] Bracha & Syed, *Supra*. n.68 at 240. According to the authors, marginal works are those for which "copyright suffices exactly to incentivize the creation of the work", while inframarginal works are those for which copyright protection is more than necessary to incentivise the creation of the works; and supramarginal works are those for which the incentive precipitated by the copyright protection is not sufficient. Also G.S. Lunney, Copyright's Excess: Money and Music in the US Recording Industry (CUP, 2018) Chap. 2.

[82] Ibid.

[83] Landes & Posner, *Supra*. n.65 at 326 ("For copyright law to promote economic efficiency, its primary legal

copyright protection granted to authors be no more than is necessary to incentivise the creation of the work, otherwise further deadweight losses will be incurred that are not necessary for the creation of the work.

B. The Property Approach: Demsetz & Externalities.

This section will examine briefly the Law&Econ property rights approach to copyright and its criticisms by some scholars. It will further reveal the limits of economic analysis in which the WM theory of copyright is packaged. Ironically, this is due not to the mistaken premises of the property rights approach to copyright law but rather to the inadequacies of the paradigm's critics to dethrone or effectively challenge it, owing to the internal flaws in economic analysis. In particular, the combination of economic analysis and the nature of the subject matter under examination necessarily situates these critics' challenge in between Scylla and Charybdis. They must either exit the market framework in order to capture values realised in non-economic systems, thereby accepting the limits of economic analysis. Or they must remain wedded to economic analysis and ignore these values.

I. Why Copyright Has Expanded: The Market Approach

There is the tendency amongst copyright scholars to blame the ongoing expansions in the breadth, length, and scope of copyright law on what one author has termed 'neoclassicism'.[84] According to Netanel, the neoclassicist approach to copyright law

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doctrines must, at least approximately, maximize the benefits from creating additional works minus both the losses from limiting access and the costs of administering copyright protection").

[84] N.W. Netanel, 'Copyright and Democratic Civil Society' (1996) 106 *Yale L.J.* 283,306 (referring to neoclassicism as a "blend of neoclassical and new institutional economic property theory."); N. W. Netanel, 'Why Has Copyright Expanded? Analysis and Critique' in Fiona Macmillan (ed.), *New Directions in Copyright Law,* Vol. 6 (Edward Elgar, 2008); M.A. Lemley, 'Property, Intellectual Property, and Free Riding' (2005) 83 Texas Law Review 1031; B.M. Frischmann, 'Evaluating the Demsetzian Trend in Copyright Law' (2007) 3 *Rev. L. &Econ.* 649. However, this property rights approach is not the only theory scholars have canvassed for copyright expansionism. See James Boyle, Shamans, Software and Spleen: Law and the Construction of the *Information Society* (HUP, 1996) [placing the blame on a romanticised author-centred conception of IP]. But *Cf.* M.A. Lemley, 'Romantic Authorship and The Rhetoric of Property' (1997) 75 *Texas Law Review* 873. Also see chapter 5 where I have attributed copyright's expansion to the way the subject matter of copyright is conceived. Furthermore, this author notes the peculiar role of natural rights theory in providing the rhetorical, theoretical, and philosophical basis for the untoward expansion of copyright as well as the independent justification for the existence of copyright. See pgs. 27-28, Chap.1 [Discussing briefly the Lockean justification for the existence of private property and by extension incorporeal rights such as copyright.] In fact, the natural rights theory, specifically the Lockean approach, has a longer pedigree than the modern economic efficiency

differs substantially from the traditional incentive-access paradigm, although both approaches have in common the norm of WM as their organising principle.[85] While incentive analysis is concerned with providing incentives for the optimal production of informational works while minimising deadweight loss, the neoclassicist approach sees copyright as "primarily a mechanism for facilitating markets in existing expression."[86] For the neoclassicists, the concern is not the preservation of author incentives "but to provide a mechanism for signalling what creative works are worth", thereby providing "a guide for copyright owners and prospective licensees in deciding how to allocate their resources in exploiting and developing creative expression."[87] This approach to copyright is clearly captured by one of its staunch proponents when he states:

> By providing a property right, copyright allows the market to determine which creative items will be rewarded (through paid consumption) and, therefore, allows the market influence which creative works are produced. There is no way other than with a property right, to let the market determine the prices and quantities of creative works consumed and produced—in spite of various proposals that attempt to use several types of information to "mimic" the behaviour of markets. Simply put, there is no way to determine the amount of money that should be spent on creative works other than by using the market,

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approach to copyright critiqued in this chapter. Accordingly, one open question thrown up by the premise of this chapter is the desirability of Lockean property rights approach in informing copyright law and policy i.e. if as argued in this chapter that economic efficiency cannot inform copyright law, then why not Lockean natural rights? Or, at least, why not the examination of the merits and demerits of Lockean natural rights as a guide to copyright law and policy? This is a legitimate inquiry for two reasons. First, as we have seen, the economic efficiency theory of copyright does not exhaust the universe of justificatory approaches to copyright. Second, the arguments for users' rights canvassed in this thesis warrant a confrontation with the Lockean rights approach, which elevates author's right in their intellectual creation as a natural right. See pgs. 202-207, Chap. 4 [Arguing for a users' rights approach to copyright limitations.] Although legitimate, such inquiry has been carried out elsewhere by many scholars. Specifically, it is not clear that the Lockean natural rights approach can ground a justification of copyright without serious difficulties or provide the basis for the expansion of copyright without inconsistencies. See Edward C. Hettinger, 'Justifying Intellectual Property' (1989) 18(1) *Philosophy & Public Affairs* 31 [Author distinguishing between Lockean-entitlement and Lockean-desert theory of private property and arguing that both are not sufficient to Justify IP rights.]; S.V. Shiffrin, 'Lockean Arguments for Private Intellectual Property' in Stephen R. Munzer (ed.), *New Essays in the Legal and Political Theory of Property* (CUP, 2001) [Author arguing that Lockean natural rights does not provide support for strong IP rights.] Nor is it clear that Lockean natural rights can guide copyright law and policy or provide answers to the difficult questions thrown up by copyright law. See Lawrence C. Becker, 'Deserving to Own Intellectual Property' (1992) 68 *Chi.-Kent L. Rev*. 609 [Exploring the Lockean-desert justification for IP and concluding that "[n]othing about what property law ought to be follows *immediately* from the desert arguments." Emphasis original]; Mark A. Lemley, 'Faith-Based Intellectual Property' (2015) 62 *UCLA L. Rev*. 1328. [Arguing that Lockean natural rights is a species of "faith-based IP" which "is at its base a religion and not a science because it does not admit the prospect of being proven wrong."] And even if one accepts that Lockean labour theory justifies proprietary rights in creative productions of the mind, there is still sound and convincing basis under natural law for a robust public domain. See Alfred C. Yen, 'Restoring the Natural Law: Copyright as Labour and Possession' (1990) 51 *Ohio State Law Journal* 517. More importantly, however, the central aim of this chapter is to examine critically the modern dominance of economic efficiency as a normative guide to copyright law from an internal perspective and as such a comprehensive discussion of natural rights theory, beyond the above pithy comments, is not warranted.

[85] Netanel, Democratic Civil Society *Ibid*. at 308

[86] Netanel, Why Has Copyright Expanded, *Supra.* n.84.

[87] *ibid*.

and the workings of markets require a property right, such as copyright.[88]

So, for neoclassicists then the concern is not the supposed trade-off in the traditional incentive-access paradigm but rather the goal of ensuring that copyright serves as a mechanism for facilitating market transactions. In order to achieve this, "neoclassicists envisage a regime of broad, fully exchangeable property rights in creative products…"[89] According to Netanel, this is the reason why the neoclassicist property rights approach favours expansive property rights.

II. Spillovers & the Limits of Economic Analysis

Frischmann and Lemley agree with the above narrative and seek to challenge it by offering what they call "spillovers" (theory?)[90] critique. They both link the origin of this property rights approach to Harold Demsetz following Coase.[91] Their concern is really not on Demsetz's property rights thesis *per se*, but rather on the normative thesis derived from (and ascribed to) Demsetz's property rights theory by those seeking to extend the theory's application to copyright law.[92] According to Frischmann, the central idea animating the normative version of Demsetz's property rights theory is that private property rights should facilitate the complete internalisation of externalities in order for markets to function efficiently. Externalities, whether positive or negative, distort the market allocation of resources; and following Coase, the dominant view amongst economists has been to internalise externalities through property rights instead of taxing or subsidising negative and positive externalities respectively. Let me briefly explain why externalities cause allocative inefficiency and their relationship to the subject matter of copyright law.

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[88] Stan Liebowitz, 'The Case for Copyright' (2017) 24 *Geo. Mason. L. Rev*. 907

[89] Netanel, Democratic Civil Society *Supra.* n.84 at 309

[90] The spillovers critique is developed in two articles which shall be the focus of this section: Frischmann, *Supra*. n.84; B.M. Frischmann & M.A. Lemley, 'Spillovers' (2007) 107 *Columbia Law Review* 257. I shall point out that the spillovers critique is a restatement of the incentive-access paradigm and therefore adds nothing new save to point out the limits of economic analysis. Frischmann in particular refers to his spillovers critique as a theory. B.M. Frischmann, 'Spillovers Theory and its Conceptual Boundaries' (2009) 51 *Wm. & Mary L. Rev.* 801. But in a more recent articled he seems to admit that the spillovers does not constitute a theory. B.M. Frischmann, 'Capabilities, Spillovers, and Intellectual Progress' (2017) 14 *Review of* Economic Research on Copyright Issues 1, 14.

[91] See Harold Demsetz, 'Toward a Theory of Property Rights' (1967) 57(2) *American Economic Review* 347; Ronald Coase, 'The Problem of Social Cost' (1960) 3 *J. Law & Econ*. 1.

[92] Demsetz in his response to Frischmann has denied making such a normative claim insisting his theory of property rights is positive. Harold Demsetz, 'Frischman's View of "Toward a Theory of Property Rights"' (2008) 4 Rev. L & Econ. 127

Externalities are a source of market failure. They are negative or positive effects one party's actions have on others for which he/she does not pay or reap the benefits. The main problem with externalities, from an efficiency standpoint, is that they are not factored into the utility-maximising calculus of a decision maker and as such the decision to engage in the externality-producing activity does not take into account the costs or benefits.[93] Put differently, the costs and benefits are external to the decision maker. This could lead to under (over) production if the externality is positive (negative). The classic textbook example for negative externality is pollution. In the absence of a mechanism (property rights or taxation etc.) to internalise the negative externality (i.e. make the costs part of the decision maker's utility calculation), there will be over-production of pollution i.e. above the optimal level. For copyright, the concern is with positive externalities.[94] Because informational works are non-excludable, the benefits they confer on third parties are difficult to capture by copyright owners. Accordingly, there would be underproduction unless the externality is internalised. The privatisation and propertisation of informational works through copyright law is used to internalise positive externalities. But, as pointed out above, the Law&Econ property approach is less concerned with the incentive function of copyright and more with maintaining the signalling function of the market system that communicates consumers' preferences so that resources can be efficiently allocated. Of course, this is based on a comparative, yet market-optimistic, view that markets allocate resources efficiently.[95] Accordingly, it is not surprising that proponents of the property rights approach advocate efficient licensing to curb the negative welfare effects of strong property rights. But it goes without saying that the panacea of efficient licensing is only illusory. Another way of looking at the Law&Econ property rights approach is to say that it is a response to the contradictions and valuation problems in the incentive-access paradigm. On this view, valuation problems are exactly the reason why the uniform approach should be to create very strong and broad entitlements and make sure that the rules are such

[93] Frischmann, *Supra*. n.84

[94] For an externality analysis of copyright law see J.L. Harrison, 'A Positive Externalities Approach to Copyright Law: Theory & Application' (2005) 13 J. *Intell. Prop. L.* 1; W.J. Gordon, 'Intellectual Property' in Cane & Tushnet (eds.), *The Oxford Handbook of Legal Studies* (OUP, 2003) [Stating that copyright in particular "can be explained as mode of 'internalizing externalities.'"]

[95] *Cf*. Harold Demsetz, 'Information and Efficiency: Another Viewpoint' (1969) 12 *J.L.&Econ*. 1. The argument for the comparative superiority of the price system in coordinating and allocating the efficient use of resources has a long history. See F.A. Hayek, 'The Use of Knowledge in Society' (1949) 35 *American Economic Review* 519

that transactions in the market are as cheap and "frictionless" as possible. This way the market will take care of the problem by ensuring that entitlements are moved to those who value them the most. This is clearly an erroneous view for the simple reason that the market does not always allocate resources efficiently. Here we find a failure of economic analysts to incorporate feasibility analysis into their models. They are simply wedded to the theoretical construct of the perfectly competitive market and fail to see the inevitable departures of this model in reality, thereby avoiding a comparative institutional analysis. But this is paradoxical for in championing property rights, the neoclassicist lawyer economist is involved in a comparative and feasibility analysis that she ignores when advocating efficient licensing.

Given the far-reaching normative implications of the Law&Econ property approach, Frischmann and Lemley have rightly attempted to challenge it although their critique exposes the limits of economic analysis. In addition, their critique has contradictions that limit its power to challenge the Law&Econ property approach. In fact, Frischmann's critique of the Law&Econ property approach (which he calls the "Demsetzian Trend") can be interpreted as offering a restatement of the incentive-access paradigm. But more interesting is Frischmann's attempt to capture values that are not cognisable within existing economic models and to incorporate some social theory into the incentive-access paradigm. To be sure, I agree with Frischmann's critique and it is insightful, but the paradigm in which he packages it backfires. Frischmann's internal critique[96] is centred on bringing attention to the benefits of information externalities, or "spillovers" as he and Lemley call it. His qualms with the Law&Econ property approach are two-fold. First, he correctly argues that some externalities are "irrelevant" (won't distort market allocation) and as such not worth internalising. Secondly, even where externalities are relevant such distortions could be social welfare enhancing. Regarding the first, Frischmann's main point is that internalising some externalities has no effect on efficiency i.e. for the purposes of efficiency, internalising these externalities are irrelevant. All the internalisation accomplishes is the transfer of wealth. What Frischmann fails to tell us is *at what point* the internalisation becomes irrelevant. Indeed, he cannot tell us. But this leaves us with no concrete policy guidance because we cannot tell beyond what

[96] The spillovers theory is an internal critique as it accepts the utilitarian objective of maximising utility as a normative guide for copyright law. Its main focus is to challenge a particular version of the Law&Econ of copyright, the "Demsetzian Trend."

level the internalisation becomes irrelevant. Absent this, we are back to the muddy welfare calculus of the incentive-access paradigm. What he is saying, in the language of the traditional model, is no more than exclusive rights should not be granted beyond that necessary to incentivise the creation of informational goods. But he neither uses this language[97] nor remains faithful to economic analysis. He instead appeals to social theory in an attempt to identify externalities for which internalisation is irrelevant, indicating a clear embracement of the limits of economic analysis. Accordingly, he cites as an example of this the case of authorial creativity that is not motivated by financial incentives. In such cases, internalising the externality is irrelevant because it does not factor in the author's decision whether to create the work or not. What is really interesting, therefore, is that Frischmann realises the limits of economic analysis in challenging the neoclassicist property approach and then proceeds to incorporate a social theory of cultural production into the traditional incentive model. Both theories, however, cannot co-exist for they share different assumptions.[98] He must either stick to economic analysis and identify the point at which externality internalisation becomes irrelevant or exit economic theory and provide a comprehensive social theory of cultural production.

These problems also characterise his second argument, which is that even where internalisation is relevant society might be better off in welfare terms if the externality is not internalised. In such cases, the benefits of internalisation are not worth the costs. Again, this might be rephrased in the traditional incentive model: the incentive benefits of internalisation may not be so great as to warrant the associated deadweight loss and administrative costs. But Frischmann decides to go a little bit further, perhaps recognising the weaknesses in relying on the incentive model. His key argument is that markets do not always allocate resources efficiently, thereby again recognising the limits of economic analysis. As an example, he refers to what he calls the "demand manifestation" problem. This is the case where private demand fails to reflect, or understates, social demand where the informational work for which

[97] Certain statements track the incentive model: "As long as we get enough incentive, the fact that other benefits aren't captured by the innovator doesn't impose any real cost on innovation and, may even contribute to innovation" Frischmann and Lemley, Spillovers, *Supra*. n.90.

[98] See Don Slater & Fran Tonkiss, *Market Society: Markets and Modern Social Theory* (Polity Press., 2001); and *Supra.* Section 2(A) [For the assumptions of economic theory]. This critique is also shared by Anne Barron, 'Copyright Infringement, 'Free-Riding' and the Lifeworld' *LSE Law, Society and Economy Working Papers 17/2008* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1280893

license is sought is used as an input in the production of merit goods, such as education. Such goods, according to Frischmann, have substantial positive externalities and it will be the case that a potential licensee who seeks a resource input for the production of these goods will take into account, in deciding to get the license, the extent of positive externalities he can internalise (i.e. the value he is able to realise reflecting his private demand); and given that the potential licensee will be unable to internalise fully all externalities, his willingness to pay will not reflect how much society values the good. This might lead to a market failure where resource input is not licensed, and positive externalities are unrealised by society. In such cases, there is a demand manifestation problem because the social demands that are not reflected in the price mechanism of the market system are not captured in economic models. Accordingly, the market may not allocate resources to where they are highly valued. What is interesting is Frischmann's recognition that economic theory is incapable of accounting for values realised in non-economic systems.[99] And if he is to mount a strong challenge against the Law&Econ property approach, he needs a theory that can account for these social demands. The language in which economic analysis and theory speak has serious limitations. Demsetz, responding to Frischmann, captures this limitation and the impossibility of what Frischmann seeks to achieve through economic analysis:

> The only way Frischmann can support his point is to create something called a societal benefit (or cost) that is detached from private benefits. This cannot be done, as far as I know, if he retains the notion that social cost and social benefit are, respectively, summations of privately borne cost benefits.[100]

What Demsetz is saying is the basic economic premise that social welfare is the sum of aggregated individual utilities. And Frischmann understands this. To assert that there is a demand manifestation problem because private demand understates social demand is not cognisable in economic analysis because social demand is the summation of private demands. Again, Frischmann must either provide a non-economic theory of demand or remain wedded to economic analysis and as such fail to challenge the Law&Econ property approach to copyright.

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[99] This limitation is noted forcefully by Guido Calabresi, *The Future of Law and Economics: Essays in Reform and Recollection* (YUP, 2016). Chaps. 2-4

[100] Demsetz, *Supra*. n.92 at 132

C. Applications: Fair Use[101]

This sub-section is a further attempt to test whether economic theory is applicable all the way down. The primary issue here is whether the normative components of the neoclassicist property approach and traditional model yield clear answers to concrete issues in copyright law. If the sole aim of copyright law is to maximise incentives benefits in excess of access costs or internalise positive externalities subject to its costs, can we determine whether specific doctrinal rules and their application to factual cases achieve this objective? Additionally, do not the practical limitations of asking a judge to maximise incentives in excess of access costs in the adjudication of copyright cases make the theory intractable? This section argues that the normative application of the economic theory of copyright is practically unworkable. Not only is it incapable of telling us whether existing rules are efficient, but also it is incapable of guiding us on how to modify existing rules.

The *aporias* and limits of economic analysis reveal themselves with full force in the fair use analysis of copyright law. There are three fundamental problems with the Law&Econ theories of fair use. The first concerns the struggle amongst these theories to determine the contours of fair use. There is a tussle between the neoclassicist approach to copyright law and the traditional incentive model to guide fair use analysis. It is not surprising, therefore, that "they reach very different conclusions" and "present a puzzling contradiction" to the issue of fair use.[102] At a deeper level, this reflects the troubling concern noted above that there are different versions of efficiency theory in economic analysis. Secondly, the Law&Econ of fair use is both reflective and representative of the methodological inconsistencies in economic theory and its rejection of the cherished principle of *de gustibus non est disputandum.* Lastly, both theories cannot provide clear answers without subjectivity in the resolution of fair use cases.

Under US copyright law, fair use is an affirmative defence to copyright infringement.[103] The defence is available for the limited and 'transformative' copying

[101] The focus is on US fair use law, but points are applicable to other jurisdictions.
[102] Mathew Sag, 'Beyond Abstraction: The Law and Economics of Copyright Scope and Doctrinal Efficiency' (2006) 81 *Tul. L. Rev.* 187.
[103] See generally, P.N. Leval, Toward a Fair Use Standard (1990) 103 *Harv. L. Rev*. 1105; *Cf.* Lenz v. Universal Music Corp., 815 F.3d 1145 (9th Cir. 2016.)

of copyrighted works, especially for the purposes of criticism, research, commentary and parody. In deciding whether a defendant is entitled to the fair use defence, the US courts consider four statutory factors.[104] The Law&Econ approach to fair use follows either the neoclassicist approach or the incentive model. The former has been dubbed the 'market failure' test and the latter a CBA approach to fair use.[105] But as shown below, these appellations are confusing and inaccurate because the former approach has a cost-benefit component. I pay special attention to the market failure approach because it seems to provide the dominant justification for fair use.[106]

The market failure approach is concerned with remedying a market failure that prevents welfare enhancing uses of copyrighted works occurring. According to this approach, the courts should recognise a fair use defence *only* in circumstances where a market failure, such as transaction costs[107], prevents a bargain that would have increased economic welfare but for the market failure. This is essentially the market simulation version of efficiency theory. Gordon, in her seminal statement of this economic approach to fair use, requires that before granting fair use, courts should first of all be convinced that market failure is present.[108] Second, the court is to determine whether "the transfer to defendant [is] value maximizing, as determined by weighing plaintiff's injury against defendant's social contribution."[109] This second part is satisfied if in the absence of market failure "the price that the owner would demand is lower than the price that the user would offer…" Lastly, the court should determine subject to the satisfaction of the first two conditions whether the grant of fair use would cause the copyright owner substantial injury.[110] On the other hand, the CBA approach is concerned with balancing the public interests at stake from

[104] Copyright Act of 1976 § 107, 17 U.S.C. § 107 (1994)
[105] See Sag, *Supra*. n.102 (discussing both approaches). For a seminal statement of the market failure approach, see W.J. Gordon, 'Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors' (1982) 82 *Colum. L. Rev* 1600. *Cf.* W.W. Fisher III, *Supra*. n.71.; and G.S. Lunney, 'Fair Use and Market Failure: Sony Revisited' (2002) 82 *B.U. L. Rev* 975 (Both offering a CBA approach to fair use based on the incentive-access balance).
[106] C.S. Yoo, 'Copyright and Public Good Economics: A Misunderstood Relation'(2007) 155 *U.Pennsylvania L. Rev.* 635, 650 ("The dominant economic justification for fair use regards it as a means for compensating for market failures induced by transaction costs"); *Cf.* R.A. Posner, 'Intellectual Property: The Law and Economics Approach' (2005) 19 *Journal of Economic Perspectives* 57.
[107] Transactions costs are neither the only source of market failure nor the only type that should matter in a fair use analysis. However, the general approach by market failure adherents is to point out the existence of transaction costs. But *Cf*. L.P. Loren, 'Redefining the Market Failure Approach to Fair Use in An Era of Copyright Permission Systems' (1997) 5 *J. Intell. Prop.* 1, 48-53 (Incorporating in her fair use analysis a different kind of market failure based on positive externalities)
[108] Gordon, *Supra*. n.105.
[109] *Ibid*. at 1626
[110] Ibid.

(dis)allowing a use. According to one commentator, fair use under this approach requires "a balancing of public benefits and losses associated with granting the copyright owner the right to prohibit particular uses."[111] These public benefits and losses that require balancing are "on the one hand the potential public benefit of additional or better works from prohibiting the use at issue, and on the other, the potential public benefit from the use itself."[112] Similarly, Professor Loren has stated that fair use exists not to rectify a market failure but rather "to permit uses whose external benefits outweigh any perceived damage to the creators' incentive to create…"[113] Hereafter, I use the "public benefit balancing approach" (PBBA) instead of CBA approach to avoid confusion.

There are several problems with the market failure approach. The first problem follows from the commonality between both approaches. In particular, the market failure approach has a CBA component. There are two fundamental differences, however. First the market failure approach, unlike the PBBA, requires the existence of a market failure as a prerequisite for any CBA. Secondly, the nature of CBA involved in both approaches differs. For the market failure approach, Gordon employs offer and asking prices to identify the costs and benefits. According to her, the second prong of the market failure approach is satisfied if in the absence of market failure "the price that the owner would demand is lower than the price that the user would offer…" This CBA is different from that employed in the PBBA where "cost" is the reduction in a copyright owner's incentives compared to what would have been the case but for allowing fair use. The two associated issues of the market failure CBA, which constitute the first problem of the market failure approach, are those of offer-asking prices and the principle of *de gustibus non est disputandum.* With regards to the former, the biases involved in employing offer, instead of asking, prices for consumers are well noted by several scholars.[114] Consider the issue of parody: suppose the issue is whether in the absence of a market failure, a copyright owner would have licensed his work to be parodied. Under the market failure approach, the answer to this would be resolved by asking

[111] Lunney Jr., *Supra.* n.105 at 996.
[112] *Ibid*. at 1030
[113] Loren, *supra*. n.107 at 48.
[114] See e.g. Edwin Baker, 'The Ideology of the Economic Analysis of Law' (1975) 5 *PHILOSOPHY & PUB. AFF.* 1; L.A. Bebchuk, 'The Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice?' (1980) 8 *Hofstra L. Rev.* 1980; and D. Kennedy, *Supra.* n.42.

what price the potential licensee would offer the copyright owner. Given that it is rarely to the benefit of a copyright owner that her work is parodied, it will generally be the case that the asking price of the copyright owner would always exceed potential licensee's offer price. Accordingly, the wealth-maximising outcome would be to deny the fair use. And this will generally be the case with fair use cases concerning criticisms since there is a rational tendency for the copyright owner to value the interests affected by the criticisms or parody greatly.[115] On the one hand, this virtually inevitable outcome of denying fair use puts into serious question the ethical desirability of WM as a normative guide given that a democratic society will substantially value criticisms and parodies. On the other hand, this simply reveals the indeterminacy of the WM criterion in assigning entitlements. In particular, it may be that the wealth-maximising outcome will be to grant fair use if we started with a situation where individuals are assigned the right to use informational works for criticism and parody. Essentially, the point here is the general one that WM depends on starting points.[116] But I am hard-pressed to imagine other areas of law where this point applies with full force given the spillovers effect of copyright law's subject matter.

It is therefore not surprising that given these issues, the market failure approach to fair use is to discount the value placed by a copyright owner on the non-dissemination of her work as irrational. In doing so, lawyer-economists breach one of the fundamental axioms of neoclassical economic theory: *de gustibus non est disputandum* i.e. economic theory and analysis is neutral to tastes and values. But, "from an abstract utility maximizing perspective, it is hard to see why we should not be completely neutral about an author's desire to suppress information."[117] This inconsistency in economic analysis has received the condemnation of no less a figure than one of the founders of the Law&Econ movement. [118]

Perhaps, the justification for this inconsistency is because under the US Constitution copyright exists to promote of the progress of science and the useful arts and not to

[115] *Cf.* A.C. Yen, 'When Authors Won't Sell: Parody, Fair Use and Efficiency in Copyright Law' (1991) 62 *U. Colo.* L. Rev. 79
[116] Baker, *Supra*. n.45
[117] Sag, *Supra.* n.102 at 228
[118] Calabresi, *Supra*. n.99 at 132.

benefit individual authors.[119] Nevertheless, it suggests that lawyer-economists are not faithful to the methodology of economic analysis and that there might be a departure from WM in order to give recognition to other interests valued by society.

A final problem is one shared by both approaches and indeed the economic analysis of law enterprise. In particular, it pertains to the issue of feasibility and determinacy in ascertaining what is efficient. Again, this issue is exacerbated by the subject matter of copyright law as most interests implicated by fair use are difficult to value in monetary terms. In the absence of a means to monetise the valuations, the judge will have to make decisions based on hunch or assumptions. Consider what the PBBA requires. According to Lunney, a court called upon to resolve a fair use case should do so by "determining… the social value of additional authorship resulting from prohibiting a use and then comparing that value to the social value of allowing the use to continue." Lunney thinks that this balancing would be performed precisely by courts in an ideal world with perfect information but understands the enormous difficulties involved in carrying out such exercise in our imperfect world. This problem in ascertaining what is efficient not only applies at the judicial level but also at every level of copyright law and policy. It is therefore not surprising that there are many articles dedicated to discerning the optimum scope of copyright protection or efficient doctrinal proposals. While those articles represent serious, commendable intellectual effort and commitment, what they share is the futility of efficiency analysis.[120] Consequently, the efficiency theory of fair use, and by extension copyright law, is theoretically elegant but in most instances practically useless.

4. Implications for Copyright as an Institution of Social Change.

This section attempts to briefly re-characterise or re-understand copyright as an institution of social change and its implications for copyright and the efficiency theory of copyright law. In particular, I consider the reciprocal interactions between copyright law and social change with the objective of ascertaining the limits of the

[119] U.S. CONST. art. I, § 8, cl.8
[120] Sag, *Supra*. n.102

efficiency theory of copyright law. In other words, the concern is what are the limits of the Law&Econ theory of copyright when we re-characterise copyright as an institution of social change.

A. Why the Re-Characterisation?

I. Law and Social Change: A Reciprocal Relationship

Social change, as used in sociology, refers to significant alterations in social structure, patterns and relations amongst peoples.[121] These alterations or modifications are significant in the sense that they go beyond changes evident in social groups. Accordingly, not every change in society is a social change. The features, amongst others, that characterise social change are the seismic shifts in cultural values, norms and behaviour patterns. Some of the major causes or engines of social change are social movements, technological innovation, political revolutions, and contacts with other societies and cultures. In a social change, the transformations are felt at every level of society: socio-cultural, political, and economic. An example of a social change is the shift from feudal society to industrial society.

The idea that law is an instrument of social change is not a new one and has been well developed in the sociology of law literature.[122] This follows generally from the fact that law affects and structures social interactions. An important insight from these works is that the relationship between law and social change is reciprocal i.e. law influences social change and vice-versa. Given this reciprocal relationship, it is always a concern to understand the extent of—and the reason behind—the 'rift' between law and social change. In other words, the existence in some cases of a divergence or deviation between legally required behaviour and actual social behaviour *might* be considered a 'lag' between law and social change; and there is

[121] See Morris Ginsberg, 'Social Change' (1958) 9 *The British Journal of Sociology* 205; W.E. Moore, *Social* Change (2nd ed. Prentice Hall, 1974); Jay Weinstein, Social and Cultural Change: Social Science for a *Dynamic World* (2nd ed Rowman &Littlefield, 2006)

[122] Yehezkel Dror, 'Law and Social Change' (1959) 33 *Tul. L. Rev.* 787; S.L. Roach Anleu, *Law and Social Change* (2nd ed. Sage Pub., Los Angeles 2010); Steven Vago, *Law and Society* (10th ed. Prentice Hall, New Jersey 2011)

every reason to understand such lags. This insight has relevance for copyright law, particularly in the context of copyright infringements.

There are several insights one can gain by rethinking copyright as an institution of social change. I mention a few due to space.

a. Of Worldviews, Copyright, & Social Development

It is fairly obvious from the foregoing brief discussion that IP, in particular patent and copyright, is an institution of social change. The body of laws that make up IP are concerned with creativity and inventions. Patent law from an economic perspective is supposed to incentivise the production of inventions and innovation. Of course, technological inventions that supposedly arise from patent law are not to be equated with social change, but they are often the cause of seismic changes in society.[123] The information society is one example of social change that emanated in significant part from digital and information technologies. Whether such technologies were directly as a result of patent, or other related laws, is not the issue. The point is that advancement in technology often precipitates social change and the main purpose of patent law is to facilitate such advancement in technological change.

The link between copyright law and social change is even more direct. Copyright law is concerned with the production, dissemination and consumption of expressive works that influence, enhance or alter our worldviews. The term "worldview" is derived from the German word *weltanschauung* and is a key concept in German philosophy.[124] According to some authors, "[a] world view provides a model of the world which guides its adherents in the world."[125] And Heylighen goes on to define worldview as a conceptual "framework that ties everything together, that allows us to

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[123] For an interesting survey on the impact of technological change on society, see Neil Irwin, 'What Was the Greatest Era for Innovation? A Brief Guided Tour' (May 13, 2016) *The Upshot, International New York Times.* (Surveying the impact of technological change on American lives from 1870-2016). https://www.nytimes.com/2016/05/15/upshot/what-was-the-greatest-era-for-american-innovation-a-brief-guided-tour.html. The printing press is one of such inventions that have caused seismic changes at the economic, social, cultural and political spheres. See Elizabeth Eisenstein, *The Printing Press as an Agent of* Change: Communications and Cultural Transformation in Early Modern Europe, (2Vols. CUP, 1979; Cambridge)

[124] M.J. Inwood, 'Weltanschauung' in T. Honderich (ed.), *Supra.* n.65

[125] B.J. Walsh & J.R. Middleton, The Transforming Vision: Shaping a Christian World View (Intervaristy Press, 1984) 32.

understand society, the world, and our place in it, and that could help us to make the critical decisions that will shape our future."[126] According to Heylighen, such a framework could be designed through a synthesis of "the wisdom gathered in the different scientific disciplines, philosophies and religions."[127] Needless to say, this is a very difficult task. For present purposes however, there are three main points. "World" in worldview extends beyond an understanding of our physical universe and refers to "everything that exists around us, including the physical universe, the [e]arth, life, mind, society and culture"[128]; when worldviews operate at the individual level, they are derived from the synthesis—or how we make sense—of the body of informational and cultural works we consume, the subject matter of copyright law; and when reality does not reflect our worldview, we seek to change reality. This is generally the reason for social movements, one of the main causes of social change. In particular, social movements arise when individuals with identical worldviews converge to challenge a reality that does not reflect their worldview.

The point is not that copyright should seek to legitimise a particular worldview. On the contrary, it should be concerned with allowing people to formulate and disseminate their worldviews as well as challenging hegemonic ones. It is this 'contestation' of worldviews in a democratic society that leads to social change and consequently development.[129] The insight therefore is that copyright should be concerned with social development. The benefits of re-characterising copyright this way are many in that it at least allows us, *inter alia*, to identify the limits of the copyright institution itself and its utilitarian-economic rationale.

b. Institutional Limits, Property, & Social Change

The main thing to understand about the institutional limits of copyright law and their effects on social change is that copyright is a market institution. This is not really a problem *per se* but rather a recognition that different institutions have limits. The real

[126] Francis Heylighen, 'What is a World View' *Principia Cybernetica Web* (Dec 9, 1996) http://pespmc1.vub.ac.be/worlview.html
[127] Ibid.
[128] Ibid.
[129] Social change is not necessarily positive in the sense that it always leads to development. For example, war and disasters are causes of social change that are not positive in any sense.

issue here is that the subject matter of copyright law confers societal benefits that may be difficult to realise when placed in the commodity space. This is not surprising because the market works on permission and price. In other words, the institution of copyright inevitably has *demand side problems* as a result of its market framework that prevent it from facilitating social change. Furthermore, subjecting a cultural work to the market sphere might affect its valuation i.e. the overriding concern in deciding to produce a cultural work is whether it will reap benefits that exceed its costs.[130] The implication is that the copyright institution might only be facilitating the production of popular works for which there are maximum profits to be earned. *This is a supply side problem*. Indeed, the Law&Econ perspective does not see this as a problem insofar as consumers' preferences are satisfied. From a social change and development perspective, however, cultural diversity matters and not just for the purpose of satisfying consumers' preferences. As noted, cultural diversity is essential to the contestation of worldviews that leads to social change. In fact, this highlights a crucial limitation of the utilitarian-economic rationale of copyright insofar as it cannot go beyond a theory of consumer preferences to give us a satisfactory account of the purposes of copyright law. To be clear, this is not an internal critique necessarily as employed in this chapter. I highlight only the institutional limits of copyright from a social change and development perspective.

On the other hand, the relationship between property and social change does not seem to augur well for a re-characterisation of copyright as an institution of social change and development. We often think of property in exclusive and static terms; whereas change is dynamic. Considering that copyright is heavily proprietary, this leads to a somewhat contradictory—even aporetic—relationship between it on the one hand and social change and development on the other hand. And even though tangible property law is replete with what one author refers to as development, necessity and equity based limits[131], our socio-cultural discussions and epistemic understanding of property are still not far from that "sole and despotic dominion… in total exclusion of the right of any other individual in the universe."[132] Furthermore, the neoclassicists lawyer economist approach to property right as a mechanism for

[130] See chapter 5 for the implication of understanding the subject matter of copyright as cultural works.
[131] M.A. Carrier, 'Cabining Intellectual Property Through A Property Paradigm' (2004) 54 *Duke Law Journal* 1
[132] William Blackstone, *Commentaries on the Laws of England* (16th edn. T. Cadell and Butterworth and Son, London 1825) 1.

internalising externalities is a drawback for the understanding of copyright as an institution of social change and development.

c. Explanatory & Normative Limits: Why they Matter?

The normative and explanatory limits of the utilitarian-economic/efficiency theory of copyright law are two issues I discuss here and how they matter for the reciprocal relationship between copyright and social change.

As mentioned above, the relationship between law and social change is two-dimensional. Additionally, there is the issue of lag or divergence between legally required behaviour and actual social behaviour that might prevent social change. Understanding the reason(s) for such divergence is therefore important. This phenomenon of divergent behaviour exists in copyright where widespread copyright infringements, facilitated mainly by digital technology, diverge from the copyright norm. Although the economic theory and the utilitarian-economic rationale offer useful explanations for copyright infringements, they are limited and accordingly should not be regarded as anywhere near a comprehensive theory or explanation for copyright infringements. From an economic perspective, individuals will infringe copyright goods where the value derived from the infringing copy minus the costs exceed the value derived from the non-infringing copy.[133] This utility-maximising narrative, although powerful, is incomplete and certainly fails to take account of those who consider the copyright regime hegemonic and seek to delegitimise or challenge it through subversive social behaviour. Additionally, the divergence between copyright and social behaviour might be understood as a "discursive" attempt by consumers to redraw what they perceive as a lopsided balance in copyright law given the sidelining of consumers' voice in copyright policy.[134] Or it may even be understood as a challenge to the 'retrofitted' incentive theory underpinning copyright law. In fact, the Sci-Hub saga[135] between Alexandra Elbakyan and Elsevier can be seen in this way i.e. not as a utility-maximising

[133] E.g. Robin Andrews, Note, 'Copyright Infringement and the Internet: An Economic Analysis of Crime' (2005) 11 *BUJ Sci. & Tech. L*. 256; Also, J.M. Newman, 'Copyright Freeconomics' (2013) 66 *Vanderbilt Law Review* 1409

[134] For a slightly similar view, see L. Edwards *et.al*, 'Communicating Copyright: Discourse and Disagreement in Digital Age' in M. David and D. Halbert, *The SAGE Handbook of Intellectual Property* (SAGE, London 2015)

[135] Kate Murphy, 'Should All Research Papers Be Free' (March 12, 2016) *The New York Times* *https://www.nytimes.com/2016/03/13/opinion/sunday/should-all-research-papers-be-free.html*

narrative but rather an attempt to challenge the hegemonic use of copyright by academic corporations to restrict A2K. These "other" narratives also highlight the prescriptive weakness of the economic perspective. In particular, the latter will proffer as solution to the divergence between copyright norms and actual social behaviour an increment in the costs of social deviance[136]; but this will likely be futile insofar as those who are participating in acts of infringement consider themselves to be challenging a reality that does not reflect their worldview. In fact, the example of Sci-Hub and other shadow libraries suggest this. Despite the mounting legal challenges and hosting issues, these shadow libraries have continued to operate.

Although the normative limits of efficiency theory in serving as a guide to copyright law and policy have been discussed, it is important to further highlight why they matter for the characterisation of copyright law as an institution of social change and development. The main problem with the efficiency theory of copyright law is that, judged by its own terms, it cannot promote social change because it is often unable to tell us whether any alternative copyright rule furthers cultural wealth-maximisation beyond the abstract and unhelpful assertion that "a level of copyright scope that approaches either zero or infinity will be sub-optimal."[137] Consider Rizzo's critique and the enormous implications that follow when copyright law becomes the subject of analysis.[138] Rizzo argues that "[a]n illusion of manageability has been created by the overly simple models within which much of the economic analysis of law takes place"[139] because, as he recognises, efficiency analyses of law are carried out from partial—rather than general—equilibrium standpoint. The implication of this, for example, is that "if… a liability rule is efficient as between two potential litigant classes, it can be inefficient once third party or *spillover effects* are taken into account."[140] Although he concedes that in principle "the spillover effects of alternative legal rules might be totaled and the socially value-maximizing set of rules specified…", he recognises that "the information requirements for such an

[136] Andrews, *Supra.* n.133.
[137] Sag, *Supra.* n.102 at 223. By cultural wealth-maximisation, I mean that the value of the quantity *and* quality of cultural works in monetary value generated by a copyright regime exceeds the costs. For the relationship between IP and cultural wealth, see P.E. Geller, 'Opening Dialogue on Intellectual Property' in Stéphane Rousseau (ed.), *Juriste sans frontières: Mélanges Ejan Mackaay* (Editions Themis, Montreal 2015)
[138] Rizzo, *Supra.* n.63.
[139] *Ibid* at 642
[140] *Ibid* at 641, emphasis added

achievement are well beyond the capacity of courts or anyone else."[141] This critique presents an unparalleled problem for copyright law and its subject matter.

What is problematic when copyright law becomes the subject of analysis is the idea of spillovers. The subject matters of copyright law are significant sources of positive externalities. The idea that an efficiency theory of copyright law can determine at any level of specificity the cultural wealth-maximising rule is unsustainable particularly when we go beyond partial-equilibrium analysis and this will always be the case with copyright law—if cultural wealth-maximisation is *truly* our focus[142]— due to the enormous amount of spillovers generated by its subject matter. In fact, "[w]hat appears to be an efficient outcome in a 'streamlined' model might well be inefficient in the context of a more inclusive notion of efficiency (and vice versa)."[143]

5. Copyright and Development

The previous section was concerned with three things: a re-characterisation of copyright law as an institution of social change; the limits of the utilitarian-economic rationale of copyright; and the institutional limits of copyright when it is properly understood as an institution of social change. The implicit assertion in the previous section is that copyright should promote development without specifying why, apart from the understanding that it is an institution of social change. This section explores that question alongside other issues necessarily implicating the idea and concept of development: what is development? Is it a goal, vision or process? Is development multipurposive or uni-dimensional? What can development thinking and discourse inform us about the legal institutions and rules underpinning current copyright law?

The approach adopted to deal with these issues is to engage with the field of development studies (DS). This inquiry is located in the interdisciplinary field of law and development which has as its central aim the explication of the role of law and legal institutions in the development process. But instead of asking whether

[141] *Ibid* at 642
[142] *Ibid* [Noting that neither partial efficiency is desirable nor is general efficiency (WM) practically possible.]
[143] *Ibid* at 647.

copyright with its norms, rules and institutions can foster development, I consider what contributions development discourse and thinking can offer copyright law and policy. The former and the latter are two sides of the same coin and in dealing with the latter issue, the former can adequately be answered given that the mirror of development discourse and thinking can display an image of copyright's role in the development process. However, given the nature of this enquiry and due to space, there is no attempt to deal exhaustively with the issues for as Williams cautions, "there are too many issues, too many institutions involved, and too many approaches for them to be sketched out."[144]

A. The Nature of Development Studies and Development.

This section begins to make the case for a development approach to copyright. Such approach however is meaningless without unpacking the concept and idea of development, as it is a loaded term. The problem is not, as with the efficiency norm, that development is incapable of providing answers or giving concrete guidance to policy. There are several development indicators to track development. Rather the issue is with the confusion surrounding its meaning.[145] In copyright conferences I have attended, the word is tossed around as if the meaning is crystal clear thereby undermining the effectiveness of the analysis.

By engaging with the field of DS, the meaning and idea of development will be unpacked.

I. Why Development Studies?

The history, definition, and scope of DS are contested in the literature. While many locate the origins of DS in the political climate of the post-Second World War era that ushered in a wave of decolonisation in African countries, others present a radical

[144] David Williams, 'The Study of Development' in Bruce Curie-Alder et.al. (eds)., *International Development:* Ideas, Experience and Prospects (OUP, 2014)

[145] G. Esteva, 'Development' in W. Sachs, The Development Dictionary: A Guide to Knowledge as Power (Zed Books, 2010), stating:

> Development occupies the centre of an incredibly powerful semantic constellation. There is nothing in modern mentality comparable to it as a force guiding thought and behaviour. At the same time, very few words are as feeble, as fragile and as incapable of giving substance and meaning to thought and behaviour as this one.

history that stretches back to colonial times.[146] These differences in the historiography and genealogy of DS are not simply motivated by the concern of getting the details right. They matter for the discourse and practice of development.[147] For instance, a post-colonial analysis questions the universalising and homogenous nature of development discourse and practice insofar as they are essentially Eurocentric.

In discussing the history of DS though, it is important to draw a distinction between the thinking and teaching of DS. Regarding the former, several scholars locate the origins from the Enlightenment period. For example, while Harris considers that "[t]he origins of theorising, analysing, and studying the social processes that are involved in bringing about the great changes in societies that can be described in terms of 'development' may be sought in the work of the Enlightenment philosophers…" he situates the origins of DS, "*as a self-defined field of academic and practical research and study*…", in the 1960s.[148] But of course the idea of development is not exclusive to the Western world. In fact, many non-Western societies even long before the Enlightenment period have pre-occupied themselves with development. What is peculiar to Western societies in the development discourse is its epistemology i.e. a specific method or mode of inquiry concerning development. The enterprise of development is as old as humankind.

Aside the controversies on the history of DS, the scope and definition of DS are also contested. Kothari asserts that "understandings of the nature and concept of DS are as varied, multiple, and contentious as definitions of what constitutes development itself."[149] In fact, "particular perceptions of what constitutes development studies are linked to, and often embedded in, particular notions about what development is."[150] Rather than seeking any specific definition though, a useful way to understand the nature of DS is to identify its purpose and object as many definitions of DS are wrapped around it. What is distinctive then about DS is its purpose, object/subject

[146] Uma Kothari, 'From Colonial Administration to Development Studies: A Post-colonial Critique of the History of Development Studies' in Uma Kothari (ed.), A Radical History of Development Studies: Individuals, Institutions and Ideologies (Zed Books, 2016)
[147] Ibid.
[148] John Harris, 'Great Promise, Hubris, and Recovery: A Participant's History of Development Studies' in Kothari (ed.) *Supra*. n.146.
[149] Uma Kothari, 'A Radical History of Development Studies: Individuals, Institutions and Ideologies' in Kothari (ed.) *Ibid*
[150] Ibid.

and method of inquiry.[151] It is concerned with the development of developing or 'Third World' countries i.e. societal development.[152] More unambiguously, the unifying theme of the DS' project could be said to be the "qualitative improvement in the lives of the world's poor."[153] While some scholars would restrict the focus of DS to poverty and inequality, a multitude of issues are examined under the enterprise of DS insofar as they affect the development prospects of developing countries (DCs): gender equality, corruption, education, security, innovation systems, environmental sustainability etc. These issues and concerns also play a role in the conceptualisation of development and as Kingsbury states "notions of 'development' continue to evolve in ways that increasingly address the range of concerns that are expressed by people in their daily lives…"[154] For example, the concern for environmental sustainability has led to the introduction of the idea of 'sustainable development'.[155]

Despite the shared consensus on the unifying theme of DS, there is little agreement however as to whether it can be seen as a discrete academic discipline.[156] What is unequivocally agreed to is that it is cross-disciplinary and involves the mixing of disciplines. This cross-disciplinarity is necessary as "no single discipline can adequately deal with the breadth or complexity of development."[157]

Whatever the disputations about the nature of DS, there is shared agreement that DS is *about* and *for* development however it is conceptualised. Contemporary DS, dating from the post-Second World War period, has concerned itself with the enterprise of development: the meaning of and approaches to development as well as measures of and proposals to achieve development. Different disciplines—economics, political science, philosophy, anthropology, geography, sociology etc.—have continued to contribute to this endeavour. While the contributions of these

[151] John Loxley, 'What is Distinctive About International Development Studies' (2004) 25(1) *Canadian Journal of* Development Studies 25.
[152] Andrew Sumner, 'What is Development Studies' (2006) 16(6) *Development in Practice* 644, 645 (Stating that development studies' "connecting theme is, in general, post-colonial countries, or the 'Global South', and standards of living within them."; See also John Loxley, *Ibid*. While the focus is on DCs, some argue persuasively that DS should be global in perspective. See A. Sumner and M. Tribe, 'What Could Development Studies Be?' (2008) 18(6) *Development in Practice* 755.
[153] Damien Kingsbury, 'Introduction' in Kingsbury et. al., *International Development: Issues and Challenges*, (3rd edn, Palgrave 2016)
[154] Ibid.
[155] On the relationship between the SDGs and the human development approach, see *infra.* ns.212-215.
[156] See David Clark, 'Introduction: Development Studies in the Twenty-First Century' in D.A. Clark (ed.), *The* Elgar Companion to Development Studies (Edward Elgar, 2006); Williams, Supra. n.144.
[157] Clark, *Ibid.*

disciplines have led to the progressive expansion or 'richness' of the concept of development, they have also complicated the discourse of development for the researcher and policymaker. Potter, referencing Hettne, has pointed out that the field of DS is characterised by evolution of ideas rather than revolutions and that development "theories and strategies have tended to stack up, one upon another, coexisting, sometimes in what can only be described as very convoluted and contradictory manners."[158] Accordingly, it is not possible to speak of a consensus on what constitutes development in DS. It is however possible to speak of hegemonic and counter-hegemonic theories. In this vein the field of DS progresses in a dialectical fashion that can be divided up into historical periods capturing a thesis and an anti-thesis followed by a synthesis or co-option of what constitutes development.[159]

But even though decades of research in this field have not produced any consensus on what development is and how to achieve it, there is still a lot to learn from this field and its relevance to copyright.

First, DS is about and for development. Development is the stuff DS is concerned with. The fact that DS is concerned with development at the macro level does not make it any less relevant to copyright law and policy. Some of the issues examined in DS—education, economic growth—implicate copyright law and policy; and the field of DS is not only concerned with theories of development but also strategies for achieving development.[160] Copyright law accordingly can be understood as a strategy or institution for achieving development. Second, an engagement with the field of DS will help track the evolution and meanings of development. What is important to note is that, in the field of DS, there has been a shift in the objective of development from economic growth to human-centred objectives.[161] This is particularly important for informing copyright law and policy. But it also opens up

[158] R.B. Potter, 'Theories, Strategies, and Ideologies of Development: An Overview' in Desai and Potter (eds.), *The Companion to Development Studies* (3rd ed. Routledge, 2014).
[159] For similar views, see Beniamin Knutsson, 'The Intellectual History of Development: Towards a Widening Potential Repertoire.' (April, 2009) 13 *Perspectives* 2.
[160] Bjorn Hettne, Development Theory and the Three Worlds: Towards and International Political Economy of *Development* (2nd ed. Longman, 1995); Potter, *Supra*. n.158.
[161] F. Stewart et.al., Advancing Human Development: Theory and Practice (OUP, 2018) 4; Knutsson, Supra. n.159.

scepticism about the role of copyright in facilitating human-centred objectives.[162] Finally, a development-oriented approach to copyright law can learn from the tensions characterising DS. Williams has identified three tensions, two of which are evident in copyright law. The first is "between generating widely applicable knowledge and policy prescriptions, and generating knowledge of particular development successes and failures."[163] This tension is between generating general and specific knowledge of development. With regards to the former, the role of the expert is to generate general knowledge that applies across the board to DCs with the assumption that DCs constitute an undifferentiated whole. In DS, this tension is evident in both the theories and strategies of development. Modernisation theory and the Washington Consensus represent attempts to generate generally applicable knowledge.[164] In copyright law and policy, this tension between general and specific knowledge is mostly evident in debates concerning the proper extent of harmonisation in international copyright law. If there is any commonly agreed insight from the decades of research in DS, it is that a 'one-size-fits all' approach to development is not conducive to development. Development is context-specific as various factors—history, institutions, culture, and politics—make the adoption of homogenous development models ineffective. Another tension which Williams identifies is "a tension between economics as the primary discipline within which development was studied, and the contributions of other academic disciplines…"[165] This tension in DS is evident in the emphasis on economic growth as proxy for development and the marginalisation of non-economic aspects of development. In copyright law, theory and policy the pre-eminence of economics is hardly controversial. Copyright policies are designed to maximise wealth, neglecting or undervaluing other aspects of development. Another issue characterising DS—not a tension but rather a gap—is the disconnect between the theory and practice of development. Potter recognises this disconnect and states that:

> Many diverse and varied approaches to development remain in currency today, and in many different quarters. Hence, in development theory and academic writing, left-of-centre socialist views may well be more popular than classical and neo-classical formulations, but in the area of practical development strategies and

[162] Stewart et.al. *Ibid*. [Authors stating that "human-centred objectives encourage more scepticism about market mechanisms."]
[163] Williams, *Supra.* n.144
[164] See *Infra*. n.193
[165] Williams, *Supra*. n.144

> policies, the 1980s and beyond have seen the implementation of neoliberal interpretations of classical theory…[166]

Vis-à-vis copyright this observation is evident: although recently there has been an increasing theorisation of copyright law demanding the incorporation of social concerns, copyright law and policy still remains for the most part wedded to a narrow conception of development.[167]

II. Can Development Serve as A Guiding Norm?

One issue worth discussing is whether DCs ought to pursue development. This is important because development has become the organising concept for DCs. In particular, should 'development' serve as a guiding or organising norm for DCs? By organising norm, I mean that the concept of development provides the frame in which to make sense of, evaluate, and tie together the different spheres in society: social, economic, political and cultural. So, if the concept of development does not make sense at the societal level then it is pointless for law, and copyright in particular, to promote development. Here I consider the critiques of post-development scholars to understand why 'development' might not make sense. The immediate objective is not to compare the desirability of development with another value such as efficiency, but rather to subject to examination the primary issue of whether the development norm can guide action.

The insight of post-development scholars is to subject to critical examination the sacredness of development in shaping reality. For some of these post-development scholars, development is nothing more than the "new religion of the west"[168]; for others, it amounts to the colonisation of the mind[169]; or as the "Westernisation of the world"[170]; or even as a discursive practice "that links forms of knowledge about the Third World with the deployment of forms of power and intervention, resulting in the mapping and production of Third World societies."[171] Accordingly, what seems to be

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[166] Potter, *Supra.* n.158
[167] See chapter 5
[168] Gilbert Rist, The History of Development: From Western Origins to Global Faith (Zed Books, 1997)
[169] Wolfgang Sachs, 'Preface' in Wolfgang Sachs (ed.) The Development Dictionary: A Guide to Knowledge as *Power* (Zed Books, 2010).
[170] Serge Latouche, In the Wake of the Affluent Society: An Exploration of Post-Development (Zed books, 1993)
[171] Arturo Escobar, 'Imagining a Post-Development Era' in Crush (ed.), *The Power of Development* (Routledge,

the main critique of post-development scholars is that the concept of "development has Eurocentric, depoliticising, and authoritarian implications."[172]

But these critiques are neither entirely new nor peculiar to post-development. Indeed, some of these criticisms were put forward by dependency theorists as a rejection of modernisation theory. What distinguishes post-development from other critical approaches is that it *rejects* development.[173] There is nothing however from the post-development critiques that necessitates the rejection of development at least for several reasons.

First, the critiques of post-development scholars are better understood as concerning the epistemology of development discourse rather than a rejection of the idea of development. Development connotes the improvement of societies and it could be argued that the principal ambition of every society is to improve, whichever dimension such society chooses to measure improvement. The repudiation of development therefore is the rejection of this principal ambition. As Professor Nussbaum states, "[w]hen we consider theories of development…we are considering what people in every nation are striving for: a decent quality of life."[174] Accordingly, development will continue to make sense unless the pursuit of a decent quality of life is no longer worthy. For post-development scholars then, what should be at stake is not development *per se* but rather the homogenising discourse and strategy of development. It is certainly the case that development discourse and strategy have mainly been produced or mapped out in the Western world, but it does not follow that as a result of this development should be discarded. What is required is to incorporate the voice of DCs in shaping development theory and strategy. The surprising thing is that post-development scholars are victims of the development 'monster' they fight to gore. By insisting that the concept of development be abandoned because of its Eurocentric implications, these scholars unwittingly maintain the hegemony of this homogenising and Eurocentric discourse because they essentialise development and thereby provide a narrow lens in which to understand and critique development. For these scholars, the Eurocentric discourse

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1996)

[172] Aram Ziai, 'The Discourse of "Development" and why the Concept Should be Abandoned' (2013) 23(1) Development in Practice 123, 124.

[173] J.N. Pieterse, 'After post-development' (2000) 21(2) *Third World Quarterly* 175

[174] M.C. Nussbaum, Creating Capabilities: The Human Development Approach (HUP, 2011) 46

of development exhausts the universe of development thinking. This is a narrow perspective. In international copyright law and policy, the development agenda is a clear example of the copyright and development debate being shaped by the voices of DCs. Instead of rejecting development, they rather reject a particular conception of development and seek to articulate a proper role of copyright and its governing institution in facilitating what they conceive of as a broader conception of development.[175]

But even if the Eurocentric assumptions of development are overcome, some post-development scholars still argue that the concept of development should be abandoned because of its negative connotations. According to Esteva:

> Development cannot delink itself from the words with which it was formed – growth, evolution, maturation… The word indicates that one is doing well because one is advancing in the sense of a necessary, ineluctable, universal law and towards a desirable goal . . . for two-thirds of the people on earth, this positive meaning of the word "development" . . . is a reminder of what they are not. It is a reminder of an undesirable, undignified condition.[176]

It is hard to take this argument seriously. If development means several things to different people in different places, then why is this particular connotation of development that requires two-thirds of the people on earth to see themselves in an undignified condition the privileged or only one? But more importantly, Esteva's statement suggests that the undignified condition is not a lived experience but rather a product of discourse i.e. but for the concept of development, these people would not view their situation as undignified. This is worrying at the least! Not only does this make a caricature of the experiences of people in the third-world, it silences their voice. Poverty and gross inequalities are features of everyday life for these people and not something to be reminded of by 'development'. Their experiences remain the same whether we choose to abandon the concept of development or not. Furthermore, the fact that mainstream development strategy has not worked for several countries is not a reason to jettison development; but rather, it reinforces the

[175] N.W. Netanel (ed.), The Development Agenda: Global Intellectual Property and Developing Countries (OUP, 2008)
[176] Esteva, *Supra*. n.145

need to unleash our powers of imagination to articulate conceptions of development that are proximate to the needs of DCs, including strategies and approaches.

Yet post-development scholars would not relent in their quest for the abandonment of the concept of development. Some of them consider that "there is still a case to abandon the concept simply because it causes many misunderstandings…"[177]. As Ziai states:

> Misunderstandings result from the fact that the same signifier is linked with different signifieds in the systems of representation of different actors. Whereas one assumes development to denote a higher income for the rural population, a second links it with a better investment climate for multinational companies leading to employment and economic growth, a third with sustainable resource use, a fourth with better health care for mothers and infants, a fifth with economic and cultural imperialism, and a sixth opportunity to make a living in the aid business.[178]

While it is true that the concept of development is vague, the same can be said of other concepts used in political and academic discourse. For example, the concept of public interest is equally vague and yet has not been abandoned. In addition, the confusion and ambiguities beleaguering the concept of development require us to be more precise in our usage rather than abandon development. Moreover, it is not development *per se* that is incapable of giving meaning to thought and behaviour but rather our confusion and imprecision with how we employ the terminology of development. And it is not clear how replacing development with another word will bring clarity and precision into the discourse. Here the problem is in confusing the word itself with the ideas underlying the word. Words are like receptacles that take in ideas and so they are completely separable from the inhabiting idea. If as Ziai seems to think that the concept of social change might serve as a substitute for development, then what stops us from associating the ideas of improvement and all connotations that come with development once we have swapped it for social change? On the other hand, Ziai considers that specific descriptions, rather than overarching concepts such as social change and development, would be more appropriate as alternative concepts of development i.e. "If we are examining strategies of farmers to cope with climate change or looking for factors contributing to economic marginality or analysing conflicts about irrigation or land

[177] Ziai, *Supra*. n.172 at 132.
[178] Ibid.

distribution…"[179], then we should just call it that. But this simply begs the question: what is the purpose of these specific activities described by Ziai? Unless we are involved in these activities simply for the reason of engaging in them, which obviously is not the case, then we should refer to them collectively as development. In fact, development provides the needed unifying framework to view these activities, particularly as the activities described by Ziai are not separate as he seems to indicate. For example, land distribution is definitely a contributing factor to economic marginality.

Second, and finally the rejection of development without an alternative is akin to performing a diagnosis without cure. As Pieterse asks, "[w]hat is the point of declaring development a 'hoax' without proposing an alternative?"[180] If we are to jettison development, then post-development theorists need to come up with another worldview. For Sachs though, certain themes run through post-development initiatives. While not explicitly stated, these themes would seem to provide an alternative. In a statement that seeks to tie these themes and initiatives coherently, he asserts that:

> At any rate, what appears to be the common denominator of those initiatives is the search for less material notions of prosperity that make room for the dimensions of self-reliance, community, art or spirituality. Their underlying conviction is that human well-being has many sources beyond money…[181]

It is not clear how the appreciation of this "common denominator" requires the abandonment of development. Why do we need post-development to understand that prosperity involves more than material progress? And the view that human welfare goes beyond money is as old as humanity for Aristotle understood a long time ago that "wealth is evidently not the good we are seeking; for it is merely useful and for the sake of something else."[182] Again, the problem here is not really with development but with a particular conception of development. And the fault with post-development scholars is to essentialise development.

In conclusion, the critiques of post-development scholars are important and serve as reminders to be critically reflective of our conceptions and strategies of development.

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[179] *Ibid*. at 133
[180] Pieterse, *Supra.* n.173 at 188.
[181] Sachs, *Supra.* n.169.
[182] Aristotle, *The Nicomachean Ethics* (trans. by W.D. Ross; OUP, 1980) book 1, s.5, p.7.

They remind us that development is a contextual endeavour and underscore the importance of rejecting the homogenising discourse of development. But these criticisms are not entirely new and have existed in development discourse. Perhaps the manner in which these critiques are reformulated and forcefully presented by post-development scholars will awaken our imaginations to rethink our conceptions of development. But they certainly do not require us to abandon development. In fact, they reinforce our shared commitment to development.

B. What Development?

The previous section dealt with the general issues of why an engagement with DS is relevant to analysing the relationship between copyright and development, and whether the development norm as an organising framework for DCs makes sense. This section moves to the more specific issues of *what* development and why copyright should facilitate development.

I. The Development Terminology: What is in a Word?

By any standard, the enterprise of development is a huge task. Almost all societies have concerned themselves with the idea underlying development be it the progress, betterment, improvement or maturation of society. From the post-Second World War era, the term gained unprecedented salience and relevance because it had become an imposed organising frame for DCs.[183] If anything, the normative role of this term in guiding action and behaviour has only increased in the 21st century with globalisation. Global institutions, civil society, and local communities all sound the gong around development; and law is seen as an instrument for facilitating development.

A host of complex questions however arises when we examine the ambiguous concept of development. I do not attempt to deal with many of the issues posed by the concept of development but a useful way of appreciating the complexities and ambiguities inherent in the concept and discourse of development is to place the

[183] Many development texts, both critical and mainstream, trace the beginning of contemporary development debate from President Harry S. Truman inaugural address.

issues into five categories: nature, definition, dimension, level and agent of development.

The Oxford Dictionary provides some useful definitions of development which track our conventional usage of the term but not dissimilar to how it is employed in development discourse. These definitions also highlight the nature of development. The first meaning is that it is "the process of developing or being developed."[184] Here development is a process and it says nothing about the desirability of development. Development in this sense is similar to evolution. It is akin to what some authors term "development as an immanent process." According to them, there is a distinction between development as an immanent process and an intentional practice and this distinction is often lost in contemporary development texts.[185] Given its focus on process rather than outcome, this definition of development is necessarily objective. Another sense in which the term development is employed is in relation to the unfolding of events. This thesis shall not be concerned with either senses of development because several elements are missing when we focus on them.

First, they fail to capture what we mean when we assert that a nation is developed or developing. Second, they fail to expose the normativity and value judgments implicit in the idea of development. Third, and crucially, they fail to tell us the aim of development. These missing elements follow from the fact that development is not only a process but also a goal and vision. And contemporary development discourse is mainly concerned with the latter two senses of development. Even when the focus is on development as a process, the analysis is on the process of achieving/reaching a goal or stated vision. The Oxford Dictionary gives another definition of development as "a specified state of growth or advancement." This definition comes close to revealing the value judgments and normativity implicit in the idea of development since to specify a state of growth is to make value judgments about what constitutes growth as well as the implicit assertion that the move to that specified state is desirable.

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[184] "Development" in Angus Stevenson (ed.), *Oxford Dictionary of English* (OUP, 2010) 479

[185] M. Cowen and R. Shenton, 'The Invention of Development' in Stuart Corbridge (ed.), *Development: Critical Concepts in the Social Sciences* (Vol 1; Routledge, 2000); see also Alan Thomas, 'Meanings and Views of Development' in Allen and Thomas (eds.), *Poverty and Development into the 21st Century* (OUP, 2000); H. Arndt, 'Economic Development: A Semantic History' in Stuart Corbridge (ed.) *Ibid.* [Tracking similar distinction in the usage of the term economic development.]

Although these definitions do not exhaust the number of ways in which we think about development, they roughly capture its nature: as a process, goal or vision. And it is these two latter senses of development that the discourse on copyright and development is mainly concerned with. Essentially, copyright could be seen as a legal mechanism for achieving a specified goal or vision. But to assert that development is a goal or vision does not tell us its content. In this respect, the cross-disciplinary nature of DS becomes indispensable in filling the content.

Furthermore, it is not enough to specify the content for questions of how to achieve the goals or visions of development are as equally important as the specification of the content or goals of development. At this stage, the distinction Cowen and Shenton make between development as an immanent process and an intentional practice becomes relevant. If development is seen as a goal or vision, then it requires an intentional practice to bring us to that goal unless we conceive of that goal as naturally occurring. This intentional practice on the other hand requires an agent of development. Traditionally, the debate has centred on state versus market as agents of development. However, the role of civil society as an actor in the development process has become increasingly important in the era of globalisation.[186] Knutsson has argued that development discourse is largely a product of the 'war of position' between these actors. For him, development "discourse is determined by the power relations between the main actors: state, market and civil society."[187] And "[t]he actor with the upper hand is most likely to have the largest influence on the discourse."[188] Given that the various actors have historically prioritised different concerns, the influence of these actors on development discourse matters significantly on the strategy and practice of development. And it also matters for copyright and policy.[189]

Finally, the level of analysis matters for development discourse. Given the advent of contemporary globalisation, the analysis of development has moved beyond the nation-state thereby complicating development discourse. The analysis of

[186] See S. Devarajan & R. Kanbur, 'Development Strategy: Balancing Market and Government Failure' in Curie-Alder *et. al*. (eds.) *Supra.* n.144
[187] Knutsson, *Supra*. n.159 at 5.
[188] *Ibid*. at 3.
[189] See chapter 5

development therefore has become multi-level: global, national, regional, local and individual. One important implication of this is that any strategy committed to development must take into account the various levels.

II. Towards a Human Development Approach

The previous sections have queried whether the pursuit of development makes sense. Given that development is necessarily normative, the next logical inquiry is what is the objective or content of development? This is important for as one commentator notes:

> The main question—What does development mean? —is important. The failure to have an objective that is widely understood, and accepted and has relevance for policy, is an important reason for many difficulties that nations encounter in designing consistent and effective policies.[190]

Similarly, Seers has cautioned that "we have to dispel the fog around the word 'development' and decide more precisely what we mean by it", if we are to "devise meaningful targets or indicators, and thus help improve policy, national or international."[191]

In engaging in an inquiry about the meaning and objective of development, we are inescapably making a normative assessment about what constitutes a decent quality of life or how to judge the welfare of society. This requires an informational focus i.e. a development theorist needs to decide which features of the world are important, and therefore should be concentrated on, in evaluating society.[192] Mainly, and in line with the dominance of economics in shaping development theories, the informational focus has been on economic growth and income. On this perspective, it is assumed that the expansion of GDP or income is a true indicator of society's development and progress. This concern for economic growth as the principal ambition of societies has held sway since 1945, post- World War II, when the main theory for understanding and facilitating development was the modernisation theory.[193]

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[190] H.J. Bruton, 'Review of H.W. Arndt: Economic Development: The History of an Idea' (1990) 38(4) *Economic* Development and Cultural Change 869.
[191] D. Seers, 'The Meaning of Development' in Stuart Corbridge (ed.), *Supra.* n.185
[192] See Sen, *The Idea of Justice Supra*. n.9 at 231.
[193] Under the modernisation theory, development was synonymous with economic growth. Apart from an emphasis on industrialisation by the modernisation theory, a key feature is the State as an agent of development. For work capturing the themes of the modernisation theory, see W.W. Rostow, *The Stages of*

Although the dependency theory emerged briefly to counter the dominance of modernisation theories, both theories share the emphasis on economic growth.[194]

This focus on economic growth can be broken down into two underlying propositions which form the backbone of the development as economic growth approach. First, it is assumed that by facilitating economic growth, through GDP per capita, that incomes are maximised. Second, maximising income leads to the improvement of lives. As we shall see, there are serious limitations to this development approach. For present purposes though, it is important to note that even though economic growth and expansion of income were the principal concern of development theories there were other approaches to development that emphasised other aspects and thereby sought to challenge the dominance of development as economic growth, particularly the Basic Needs Approach (BNA).[195] According to Streeten, the basic needs concept is "a reminder that the objective of development is to provide all human beings with the *opportunity* with a full life", and that a shorthand way of describing the BNA is "incomes + publics services + participation".[196] However, the advent of neoliberalism in the 1980s as a development model re-centred the focus on economic growth thereby extinguishing the flame of other development approaches and the BNA. With neoliberalism the agent of development as economic growth shifted from the State, as it was under the modernisation approach, to the market.

There are many problems with the economic growth approach to development. First, there is no necessary correlation between economic growth and high quality of life. As Streeten states, "[e]conomic growth can be quite rapid without an improvement in the quality of life of the majority of the people, and many countries have achieved a high quality of life with only moderate growth rates of income."[197] This follows from the fact that economic growth, as measured by GDP, cannot serve as an indicator of the actual lives people are living because it elides different component parts of lives

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Economic Growth: A Non-Communist Manifesto (CUP, 1960); Cf. Hettne, Supra. n.160

[194] See Knutsson, *Supra.* n.159 at 15-18.

[195] On the BNA, see P.S. Streeten, 'Basic Needs: Premises and Promises' (1979) 1(1) *Journal of Policy Modeling* 136; P.S. Streeten, 'From Growth to Basic Needs' (1979) 16(3) *Finance and Development* 28; Frances Stewart, *Planning to Meet Basic Needs* (Macmillan Press Ltd; 1985); J.S. Hoadley, 'The Rise and Fall of the Basic Needs Approach' (1981) 16(3) *Cooperation and Conflict* 149.

[196] P.S. Streeten, 'Shifting Fashions in Development Dialogue' in Sakiko Fukuda-Parr and A.K. Shiva Kumar(eds.), *Readings in Human Development* (OUP, 2003) (Emphasis original).

[197] Ibid.

that are distinct: health, education, political rights, longevity and many others.[198] This deficiency of the development as economic growth approach is characteristic of any approach that relies on a single metric to evaluate the quality of life. For example, the same criticism can be levelled at the utility-based approach to development.[199] Second, economic growth as measured by GDP says nothing about distribution. Indeed, the substantial inequalities prevalent in many countries despite economic growth reflect this point. Third, even if incomes were evenly distributed amongst the citizens of a country it says nothing, as we have seen, about the quality of life they live. Another way of saying this is that income is only one dimension of a good life. This brings us to the next point. Fourth, the development as economic growth approach focuses on means rather ends. In focusing on the maximisation of income, the economic growth approach might be confusing the means of development with ends. People are concerned about living fulfilling lives and income is only instrumental to this but not enough.

In relatively recent times, there has been a rethinking of development that radically moves away from economic growth to a focus on the ends of development: humans. This is referred to as the human development approach (HDA) and has been expanded upon by Sen and Nussbaum following the initiation of the *Human Development Report* by Mahbub ul Haq.[200] The central objective of the HDA is to expand people's choices in order to enrich their lives. According to Mahbub ul Haq:

> The basic purpose of development is to enlarge people's choices. In principle, these choices can be infinite and change over time. People often value achievements that do not show up at all, or not immediately, in income or growth figures: greater access to knowledge, better nutrition and health services, more secure livelihoods, security against crime and physical violence, satisfying leisure hours, political and cultural freedoms and a sense of participation in community activities. The objective of development is to create an enabling environment for people to enjoy long, healthy and creative lives.[201]

The philosophical foundation of human development rests on the capabilities approach which has been extensively theorised by Sen and Nussbaum.[202] The key

[198] Nussbaum, *Supra.* n.174 at 49.
[199] See *Supra*. Section 2
[200] Sen, Development as Freedom Supra. n.16; Sen, The Idea of Justice Supra.n.9 at 225-291 [Using the capability approach which informs human development to develop a theory of justice]; Nussbaum, *Supra*. n.173; Amartya Sen, 'Development as Capability Expansion' (1989) *Journal of Development Planning* 41; Mahbub ul Haq, 'The Human Development Paradigm' in Sakiko Fukuda-Parr and A.K. Shiva Kumar (eds.), *Supra.* n.196.
[201] Mahbub ul Haq, *Reflections on Human Development* (OUP, 1995) 14.

concepts in the capability approach to human development are: functionings, capabilities, and freedom. According to Sen, functionings are the "various things a person may value doing or being."[203] These valued functionings could range from the very basic, such as being educated, to the complex ones such as travelling around the world. Capability on the other hand refers to alternative combinations of functionings that a person may feasibly achieve.[204] The concept of capability is connected to the notion of freedom, particularly what Sen describes as the opportunity aspect of freedom.[205] So, capability is the "substantive freedom to achieve alternative functioning combinations"[206] or various lifestyles. The central question then for the capability approach to human development is whether a person has the capability to do things he or she has reason to value.[207]

It is clear then that freedom is of central importance in the HDA.[208] In fact, Sen conceptualises development as "a process of expanding the real freedoms that people enjoy."[209] This necessarily requires the removal of major sources of unfreedom. To be clear though, freedom is also of importance in the neoliberal vision of development as economic growth—given that both approaches have common roots in the liberal tradition—but the emphasis is different.[210] While neoliberalism's commitment to freedom is for the purpose of maximising the satisfaction of preferences and facilitating market transactions following the long-standing tradition in welfare economics, the concern for freedom under the HDA is in order to expand opportunities to enable people achieve what they value to do or be.[211] Furthermore, the HDA emphasises the interconnectedness of freedoms which is critical for an understanding and evaluation of the quality of lives people live.

This emphasis on the interconnectedness of freedoms and the expansion of capabilities has provided the philosophical basis for the Sustainable Development

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[202] See Supra. n.200
[203] Sen, Development as Freedom, Supra. n.16 at 75
[204] Ibid.
[205] *Ibid*. at 17
[206] Ibid.
[207] Sen, *The Idea of Justice*, Supra. n.9 at 231; Nussbaum, *Supr*a. n.174 at 59.
[208] Sen distinguishes between what he refers to as the "opportunity" and "process" aspects of freedom. Sen, *The* Idea of Justice Ibid. at 228-9
[209] Sen, Development as Freedom, Supra. n.16 at 3.
[210] See Richard Jolly, 'Human Development and Neoliberalism—Paradigms Compared' in Sakiko Fukuda-Parr and A.K. Shiva Kumar(eds.), *Supra*. n.196.
[211] Jolly, *Ibid*.; Séverine Deneulin and Lila Shahani (eds.), *An Introduction to the Human Development* and Capability Approach: Freedom and Agency (Earthscan; 2009) 53.

Goals (SDGs), as captured in the 2030 Agenda.[212] The SDGs—which comprise 17 goals, 169 targets, and 232 indicators—were adopted by all UN member states in 2015 and applies to all countries, whether developing or developed.[213] Following the HDA, the 2030 Agenda is people-centred and seeks to expand human capabilities. For example, the 2030 Agenda is committed to eradicating poverty in all its forms and dimensions which it believes "ensure[s] that all human beings can fulfil *their potential* in dignity and equality and in a healthy environment."[214] Furthermore, the SDGs are "integrated and indivisible", thereby emphasising the linkages and interconnectedness of the goals to the achievement of sustainable development. And like the HDA, the 2030 Agenda goes beyond economic focus to emphasise the three dimensions of sustainable development: the economic, social and environmental. In short, the SDGs, which build on the MDGs and complete what it did not achieve, draw intellectual contributions from the HDA by insisting on the centrality of people for sustainable development.[215]

III. A Human Development Approach to Copyright.

In bringing the HDA to bear on copyright law and policy, the analysis changes immediately.[216] As we have seen the principal objective of HDA is to expand human freedoms and choices in order to live fulfilling lives, rather than the maximisation of economic welfare. Furthermore, the focus of HDA is on humans rather than on markets as it is with the neoliberal model of development. Consequently, copyright law from the perspective of the HDA approach is analysed on the basis of its role in

[212] See United Nations, "Transforming Our World: The 2030 Agenda for Sustainable Development." https://sustainabledevelopment.un.org/post2015/transformingourworld

[213] On this level alone, the SDGs are different from the Millennium Development Goals (MDGs) which focus on developing countries. For further differences between the SDGs and MDGs, see S. Kumar, N. Kumar, and S. Vivekadhish, 'Millennium Development Goals (MDGs) to Sustainable Development Goals (SDGs): Addressing Unfinished Agenda and Strengthening Sustainable Development and Partnership' (2016) 41(1) *Indian Journal* of Community Medicine 1.

[214] *Ibid*. Emphasis added

[215] For further relationship between the SDGs and HDA, see Pedro Conceição, 'Human Development and the SDGs' (June 24, 2019) UNDP Human Development Reports *http://hdr.undp.org/en/content/human-development-and-sdgs*; UNDP, Human Development Report 2016: Human Development for Everyone (UNDP, 2016) https://sustainabledevelopment.un.org/content/documents/25212016_human_development_report.pdf

[216] See Madhavi Sunder, 'Intellectual Property and Development as Freedom' in N.W. Netanel (ed.), *Supra.* n.175.; M. Chon, 'Intellectual Property "from Below": Copyright and Capability for Education' (2007) 40 UC Davis L. Rev. 803.

enhancing or constraining the freedoms to be or do what people have reason to value. Consider education for example which Nussbaum considers as one of the central capabilities.[217] Given that copyright law necessarily implicates the issues of A2E,[218] a key question for the HDA approach to copyright law is inquiring whether the capability to achieve the functioning of A2E is frustrated by the institution of copyright law.

This question will be examined in subsequent chapters. In subsequent chapters, I will use development in place of HD because I believe development properly conceived should be about humans.

6. Conclusion

The discussion in this chapter has focused mainly on a critique of the economic theory of copyright from an internal perspective i.e. *acceptance* of the assumptions underlying the economic theory. It started with a general and brief exposition of the economic approach to law with the main argument being that the central norm underlying law and economics, efficiency, is difficult to operationalise; and that this limits the prescriptive usefulness of the Law&Econ approach to copyright law.

Accordingly, the main contribution of this chapter has been to show the methodological and philosophical connections between utilitarianism and economic efficiency. By replacing utility with wealth in order to avoid the difficulties with calculating and comparing utilities, the welfare economist is able to improve the precision in calculating the effect of policies on social welfare. But the same cannot be truly said about the lawyer qua economist. Law is concerned mostly with non-market interest and behaviour and it is therefore difficult to subject the interests in law to monetary valuation. This is clearly the case in copyright law where the interests protected by the entitlements and limitations cannot be reduced to monetary value. Therefore, the claim that copyright law ought to promote efficiency is the same as asking the utilitarian welfare economist to measure the effect of a

[217] Nussbaum, *Supra*. n.174 at 33,152.
[218] See chapters 1, 3 and 4 for the ways in which copyright law implicate issues of A2E

policy on utility maximisation, understood as happiness. It is clearly not possible. This, in my view, is why the dominance of the efficiency theory of copyright law should be rejected. Furthermore, the normative and explanatory limits of the WM account of copyright law necessarily limit it from being an institution of social change, as it should be.

Given the limited role of the economic approach to copyright law to account for non-monetisable interests thereby impacting on its claim to WM, one of the important contributions of this chapter is the search for a normative framework that does not privilege economic interests at the expense of non-economic ones. By delving into DS, the conclusion reached is that a human development paradigm will better inform copyright law and also take into account concerns of A2E that plague Nigeria and other DCs, as we will see in the next chapter.

CHAPTER 3: THE CASE FOR INTEGRATING COPYRIGHT WITH THE CONSTITUTIONAL RIGHT TO EDUCATION IN NIGERIA AND DEVELOPING COUNTRIES.

When people don't have free access to books, then communities are like radios without batteries.*

1. Introduction

Education is a development imperative. Its social, economic, and human development value can hardly be exaggerated. The sacrosanct importance of education is underscored by global, regional and national initiatives as well as efforts aimed at achieving universal education: international human rights instruments, constitutional rights, and UN Sustainable Development Goals (SDGs) are laudable examples. Together these efforts serve to reaffirm, if ever there was any doubt, that education remains one of the most powerful and effective tools to foster development.

This goal of education, though universal, is particularly pressing for DCs for obvious reasons.[1] The literacy rate in some of these countries is discouraging and alarming. For example, according to the UNESCO Institute for Statistics (UIS) the literacy rate of South Sudan's population for persons aged 15-24 years old is a mere 47.90% in 2018; for Mali it is 50.13% in 2018; and Senegal 69.48% in 2017.[2] Even though in general there has been a steady increase of literacy rates in DCs over the years, the literacy proficiency level might still be an issue i.e. whether a primary student from a DC has a comparable literacy proficiency level with a developed country's student of same standing. Given that the quality of education is a significant factor that affects literacy proficiency level, it is feared that in many cases the answer is in the negative since many DCs struggle with the material and financial resources to invest in quality

* Quoted in Maria Popova, 'Ursula K. Le Guin on the Sacredness of Public Libraries' *Brain Pickings* *https://www.brainpickings.org/2015/11/06/ursula-k-le-guin-libraries/*

[1] The data presented below are for African DCs, but the same pattern is observable in Asian and South American DCs.

[2] "Education: Literacy Rate" *UNESCO Institute for Statistics*, UNESCO http://data.uis.unesco.org/index.aspx?queryid=166#%22%20http://data.uis.unesco.org/index.aspx?queryid=166

education.[3] In fact, the UNESCO statistics may not even represent the accurate picture of literacy in DCs. Illiteracy is a problem but so is functional illiteracy.[4] This is problematic because illiteracy has huge economic and social developmental costs.

This issue of (functional) illiteracy is as a result of not having A2E. And even when there is A2E, the quality may be poor. Based on data from UIS, the percentage of the population who are 25+years that have at least completed their primary education in DCs is dwarfed by same statistics from developed countries. In 2016, it is 95.70% for Belgium whereas Mali recorded 15.62% in 2018. Similar disparities between developed and DCs are replicated in other areas. For example, the dropout rate in primary education for both sexes in Austria, Denmark, and Italy in 2014 is 0.57%, 0.23%, and 0.82% respectively; whereas for Cameroon, Burkina Faso, and Senegal, it is 61.97%, 31.15%, and 39.67% respectively for the year 2017.[5] Similarly, wide gaps emerge on the mean years of schooling for developed and DCs as shown by the UNDP human development report (HDR).[6] Furthermore, in DCs there is a gender imbalance in A2E in which females have substantially less access than males.[7] Clearly, A2E is a problem in DCs. Even more so is access to quality education.

Of course, the statistics do not show, nor should they be interpreted, that African DCs place little value on education or fail to understand its developmental importance. On the contrary, the UNESCO statistics concerning government expenditure on education, apart from regional and national initiatives, show that these countries place commendable value on education although in some cases the education expenditure falls short of the UNESCO benchmark.[8] And there is ample reason for DCs to be enormously concerned about access to quality education: the

[3] Recently a Ghanaian teacher had to resort to drawing Microsoft Word on a blackboard to teach students who had to sit a national examination that includes questions on ICT, as the school did not have a computer since 2011. See G. Mezzofiore 'New Word Order: Ghanaian Teacher Uses Blackboard to Explain Software' *CNN: AFRICAN VOICES: CHANGEMAKERS* (March 1, 2018) https://edition.cnn.com/2018/03/01/africa/ghana-teacher-blackboard-intl/index.html

[4] Even when someone is not illiterate, the writing and readings skills may not be adequate to enable the person carry out important daily tasks. This is functional illiteracy.

[5] "Education: Cumulative Drop-out Rate to the Last Grade of Primary Education, Both Sexes %" UIS, UNESCO http://data.uis.unesco.org/index.aspx?queryid=166#%22%20http://data.uis.unesco.org/index.aspx?queryid=166

[6] "Mean Years of Schooling" *UNDP Human Development Reports* http://www.hdr.undp.org/en/indicators/103006

[7] See *supra*. n.2, the UNESCO statistics on the completion rates of both sexes for primary education.

[8] "Education: Expenditure on Education as a Percentage of Total Government Expenditure" *UNESCO Institute* for Statistics, UNESCO http://data.uis.unesco.org/index.aspx?queryid=166#%22%20http://data.uis.unesco.org/index.aspx?queryid=166

UNDP HDR data shows a correlation between education and other components of development.

Given this developmental importance of access to quality education, one might expect an outpouring of literature on the relationship between copyright and A2E. After all, copyright is concerned with the governance of cultural works of which learning materials are a significant part. It is crucial then that if the global South is to enhance A2E and thereby promote development, all areas that affect A2E—legal, socio-economic, and cultural—should be critically addressed. Unfortunately, and in particular in Nigeria, there is almost no analysis on the role of copyright in facilitating A2E; and when such issues are explored, it is mainly touched upon in passing within the broader framework of A2K.[9] Several reasons can be attributed to this lack of analysis but three are particularly dangerous. First, in Nigeria there is a legalistic normative approach to copyright law and policy in which the focus is on copyright enforcement and how everyday practices fall short of norms in copyright law. Second, the prevailing understanding of copyright law in Nigerian scholarship and policy is mainly economic and this is not surprising given the creative industries' interests that inform copyright policy and scholarship. Third, there is no reported judicial decision that discusses or interrogates the interface between copyright and human rights or development. Most copyright judicial decisions are concerned with either copyright infringement of musical works or book piracy.[10]

This chapter provides pathways to solving the crises of poor ALM and A2E generally by integrating copyright law with the constitutional right to education, an established ESC right in various national constitutions. This is a novel approach. Existing approaches have focused on L&Es in copyright law informed by A2K theory, and international human rights.[11] These are interesting and valuable perspectives, but

[9] Few exceptions are A. Rens et.al., Intellectual Property, Education and Access to Knowledge in Southern *Africa* , (ICTSD/UNCTAD/TRALAC, 2006) https://unctad.org/en/PublicationsLibrary/ictsd-tralac2006d1_en.pdf C. Armstrong et.al., Access to Knowledge in Africa: The Role of Africa (UCT Press, 2010); S.I. Strba, International Copyright and Access to Education in Developing Countries: Exploring Multilateral Legal and *Quasi-Legal Solutions* (Martinus Nijhoff Publishers, 2012) [While the author focuses on copyright and access to education, the analysis is broad and does not focus on any specific DC.]

[10] "Copyright Cases in Nigeria" *Nigerian Intellectual Property Watch*(blog) https://nlipw.com/copyright-cases-nigeria/

[11] There are challenges with framing copyright in the language of human rights, see R.L. Okediji, 'Intellectual Property in the Image of Human Rights: A Critical Review' in R.C. Dreyfuss & E. Siew-Kuan Ng (eds.), *Framing* Intellectual Property Law in the 21st Century: Integrating Incentives, Trade, Development, Culture and Human *Rights* (CUP, 2018).

the constitutional approach can provide strong reinforcements given that the constitution is the supreme law of the land.

Section 2, therefore, inquires whether there is an enforceable right to education under the Nigerian Constitution. Furthermore, this section notes that the topic of access to learning materials (ALM) is part of a complex mix of institutional, economic, and legal issues. These issues and their resultant effect, poor ALM, are not peculiar to Nigeria. The patterns are similar and observable in many DCs. Aided by technology and black markets, students in DCs have responded to the crisis of ALM by adopting expedient measures—photocopying, downloading, purchasing pirated copies, and shadow libraries—that cross the boundaries of copyright law. Publishers on the other side have responded to these measures by aggressively seeking increased enforcement and punitive damages for copyright infringement. There are many ways to unpack this narrative, but the sad reality is that given reduced government spending budget for education and the weak purchasing power of students in Nigeria and other DCs, copyright law and policy has failed to prioritise A2E for students in these countries. Section 3 analyses the interface between copyright law and A2E and thereby point to pathways by which copyright can enhance A2E. Section 4 concludes.

2. Access to Education in Nigeria and Beyond: Issues and Promises to Keep.

A. Nigeria at a Glance: History and Socio-Economic Realities

I. Nigeria: An Overview[12]

The issue of A2E in Nigeria, as with any other country, needs to be examined in its proper socio-economic and historic context; and so, this section offers an overview of the history and socio-economic landscape of Nigeria.

[12] See generally A.A. Nwankwo, The Power Dynamics of the Nigerian Society: People, Politics and Power (Fourth Dimension, 1988); John Campbell & M.T. Page, *Nigeria: What Everyone Needs to Know* (OUP, 2018); Richard Bourne, *Nigeria: A New History of a Turbulent Century* (Zed Books, 2015)

Nigeria is a country located in West Africa with the Gulf of Guinea in between its borders with Benin in the west and Cameroon in the east while also having borders with Niger and Chad in the north and east respectively. A federal republic, it gained independence on October 1, 1960 after almost a century under British colonial rule.[13] English is the official language with Igbo, Hausa, and Yoruba being the three main ethnic languages although there are more than 500 indigenous languages. With a population of more than 190 million, it is easily the most populous country in Africa and seventh globally. Demographically, 43% of the population are under 15; almost 20% of the population fall within the age bracket of 15-24 years and 31% within 25-54 years.[14] While the age structure and population growth of Nigeria might prove challenging in realising the economic benefits of demographic dividend, it clearly shows the need for facilitating A2E.[15]

II. Nigeria: Poverty Capital of the World?

Economically, Nigeria is Africa's largest oil-producer and sixth globally. Although a petroleum-based economy, in recent years there have been efforts to diversify the economy. When judged by the economic indicator of Gross Domestic Product (GDP) either in nominal term or Purchasing Power Parity (PPP), Nigeria is Africa's largest economy. The GDP (PPP) and GDP (nominal) for 2017 are 1.1 trillion USD and 376 billion USD respectively.[16] In comparison to the world, this places Nigeria 24th for GDP (PPP) and 31st for GDP(nominal).[17] Given Nigeria's population, GDP (PPP) per capita is 5900 USD and placed 164th globally.[18] Although 5900 USD is not a huge amount it will certainly provide for basic needs, given the cost of living in Nigeria. But of course, it would be a mistake to translate the GDP data literally without any context of a population's lived experiences since GDP does not tell us anything about the distribution of wealth.

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[13] "Nigeria Profile—Timeline" *BBC News Africa* (February 18, 2019) http://www.bbc.co.uk/news/world-africa-13951696

[14] "Nigeria" *The World Fact Book, Central Intelligence* Agency https://www.cia.gov/Library/publications/the-world-factbook/geos/ni.html

[15] "Nigeria" *Demographic Dividend* http://www.demographicdividend.org/country_highlights/nigeria/

[16] "World Economic Outlook Database, 2018" *International Monetary Fund* http://www.imf.org/external/pubs/ft/weo/2018/01/weodata/index.aspx

[17] "Country Comparison: GDP (Purchasing Power Parity)" *World Fact Book, Central Intelligence Agency* *https://www.cia.gov/Library/publications/the-world-factbook/rankorder/2001rank.html#ni*

[18] "Country Comparison: GDP Per Capita (PPP)" *Ibid*. https://www.cia.gov/Library/publications/the-world-factbook/rankorder/2004rank.html#ni

This is exactly the case of Nigeria where the GDP data does not translate into economic prosperity for a majority of the population. The poverty rate is seriously alarming and depressing. According to a World Bank report, the number of people living in extreme poverty, defined as those people living on less than 1.90 USD a day, in Nigeria has only increased.[19] In 1990, it was 51 million but in 2013 it increased to 86 million. According to World Poverty Clock, which provides real time poverty estimates, 102.1million persons in Nigeria currently live in extreme poverty i.e. 50% of the population.[20] In 2010, 70% of its population lived below the poverty line.[21] This does not mean that the poverty level in Nigeria is decreasing; on the contrary, it is increasing if we take into account population growth over the years. Indeed, the World Poverty Clock confirms that poverty is rising in Nigeria which means that *vis-a-vis* the UN SDG goal of ending extreme poverty by 2030, Nigeria is regressing rather than making *any* progress. In fact, some authors conclude that "Nigeria has already overtaken India as the country with the largest number of extreme poor."[22] This statistic means Nigeria is the world poverty capital.[23] Though heart-breaking, this is not surprising given the country's abysmal record on corruption, insecurity, and mismanagement. The effects of these are palpably clear: failed healthcare and poor access to quality education. This creates a feed-back loop in the system in which more poverty is created and in turn exacerbates the failed health care and A2E.

B. The State of A2E in Nigeria

I. Why A2E: A Special Case for Developing Countries

[19] World Bank, Atlas of Sustainable Development Goals 2017: From World Development Indicators (World Bank Atlas; Washington DC; World Bank 2017) https://openknowledge.worldbank.org/handle/10986/26306
[20] "World Poverty Clock" *World Data Lab* http://worldpoverty.io/ [Accessed May 13, 2020; 15:10PM]
[21] "Population Below Poverty Line" The World Fact Book, Central Intelligence Agency https://www.cia.gov/library/publications/the-world-factbook/fields/221.html
[22] H. Kharas, K. Hamel, and M. Hofer 'The Start of a New Poverty Narrative' (June 19, 2018) *Future Development*, *The Brookings Institution* https://www.brookings.edu/blog/future-development/2018/06/19/the-start-of-a-new-poverty-narrative/
[23] Yomi Kazeem, 'Nigeria has Become the Poverty Capital of the World' (June 25, 2018) *Quartz Africa* https://qz.com/africa/1313380/nigerias-has-the-highest-rate-of-extreme-poverty-globally/

What is the value of education?[24] The question is not whether education has value but rather an invitation to enumerate its values. Very few people, if any, would doubt the value of education but given the appalling education statistics in many DCs, a reminder of the benefits of education is appropriate. Therefore, the purpose of this question is to serve as a reminder—rather than to convince—of the benefits of education.

a. Global Efforts on A2E

The commitment to provide universal basic education is of supreme importance on the international stage. These commitments and aspirations find their unequivocal expressions in various human rights treaties, declarations, programmes of action, and conferences. In 1990, the global education movement was launched in Jomtien with the adoption of the World Declaration on Education for All (EFA). The Jomtien conference is a game changer for global education because it encouraged greater international cooperation by fostering the cooperative efforts of different sectors of society—governments, IGOs, civil society, education professionals, private sector—thereby emphasising that the goal of education is a shared responsibility. Furthermore, education was understood to be more than just access to primary education but also addressed the learning needs of youth and adults. These commitments were reiterated in 2000 with the adoption of the Dakar Framework for Action in the World Education Forum (WEF), Dakar, laying out six (6) EFA goals. In the same year, the UN adopted the eight (8) MDGs with the second goal being to achieve universal primary education by 2015. This battle for global education is still ongoing. In 2015, the WEF adopted the Incheon Declaration for Education in Incheon, South Korea. The declaration continued the EFA movement and focused on “inclusive and equitable quality education and lifelong learning for all.” In the same year, the UN adopted the 17 SDGs of which goal 4 is focused on quality education.

[24] Although the term education in this paper is generally employed in its formal and narrow sense i.e. the act of learning in schools carried out by certified teachers following a standardised curricula and assessment tests/exams, the completion of which determines the eligibility of the learner to progress to a higher level or graduate, the discussions in this and subsequent sections are equally applicable to informal education unless otherwise stated.

On the legal front, several international declarations and covenants have established the right to education as a fundamental human right: the UDHR[25], the ICESCR[26], the CRC[27], the CEDAW[28], and the CRPD.[29] At the regional level, the ACHPR is prominent.[30] Art 13(1) of ICESCR, the longest provision of the covenant and on education in any international human rights instrument, recognises the right of everyone to education.

Clearly, education is of great importance in the global agenda. Not only is the issue of education brought within the human rights regime but also the interaction of this regime with development-based approaches in combating the issue of education is a real indication of the importance accorded to education. Furthermore, in adopting a rights-based approach the right to education is supplied with concrete normative content and properly elevated to the realm of human dignity.

b. The Value of Education

The world faces pressing challenges that are clearly an issue of life and death: hunger, poverty, insecurity, and disease are the most prominent. Lack of education, one might opine, is not life threatening. Therefore, in a world of scare resources the commitment to addressing issues of A2E might have to give way to "life-threatening" concerns. This is false because in many instances these life-threatening concerns are the effect of lack of education. As some commentators note:

> people may not grasp the crises of poor education in developing nations because they may never turn on CNN and see someone dying from a lack of education. But make no mistake about it: when you look at the effect of education on family structure, health, infant mortality, and maternal mortality, there is no question that every day thousands of children die from a lack of education.[31]

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[25] Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948)
[26] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 U.N.T.S. 3.
[27] Convention on the Rights of the Child (adopted 20 October 1989, entered into force 2 September 1990) (1989) 28 ILM 1456.
[28] Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 U.N.T.S. 14.
[29] Convention on Rights of Persons with Disabilities (adopted 13 December 2006, and entered into force 3 May 2008) 2515 U.N.T.S 3.
[30] African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58.
[31] D.E. Bloom, M.R. Kremer, & G.B. Sperling, 'Education in the Developing World' (2007) 60(4) *Bulletin of The* American Academy of Arts and Sciences 13.

Lack of education is a life-threatening issue. This fact is not appreciated because most times education is primarily seen as an economic investment to improve the earnings of an individual. The calculus is mostly couched in CBA[32] i.e. weighing the costs of attending education (direct costs plus opportunity costs) minus the benefits measured in the form of improved income earnings over a lifetime. Of course, this is not to say that the economic value of education is not important. Clearly, it is of great importance. The point though is that we undervalue the benefits of education if the focus is only on its economic value. And this is so especially for DCs like Nigeria where the unemployment rate is exceedingly high. In such cases a rational utility-maximiser might consider that investing in a child's education might not yield good returns given the gloomy prospects of employment.

But the value of education extends beyond the economic. Education is a public good and it creates positive externalities i.e. benefits external to the educated individual. Accordingly, the benefits of education will be examined in two dimensions. First is whether the benefit is private or social.[33] A benefit is private if it is captured by the individual or his/her family. On the other hand, the social benefits of education are not captured by the individual. There is a risk that there might be an under-investment in education as the social benefits are not captured by the individual although they are equally as important as the private benefits and contribute immensely to the welfare of society. Secondly, the benefits are either monetary or non-monetary.[34]

The most recognised and associated benefit of education is economic. This private economic benefit is well established in the literature.[35] In many societies, the welfare gap between the educated and non-educated is substantially due to their income

[32] T.E. Snider, 'Education: An Economic Analysis' (1974) 22(1) *Improving College and University Teaching* 69; *Cf.* S.L. Ketkar, 'The Economics of Education in Sierra Leone' (1977) 15(2) *The Journal of Modern* African Studies 301

[33] B.L. Wolfe & R.H. Haveman, 'Social and Non-Market Benefits of Education in an Advanced Economy' (2002) Vol. 47 Conference Series- Federal Reserve Bank of Boston 97 [Cataloguing the private and social benefits of education while emphasising that a full evaluation of the effects of education on welfare requires moving beyond its market-based effects.]; E.H. Bedenbaugh, 'Education Is Still a Good Investment' (1985) 59(3) *The Clearing House* 134 [Dividing the benefits of education broadly into private and social]; L.E. Villa, 'The Non-Monetary Benefits of Education' (2000) 35(1) *European Journal of Education* 21.

[34] I use monetary interchangeably with economic and *vice-versa* although the latter term is broader.

[35] John Conlisk, 'A Bit of Evidence on the Income-Education-Ability Interrelation' (1971) 6(3) *Journal of Human Resources* 358; O. Ashenfelter & A. Krueger, 'Estimates of the Economic Return to Schooling from a New Sample of Twins' (1994) 84(5) *The American Economic Review* 1157 (Finding that "an additional year of Schooling increases wage by 12-16 percent.)

earnings and this in turn is significantly affected by education. There is abundant evidence that education investment has a positive effect on market earnings.[36] It is partly based on this that education is considered as an effective tool to lift people out of poverty. And this redeeming effect of education is even more salient in this knowledge society where labour is skills-based.

Given the private economic value of education, it is not difficult to imagine the effect of education investment (or lack thereof) on the social level. If education has a positive effect on market earnings, which is soundly established, then the cumulative effect on the social level would be higher GDP per capita and therefore increased economic growth. Conversely, the forgone income growth owing to underinvestment in education would have a negative impact on economic growth.[37] This also explains the gap in economic growth between societies that encourage and invest in girl-child education and those that do not.[38] It is plain and simple: the opportunity cost of underinvestment in girl-child education is the foregone value in the form of earnings that would have been realised had the girl-child been schooled instead of attending to house chores. In fact, there is a positive correlation between girl-child education and GDP per capita if one gleans through HDR statistics as represented in table 1.

Country	Mean years of schooling(Female)	Mean years of schooling (Male)	Gross National Income(GNI) per Capita
Afghanistan	1.9	6.0	1,746.00
Bangladesh	5.3	6.8	4,057.00
Iraq	6.0	8.6	15,365.00
Nigeria	5.3	7.6	5,086.00
Pakistan	3.8	6.5	5,190.00
Sri Lanka	10.5	11.6	11,611.00

Table 1: **Positive correlation between female mean years of schooling and GNI.[39]**

[36] L.E. Villa, 'The Outcomes of Investment in Education and People's Well-Being' (2005) 40(1) *European Journal of Education* 3; Ashenfelter & Krueger, *Ibid.*

[37] N. Birdsall, D. Ross, & R. Sabot, 'Underinvestment in Education: How Much Growth Has Pakistan Foregone?' (1993) 32(4) The Pakistan Development Review 453

[38] Kaushik Basu, 'Why is Bangladesh Booming' (April 23, 2018) *Project Syndicate.* https://www.project-syndicate.org/commentary/bangladesh-sources-of-economic-growth-by-kaushik-basu-2018-04

[39] The tabulated information is compiled based on a study of available data from HDR statistics for the year 2018.

But certainly, the benefits of education extend beyond the purely economic. And although it is difficult to quantify the non-economic benefits of education due to measurement problems, there are strong reasons to believe that they outweigh the economic ones. They are diverse and, as we shall see, contribute substantially to the economic ones.

On a private level, one of the key primary benefits of education is its role in guaranteeing effective freedom.[40] As Nietzsche thoughtfully considers, "[n]o one can build you the bridge on which you, and only you, must cross the river of life."[41] In order to accomplish this, one must have the capacity to make informed daily decisions and map out a life-plan. But illiteracy is certainly a huge impediment in attaining this capacity. When one is illiterate, daily market and social transactions become practically impossible. At a basic level, simple but potentially life-changing tasks such as reading drug dosage instructions, safety manuals, nutrition information or hygiene instructions become difficult. The task of education is to prevent this sort of unfreedom and empower the individual to make informed choices.[42] Of equal importance is the intrinsic benefit of education. This intrinsic value of education is clearly captured in the General Comment on art 13 by the Committee on Economic, Social and Cultural Rights (CESCR) when it notes that "the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence."[43]

Apart from the enabling of substantive freedom, education is correlated with many positive outcomes. As Anderson and Portner state, "[p]eople who drop out of high school do substantially worse compared to those who graduate. Dropouts earn less, report lower levels of happiness, commit more crimes, and suffer from poorer

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UNDP Human Development Reports: Human Development Data (1990-2018) http://hdr.undp.org/en/data

[40] Kiran Bhatty, 'Educational Deprivation in India: A Survey of Field Investigations' (1998) 33(28) *Economic and Political Weekly* 1858, 1859 ["The most fundamental benefit of education, not cited often enough, is its intrinsic value to the well-being or "effective freedom" of a person]. On the difference between 'effective freedom' and 'formal freedom' see Adam Swift, Political Philosophy: A Beginners' Guide for Students and Politicians (3rd ed. Polity Press, 2014) 61 ["The difference between effective and formal freedom is the difference between having the power or capacity to act in a certain way and the mere absence of interference"]; see also Amartya Sen, Development as Freedom (OUP, 1999) 17.

[41] F.W. Nietzsche, *Schopenhauer as Educator* (Edited by E. Vivas; Regenery, 1965) 4.

[42] K.J. Arrow, 'The Benefits of Education and the Formation of Preferences' in Behrman & Stacey (eds.), *The Social Benefits of Education* (University of Michigan Press, 1997)

[43] UN CESCR, General Comment No. 13: The Right to Education (Art. 13 of the ICESCR), 8 December 1999, E/C.12/1999/10. http://www.refworld.org/docid/4538838c22.html

health."[44] The authors also "find evidence supporting a positive relationship between dropping out of high school and the risk of contracting an STI for females."[45] In a different study concerning the effects of literacy on health in Canada, Rootman and Ronson confirm that literacy has a direct effect on health.[46] Other authors have even found a causal relationship between education and health.[47] In their study that concerned the effects of a compulsory schooling law introduced in the Netherlands, Kippersluis *et al*. conclude that "education significantly reduces mortality in old age."[48] It could confidently be said that education is positively correlated with life expectancy. Furthermore, education is correlated with crime reduction in society.[49] There is also evidence of a strong correlation between education and civic participation such as voting and volunteerism.[50] This is not surprising since education enables effective freedom and the formation of preferences. Education is also one of the most proven effective tools for ensuring gender equality, and nowhere is this more important than in DCs where boy-child education is prioritised over girl-child's.[51] Finally, education is essential to the smooth functioning of a democratic polity.[52]

II. Is there A Fundamental Right to Education Under Nigerian Law?

The issue of whether there is a fundamental right to education under Nigerian law is quite disputed although it would seem to have been conclusively settled. Perhaps one of the reasons for this disputation lies in the status of the right to education as an

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[44] D.M. Anderson and C.C. Portner, 'High School Dropouts and Sexually Transmitted Infections' (2014) 81(1) Southern Economic Journal 113

[45] Ibid.

[46] I. Rootman and B. Ronson, 'Literacy and Health Research in Canada: Where Have We Been and Where Should We Go?' (2005) 96(2) *Canadian Journal of Public Health* 62. Although education is not the sole determinant of literacy, it is certainly the most important.

[47] H. Kippersluis, O. O'Donnell, E. Doorslaer, 'Long-Runs Return to Education: Does Schooling Lead to an Extended Age?' (2011) 46(4) *The Journal of Human Resources* 695.

[48] *Ibid.* at 713; See also S. Wigley and A. Akkoyunlu-Wigley, 'Human Capabilities Versus Human Capital: Gauging the Value of Education in Developing Countries' (2006) 78(2) *Social Indicators Research* 287.

[49] L. Lochner and E. Moretti, 'The Effect of Education on Crime: Evidence from Prison Inmates, Arrests and Self-Reports' (2004) 94(1) *The American Economic Review* 155.

[50] H. Larreguy and J. Marshall, 'The Effect of Education on Civil and Political Engagement in Nonconsolidated Democracies: Evidence from Nigeria' (2017) 99 *Review of Economics and Statistics* 387; T.S. Dee, 'Are There Civic Returns to Education' (2004) 88 *Journal of Public Economics* 1697.

[51] H. Kharas and R. Winthrop, 'Education for Fragile States' (September 18, 2018) *Project Syndicate*, https://www.project-syndicate.org/commentary/strengthening-fragile-states-by-improving-education-by-homi-kharas-and-rebecca-winthrop-2018-09

[52] Milton Friedman, 'The Role of Government in Education' in R.A. Solo (ed.) *Economics and the Public Interest* (Rutgers University Press, 1955)

economic, social and cultural (ESC) right in the human rights regime. Many African states guarantee lesser protection to ESC rights than civil and political (CP) rights.[53]

a. Justiciability of ESC Rights and the Right to Education Under the Nigerian Constitution.

Chapter IV of the Constitution of the Federal Republic of Nigeria 1999, which guarantees fundamental rights, does not include the right to education.[54] The rights guaranteed are mainly CP rights which are contained in ss.33-43: right to life; right to dignity of human persons; right to personal liberty; right to fair hearing; right to private and family life; right to freedom of thought, conscience and religion; right to freedom of expression and the press; right to peaceful assembly and association; right to freedom of movement; right to freedom from discrimination; and right to acquire and own immovable property.

Some have asserted that the right to education, even though not mentioned under chapter IV of the Constitution, "found indirect rendition under section 39 of the same Constitution"[55] which guarantees the freedom of expression and the press. Put differently, the right to education follows from the understanding that "[e]ducation is the key to the realization of the right to freedom of expression and the press."[56]

Although a clever argument, it may not be persuasive or convincing enough as a free-standing argument to ground the existence of the right to education under Nigerian law.[57] First, the right to free speech is well established as a civil right under

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[53] Manisuli Ssenyonjo, 'The influence of the International Covenant on Economic, Social and Cultural Rights in Africa.' (2017) 64 *Neth. Int. Law Rev.* 259 [Noting the limited constitutional protection of ESC rights in Africa]. For the different constitutional approaches to the protection of ESC rights in Africa, see D.M. Chirwa & L. Chenwi (eds.), The Protection of Economic, Social and Cultural Rights in Africa: International, Regional, and National Perspectives (CUP, 2016).

[54] References to the "constitution" are to the Constitution of the Federal Republic of Nigeria 1999 (Fourth Republic). Prior to this, Nigeria has had several constitutions: constitution 1960 (Independence); constitution 1963 (First Republic); constitution 1979 (Second Republic); and constitution 1993 (Third Republic).

[55] E.M. Adam, 'Advancing the Anti-Poverty Crusade Through the Enforcement of the Fundamental Right to Education Under Nigerian Law' in Falola & Abidogun (eds.), *Education, Creativity and Economic Empowerment in Africa* (Palgrave Macmillan, 2014)

[56] Ibid.

[57] A distinction has to be made between inferring the existence of an ESC right, not expressly recognised, on the basis of the express guarantee of CP right; and enabling the enjoyment or realisation of a CP right via the protection of an ESC right that is expressly guaranteed. I am here concerned with the former. There is authority for the latter in international, national and regional human rights law. See Martin Scheinin, 'Indirect Protection of Economic, Social, and Cultural Rights in International Law' in Chirwa & Chenwi (eds.), *Supra*. n.53. At the national level, see E.S. Nwauche, 'Indirect Constitutional Protection of Economic, Social and Cultural Rights in

the international human rights regime; and it is different, though not disconnected, from the right to education, an ESC right.[58] The protection of free speech in constitutional provisions does not diminish the importance of explicitly recognising the right to education or make such recognition a superfluous exercise. Second, although it is true that education enables the realisation of the right to freedom of expression it certainly does not follow that by implication there exists the right to education. But it is not only the right to free speech that education enables or makes more meaningful. As the UN CESCR notes in its General Comment, "[e]ducation is both a human right in itself and *an indispensable means of realizing other human rights*."[59] Nor is the right to education the only ESC right that enables the meaningful enjoyment of other rights. The indispensability of ESC rights— right to education in this instance—to the enjoyment and meaningful realisation of CP rights is unchallenged. This recognition, however, is not and cannot be a basis for asserting the existence of the right to education that has not been explicitly protected as a fundamental right. If it were, we might also insist that the constitutional protection of other rights is a clear indication of the existence of the right to education, even if not explicitly protected, given that education is an enabler of other human rights. For example, on this logic there is nothing that precludes an inference of the existence of the right to education on the basis of the explicit recognition of the right to vote since education enables a citizen to have informed choices on whom or what to vote for. The purpose of the recognition rather is to emphasise the interconnectedness of ESC and CP rights and thereby ensure that ESC rights are treated with equal importance. To be clear, the argument is not that the existence of the fundamental right to free speech under Nigerian law may not be used to support the existence of the right to education. But, as a free-standing argument, it does not gain traction. And neither is there any Nigerian judicial decision on this.[60]

Nigeria' in Chirwa & Chenwi (eds.) *Ibid.*

[58] It is worth emphasising that the difference reiterated between ESC and CP rights is not a judgment regarding the justiciability of the former. Nor is it a statement to diminish the interconnectedness of ESC and CP rights.

[59] UN CESCR, *Supra*. n.43 [Emphasis added]

[60] The only case law I have come across that dealt with the interplay of the fundamental right to freedom of expression and education is Archbishop Anthony Olubunmi Okogie & Ors v Attorney General of Lagos State (1981) 2 NCLR 337. In this case, the Court of Appeal had to determine the constitutionality of a circular by the Lagos State Government purporting to abolish all private primary schools, the purpose of which was to facilitate adequate and equal educational opportunities. The Court of Appeal held in favour of the plaintiffs on the basis that preventing them from establishing private primary educational institutions impinged on their constitutionally protected right to freedom of expression as guaranteed under Section 36 of the Constitution of Nigeria 1979. The case, however, does not go beyond establishing that educational institutions are avenues for the exercise of the right to freedom of expression. See also *Adebowale v Jakande* (1981) 1 NCLR 262.

The only place education is dealt with is in Section 18 under Chapter II of the Constitution, titled "Fundamental Objectives and Directive Principles of State Policy" (FODPSP). Section 18 provides:

1. Government shall direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels.

2. Government shall promote science and technology

3. Government shall strive to eradicate illiteracy; and to this end Government shall as and when practicable provide

    a. free, compulsory and universal primary education;

    b. free secondary education;

    c. free university education; and

    d. free adult literacy programme.

Although Section 13 of same Chapter II of the Constitution imposes a duty on all arms of government to "observe and apply the provisions of this Chapter of this Constitution", Section 6(6)(c) of the Constitution however provides:

> The judicial powers vested in accordance with the foregoing provisions shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution.

Accordingly, Section 18 is not justiciable and does not confer any legal entitlement.[61] Put differently, the effect of Section 6(6)(c) is that an aggrieved party who complains of a violation of Section 18 or Chapter II in general will not obtain judgment before a court of law as Section 6(6)(c) removes the jurisdiction of the court to try any issue or matter under Chapter II of the Constitution. Putting Section 6(6)(c) aside, the language of Section 18—with words such as "shall strive" and "when practicable"—can hardly be seen as conferring any justiciable legal entitlement. These words are more declaratory than right-conferring.

[61] Justiciability is the "quality or state of being appropriate or suitable for adjudication by a court." B.A. Garner (Ed.), *Black's Law Dictionary* (9th ed. Thomson Reuters, 2009) 943.

Although the non-justiciability of the FODPSP of the Constitution is well established in judicial decisions[62] and academic commentary[63], the settled law is that there are exceptions in which Chapter II or its provisions may be made justiciable. In *Attorney General of Ondo State v. Attorney General of the Federation*[64], the Supreme Court (SC) was called upon by the Ondo State Government to adjudicate on the constitutionality of the Corrupt Practices and Other Related Offences Act, an enactment of the National Assembly (NASS) which sought to establish the Independent Corrupt Practices and Other Related Offences Commission. The Ondo State Government argued that the enactment was unconstitutional because NASS did not have the legal mandate under the Constitution to make such enactment and that such power lay with state legislatures. It was argued on behalf of the NASS that Section 15(5) in conjunction with other provisions of the Constitution empowered the NASS to make such enactment.[65] In response, it was argued in part that Section 15(5) is non-justiciable. The SC held that the enactment was constitutional. In delivering the leading judgment, Uwaifo JSC stated that:

> As to the non-justiciability of the Fundamental Objectives and Directive Principles of State Policy in Chapter II of our Constitution, section (6)(6)(c) says so. While they remain mere declarations, they cannot be enforced by legal process but would be seen as a failure of duty and responsibility of State organs if they acted in clear disregard of them, the nature of the consequences of which having to depend on the aspect of the infringement and in some cases the political will of those in power to redress the situation. But the Directive Principles (or some of them) can be made justiciable by legislation.[66]

Accordingly, the law as it stands is that although Chapter II is non-justiciable, it may be made justiciable if the NASS enacts legislation which it is empowered to for the enforcement of the provisions of Chapter II.[67]

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[62] Archbishop Anthony Olubunmi Okogie, Ibid.; Ahmed v Sokoto State House of Assembly (2002) 15 NWLR 539

[63] Femi Falana, 'Chapter II and Socio-Economic Rights' (May 3, 2016) *THISDAY* https://www.thisdaylive.com/index.php/2016/05/03/chapter-ii-and-socio-economic-rights/; H.D. Kutigi, 'Towards Justiciability of Economic, Social and Cultural Rights in Nigeria: A Role for Canadian-Nigerian Cooperation?' (2017) 4(1) *The Transnational Human Rights Review* 126; Taiwo Olaiya, 'Interrogating the Non-Justiciability of Constitutional Directive Principles and Public Failure in Nigeria' (2015) 8(3) *Journal of Politics and Law* 23; O.V.C. Ikpeze, 'Non-Justiciability of Chapter II of the Nigerian Constitution as an Impediment to Economic Rights and Development' (2015) 5(18) *Developing Country Studies* 48; Nwauche, *Supra.* n.57

[64] (2002) 9 NWLR (Pt. 772) 222

[65] Section 15(5), which is part of the FODPSP, provides that "[t]he State shall abolish all corrupt practices and abuse of power."

[66] *Supra*. n.64 at para. 4.12. Ogwuegbu, JSC. also concurred with the statement that the FODPSP is made justiciable by an Act of the NASS.

[67] Some have argued that making Chapter II of the Constitution justiciable in this way is a contradiction. See G.N. Okeke & C. Okeke, 'The Justiciability of the Non-Justiciable Constitutional Policy of Governance in Nigeria'

Parts of section18(3) of the Constitution have been enacted into law with the passage of the Compulsory, Free, Universal Basic Education Act, 2004 (UBE Act 2004). This law provides for free, compulsory primary and junior secondary education.[68] In *LEDAP GTE & Ltd. v. Federal Ministry of Education & Ors*,[69] the issue was whether section 18(3)(a) of the Constitution granted an enforceable right by virtue of the UBE Act 2004. Justice J.T. Tosho, sitting at the Abuja division of the Federal High Court, held that even though Chapter II of the Constitution is non-justiciable, the legislature having enacted the UBE Act 2004 meant that section 18(3)(a) granted an enforceable constitutional right. Therefore, Nigerians have an enforceable constitutional right to free, compulsory primary and junior secondary education.

b. Other Mechanisms for Enforcing the Right to Education in Nigeria.

Apart from the foregoing, the right to education is guaranteed under several human rights treaties ratified by Nigeria. Of pertinence is Art 17(1) of the ACHPR which states that "[e]very individual shall have the right to education." Nigeria, a signatory to the treaty, has domesticated the ACHPR by an Act of the NASS.[70] In *Abacha v. Fawehinmi*[71] it was held by the SC that the domesticating Act of the ACHPR being "a statute with international flavour" is superior to domestic legislation although subordinate to the Constitution. Given that ESC rights are non-justiciable under the Constitution, it is not difficult to imagine a conflict between ACHPR Act and the Constitution. And since the Constitution is the supreme law of the land, any domestic court called upon to adjudicate on any issues involving the conflict will have to give effect to the Constitution. The case however is different where a party who alleges an infringement of an ESC right calls upon a regional or international human right court to adjudicate on the issue.

(2013) 7(6) IOSR Journal of Humanities and Social Science 9

[68] Section 2.

[69] (2017) 3 CLRN 116

[70] See African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Chapter A9, Laws of the Federation of Nigeria. Nigeria applies a dualist approach to international law as international treaties are required be domesticated before they have the force of law. See section 15(1) of the Constitution.

[71] (2000) 6 NWLR 228

In *SERAP v Nigeria and Universal Basic Education Commission*[72], the plaintiff a human rights NGO brought a case to the ECOWAS court of justice alleging *inter alia* a violation of the right to quality education as guaranteed by Art 17(1) of ACHPR. The defendants argued that the ECOWAS court lacked the jurisdiction to hear the case because, amongst others, "the educational objective of the Federal Republic of Nigeria is provided for under Section 18(1), (2) and (3) of Chapter II of the 1999 Constitution and is non justiciable or enforceable and cannot be determined by the Court."[73] In dismissing the argument and holding that the right to education was justiciable before the ECOWAS court, the court stated that "[t]he right to education guaranteed under Art 17 of the African Charter is independent of the right of education captured under the directive principles of state policy of the 1999 Federal Constitution of Nigeria." And since the issue was whether a violation of Art17(1) of ACHPR occurred, it was irrelevant whether the Constitution made the right to education justiciable or not.

Of relevance also are the ICESCR and the CRC. As noted, Art 13 of the ICESCR provides for the right to education. Nigeria, although having acceded to the ICESCR, is yet to domesticate it.[74] Given that Nigeria adopts a dualist approach to international law[75], the effect of the ICESCR at domestic courts would only be persuasive rather than binding.[76] On the other hand, Nigeria has domesticated the CRC with the Child's Right Act, 2003 (CRA).[77] Section 15 of CRA guarantees the right of a child to free, compulsory and universal primary education while s.277 defines a child to be a person under the age of eighteen years. By virtue of section 12(1) of the Constitution, CRC has the full effect of law in Nigeria and in conjunction with the Fundamental Rights (Enforcement Procedure) Rules 2009 the courts are

[72] (2009) ECW/CCJ/APP/08/08
[73] Ibid.
[74] https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx
[75] See *Supra*. n.70
[76] But see Preamble 3(b) of the Fundamental Rights (Enforcement Procedure) Rules 2009 which states that "the Court shall respect municipal, regional and international bills of rights cited to it or brought to its attention or of which the Court is aware…" http://www.refworld.org/pdfid/54f97e064.pdf . Some have rightly pointed out that the effect of Preamble 3(b) on Nigerian courts vis-à-vis the application of human rights treaties Nigeria has acceded to, though yet to domesticate, is not to confer binding legal status on them but rather to "encourage Nigerian courts to accord a greater role to international instruments in the enforcement of human rights." See Enyinna Nwauche, 'The Nigerian Fundamental Rights (Enforcement) Procedure Rules 2009: A Fitting Response to Problems in the Enforcement of Human Rights in Nigeria?" (2010) 10(2) *African Human Rights* Law Journal 502.
[77] Act No. 26 of 2003, Child's Rights Act, 2003. http://www.refworld.org/docid/5568201f4.html

bound to apply it. Furthermore, following *AG of Ondo State*, CRA has made section 18(3)(a) an enforceable right.

III. A2E in Nigeria: Beyond the Law

That Nigerians have an enforceable right to education says nothing about whether in fact Nigerians enjoy A2E. The former is a question of law whereas the latter a question of fact. Although essential to the guarantee of fundamental freedoms, rights do not mirror reality, nor do they necessarily translate into improved socio-economic conditions. As such, it is necessary to move beyond rights talk to inquire about the real conditions vis-à-vis the state of A2E in Nigeria.

a. Content of the Right to Education

The CESCR has outlined the essential features of the right to education.[78] These features constitute the analytical framework for assessing whether there is a fulfilment of the right to education. In its general comment, the CESCR states that the right to education, irrespective of the condition obtainable in member States, shall have four essential attributes: availability, accessibility, acceptability, and adaptability.

According to the CESCR, the criterion of availability requires functioning educational institutions in sufficient quantity. In elaborating further on the requirement of functioning educational institutions, the CESCR states:[79]

> What they require to function depends upon numerous factors, including the developmental context within which they operate; for example, all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, *teaching materials*, and so on; while some will also require facilities such as a library, computer facilities and information technology.

On the other hand, the criterion of accessibility requires the removal of hurdles in accessing educational institutions and programmes. This requires the removal of

[78] UN CESCR, *Supra*. n.43
[79] *Ibid*. at para. 6 [Emphasis added]

constraints in three dimensions: non-discrimination, physical accessibility and economic accessibility.

With regards to acceptability, the issue is whether the form and substance of education is acceptable to students and parents. Finally, the adaptability feature requires that "education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings."

Furthermore, the SDGs, although a global development programme, can also shed further light on the nature of the right to education.[80] Specifically, the SDG goal 4 with its targets and indicators. Goal 4, focused on education, has 10 targets and 11 indicators. A target is "a specific, measurable objective" which will aid in the achievement of the SDGs, in this instance goal 4 whereas indicators are markers of change or continuity which measure the path of development.[81] Put differently, targets specify an objective whereas indicators track the progress towards the achievement of that objective.

Target 4.1 covers primary and lower secondary education. The objective is that by 2030 all girls and boys should complete free, equitable and quality primary and secondary education. As mentioned below[82], the UBE Act 2004 is one of the legal mechanisms that will aid Nigeria in achieving this target. However, there are still numerous challenges owing to the number of OSC in Nigeria. Target 4.3 covers equal access to affordable technical, vocational and higher education. The objective is that by 2030 all men and women will have access to affordable and quality technical, vocational and technical education, including university. The indicator of target 4.3 is the participation rate of youths and adults in formal and non-formal education in the previous 12months by sex. Clearly, this target is relevant to the primary concern of this thesis, A2E in Nigerian higher institutions. Unlike the

[80] For the relationship between the SDGs or development generally and human rights, see Karin Arts, 'Inclusive Sustainable Development: A Human Rights Perspective' (2017) 24 *Current Opinion in Environmental Sustainability* 58, 59 ["Agenda 2030 is conceptually based in human rights."]; M. Kaltenborn, M. Krajewski, and H. Kuhn (eds.), *Sustainable Development Goals and Human Rights* (Springer 2020). In fact, the 2030 Agenda states that the SDGs "seek to realize the human rights of all…" UN General Assembly, *Transforming Our* World: The 2030 Agenda for Sustainable Development, 17th Session, A/RES/70/1, 21 October 2015 (pmbl.). On the relationship between the SDGs and HDA, see chapter 2, section 5(B)(II)

[81] UNESCO Institute of Statistics, *Quick Guide to Education Indicators for SDG 4* (UNESCO/UIS, 2018) at 7-8.

[82] *Infra*. *n*.90 and accompanying text

CESCR, however, there is no mention in the SDGs of ALM or teaching materials as a component of the right to education or the achievement of the developmental goal of A2E. The indicator of target 4.3, the participation rate of youths, while important should be considered only as a starting point for the achievement of target 4.3. This is crucial because, as discussed below, inadequate ALM is an impediment to the developmental goal of A2E in Nigerian higher institutions.

b. The Nigeria Education System: A Snapshot

The federal, state and local governments are responsible for the administration of education in Nigeria as it falls under the concurrent legislative list.[83] The Federal Ministry of Education (FME) is the body responsible for the formulation of national policy on education. In practice, the FME is primarily responsible for tertiary education while state and local governments are responsible for primary and secondary schools. Aside from state schools (public schools), there are many private schools in Nigeria at all levels of education. However, private schools are expensive and not affordable to many.

Nigeria has a 6-3-3-4 education system as provided for by the National Policy on Education (NPE).[84] This structure translates into 6 years of primary school, 3 years junior secondary school (JSS), 3 years of senior secondary school (SSS), and 4 years of tertiary education. The first 9 years (primary and JSS) form the free and compulsory basic education as provided for by the UBE programme and legalised by the UBE Act 2004, although an additional 1 year has been added to the education structure after a 2013 review to make room for the formal inclusion of pre-primary education. The first 10 years of education (pre-primary, primary, JSS), apart from being compulsory and free, is continuous and does not require any examination to progress to the next stage although continuous assessments are required. At the end of primary school a student is awarded the Primary Leaving School certificate and progression to JSS is automatic. On completion of JSS, the student is awarded a Basic Education Certificate (BEC) ,formerly known as Junior School Certificate, in a final examination administered by the state government if it is a state secondary

[83] See Part II, Second Schedule of the Constitution.
[84] Federal Republic of Nigeria, *National Policy on Education* (4th Ed. NERDC, 2004).

school. Otherwise it is administered by the National Examinations Council (NECO) if it is a Federal Unity College. Basic education terminates at this level and successful completion of the BEC Examination is required to gain entrance to the SSS. A student who elects to proceed further to the SSS will spend 3 years at the SSS and on completion will be awarded a Senior School Certificate after completing an examination administered either by the National Examinations Council (NECO) or West African Examinations Council (WAEC).[85] This certificate, with the minimum required passes, is required in addition to the Unified Tertiary Matriculation Examination administered (UTME) by the Joint Admissions and Matriculation Board (JAMB) to gain entry into university. Apart from universities, Nigeria's tertiary institutions consist of polytechnics, monotechnics, and colleges of education. Generally, a UTME is not required to gain entrance into these tertiary institutions. These institutions also provide alternative pathways to gain entrance to the university normally after a student has gained a National Diploma in the case of polytechnics.

There are 41 federal universities[86], 47 state universities[87], and 75 private universities[88] in Nigeria.

c. Challenges of A2E in Nigeria: The Cost of Reading a Book.

The importance of education in national and individual development is well understood by the Nigerian government as clearly articulated in the NPE.[89] In fact, there are several intervention programmes backed by law in Nigeria to deal with the issue of A2E at the basic and tertiary levels.[90] Aside these efforts, Nigeria is

[85] Aside from proceeding to SSS, students can also opt for 3 years of secondary vocational education at a technical college and awarded the National Technical Certificate or the National Business Certificate.
[86] National Universities Commission http://nuc.edu.ng/nigerian-univerisities/federal-univeristies/
[87] http://nuc.edu.ng/nigerian-univerisities/state-univerisity/
[88] http://nuc.edu.ng/nigerian-univerisities/private-univeristies/
[89] Federal Republic of Nigeria, *Supra*. n.84.
[90] Two programmes are prominent. The UBE programme, introduced by President Olusegun Obasanjo on 30 September 1999, and the Tertiary Education Trust Fund (TETFund). The central goal of the UBE programme is to provide free, compulsory, and universal basic education for children enrolling in primary and junior secondary school, and is legally backed by the UBE Act 2004. For some of the challenges in implementing the UBE programme see, Kayode Ajayi and Muyiwa Adeyemi, 'Universal Basic Education (UBE) Policy Implementation in Facilities Provision: Ogun State as a Case Study' (2011) 2(2) *International Journal on New Trends in Education and their Implications* 34. A. Adepoju & A. Fabiyi, 'Universal Basic Education in Nigeria: Challenges and Prospects' http://uaps2007.princeton.edu/papers/70830 Unlike UBE, TETFund applies to tertiary institutions and is backed by the TETFund (Establishment, Etc.) Act, 2011. For the history of TETFund see G.O. Ugwuanyi, 'Taxation and Tertiary Education Enhancement in Nigeria: An Evaluation of the Education Tax Fund (ETF) Between 1999-2010' (2014) 5(6) *Journal of Economics and Sustainable Development* 131. Furthermore, TETFund *does not* guarantee a statutory right to free higher education in Nigeria. All it does is to

committed to the SDG goals 2030 by virtue of its UN membership. Despite these well-intentioned efforts, there is broad consensus that the Nigerian experience has been alarmingly appalling.[91] In other words, the right to education has not translated into quality A2E for Nigerians. Coupled with Nigeria's exponential growth in population, the prospects of achieving SDG goal 4 by 2030 is very far-fetched. The effects of these are evident at the national and individual levels although data is hardly available.[92]

Nigeria's Human Development Index (HDI) rank currently is 158 out of 188 countries.[93] This is not surprising given that, as shown above, lack of education is correlated with many negative outcomes. According to UNESCO statistics, the literacy rate among the population aged 15 years and older is 62.02% for both sexes in 2018.[94] This is a substantial improvement from previous decades based on available data. In 1991, it was 55.45% and 54.77% in 2003. Despite this improvement, however, Nigeria is still lagging behind other developing countries of comparable standing. For example, South Africa's literacy rate among the population aged 15 years and older is 87.05% for 2017[95]; Ghana is 79.04% for 2018[96]; and Kenya is 81.53% for 2018.[97] What is more troubling is when the available literacy statistics are juxtaposed with data on the mean years and expected years of schooling. According to the UNDP HDR on Nigeria, mean years of schooling for people aged 25 years and above is 6.0 for 2015 while the expected years of

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provide support to public tertiary institutions and it does not ensure provision of free ALM like the UBE Programme. And it is saddled with inefficiency and corruption. L.E. Udu and J.O. Nkwede, 'Tertiary Education Trust Fund Interventions and Sustainable Development in Nigerian Universities: Evidence from Ebonyi State University, Abakiliki' (2014) 7(4) *Journal of Sustainable Development* 191.

[91] For a sample of literature lamenting on the problems of A2E in Nigeria, see S.N. Aja *et. al*., 'Overview of the Progress and Challenges of Education for All in Nigeria' (2014) 5(7) *Educational Research* 257; E.O. Kingdom *et.* a*l.,* 'The Role of Education in National Development: Nigerian Experience' (2013) 9(28) *European Scientific Journal* 312; U.S. Anaduaka & C.F. Okafor, 'The Universal Basic Education (UBE) Programme: Problems and Prospects' (2013) 2(3) Basic Research Journal of Education Research and Review 48.

[92] See Federal Ministry of Education, "Education for All 2015 National Review Report: Nigeria" [One of the very serious challenges in the way of documenting the progress achieved towards the EFA Goal(s) within the Nigerian context is the paucity, and in some cases, the complete absence of data required for such an exercise."] https://unesdoc.unesco.org/ark:/48223/pf0000231081?posInSet=1&queryId=fd58e6ad-3a7f-4775-8df6-df9af56bc0f6

[93] 'Nigeria: Human Development Indicators' *UNDP Human Development Reports, UNDP* http://hdr.undp.org/en/countries/profiles/NGA

[94] 'Nigeria: Education and Literacy' UNESCO Institute for Statistics, UNESCO http://uis.unesco.org/en/country/ng?theme=education-and-literacy

[95] 'South Africa: Education and Literacy' UNESCO Institute for Statistics, UNESCO http://uis.unesco.org/en/country/za

[96] 'Ghana: Education and Literacy' UNESCO Institute for Statistics, UNESCO http://uis.unesco.org/en/country/gh

[97] 'Kenya: Education and Literacy' UNESCO Institute for Statistics, UNESCO http://uis.unesco.org/en/country/ke

schooling is 10.0.[98] Putting this in context, mean years of schooling for Ghana and Kenya are 6.9 and 6.3 respectively. For developed countries like Ireland and Germany, it is 12.3 and 13.2 respectively. The positive thing though is that there has been a continuous increase of both mean and expected years of schooling over the years in Nigeria.[99] This increase though has not translated into improved literacy rates as the data shows. Although surprising, the explanation for this is mainly due to lack of access to teaching materials and inadequate infrastructure. Furthermore, the Nigerian government has admitted that the country has the highest number of OSC in the world.[100]

To be clear, the causes of the failure of the education system in Nigeria are multi-faceted and multi-layered: corruption, incompetent teachers, non-existing or dilapidated infrastructure, weak policy implementation etc. Accordingly, the assertion is not that copyright law reform is the panacea to Nigeria's education woes. Many of the issues are governance related while others are better handled through re-thinking the policy landscape of copyright law. Perhaps, it will be useful to elaborate on some of the issues responsible for poor literacy rates in Nigeria and which if addressed would translate the right to education into effective opportunities for Nigerians. A proper understanding of these issues dispels the view that the appalling literacy rate in Nigeria is due to a lack of reading culture amongst the youths.

1. ALM and textbooks: students in Nigeria still depend on bulk access to printed materials for learning. There is very little to no access to electronic materials which creates difficulties for reaping the digital dividend. Although information is non-rivalrous, the hard copy material embodying the information is rivalrous. This rivalrous nature of hard copy materials creates problems of access to knowledge for DCs like Nigeria where there is insufficient supply of and limited access to printed materials. This is especially the case in Nigeria for several economic and legal reasons.

[98] UNDP, 'Human Development for Everyone: Briefing Note for Countries on the 2016 Human Development Report: Nigeria' (2016) Human Development Report. http://hdr.undp.org/sites/all/themes/hdr_theme/country-notes/NGA.pdf

[99] UNDP, 'Human Development Indices and Indicators: 2018 Statistical Update: Nigeria' http://hdr.undp.org/sites/all/themes/hdr_theme/country-notes/NGA.pdf

[100] 'Nigeria has 'largest number of children out-of-school' in the world' (25 July 2017) *BBC News*: *Africa* https://www.bbc.co.uk/news/world-africa-40715305.

School libraries in Nigeria are notoriously under-resourced. This is not surprising given Nigeria's poor funding of education and spending per student in both secondary and higher institutions as shown on tables 3A and 3B below. In fact, many public primary and secondary schools in Nigeria do not even have libraries. For students in these schools, the two options available for gaining ALM are either to acquire them from vendors or do without them. Sadly, out of economic necessity a great number of households would opt for the latter. The sad reality is that many families cannot even afford school uniforms for their dependants let alone textbooks. Higher institutions on the other hand do have libraries but they are badly equipped unless you are part of the privileged few whose parents can afford a private college. For these unfortunate students, there are various ways to gain ALM with different copyright implications. First is by photocopying the original texts. This option is only feasible if on the one hand the learning material is available and within reach; and on the other hand the student can bear the economic and legal costs of photocopying the copyrighted material. Second is through course packs. Course packs are a compilation of photocopied materials (usually extracts from copyrighted materials) made for a particular course of study. They are useful especially where the collected materials are not available in sufficient quantity or not affordable as is the case in Nigeria. They are also flexible since they allow the teacher to tailor the content of the course packs to the curriculum. However, they involve copyrighted materials and this may require copyright clearances for their preparation. Lastly, through the outright purchase of learning materials. This is not a viable option for a great number of students in Nigeria due to weak purchasing power. For many students the only way of owning a copy is to purchase pirated copies since they are significantly cheaper.

2. Access to electronic materials: the problems of access to printed materials discussed above would be reduced if there was broad access to ICT, in particular computers and the internet, as ICT provides the technological

capacity to utilise the non-rivalrous character of information.[101] But access to electronic materials via the Internet is a luxury only reserved for the affluent household. This is not surprising. In a country where more than 40% of the population live in extreme poverty, it is a Sisyphean task to expect households to afford a computer with or without internet connection. For a majority of those who even have access to the internet, it is through mobile phones. And even then it is estimated that 111million people are offline in Nigeria.[102] The impact of this poor access to ICT on A2E cannot be exaggerated. The internet provides quick and easily accessible way to find information. For those in developed countries, access to Wikipedia might be taken for granted given that it is easily accessible 24/7. But imagine being without it. Yet this is the experience of many students in DCs. Furthermore, many works that are not easily available in hard copies and out of print are now digitised. Given that ICT have greatly reduced the production costs of informational works, many academic journals are now published online. On the one hand, these problems of ICT access clearly mean that Nigerian students are not reaping the digital dividends. On the other hand, this issue of poor access to ICT in Nigeria, an observable fact in many DCs, brings in to sharp focus the issue of whether the issues and concerns of the A2K movement accommodate the concerns of DCs.

TABLE 3A: FEDERAL GOVERNMENT OF NIGERIA BUDGETARY ALLOCATION TO EDUCATION: 2006-2015

Year	Allocation as % of Total Budget
2006	11.0
2007	8.09
2008	13.0
2009	6.54
2010	6.40
2011	1.69
2012	10.0
2013	8.70
2014	10.6
2015	9.5

[101] See Chapter 5
[102] World Bank, *World Development Report 2016: Digital Dividends* (Washington, D.C: World Bank, 2016)

SOURCE: ANNUAL STATISTICAL BULLETIN, CENTRAL BANK OF NIGERIA.[103]

TABLE 3B: PUBLIC RECURRENT SPENDING PER YEAR IN SUB-SAHARAN AFRICAN COUNTRIES BY EDUCATION LEVEL 2003.

Country	Primary (% of GDP per capita)	Higher Education (% of GDP per capita)
Ghana	17.6	372.0
Kenya	9.0	266.1
Malawi	11.0	1760.0
Nigeria	14.4	111.0
Senegal	13.9	257.0
Zimbabwe	16.2	201.3

SOURCE: WORLD BANK STUDY[104]

C. A2E in India and Beyond

The crisis of ALM and the strategies employed by students to overcome this crisis are not peculiar to Nigeria nor even to DCs though there are cogent reasons for emphasising the access conditions of developing over developed countries: (1) the salience of education for DCs' developmental progress given their developmental level, (2) the weaker purchasing power of DCs' students, (3) limited broad access to ICT, and (4) the fact that developed countries are the main producers of knowledge goods.

It is therefore interesting to examine how some DCs grapple with this crisis. This and subsequent sections will focus on India for three reasons. India is a DC; it is a prominent voice in the copyright and development discourse; and apart from similar socio-economic conditions with Nigeria, its constitutional guarantee of the right to education tracks that of Nigeria in interesting ways.

[103] Central Bank of Nigeria, '2014 Statistical Bulletin: Public Finance Statistics' (2015) *Annual Statistical Bulletin*. https://www.cbn.gov.ng/documents/Statbulletin.asp

[104] K. Majgaard and A. Mingat, 'Education in Sub-Saharan Africa: A Comparative Analysis' (2012) *A World Bank* Study *http://documents.worldbank.org/curated/en/892631468003571777/Education-in-Sub-Saharan-Africa-a-comparative-analysis*

I. The Right to Education: A Foundational Commitment.

a. India

Although located in South Asia, India's political history, structure and socio-economic conditions are similar to Nigeria's. Like Nigeria, it gained independence from Britain, on August 15, 1947. With a population of 1.2billion, India is the most populous democracy in the world. It boasts a rich diversity of ethnicities, languages, and religions. English is the most important language for national, political and commercial communication although Hindi enjoys the status of official language with English being the second official language.

Similarly, the current development indicators and economic realities track those of Nigeria. Despite increased economic growth, India continues to be plagued by massive inequality, discrimination against women and poverty.[105] With a GDP per capita (PPP) of 7,200 USD, per capita income still remains below world average.[106] India, however, is on track for SDG 2030 goal 1 of no poverty as the percentage of people living in extreme poverty is only 4%.[107] But its HDI rank is a low 131.

On the education front, India has made substantial progress. The adult literacy rate—i.e. as a percentage of the population aged 15 and above— is 69.3%.[108] But there are still significant problems especially with access to higher education. While the percentage of secondary school-age population enrolled in secondary school is 69%, as of 2013 that of tertiary school is a meagre 24%.[109] The government expenditure on education as a percentage of GDP is neither significant nor increased much over the years. It was 3.4%, 3.8%, and 3.9% for each year from 2010-2012 respectively.[110] Furthermore, even though the adult literacy rate is 72.1% there are wide gaps in the literacy level between different regions of the country.

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[105] Nisha Agrawal, 'Inequality in India: What's the Real Story?' (04 October 2016) *World Economic Forum*. https://www.weforum.org/agenda/2016/10/inequality-in-india-oxfam-explainer/
[106] "India" *World Fact Book, Central Intelligence* Agency https://www.cia.gov/library/publications/the-world-factbook/geos/in.html
[107] "World Poverty Clock" *World Data Lab* http://worldpoverty.io/ [Accessed August 15, 2018; 07:20AM]
[108] "India" *UNDP Human Development Reports* http://hdr.undp.org/en/countries/profiles/IND
[109] Ibid.
[110] Ibid.

More importantly is the effect of poor economic conditions on A2E opportunities for children. As Pandey explains:[111]

> India has the dubious distinction of having largest number of child workers of any country in the world. The estimates of child workers in the country vary from 17 to 44 million. Poor parents hard pressed with economic depression prefer to avail themselves of the services of their children even at the risk of being fined, and how can one expect these people to send their children to school for a number of years and to bear the expenses of their children when they are unable to afford even two meals a day. Even if they do not have to pay fees, the price of books and other educational material are beyond their means.

b. The Right to Education in India: Connecting ESC and CP Rights.

India, a federal republic though with certain unitary features, is governed by its supreme law, the Constitution of India. It was adopted on 26th November 1949 and came into force on 26th January 1950.

The Constitution of India recognises the rights guaranteed in the ICCPR and ICESCR. Indeed India is a signatory to both conventions having acceded to both on 10th April 1979.[112] Like Nigeria, the Indian Constitution distinguishes between CP rights contained in Part III as fundamental rights and ESC rights contained in Part IV as Directive Principles of State Policy (DPSP). Regarding Part IV, art. 37 of the India Constitution states that "[t]he provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws." Clearly, the import of art. 37 is to demarcate the regime of fundamental rights from DPSP vis-à-vis justiciability. The implication therefore is that the rights contained in the DPSP are to be implemented only by the State and not enforceable by the judiciary.

Education, as an ESC right, is dealt under the DPSP in India's Constitution. Three provisions—arts. 41, 45, and 46—deal with education but two are particularly important for present purposes. Art. 41 states that "[t]he State shall, within the limits of its economic capacity and development, make effective provision for securing the

[111] Saroj Pandey, 'Education as a Fundamental Right in India: Promises and Challenges' (2005) 1 *Int'l J. Educ. L. & Pol'y* 13

[112] Like Nigeria, India has a dualist approach to international law. See India Constitution, Part XI, art. 253. https://www.india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf

right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement and in other cases of undeserved want." And art. 45, originally before amended, states that "[t]he State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years."

The issue of whether education, in Indian Constitution, is a fundamental right is contingent on the relationship between Part III and IV as understood and interpreted by the Indian judiciary. Although the DPSP seems to be accorded a lesser status vis-à-vis Part III by virtue of art.37 which makes it non-justiciable, the Indian SC has been innovative in construing the status of the DPSP in the constitutional scheme.

Initially, in the first case in which this relationship was examined it was held that fundamental rights were superior to the DPSP. Specifically, in *State of Madras v. Champakam Dorairajan* the SC of India held that "the directive principles have to conform to and run subsidiary to the chapter on fundamental rights."[113] The SC of India has since shunned this view preferring a harmonious approach in which the relationship between Part III and IV is considered supplementary and complementary. So in *Minerva Mills v. Union of India*[114] Chandrachud CJ delivering the leading judgment in the Indian SC stated:

> Granville Austin's observation brings out the true position that Parts III and IV are like two wheels of a chariot, one no less important than the other. You snap one and the other will lose its efficacy. They are like a twin formula for achieving the social revolution, which is the ideal which the visionary founders of the Constitution set before themselves. In other words, the Indian Constitution is founded on the bed-rock of the balance between Parts III and IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution.

If neither Part III nor Part IV is superior but they are of equal importance, then it follows that both Parts should be equally protected. In *Keshavanda v. State of Kerala* Mathew J. put it this way:

> Many of the articles, whether in Part III or Part IV, represent moral rights which they have recognised as inherent in every human being in his country. The task

[113] (1951) AIR 226
[114] 1980 SCR (1) 206 at p.53 https://indiankanoon.org/doc/1939993/

> of protecting and realising these rights is imposed upon all the organs of the State, namely, legislative, executive and judicial. What then is the importance to be attached to the fact that the provisions of Part III are enforceable in a Court and the provisions in Part IV are not? Is it that the rights reflected in the provisions of Part III are somehow superior to the moral claims and aspirations reflected in the provisions of Part IV? I think not. Free and compulsory education under Article 45 is certainly as important as freedom of religion under Article 45. Freedom from starvation is as important as right to life. Nor are the provisions in Part III absolute in the sense that the rights represented by them can always be given full implementation.[115]

By adopting this approach, the SC of India is able to connect Part III and IV as supplementary and complementary to each other thereby enabling it to give effect to the provisions under the DPSP.

The issue of whether there is a fundamental right to education enforceable by the Court was first answered affirmatively in *Mohini Jain v. State of Karnataka*.[116] In this case, which concerned the charging of "capitation fees" in consideration of admission, the SC held that every citizen has a right to education under the Constitution and that the State was under an obligation to establish educational institutions to enable the citizens to enjoy the said right. This obligation may be discharged either through State owned or State-recognised educational institutions. In *Unni Krishnan v. State of Andhra Pradesh*[117], the Indian SC with a larger bench of five judges had the opportunity to examine the validity of the *Mohini Jain* decision. Like *Mohini Jain*, *Unni Krishnan* challenged the ability of private medical and engineering colleges in Andhra Pradesh to charge capitation fees to students seeking admission. The primary issue for the Court was whether the social right to education is a fundamental right under the Indian constitution. What is interesting in both *Mohini Jain* and *Unni Krishnan* is not just the outcome but the manner in which the Indian SC arrived at the decision. In *Mohini Jain*, the SC held that there is a fundamental right to education under the Indian Constitution and that this right "flows directly from right to life."[118] The SC in *Unni Krishnan* affirmed this part of *Mohini Jain's* judgment and held that the "right to education is implicit and flows from the right to life guaranteed by Article 21." In other words, the right to education is a

[115] *Keshavanda Bharati v. State of Kerala* (1973) 4 SCC 225. This remark was quoted with approval by the SC of India in Unni Krishnan & Ors. v. State of Andhra Pradesh & Ors. (1993) AIR 2178
[116] (1992) AIR 1858
[117] *Supra*. n.115
[118] *Supra.* n.116

component of the right to life and as such is a fundamental right and should be enforced as such. According to the SC, the fact that the right to life as guaranteed by art. 21 of the Indian Constitution is negative in character—i.e. requires non-interference rather than any positive obligation by the State—has no relevance to whether the right to education is constitutive of the right to life. The Court however departed from *Mohini Jain* in determining the content of the right to education. According to the Court, "[t]he right to education which is implicit in the right to life and personal liberty guaranteed by Article 21 must be construed in the light of the directive principles in Part IV of the Constitution."[119] After analysing the various articles in Part IV—arts. 41,45,and 46— the Court held that "[r]ight to education understood in the context of Articles 45 and 41 means, (a) every child/citizen of this country has a right to free education until he completes the age of fourteen years and (b) after a child/citizen completes 14years, his right to education is circumscribed by the limits of the economic capacity of the State and its development."[120] So the right to education guaranteed in the Indian Constitution by virtue of Art 21 is the right to basic education which ends when a normal child completes the age of 14 in India.

Given the way in which the SC arrived at the fundamental right to education, the Court was wary to open up flood gates to other claims relying on art. 21 and so it stated:

> We must hasten to add that just because we have relied upon some of the directive principles to locate the parameters of the right to education implicit in Article 21, it does not follow automatically that each and every obligation referred to in Part IV gets automatically included within the purview of Article 21. We have held the right to education to be implicit in the right to life because of its inherent fundamental importance. As a matter of fact, we have referred to Articles 41, 45 and 46 merely to determine the parameters of the said right.[121]

Following this judgment, the Constitution (Eighty-sixth Amendment) Act, 2002, inserted art 21A in the Indian Constitution which explicitly guarantees the right to basic education to all children of the age of six to fourteen years. The Right of Children to Free and Compulsory Education Act, 2009, is the enabling legislation

[119] *Supra*. *n*.115 at para. 45
[120] *Ibid.* at para. 15
[121] *Ibid*. at para. 50

that implements the fundamental right to education; and both the constitutional amendment and the Act came into force on April 1, 2010.

II. Other Developing Countries with the Right to Education: South Africa & Brazil

The Indian judgment on the right to education is ultimately representative of the importance of education in individual development in as much as it connects the right to education with the right to life. Therefore, it is not surprising that several DCs have constitutional provisions protecting this important right. Unlike Nigeria, the right to education in South African (SA) and Brazilian constitutions is a fundamental right and therefore justiciable.

The SA Constitution in the Bill of Rights chapter explicitly guarantees the right to education.[122] Section 29(1) of the South African Constitution contained in the Bill of Rights chapter states that "Everyone has the right (a) to a basic education, including adult basic education; and (b) to further education, which the state, through reasonable measures, must make progressively available and accessible." The SA Constitutional Court has not considered the content or meaning of "basic education". But section 3(1) of the South African Schools Act, 1996, makes education compulsory for children from the age of seven years until the age of fifteen years or ninth grade, whichever comes first.[123]

The right to basic education in the Bill of Rights is absolute, thereby impressing the importance of education for national and individual development. As some commentators note, the way SA courts adjudicate on the right to basic education differs from the adjudication of other socio-economic rights.[124] In *Governing Body of the Juma Musjid Primary School v Essay*, the Constitutional Court stated that:

> [i]t is important… to understand the nature of the right to 'a basic education' under section 29(1)(a). Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the

[122] Constitution of the Republic of South Africa (1996). https://www.gov.za/documents/constitution-republic-south-africa-1996
[123] South African Schools Act, 1996. https://www.gov.za/sites/www.gov.za/files/Act84of1996.pdf
[124] C. Churr, 'Realisation of a Child's Right to a Basic Education in the South African School System: Some Lessons from Germany' (2015) 18(7) *PER* 2405.

> right be 'progressively realised' within 'available resources' subject to 'reasonable legislative measures'. The right to basic education may be limited only in terms of a law of general application which is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.'[125]

Given the indispensability of ALM to education, SA courts have held the right to basic education can only be meaningfully operationalised if there is ALM. In *Section 27 and Others v. Minister of Education and Another,* the North Gauteng High Court held that:

> the provision of learner support material in the form of text books, as may be prescribed is an essential component of the right to basic education and its provision is inextricably linked to the fulfilment of the right. In fact, it is difficult to conceive, even with the best of intentions, how the right to basic education can be given effect to in the absence of text books. . . .[126]

In yet another decision, the Eastern Cape Local Division of the SA High Court in *Madzodzo and Others v. Minister of Basic Education and Others* stated that the state's obligation to provide basic education under the Constitution "requires the provision of a range of educational resources:- schools, teachers, teaching materials and appropriate facilities for leaners."[127]

The Constitution of the Federative Republic of Brazil promulgated on October 5, 1988 provides for the right to education.[128] There are 9 titles in the Brazilian Constitution divided into chapters and articles. Title 2 is captioned "Fundamental Rights and Guarantees." Under this title, chapter 2 comprising Arts 6-11 provides for social rights. Art. 6 states that "Education, health, food, work, housing, leisure, security, social security, protection of motherhood and childhood, and assistance to the destitute are social rights, as set forth by this Constitution." Art. 205 states that "[e]ducation, which is the right of all and duty of the State and of the family, shall be promoted and fostered with the cooperation of society, with a view to the full development of the person, his preparation for the exercise of citizenship and his qualification for work." Art. 208 elaborates on the nature of this right in providing that the duty of the State towards education shall be fulfilled by ensuring, amongst others, free, mandatory basic education for every individual from the age of 4

[125] (2011) ZACC 13, at 37 http://www.saflii.org.za/za/cases/ZACC/2011/13.html
[126] (2012) ZAGPPHC 114 at 25
[127] (2014) ZAECMHC 5 at 20
[128] Constitution of the Federative Republic of Brazil (1988) http://english.tse.jus.br/arquivos/federal-constitution

through the age of 17; and access to higher levels of education according to individual capacity. According to art. 208(1), access to compulsory and free education is a subjective public right i.e. a person may petition the court to enforce his/her claim against the state. In other words, it is justiciable. So the constitutionally guaranteed right is the right to basic education, as in other countries examined above. Although access to higher levels of education and research is guaranteed, it is not a subjective public right. An important principle though in the fulfilment of the state's obligation to provide education as stated in art. 206(II) is "freedom to learn, teach, research and express thought, art and knowledge."

3. Copyright and A2E

The right to education as guaranteed in various DCs' Constitutions provides an opportunity to launch into a much broader and complex issue concerning the legal, institutional, and stakeholder dynamics conditioning ALM on the one hand; and on the other hand, the challenges of integrating the right to education, as recognised in various constitutions, with copyright in order to enhance access.

A. Access to Learning Materials in Higher Institutions

I. Why ALM Matters.

Learning materials can take different forms: printed textbooks, monographs, e-books, course packs, journals and audio-visual content. The type of learning material(s) used will depend on various factors, such as the level of education, technological development/infrastructure, and economic capability. For example, at the basic level the primary learning material is textbooks. At higher institutions, the different types of learning materials are employed though the economic and technological conditions of a country will influence the choice of learning materials. As highlighted above, the dominant form of learning materials used in Nigeria is printed texts with limited reliance on e-books. This is generally the case in other DCs.

The importance of learning materials cannot be over emphasised. It is impossible to conceive of a sound education without ALM. If, as established above, education has enormous economic and social value then it follows that the realisation of these values will be completely hindered without ALM. Of course, the terminology and concerns of A2E are broader than ALM. In assessing A2E, there are other concerns such as school buildings, toilets, transportation, uniforms, and teachers. For example, the fact that a student has ALM is not an absolute guarantee of A2E. For many students, learning is difficult without access to qualified teachers. But it remains the case that ALM is a fundamental component, and the key in realising the goal, of A2E. As the SA High court realised, the constitutional guarantee of the right to education cannot be meaningfully operationalised without ALM.[129] Hence, ALM is used interchangeably with A2E in this chapter to highlight the important connection between the two.

In Nigeria, ALM at the basic level of education in principle is not an issue as the government provides for free textbooks.[130] The situation is different for higher institutions in Nigeria, whether public or private, as they are mainly responsible for the procurement of learning materials, the costs of which are substantially borne by students as part of tuition fees. Furthermore, it is at the tertiary level of education that the concerns of ALM become salient. At this stage, students engage with significantly more academic works than at the basic level. Each module or course will have several recommended texts including required and supplementary readings from academic journals; and, in an academic term, students will have at least four courses depending on the degree pursued and the chosen electives. Clearly, ALM in this environment is paramount. Consequently, the focus is on ALM in higher institutions.

II. Copyright, A2E and the Market: Connecting the Dots

It is clear, as we shall see in the following sections, that copyright determines the conditions of ALM and consequently A2E. An immediate inquiry though is what (is) should be the relationship between copyright and A2E. In carrying out this inquiry, it

[129] *Supra*. ns.126-127 and accompanying text
[130] See *Supra*. n.90

is important to inquire about the limits of the market in this relationship because copyright operates through the market, and copyright works are commodities that have market value in different markets. For example, literary works such as novels beyond the market for immediate readership are valuable in other markets such as those for translation and adaptation. Indeed, the rights conferred by copyright are for the purpose of enabling the copyright holder/owner to internalise this value. Copyright and the market therefore operate in tandem: the market commodifies and valorises the subject matters of copyright while the ownership of copyright enables the value of copyright works, made possible through valorisation, to be internalised. But it is not only the system of copyright that operates through the market. Copyright doctrines are also substantially influenced by market norms.[131]

Education on the other hand is a merit/non-market good. A merit good is a good that is socially desirable but that will be under-produced or under consumed through the market mechanism. Education creates positive externalities. As discussed above, the benefits of education are not completely internalised by the educated individual. One of the private (internalised) benefits of education is increased income earnings but there are also numerous social benefits (positive externalities). The issue here is the divergence between private benefit and social benefit. An individual in deciding to consume a merit good such as education will calculate only his private benefits and private costs because he cannot capture the social benefits. Given that the market is an economic system that allocates resources efficiently based on the price system, an individual might decide to consume too little or none at all because the private benefits are not worth the costs. Specifically, for DCs where purchasing power is weak, the operation of the market concept of value in determining the allocation of this merit good will prevent many people from consuming the good at all. From a welfare standpoint, this is inefficient because the benefits of the transaction are not just the private benefits to the individual but also the numerous social benefits not captured by the price system. These benefits are huge and significant, but they do not matter to the market because they are not backed by

[131] Oren Bracha, Owning Ideas: The Intellectual Origins of American Intellectual Property 1790-1909 (CUP, 2016) 93-105 [Discussing the influence of market and economic norms in reshaping the originality requirement.] For the fair use doctrine, see W.J. Gordon, 'Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors' (1982) 82 *Colum. L. Rev.* 1600

willingness to pay. This is a market failure which shows the limits of the market in efficiently allocating socially valuable goods.

Clearly, there is tension in the relationship between copyright and A2E. Copyright is designed to function through the market while education is a non-market good. This tension plays out nicely on the demand side. Suppose a student in a DC higher institution wishes to photocopy parts of a textbook for course work. Due to copyright restrictions, he is unable to do so without a license. Although the use would be valuable to the student, he will forego access due to associated costs. There are two kinds of costs (legal and illegal) representing two methods of access. For students in some countries, the illegal option is costly because copyright infringement is a criminal offence with persistent enforcement. The legal cost is the cost of obtaining permission or license which many students may not be able to afford in DCs. The market, therefore, fails to effectuate the demand of these students even though it would have been efficient had the transaction been completed given the potential social benefits. As will be shown in the following sections with concrete examples of Brazil and India, the issues posed by this tension are very real for DCs.

Some may however downplay this tension or insist that even if it is real the benefits of the supply side compensate for this demand distortion i.e. the goal of copyright is simply the maximisation of cultural production.[132] And for this goal to be accomplished, they argue, copyright must not be 'leaky' i.e. it must be able to capture every market value through the strengthening and extension of private property rights.[133] These arguments reflect broader concerns about the goals of copyright and the role of the State and market in providing A2E.[134] For those who consider the goal of copyright as the maximisation of creative production and property rights as essential to achieving this objective, they are inclined to argue that copyright should not be saddled with the public interest objectives of A2K and A2E unless for efficiency grounds. According to them "[t]he public interest in copyright policy specifically is… not entirely separable from the public interest in economic

[132] Madhavi Sunder, From Goods to a Good Life: Intellectual Property and Global Justice (YUP, 2012) 23 ["In the modern day intellectual property is understood almost exclusively as being about incentives. Its theory is utilitarian, but with the maximand simply creative output."] E.E. Johnson, 'Intellectual Property and the Incentive Fallacy' (2012) 39 *Florida State University Law Review* 623, 635.

[133] For a critical discussion of this view, see B.M. Frischmann, 'Evaluating the Demsetzian Trend in Copyright Law' (2007) 3 Review of Law and Economics 650.

[134] Many goals are attributed to copyright law. See William Patry, *How to Fix Copyright* (OUP, 2011)75-77

policy generally."[135] It is enough that copyright markets generate wealth which is what markets are designed for.[136] The State and higher institutions providing education are responsible for ensuring ALM. As we will see, publishers and rights organisations have used this sort of argument in insisting on very narrow interpretations of copyright L&Es.

III. Determinants of ALM in Higher Institutions

The terms and conditions of ALM in higher institutions are determined by a complex trajectory of law, institution and the state. Different parties with different interests are camped against each other armed with different banners and labels in a seemingly never-ending 'knowledge war', reminiscent of the legendary battle of the book case.[137] At the centre is copyright law and policy with different parties informed by different interests seeking to re-draw the balance of this important law shaping the cultural ecosystem. In this protracted battle for knowledge production and use, concerns of ALM are juxtaposed against goals of rewarding creators. The narrative is often that the realisation of one concern impedes the other, but nothing is so further away from the truth.

a. Determinants of ALM in Nigerian Higher Institutions

In this battle for knowledge production and use, the prominent parties are students and publishers, the former labelling the latter as capitalists whereas the latter cast the former as pirates. This altercation is even more exacerbated in DCs where the legal market for books does not meet the needs of students.

In Nigeria, the book publishing industry while enjoying some growth in recent years continues to encounter challenges in meeting the growing needs of students. As the chairman of Literamed Publications in Nigeria notes:

> Nigeria's national book policy envisages that each primary school child should

[135] Jeremy de Beer, 'Making Copyright Market Work for Creators, Consumers and the Public Interest' in Giblin & Weatherall, *What If We Could Reimagine Copyright* (ANU Press, 2017).
[136] Ibid.
[137] See chapter 1.

> have at least five books. That translates to a huge volume: 125 million books for 25 million primary school children; which does not include another five million children in private schools. About 8 million children are registered in secondary schools, there are 129 universities and 69 technical colleges and colleges of education. Simply put, there are not enough local publishers and infrastructure to cope with such a huge demand for books.[138]

Apart from the supply side issue, there are a host of other problems facing the Nigerian publishing industry. There is poor distribution of books due to weak transportation systems, book supply networks, and lack of decent book stores. Although there are online book stores, the issues of transportation and delivery still remain. Also a search of these online book stores shows very limited titles available and in particular few educational texts on display. Even the editions available are not up to date. A further limitation is that some of the online book stores, with the exception of Konga and a few others, can only deliver to certain locations. The cost of doing publishing business in Nigeria is also not very favourable to publishers. Issues such as poor electricity, import tax, currency exchange, and high price of printing materials all contribute to the business costs.[139] The effect is that even though there has been a growing number of indigenous publishers in Nigeria, the cost of books remains very high for the average Nigerian student even for indigenous publications. For example Konga, the online book store, lists the price of The Nigerian Legal Method by Ese Malemi as ₦5,500 which is about $15.26. This is a tough sell in a country where it is estimated that almost 43% of the population lives on $1.90 a day. The reality is that at the tertiary level, foreign materials constitute the majority of the works used by Nigerian students thereby worsening the affordability issue.[140]

Publishers are however quick to point out that the failure of the publishing industry to meet the growing needs of students is due to widespread book piracy. The reasoning is that book piracy constitutes lost sales and therefore profits that should have accrued to authors and right holders. It is also argued that the high costs of educational texts are due to book piracy. The merits of these arguments will be

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[138] Otunba Olayinka Lawal-Solarin, 'Otunba Olayinka Lawal-Solarin on Challenges Facing Publishing in Nigeria' Interview by International Publishers Association. *International Publishers Association* (24 August 2015). https://www.internationalpublishers.org/country-reports/320-otunba-olayinka-lawal-solarin-on-challenges-facing-publishing-in-nigeria

[139] Emma Shercliff, 'Publishing in Nigeria: Context, Challenges, and Change' (2015) 26(3) *Logos* 51

[140] A.M. Oyinloye, 'Books and Education in Sub-Saharan Africa' (2001) 44(3) *Education Libraries Journal* 13 [Although written in 2001, the author's assessment of book publishing situation in many DCs captures the current situation in Nigeria.]

discussed below. For now, what is important to note is that in the circumstances described above, the baton remains at the hands of the State and university libraries to fulfil the growing needs of students at the tertiary level. With reduced State funding, the pressure is on university libraries to satisfy this growing demand. This task is not an easy one.

The first dimension of this task is resource based. Subscription to academic journals and acquisition of books require huge funds. Given reduced funding from the government and the increasing costs of electronic databases, universities in Nigeria cannot afford the subscription costs to electronic databases. In fact, university libraries in Nigeria are in a state of decay. In a study conducted by Tiemo regarding the availability of electronic information databases in South-South Nigeria state and federal universities[141], the author found that federal universities had access to 17 electronic information resource (EIR) databases while state universities had access to 12.[142] Of these 17 EIR databases, 7 were fee-based and 10 free. And for the 12 EIR databases of state universities in South-South Nigeria, 2 were fee-based and 10 free. As the author further notes, "[t]his is unlike other university libraries in developed nations such as Queen's University that had 1750 e-databases…"[143] Although the study focuses on universities in South-South Nigeria, the conditions are not any better in the other geo-political zones.

The other task facing higher institutions is in how they facilitate and negotiate access for students. In the atmosphere just described, it is not difficult to imagine that students will resort to infringement as a means of access. What usually happens as a consequence is that publishers and rights organisations ramp up crackdown measures to enforce their copyrights. In Nigeria, the Reproduction Rights Society of Nigeria (REPRONIG) is the sole collecting society for the rights of authors and rightsholders in the literary field. Given that most of the copyright infringements happen in university campuses, particularly in copy shops located inside the campus, the critical issue for universities is what their stance would be in regards to these infringements. In other words, would they be seen as turning a blind eye to

[141] South-South Nigeria is one of the six geopolitical zones in Nigeria. The states that constitute the South-South are: Akwa Ibom, Cross River, Bayelsa, Rivers, Delta, and Edo.
[142] P.A. Tiemo, 'Availability of Electronic Information Resource Databases in University Libraries in South-South Nigeria' (2016) 4(13) *British Journal of Education* 77
[143] *Ibid* at 85

these infringements or rather aid rightsholders in curtailing these infringements. DCs' universities faced with this reality have a difficult decision to make because universities have a duty to provide quality education to their students and of course it is impossible to fulfil this mandate without proper ALM. This task becomes even tougher as enrolment figures continue to increase. In Nigeria, public higher institutions are overcrowded thereby further putting pressure on the available limited resources. But universities are also under obligation to ensure that materials are accessed and used legally. How they manage this task is crucial to the sustainability of the cultural ecosystem. One way to unpack this situation is to see the universities as playing a mediating role between students and publishers. The other, and better, approach is to understand the role of universities as facilitatory in ensuring that the public interests objectives of equitable ALM and fair remuneration for authors are met. Whatever strategies the universities adopt to ensure the fulfilment of this objective, the country's prevailing socio-economic conditions should be a key consideration.

This complex interaction amongst universities, libraries, students, publishers, copy shops and the State in determining the conditions of access has played out in many DCs. Brazil and India are notable examples.

b. "Copy Book is Right"

The conflict between publishers and students vis-à-vis the legality of copying carried out by the latter in university copy shops played out heavily in Brazil.

In 2005, there were 20 civil actions and 150 raids carried out in Brazilian higher institutions by the Brazilian police at the request of Associação Brasileira de Direitos Reprográficos (ABDR), the Brazilian reprographic rights association representing publishers.[144] In March 2005, 74 books and 141 teachers' folders were seized.[145] ABDR claimed that due to the rampant photocopying of academic books in

[144] Marcelo Gutierres and Simone Harnik, "Editoras Dão Descontos para Coibir Xerox," *Folha de São Paulo*, 27 October, 2005. https://www1.folha.uol.com.br/fsp/cotidian/ff2710200528.htm [Translation on file with author]

[145] Fábio Takahashi, 'Alunos e Editoras Duelam por Xerox de Obra' *Folha de São Paulo,* 30 May 2005. https://www1.folha.uol.com.br/fsp/cotidian/ff3005200520.htm

universities by students, publishers lost USD400million. One of the affected universities, Pontificial Catholic University of Sao Paulo (PUC-SP) tried to reach an agreement with ABDR. PUC-SP offered to create an intranet system that would control copying and also enable the compensation of publishers through reproduction costs. ABDR rejected this proposal and instead offered 40% discount on the price of all college books for college libraries with the possibility of freight paid by publishers on the condition that universities prevent copying by students. Universities rejected this offer as the condition of the offer is not practically feasible because copies are necessary to fulfil the learning needs of students. Even at 40% discount it is not possible for libraries to stock all the books and copies required by the growing number of students. And it is an economic "death sentence" to require students to purchase all the books required for an academic degree. According to a survey by Fundação Getulio Vargas (FGV), students in the first semester would have to spend USD2000 to acquire all the books required by the teachers.[146]

This conflict around the copying of educational books amongst publishers, students and universities revolves around Brazilian copyright law.[147] Art 46(II) of the Brazilian copyright law states that "the reproduction in one copy of short extracts from a work for the private use of the copier, provided that it is done by him and without gainful intent" shall not constitute a violation of copyright. The problem is that this provision is not clear about the extent of permissible legal copying that will not constitute a violation but for the stipulation of short extracts. Is a short extract 5%, 10% or 20% of a book? Both parties latched onto this legal loophole to provide support for their activities. For students, short extracts could be a chapter of a book and as such provides justification for their copying activities. ABDR and publishers on the other hand considered this to be unwarranted liberal interpretation of Art 46(II) and accordingly intensified their crack down. For them, even the photocopy of two pages of a book could amount to unlawful copying. It is therefore not a stretch to say that the position of ABDR is that any reproduction requires permission, the implication being that universities have to pay for every access. As the president of ABDR put it, "the university community, now protected by a large number of teachers and school owners, thinks that the villain of history is the author and the publisher. I say: the

[146] Fábio Takahashi, 'Universitários Lançam Frente Pró-Xerox' *Folha de São Paulo,* 22 February 2006. https://www1.folha.uol.com.br/fsp/cotidian/ff2202200618.htm
[147] Law No. 9.610 of February 19, 1998 (Law on Copyright and Neighbouring Rights)

villain of history is the one who offers, who proposes to offer a package called education and it does not do it completely. That is, those who offer education in the market have to offer buildings, facilities, laboratories, internet, other supports for information and knowledge and books and libraries."[148]

Following the raids and the lack of clarity in Art 46(II) of Brazilian copyright law, a number of Brazilian universities passed internal resolutions that established the permissible extent of legal copying in the various universities. The involved universities were PUC-SP, University of São Paulo (USP), FGV and later in 2010 Federal University of Rio de Janeiro. According to Mizukami and Reia:

> The resolutions are very similar but diverge somewhat in the range of rights defined and justifications offered. All authorize the reproduction of chapters, articles, and other substantial portions of works for personal use—as well as copies of full works that have been out of print for at least a decade. All authorize the "professor's folder" as means of distributing materials via the copy shops. All require the library to tag work that can be fully copied. Most authorized the copying of foreign works not available in the domestic market.[149]

The intensification of ABDR efforts to prevent photocopying in universities led to the birth of an organised movement "Copiar Livro É Direito" (Copy Book Is Right) by students from USP, PUC-SP, FGV of São Paulo and Rio, Mackenzie, Ibmec Rio de Janeiro, and São Judas University. Anchoring their arguments on human rights law and the Brazilian constitution, the movement challenged the threats of ABDR and publishers that sought to undermine A2E. As they correctly pointed out, human rights and constitutional law provide for "the access of all citizens to culture, information and knowledge, independent of prior consultation with right holders (especially book publisher associations)."[150] For these students, they were simply "fighting for what is already legal, that is, the right to access to information."

This conflict amongst publishers, students and universities over the conditions of ALM in Brazil is sharply representative of the complex interactions between law and

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[148] "Afinal, Copiar Trechos de Livros é Certo ou Errado?" http://noticias.universia.com.br/destaque/noticia/2005/09/12/463293/afinal-copiar-trechos-livros-e-certo-ou-errado.html

[149] Pedro Mizukami & Jhessica Reia, 'Brazil: The Copy Shop and the Cloud' in Joe Karaganis (ed.), *Shadow Libraries: Access to Knowledge in Global Higher Education* (MIT Press, 2018)

[150] 'Copiar Livro é Direito' UNIFIMES, Centro Universitário de Mineiros. http://www.fimes.edu.br/paginas/noticias/noticia.php?id=184

institutions in determining the conditions of ALM and *a fortiori* A2E. At the centre of these interactions and conflict is copyright law. Although State funding can impact on A2E, it is also palpably clear as the Brazilian case shows that copyright law substantially shapes A2E. Whether it is conducive to or restrictive of access depends on the nature of the L&Es contained therein. This in turn depends on how copyright is understood: whether as a distinct and separate sphere of law or an overlapping sphere that needs to be connected with other areas of law. DCs need to adopt the latter view and thereby integrate copyright with the constitutional right to education. As Branco states:

> In a country like Brazil where 6 million children live in absolute poverty we cannot ignore the benefits of technology, nor regard copyright as an absolute rule to be followed to the letter. Copyright is part of a far wider context, involving constitutional and international rules that need to be respected. As the Brazilian Constitution requires the observance of the social function of all forms of property… it is of vital importance that the LDA is read in the light of the Constitution and not the other way around.[151]

It is interesting to point out that on July 12, 2018, Brazil enacted Law No. 13,696 which institutes the National Policy of Reading and Writing(NPRW).[152] Art. 2 of this law is important. It states:

> The following are guidelines of the National Policy of Reading and Writing:
>
> I- Universalisation of the right to access to books, reading, writing, literature and libraries;
>
> II- The recognition of reading and writing as a right in order to enable everyone, including through policies to stimulate reading, the conditions to fully exercise citizenship, to live a dignified life and to contribute to the construction of a more just society;

Art 2(V) on the other hand affirms the "recognition of the creative, productive, distributive and mediating chains of books, reading, writing, literature and libraries as fundamental and stipulating components of the creative economy" thereby pointing out the important roles of authors and publishers. And according to Art. 3(I), one of the objectives of the NPRW is to "democratise access to the book and the various supports for reading through public libraries, among other places to encourage

[151] Sergio Branco, 'Brazilian Copyright and How It Restricts the Efficiency to of the Human Right to Education' (2007) 4(6) *Sur. Revista Internacional de Direitos Humanos* 115.
[152] http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2018/Lei/L13696.htm

reading, in order to expand the physical and digital collection and accessibility conditions."

The Brazilian NPRW is a development strategy. What is interesting about it is its concise articulation of the benefits of reading and writing. It recognises reading as a right and necessary to live a dignified life. As a development strategy, the NPRW is part of a package of other development policies and laws aiming to transform the lives of individuals and for its successful implementation requires that these other development areas be harmoniously interpreted with the NPRW.

Copyright law and policy is part of this set of development tools. It is a key part in realising the noble goals of the Brazilian NPRW. State funding and library acquisition can only go so far due to finite resources. And even if libraries were able to stock enough books for each and every student, the L&Es of copyright law regarding the making of copies would still be necessary for A2E.

c. *Delhi University Photocopy Case: A Clash of Knowledge Seekers and Knowledge Dealers.*

The conflict examined above played out in India recently.

In August 2012, five prominent publishers— Oxford University Press; Cambridge University Press (United Kingdom); Cambridge University Press India Pvt. Ltd.; Taylor & Francis Group (United Kingdom); and Taylor & Francis Books India Pvt. Ltd.— brought a copyright infringement suit before the Delhi High Court (DHC) against Rameshwari Photocopy Service (RAPS) and Delhi University (DU) seeking the relief of a permanent injunction for the photocopying and distribution of their publications in the form of course packs to students.[153] Specifically, the plaintiff publishers alleged that the first defendant, RAPS, in reproducing chapters of their works, compiling the same as course packs, and distributing them for sale to students infringed their copyright. Furthermore, the publishers argued that DU institutionalised copyright infringement by permitting the photocopying of their

[153] *The Chancellor, Masters and Scholars of the University of Oxford and Ors. v. Rameshwari Photocopy Services and Ors.* CS(OS) 2439/2012

chapters and the sale as course packs. They pleaded that these course packs competed with their publications and thereby sought a permanent injunction restraining the defendants from making the course packs. Relatedly, they maintained that failure to protect their copyright will sound a death knell for the publishing business.

The facts of the case are that RAPS obtained a license from DU to operate a photocopying facility at the Delhi School of Economics (DSE). Although initially denied by DU, it emerged that teachers at DSE authorised the creation of course packs and assigned this task to RAPS which photocopied pages and chapters from the plaintiff-publishers' publications, compiled them, and supplied them to students pursuant to the license agreement at 40 paisa per page. The excerpted chapters were part of the syllabus prescribed by DU.

The infringement suit first came up before the DHC on August 14, 2012. The court appointed a Commissioner to visit the premises of RAPS without prior notice and to make an inventory of all the infringing and pirated copies plaintiffs' publication found and to seize and seal the same. On October 17, 2012, Justice Kailash Gambhir sitting at the DHC granted an interim injunction against RAPS restraining them from making or selling course packs.[154]

Following these events, a mobilisation of students, academics and civil society converged to challenge the publishers' suit. Students organised protest rallies. The Association of Students for Equitable Access to Knowledge (ASEAK), an association organised by students of DU, filed an application in 2013 to be impleaded as a necessary party. On March 1, 2013, ASEAK was impleaded as defendant No. 3. Similarly, the Society for Promoting Educational Access and Knowledge (SPEAK), a society of academics from reputed academic institutions in India, filed an impleadment application and was so impleaded as defendant No. 4 on April 12, 2013. Furthermore, a change.org online petition was started by academics with over 1300 supporters.[155]

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[154] *The Chancellor, Masters and Scholars of the University of Oxford and Ors. v. Rameshwari Photocopy Services and Ors*. CS(OS) 2439/2012. http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=212892&yr=2012

[155] 'Appeal to Publishers to Withdraw Suit Filed Against Delhi University' *Change.org*, https://www.change.org/p/academics-appeal-to-publishers-to-withdraw-suit-filed-against-delhi-university

On September 16, 2016 Justice Rajiv Sahai Endlaw sitting as a single judge before the DHC delivered the judgment of the court. According to Justice Endlaw, the issue before the court was one of law that required an adjudication "whether the making of course packs as the defendant No. 2 university is making amounts to infringement of copyright." So the factual issue of whether the percentage of photocopied copyright content constituting the course packs, as argued by both defendants and plaintiffs, was substantial so as to fall outside of fair use protection was considered relevant to the adjudication of the suit. The learned judge held that the actions of the defendants do not amount to copyright infringement by virtue of s.52(1)(i) of the Indian Copyright Act which provides that the reproduction of any work by a teacher or a pupil in the course of instruction does not constitute copyright infringement.[156] In a big win for students and civil society, the court denied the injunction sought by the plaintiffs. The plaintiffs appealed this decision before the Division Bench (composed of two judges) of DHC and on December 9, 2016, Justice Pradeep Nandrajog delivered the judgment of the court. Prior to the judgment, intervention applications by the Association of Publishers in India, the Federation of Indian Publishers, and the Indian Reprographic Rights Organisation (IRRO) were filed supporting the appellants before the DHC and on November 8, 2016, the application was allowed.

In a blow to the appellants and interveners, the Division Bench of the DHC denied the grant of interim injunction against the respondents holding that the impugned action of the respondents—the making and distribution of course packs to students—does not constitute copyright infringement provided the inclusion of the copyrighted work in the course pack was justified by the purpose of educational instruction. It did not matter the quantity photocopied as long as the course pack was justified by this purpose of educational instruction. In reaching this conclusion, the court per Justice Nandrajog, penning the judgment of the court, affirmed the determination of the Single Judge that the adjudication of the suit was contingent on the interpretation of s.52(1)(i) and further elaborated that the issue for determination is "whether the right of reproduction of any work by a teacher or a pupil in the course of instruction is absolute and not hedged with the condition of it being a fair use."[157] The bone of contention was whether a general principle of fair use or the specific

[156] Indian Copyright Act 1957. http://www.copyright.gov.in/Documents/CopyrightRules1957.pdf
[157] *The Chancellor, Masters and Scholars of the University of Oxford and Ors. v. Rameshwari Photocopy Services and Ors*. RFA(OS) No. 81/2016 at para.17

four fair use factors as applied in the US should circumscribe the limits of s.52(1)(i). The appellants argued that fair use principle as applied in the US and other jurisdictions was applicable to the interpretation of s.52(1)(i) but the court disagreed, stating that "the general principle of fair use would be required to be read into the clause and not the four principles on which fair use is determined in jurisdictions abroad and especially in the United States of America…"[158] This general principle of fair use read into s.52(1)(i) of the Indian Copyright Act would be "determined on the touchstone of 'extent justified by the purpose.'"[159] Put differently, "the utilization of copyrighted work would be a fair use to the extent justified for purpose of education. It would have no concern with the extent of the material used, both qualitative and quantitative."[160]

As a matter law, the court therefore denied the grant of interim injunction on the grounds stated above but remanded the suit to the Single Judge to determine the factual issue of whether the inclusion of copyrighted works in the course pack was justified by the purpose of instructional use by the teacher to the class.

On March 9, 2017, the publishers issued a joint statement to withdraw as plaintiffs and not to appeal the judgment of the DHC Division Bench to the SC of India.

d. Commentary: Paving the Way for A2E

Whichever way one chooses to unpack or characterise the Brazilian and Indian case, it is impossible to deny that central to the cases are the concerns of A2K and A2E. And they show how copyright law is central to these concerns. In both cases, the contestation revolved around the permissible extent of copying allowed under each country's copyright law. For Brazil, it was Art 46(II) of the Brazilian Copyright law; and in India, s.52 of the Indian Copyright Act.

Although there are significant parallels between these two cases, the India case in particular represents a watershed in the struggle for the governance of knowledge

[158] *Ibid*. at para 31
[159] *Ibid*. at 33
[160] Ibid.

use in higher institutions, because it pits globally recognised publishers against DC students and also brings the case up for determination before the court. Also, the outcome of the India case is partly as a result of a clear effort to integrate the right to education with copyright law. Although there were echoes of A2E concerns in the Copy Book is Right movement in Brazil, the India case differed in the sense that the court served as a platform to articulate these concerns coherently and integrate them with copyright law.

Before Justice Endlaw at the Single Bench, counsels for the defendants incorporated the issue of education in their arguments and specifically the right to education under the Indian Constitution. Broadly, they drew attention to the socio-economic inequalities in Indian society and its impact on A2E. Particularly, they showed that the purchasing power of Indian students is weak given the existing socio-economic conditions and, consequently, the difficulty of placing unrealistic expectations on students to purchase copies of textbooks that are beyond their means. Counsel for defendant no.1 "drew attention to Articles 39(f) and 41 of the Constitution of India constituting giving of opportunities and facilities to children to develop in a healthy manner, protected from exploitation and right to education as Directive Principles of State Policy…" Counsel for defendant no. 2 relatedly argued "that the question, though relating to copyright law, has to be judged in the light of the right to access to knowledge", that "the right to education finds mention in the Constitution not only as a Fundamental Right but also as a Directive Principle of State Policy" and "that A2E is a cherished constitutional value and includes within it access for students to book library and right to research and to use all materials available."[161] These arguments—clear attempts to integrate copyright law with the right to education—clearly informed the court's judgment as Justice Nandrajog, writing the decision of the DHC Division Bench, articulated:

> The importance of education lies in the fact that education alone is the foundation on which a progressive and prosperous society can be built... So fundamental is education to a society – it warrants the promotion of equitable access to knowledge to all segments of the society, irrespective of their caste, creed and financial position. *Of course, the more indigent the learner, the greater the responsibility to ensure equitable access.*[162]

[161] *The Chancellor, Masters and Scholars of the University of Oxford and Ors. v. Rameshwari Photocopy Services and Ors*. CS(OS) 2439/2012 at 18.
[162] *Chancellors and Ors*, *Supra*. *n*.157, at para. 30. Emphasis added

One aspect of the court's judgment—which dovetails with the responsibility to ensure A2E—is its understanding of the relationship between s.52 and s.51. The latter section under Indian Copyright Act confers exclusive rights on copyright owners and the former section is what is normally referred to under a copyright regime as "exceptions" because it permits the doing of an act that but for the section would constitute a copyright infringement.[163] The plaintiffs argued that s.52 is an exception to the rights conferred by s.51 and should be interpreted narrowly. The court, per Judge Endlaw, disagreed stating:

> I thus agree with the contention of the senior counsel for the defendant no.2 University that the rights of persons mentioned in Section 52 are to be interpreted following the same rules as the rights of a copyright owner and are not to be read narrowly or strictly or so as not to reduce the ambit of Section 51...[164]

The Division Bench agreed with the Single judge. S.52 should be understood as rights and interpreted accordingly, and not just as exceptions to the exclusive rights of copyright owners. The implication of this is clear: exclusive rights of copyright owners and rights of users are equally important, and as such neither should be given any preference. The practice of treating rights of users as concessions or simply exceptions does not fit in with the objective of copyright which Justice Endlaw noted "seeks to maintain a balance between the interest of the owner of copyright in protecting his works on the one hand and interest of the public to have access to the works, on the other."[165]

As mentioned above, there are similarities between the Indian and Brazilian case. Notably are the publishers' hackneyed tactics of exaggerating economic losses due to supposed copyright infringement. In Brazil, the ABDR had estimated a USD400million economic loss due to the rampant photocopying by students. The same argument was utilised by the publishers in India. They asserted that the course packs constituted lost sales and therefore huge economic losses to the publishing industry. The Division Bench rejected this argument even suggesting that improved

[163] On the difference between "exceptions" and "limitations" in copyright law, see J.C. Ginsburg, 'Copyright' in Dreyfuss & Pila (eds.) *Oxford Handbook of Intellectual Property* (OUP, 2018); also Sam Ricketson, 'The Boundaries of Copyright: Its Proper Limitations and Exceptions: International Conventions and Treaties' (1999) *Intellectual Property Quarterly* 56 at 59.
[164] Chancellors, Masters and Ors, *Supra.* n.153 at para. 41.
[165] Chancellors and Ors, *Supra*. n.157, at para. 24

education could in the long run expand the market for copyright works:

> In the context of the argument of an adverse impact or the likelihood of the same on the market of the copyrighted work in question, taking the example of a literacy programme, assuming the whole of the copyrighted material is used to spread literacy, one cannot think of any adverse impact on the market of the copyrighted work for the simple reason the recipient of the literacy programme is not a potential customer. Similar would be the situation of a student/pupil, who would not be a potential customer to buy thirty or forty reference books relevant to the subject at hand. For purposes of reference she would visit the library. It could well be argued that by producing more citizens with greater literacy skills and earning potential, in the long run, improved education expands the market for copyrighted materials.[166]

It is interesting to note that the plaintiff publishers had stated before the Single and Division Benches of the court that the objective was not to compel students into buying copies of their copyrighted works but rather to direct DU to obtain licenses from the IRRO in order to reproduce extracts of their copyrighted works. In Brazil however, the ABDR insisted that students purchase the textbooks at 40% discount. One reason why the publishers in the Indian case opted for the strategy of requiring the negotiation of licenses with the IRRO—instead of insisting on the purchase of textbooks even at a discounted price— would be to paint a picture of an empathetic publisher who understands the economic realities of the Indian society. But it is also likely that the publishers opted for this approach because it would fit well with the neo-classical Law&Econ theory of copyright which privileges market as an efficient mechanism for determining the production and consumption of creative works. As discussed in previous chapters, the preference for markets and copyright as property rights are fundamentals of this theory.[167] According to this theory, the use of a copyrighted work without the permission of the copyright owner should only be considered fair use if there is market failure.[168] This market failure could manifest in the form of transaction costs in negotiating licenses or where collecting societies such as IRRO do not exist. In the absence of market failure, licenses for the use of copyrighted works should be negotiated even if the impugned act constitutes a fair

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[166] *Ibid*. at para. 36

[167] See chapter 2. Also, Stan Liebowitz, 'The Case for Copyright' (2017) 24 *Geo. Mason. L. Rev*. 907; Jeremy de Beer, *Supra.* n.135.

[168] W.J. Gordon, *Supra*. n.131; Ricketson, *Supra*. n.155 at 60 [Stating that "free use provisions should only arise where the benefit of allowing the use in question outweighs the losses to the right owner and where transactions costs would otherwise prevent a negotiated license." To be fair to Ricketson, he admits that economic considerations should not be the sole concern in determining exceptions to copyright but considers it to be a "starting point of analysis."]

use. Given that a collecting society, IRRO, exists, the plaintiff publishers were likely hoping that the court will opt for a licensing regime. This is evident from their arguments before the Single judge, submitting "(y) that the defendants on the one hand are infringing copyright of the plaintiffs and on the other hand also depriving the plaintiffs of the IRRO licence fee; (z) that once an efficient mechanism is in place to deal with the situation as has arisen, the same should be adopted."[169] Justice Endlaw nipped these arguments in the bud. According to the learned judge, the question of directing DU to approach IRRO for a reproduction license "would arise only upon finding that what the defendant No.2 University is doing is not covered by Section 52 of the Act and which would make it an infringement of the copyright and to avoid which it can go before IRRO."[170]

B. Copyright and A2E: The Nigerian Understanding

This section considers the relevance and implications of copyright law for A2E in Nigerian higher institutions.

The problem of access to quality education in Nigeria seems to revolve around poor funding, infrastructural development, political will, and provision of skilled teachers. Of course, these concerns are pressing and their resolution indispensable to the realisation of quality education in Nigeria. But even in developed countries where higher institutions have huge endowments, these institutions are still not able to afford the price hikes of journal publishers.[171] Very few Nigerian universities can afford subscriptions to the major academic databases. Nor does access to qualified teachers diminish the importance of ALM. As we have seen in the cases of Brazil and India, these concerns are not the only ones that matter to the facilitation of A2E in higher institutions. In particular, copyright law plays a huge role in determining ALM and consequently A2E.

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[169] Chancellors and Ors, *Supra*. n.153 at para. 14

[170] *Ibid*. at para. 23

[171] As of 2013, Harvard University had an endowment of USD32.3Billion which is by far larger than some country's GDP. Vedder & Denhart, '22 Richest Schools in America' (30 July 2014) *Forbes*. https://www.forbes.com/sites/ccap/2014/07/30/22-richest-schools-in-america/#3deb737a6982. Despite the endowment funds, Harvard University has stated that it cannot afford the prices of journal publishers. Ian Sample, 'Harvard University Says It Can't Afford Journal Publishers' Prices' (24 April 2012) *The Guardian*. https://www.theguardian.com/science/2012/apr/24/harvard-university-journal-publishers-prices

In Nigeria, it is not obvious from a reading of academic commentaries or policy documents on copyright that this area of law has an impact on A2E. Or that one of the key goals of copyright law from a utilitarian perspective is to ensure access to creative works in order to maximise social welfare. Sadly, this aspect of copyright theory is brushed aside in many copyright analyses.

This is not surprising given that the focus of copyright debates in Nigeria has been on the maximisation of creators' returns and the enforcement of copyright laws. Copyright is simply viewed as a property right to facilitate the working of a market economy. Here, the efficiency theory of copyright is mixed with a watered-down version of the reward theory of copyright to provide a departure point for policy prescriptions and critique of existing practices. Additionally, the interface between copyright and broader development concerns is yet to be explored by the judiciary.

I. Copyright, Piracy and Higher Institutions in Nigeria

a. Literature Review on Copyright and Higher Institutions: Students as Pirates?

As in Brazil and India, the extent of copying of copyrighted content carried out in Nigerian universities both by students and academic staff is substantial. In a national survey carried out by REPRONIG in 2004 titled "Photocopying in Nigeria's Tertiary Institutions" concerning the extent of copying in higher institutions, the rights organisation estimated that the average annual copy volume per student is 1,516 A4 copy pages.[172] Out of the 1,516 copy pages per student, 1,239 is copyright protected content. So, on average 81.7% of the photocopied materials by each student is copyright protected. This however does not mean that 81.7% of the photocopied materials is infringing—a point REPRONIG failed to make clear—since certain uses are allowed under Nigerian copyright law without the permission of the copyright owner. According to the study, the most photocopied materials are textbooks constituting 52.8% of the source materials with journals coming second at 5.9%.

[172] Report on file with author. The data however may not be objective as the survey is carried out by an authors' rights organisation.

Non-fiction accounts for the type of material most photocopied at 83.3%. Clearly, the data shows that the photocopied materials are for advancement of education otherwise fiction and other sources would have constituted a significant proportion of photocopied materials. The study also finds that 51% of the photocopied materials originate from Nigeria while more than 30% are foreign.

There are other more recent studies that investigate the copying practices in Nigerian higher institutions. These studies have four things in common. First, they find a substantial amount of copying of copyrighted content amongst university students and academic staffs. Second, the studies concur that the reasons for the rampant copying of copyrighted content in higher institutions are mainly due to the high cost of textbooks and poor economic conditions which make students unable to afford these books. Third, the solution they proffer surprisingly is to intensify copyright enforcement in higher institutions. The reason for this is that these studies examine the issues from the aspect of legal normativity i.e. whether the practices of students conform to copyright law, and not as a crisis of A2E issue. Fourth, the studies rarely engage in any analysis regarding whether existing copyright law is favourable to A2K or A2E. An example is the study conducted by Rose Okiy whose purpose is to "investigate photocopying practices in tertiary institutions in Nigeria as they relate to the existing copyright law and suggestions to regulate photocopying practices so that the infringement of copyright laws will be minimized".[173] She acknowledges that "[t]he Nigerian Book Sector study of 1990 revealed that only 5 percent of undergraduates can afford to purchase their own copies of textbooks even if these are available."[174] And further confirms that "libraries are …battling with how to make their scanty collections available to their ever increasing users." Notwithstanding these observations and the crucial point she recognises that books have a "significant influence in moulding people", she nevertheless concludes:

> The study has revealed that the copyright law is being infringed by students and photocopier operators, a development which has been attributed largely to the dearth of books in the Nigerian book market and the institutional libraries. It is important that this trend be reversed in order that Nigerian authors can be encouraged to devote their time and energies to writing and publishing more books for the Nigerian market. Libraries have a very important role to play in

[173] R.B. Okiy, 'Photocopying and the Awareness of Copyright in Tertiary Institutions in Nigeria' (2005) 33(1) *Interlending and Document Supply* 49
[174] *Ibid*.

adequately informing library users about copyright issues.[175]

This is a very startling conclusion for various reasons. The author seems to say that copyright infringement is carried out due to lack of books in libraries and the Nigerian book market but also that there will be adequate supply of books if copyright infringement is curtailed. The problem here is that copyright infringement is both an effect and a cause. In the first place, the effect of lack of books in the book market and libraries is copyright infringement. In the second place, there will be plentiful supply of books if the copyright infringement practices of students are reversed. The point is that it is hard to make sense of copyright infringement being the cause of something of which it is also an effect, unless perhaps the author is talking of a perpetuating cycle i.e. scarcity of books causes copyright infringement and this in turn perpetuates the scarcity of books. There is one way to understand this argument which will be discussed further below. But briefly the argument would seem to be based on the view that copyright infringement constitutes lost sales, and this would deter authors and book publishers from satisfying the demand of the book market. This conclusion is hard to arrive at given the author's acknowledgment of the Nigerian Book Sector study of 1990 that revealed only a fraction of undergraduates can afford to purchase their own copies of textbooks even if these are available. And the situation has not changed given the level of poverty in Nigeria.[176] In any event, the author's recommendation of increasing copyright enforcement and awareness does not address the key issues she raises, and this is partly due to how the narrative is packaged as one concerning the flagrant abuse of copyright rather than as a crisis of A2E. Although she states that "government should provide funds for university libraries to procure more books", there is no inquiry into how copyright can facilitate A2E other than the recommendation that increasing copyright enforcement and awareness will solve the scarcity of books situation.

Similar reasonings are found in other articles dealing with copyright and higher institutions in Nigeria. Aboyade *et.al.* in their article in which they seek to "find out the

[175] *Ibid* at 52.

[176] It is safe to assume that the situation has remained the same or not improved significantly over the years. The Book Sector study quoted by Okiy which confirms that only 5% of students can only afford to purchase their copy of books is based on the purchasing power of students. If economic indicators are any guide, then the situation is not any better because the total number of people in extreme poverty in 2020 since 1990 has doubled. In addition, GDP per capita in 1990, based on constant US$ 2010, was 1,482 USD whereas in 2019 it only improved slightly to 2,386 USD. World Bank Data, 'GDP Per capita (constant 2010 US$)-Nigeria' *https://data.worldbank.org/indicator/NY.GDP.PCAP.KD?end=2019&locations=NG&start=1990&view=chart*

various reasons why students and teachers engage in photocopy of books instead of purchasing the original copy"[177], find that:

> The possible reasons for the abuse may be the prohibitive cost of books which appears not affordable by an average Nigerian student. The activities of pirates of intellectual materials discourage the local production of books and other information materials. As such, an average Nigerian student therefore relies heavily on photocopy of published materials which is cheaper and within their reach. In addition, shortage of books especially for the higher institutions of learning in Nigeria is another potent factor that encourages photocopy of published works. As a result, books meant for the higher institutions of learning are imported which make their procurement a herculean task.[178]

It would seem that the authors have identified three reasons for the photocopying of books by students: prohibitive cost of books, piracy, and shortage of books for higher institutions. There is no attempt to elaborate on the specific reasons and it is not clear whether they are linked or separate. It would also seem that the authors use "pirates" loosely to refer to students making copies to advance their education. The authors then proceed to conclude:

> Copyright abuse robs the authors of intellectual works of both moral and economic benefits. The activities of pirates of published works have continued to summersault the efforts of both the Nigerian Copyright Commission and that of the copyright owners. The unguarded photocopy of books in higher institutions of learning in Nigeria also constitutes an abuse of the concept of fair use. There should be concerted efforts by all the stakeholders… at stemming the unwholesome tide of the activities of copyright offenders. It is believed that this will encourage more of intellectual creativities thus helping to better the lots of an average Nigerian.

This conclusion is a puzzle. These students are not pirates. They make copies because they *cannot* afford to buy these books even if they were available. The solution is not to ramp up copyright enforcement in the hope of coercing them to buy books because they *cannot* pay the price of these books. In a DC like Nigeria, copyright law should work for both students and creators taking into account the economic situation.

[177] W.A. Aboyade, M.A. Aboyade & B.A. Ajala, 'Copyright Infringement and Photocopying Services Among University Students and Teachers in Nigeria' (2015) 8(1) *International Journal of Arts & Sciences* 463
[178] *Ibid* at 471

b. Piracy as Lost Sales: Analysis of a Contested Narrative

As we have seen, it is always the case that publishers, rights organisations, and authors that push for increased copyright enforcement in higher institutions support their position with the view that an unauthorised photocopy is a lost sale i.e. the market impact of making illegal copies of copyrighted works is the lost sales that would have been captured by publishers/authors but for the illegal copies. These stakeholders on this basis claim enormous losses. As noted above, the plaintiff publishers in the DU photocopy case used this "lost sales" thesis, but this argument was dismissed by the court. In the Brazilian case, ABDR estimated that publishers lost USD400 million. Of course, this tactic has been even more aggressively employed in other copyright industries by developed countries to ratchet up copyright enforcement. The Motion Picture Association of America (MPAA) and Recording Industry Association of America (RIAA) have consistently employed this tactic to exaggerate economic losses in the film and recording industries respectively. They have also employed it as a theory of loss in order to compel courts to award significant costs against copyright infringers.

In *United States v. Daniel Dove,*[179] a criminal copyright infringement case, the court was tasked with determining restitution after the defendant, Daniel Dove, a high-level member of an Internet piracy group known as the "Elite Torrents" organisation, was found guilty by a jury of participating in the illegal reproduction and distribution of copyrighted movies, software programmes, and video games. In order to require the defendant to pay restitution to the victims, the actual losses sustained by the victims had to be shown. So, it was up to the victims to prove actual losses for restitution purposes. RIAA, one of the victims, provided proof that 183 sound recordings were transferred through Dove's server a combined total of 17,281 times. Using the analogue world as an analogy, this would be equivalent to saying that Daniel Dove operated or principally participated in a shop that allowed members to make 17,281 combined total pirated copies of 183 sound recordings. According to RIAA, the economic loss incurred is the average wholesale price of a digital album in 2005 as at the time the act was carried out ($7.22) multiplied by 17,281 i.e. $124,768.82. In other words, each illegal download of a sound recording is a lost sale. This theory of

[179] Case No. 2:07CR00015 (W.D. Va. Aug. 25, 2008)

loss was dismissed by the learned judge and as such did not require the defendants to pay restitution. According to the learned judge, "although it is true that someone who copies a digital version of a sound recording has little incentive to purchase the recording through legitimate means, it does not necessarily follow that the downloader would have made a legitimate purchase if the recording had not been available for free."[180]

Recently, the lost sales thesis has also been debunked in a study commissioned by the European Commission regarding the impact of online infringements on legitimate purchases of copyrighted work in the EU.[181]

In short, there is little evidence for the lost sales theory even for developed countries where purchasing power is strong. Neither is there evidential support for the related view that piracy has an effect on the supply of creative works or, as the plaintiff publishers in the DU case suggested, will "sound a death knell for the publishing business." For example supply of recorded music continues to increase despite the ubiquity of file sharing sites.[182] In a 2016 article, Oberholzer-Gee and Strumpf still maintain their conclusion after a decade concerning the effect of online piracy on music sales that "[w]hile there are many explanations for the sharp changes in the recorded music industry over the last twenty years, our sense is that file sharing is but one small facet."[183] Although the focus of these studies is on music, there is nothing to suggest that a different conclusion would be reached for textbooks. In fact, given the different models of production for textbooks and music, it is very unlikely that the unlawful photocopying of textbooks will affect supply. Music is individually and privately financed whereas faculty funding and grants support the production of textbooks. Nor will the unlawful photocopying of academic articles negatively affect the supply side given their costs of production and the different motivations that

[180] *Ibid*. at para 14

[181] Martin van der Ende et. al., Estimating Displacement Rates of Copyrighted Content in the EU: Final *Report* (Ecorys, 2017) https://publications.europa.eu/en/publication-detail/-/publication/59ea4ec1-a19b-11e7-b92d-01aa75ed71a1# ["In general, the results do not show robust statistical evidence of displacement of sales by online copyright infringements." This is so "*despite the carefully developed questionnaire and the application of econometric analysis*." Emphasis added]

[182] See Joel Waldfogel, 'Music Piracy and Its Effects on Demand, Supply, Welfare' (2012) 12 *Innovation Policy and the Economy* 91; F. Oberholzer-Gee & K. Strumpf, 'The Effect of File Sharing on Record Sales: An Empirical Analysis' (2007) 115 *J. Polit. Econ* 1

[183] Oberholzer-Gee & Strump, 'The Effect of File Sharing on Record Sales, Revisited' (2016) 37 *Information Economics and Policy* 61

underlie their production.[184] If anything, it is likely that the popularity that follows the sharing of academic articles may prompt academics to write more articles.

Some studies however claim to confirm the displacement of legal sales due to copyright infringement. There are three pertinent things to note about these studies. To be clear, these studies do not lend credibility to the lost sales theory i.e. the claim is not that for every illegal download a legal sale is displaced. Rather, the conclusion is that *some displacement* of legal sales can be attributed to copyright infringement. Another thing to note is that virtually all of these studies have as their focus developed countries. This is important. Piracy is correlated with lack of purchasing power. The obvious implication is that the substitutive/displacement impact of copyright infringement on legal sales is higher for developed countries given that due to their purchasing power residents in developed countries *can afford* to make legal purchases but for the availability of pirated content. Lastly, there is always some statistical uncertainty in these studies that claim to establish a causal link between copyright infringement and displacement of legal sales. A recent example is the study carried out by Institute for Information Law, University of Amsterdam and Ecorys, an economic research and consulting company.[185] One of the three main purposes of this study is to "assess the effect of online piracy on consumption from legal sources." It is not clear though why the study is titled "Global Online Piracy Study" because the countries studied are selected from three continents and almost 80% of these countries are developed countries: Europe (France, Germany, Netherlands, Poland, Spain, Sweden, and United Kingdom); Americas (Brazil and Canada); Asia (Hong Kong, Indonesia, Japan, and Thailand). The creative works which form the subject of the study are music, film, series, books and games. Regarding the displacement effect of online copyright infringement on books, the study finds that "the results are contrary to those for music and audio-visual in the sense that large statistical significant displacement rates are found for books bought in print (or as audio books on a physical carrier) and borrowed from the library." But it quickly cautions that "these displacement rates may be overstated by capturing the effect of some people who have shifted from consuming print books to digital and

[184] Waldfogel, *Supra.* n.182.
[185] J.P. Poort *et al*., *Global Online Piracy Study* (IVIR/Ecorys, 2018) https://www.ivir.nl/publicaties/download/Global-Online-Piracy-Study.pdf

others who have not."[186] Apart from this specific caveat, it also adds a general one that the "[displacement] estimations are surrounded with substantial uncertainty."[187]

Amidst these conflicting conclusions, one thing is certain. For a DC like Nigeria, nothing could be so further away from the truth as the lost sales theory. The peculiarities of the Nigerian situation mean that the lost sales theory is anything but reality, and it cannot be seriously maintained that the unlawful photocopying of textbooks in Nigerian higher institutions has any significant impact on legal sales. As Waldfogel notes, "Piracy reduces sales inasmuch as it allows consumers who value products above their price and *who would previously have purchased* to obtain products without payment. But to the extent that low-valuation consumers engage in piracy, it would not reduce sales and would instead only turn deadweight loss into consumer surplus."[188] This is important. The valuations of many Nigerian students for available textbooks are significantly below the market price and as such would not have previously purchased the textbooks. The same view is shared by Branco in the Brazilian context:

> If we consider that Brazil is a country with a shamefully high percentage of people living in poverty and below the poverty line, should we expect students from poorer families to pay for the books that will guarantee them their education, just like any other student? It needs to be considered that in the majority of cases, poor students are excluded from the market because they simply do not have the money to purchase the immaterial goods they need for their education. There is, therefore, no loss to be incurred by the editor, since if it were not for the possibility of making a copy, the students would not have any other means of accessing these works.[189]

In fact, the peculiarities of the Nigerian situation which makes it very untenable that an unlawful photocopy displaces a legal purchase, mean that the photocopying of educational materials in Nigerian higher institutions is welfare-enhancing.

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[186] *Ibid*. at pg.8
[187] Ibid
[188] Waldfogel, n.182 at 95 [Emphasis original]
[189] Branco, *Supra*. n.151 at 125.

4. Conclusion: Challenges on Integrating Copyright with the Constitutional Right to Education?

As we have seen, many DCs in their Constitutions provide for A2E either as a fundamental right or part of DPSP. This importance accorded to education in national constitutions is a firm recognition of its indispensable value for national and human development. It attests to the fact that education is correlated with many positive outcomes. The constitutionalisation of the right to education is also reinforced by, and reinforces, international human rights and global development efforts in pushing the agenda for universal education forward. This concern for education as expressed is particularly pressing for DCs as they face numerous challenges concerning access to quality education.

One of these numerous challenges is ALM. There are two dimensions to this problem. One is resource based and the other legal. The first has to do with the resource limitations of libraries and the weak purchasing power of university students in DCs to acquire learning materials. The Nigerian situation, which is not any different from many DCs, shows that libraries are significantly under-resourced and the fee-based available titles in these libraries are not sufficient for research and learning needs. Students on the other hand cannot afford to purchase textbooks. On the legal dimension of this issue, the concerns centre on the conditions of access to and use of existing materials. The DU case in India and the Brazilian case both capture and map out these institutional and legal determinants of ALM in higher institutions. As we have seen, at the centre is copyright law. The exclusive rights guaranteed by this regime, the proprietary and market justifications predominantly underpinning the regime, and the litany of misleading arguments and tropes legitimising the intensification of enforcement all ensure that existing L&Es, which are already narrow, are further interpreted narrowly to suit private interests. Increasingly, copyright law continues to pander to private interests and undermine development goals such as A2E. But there is good news.

The importance of the Brazilian and the Indian photocopy cases discussed above is less about the outcome than the strategy employed by knowledge seekers to counter the claims of knowledge dealers. The parties affected by copyright restrictions on

photocopying in these cases understood that their petition for a liberal interpretation and understanding of users rights will hardly be answered if copyright is not understood in its wider context. Accordingly, the debates and issues at stake were pushed beyond the boundaries of copyright law. By removing the contested issues solely from the turf of copyright law and framing it as A2K and A2E, copyright law is forced to interact and integrate with other areas of law. The implication is that the issues at stake are removed from the narrow confines of copyright law and thereby interrogated in their broader context. Integrating the constitutional right to education with copyright law accomplishes this task and more importantly aligns copyright law with its public interest objectives. But there are challenges in integrating copyright law with the constitutional right to education which I will outline briefly.

The first set of challenges is in regards to the nature and content of the right to education expressed in many DCs Constitutions. As discussed above, there is a noticeable pattern in the Constitutions of some DCs of relegating the right to education to the DPSP which are not justiciable mainly because they require resources and are classified as ESC rights. The constitutional right to education needs to be justiciable in order to be meaningfully integrated with copyright law. This non-justiciability effect poses problems for a claimant who calls upon the court to determine if a law affects her enjoyment of the constitutional right to education. If a court has no jurisdiction to determine if the right has been infringed, then it will be hampered in adjudicating issues affecting the right. This challenge does not exist for the countries examined (India, South Africa, and Brazil), and seemingly so for Nigeria, as the right to education now enjoys the status of a fundamental right. But there is the perception that ESC rights are somehow inferior to CP rights and thereby non-justiciable. As the Indian SC jurisprudence shows, however, both rights are supplementary and complementary, and should be equally protected. In fact, lack of education is life-threatening.

Another challenge concerns the scope of the right to education. In all the countries examined above, the constitutionally guaranteed right is the right to basic education. The State is under obligation to provide access to quality education at this level and an aggrieved party may compel the State before the courts to carry out its obligation. Beyond the basic level, the courts will defer to the State. But, as discussed, in the

countries discussed above—Brazil, India, and Nigeria— the issue of access to text books is of greater concern in higher institutions than at the basic level. And there is no reason to suggest it is any different for other DCs. If the constitutionally guaranteed right to education extends no more than at the basic level and the concerns which implicate copyright are more prevalent in higher institutions, the challenge is whether this limitation would prevent the effect the integration would have at the higher level of education. This is unlikely to be so. The purpose of the integration is to enable copyright respond to developmental goals of A2E and not for the state to commit resources in the provisioning of higher education. In fact, if the reason why the constitutional right to education is limited to the basic level is due to limited resources then that is the more compelling reason why the integration should have maximum impact at the higher institution level because it does not require the commitment of resources for copyright to respond to concerns of A2E. Indeed, this supposed limitation did not prevent counsels for the respondents in the India photocopying case from utilising the constitutional right to education even though as we have seen in India the right guaranteed is the right to a basic education. Nor did it change the court's view on the importance of education and the need to ensure equitable access.

The final issue is *whether* the constitutional right to education can be integrated with copyright law. This concerns the nature of the obligation conferred by the constitutional right to education and how it may interact—or the nature of the relationship—with rights and obligations conferred by copyright law. Both areas of law are different. Copyright is private law with obligations and rights created between individuals; whereas, constitutional law is public law which deals with the relations between private individuals and the State. The constitutional right to education imposes an obligation on States with private individuals as right bearers. The question then is whether it is possible to integrate the two as the constitutional right to education and copyright law impose obligations on states and individuals respectively. The issue might be stated differently in the form of an argument: the constitutional right to education imposes an obligation upon States which may be fulfilled by increased state funding and provision of text books. Copyright law has no role in this constitutional assignment as requiring it to assist in this assignment would

be the State passing the buck or shying away from its responsibility and encroaching on the property rights of private individuals to achieve a societal objective.

There are several problems with this understanding. First, there are other ways the State can ensure its constitutional obligation on the right to education is fulfilled other than funding. One way is the enactment or amendment of existing laws that aligns with or facilitates the constitutional right to education. For example, the recently enacted Brazilian law No. 13,696 which institutes the NPRW facilitates the constitutional right to education by promoting access to reading materials. Copyright law can be amended to facilitate these goals. Secondly, the State being under obligation to fulfil the enjoyment of the constitutional right to education does not prevent it from enjoining private citizens in carrying out acts or exercising rights that may impinge on the enjoyment of the right to education. Put differently, if the state is under obligation to ensure the enjoyment of the constitutional right to education, which involves ALM, it may carry out this obligation by preventing the exercise or conferral of rights on private citizens, through its organs, that hinder ALM and thereby A2E. Copyright is one such law and there is no reason why it cannot be integrated with the constitutional right to education. Lastly, this understanding of copyright law's limited role is premised on the public/private distinction. The demarcation between public law and private law follows from the public/private divide in liberal thought. In classical legal thought, the public/private distinction serves as labels to demarcate spheres of activities that may legitimately be subject to government regulation or intervention from those that are presumptively outside the bounds of such intervention.[190] Market and family are the two main examples of the latter, the private sphere. This demarcation of the private sphere from the public arose out of the idea that governments' encroachment on the rights of the individual should be restrained.[191] On the basis of this distinction, "a clear separation between constitutional, criminal and regulatory law—public law—and the law of private transactions—torts, contracts, property, and commercial law" was created.[192] Horwitz states that this separation between public law and private law i.e. the public/private

[190] See R.H. Mnookin, 'The Public/Private Dichotomy: Political Disagreement and Academic Repudiation' (1982) 130 *U. Pa. L. Rev.* 1430; Hila Shamir, 'The Public/Private Distinction Now: The Challenges of Privatization and of the Regulatory State' (2014) 15 *Theoretical Inquiries in Law* 1 [Summarising the public/private distinction]. For the history of the public/private distinction, see M.J. Horwitz, 'The History of the Public/Private Distinction' (1982) 130 *U. Pa. L. Rev.* 1423.
[191] Hortwiz, *Ibid.* at 1423
[192] *Ibid* at 1424

distinction in the arena of law, was brought about by "[t]he emergence of the market as a central legitimating institution." This is important. Private law is seen as merely facilitative of the voluntary transactions of individuals in order to achieve the efficiency goals of the market. The role of the state is therefore facilitative and not to regulate private transactions.

The implication of the public/private distinction on the integration of the constitutional right to education with copyright law is clear: copyright law is a genus of private law which confers exclusive rights in the form of property rights to rightsholders, the purpose of which is to facilitate voluntary transactions in the market place for creative works; and the role of the state is to facilitate these transactions through the guarantee and strengthening of these property rights.

This may be true on the logic of the public/private distinction but it is the case that this distinction has come under increasing attack.[193] Many have pointed that it is incoherent, useless as an analytical tool, that "[t]he distinction is dead, but it rules us from the grave"[194], and have even stated that *"[t]here is no public/private distinction*."[195] The general conclusion is that the public/private distinction has lost its ability to distinguish.[196] Even if we insist that the public/private distinction exists, the key question still remains: is copyright a private law? This is by no means definite even though I have suggested above for the sake of argument that it is private law. Patterson and Judge Birch, as he then was, have argued that copyright law is public law.[197] According to them, the impact rather than source of a law should determine whether it is public or private.[198]

Accordingly, they argue that "copyright law, both in the form of statutory law and private pronouncements, should be treated as public law because of its impacts on the lives of all citizens."[199] To label it as private law is to deny that it has distributive

[193] Symposium, 'The Public/Private Distinction' (1982) 130 *U. Pa. L. Rev.* 1289; Symposium, 'The Boundaries of Public Law' (2013) 11 *Int. J. Constitutional Law* 125; Symposium, 'Public/Private Beyond Distinctions?' (2013) 15 *Theoretical Inquiries Law* 1; P.M. Schoenhard, 'A Three-Dimensional Approach to the Public-Private Distinction' (2008) *Utah. L. Rev.* 635

[194] Duncan Kennedy, 'The Stages of the Decline of the Public/Private Distinction' (1982) 130 *U. Pa. L. Rev.* 1349, 1353.

[195] K.E. Klare, 'The Public/Private Distinction in Labor Law' (1982) 130 *U. Pa. L. Rev* 1358 [Emphasis original]

[196] Schoenhard, *Supra.* n.193

[197] L. Patterson and Judge S.F. Birch Jr., 'Copyright and Free Speech Rights' (1996) 4 *Journal of Intellectual* Property Law 1

[198] *Ibid*. at 18

[199] *Ibid*. at 19; see also Keith Aoki, '(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography

consequences and, most importantly, that it impacts on the lives of countless indigent people to gain A2E.

of Authorship' (1996) 48 *Stan. L. Rev.* 1293 [Author seems to suggest that copyright law is public law based on his assessment of the relationship between "property" and "sovereignty" in American IP law.]

Chapter 4: The Role of Copyright L&Es in Facilitating Access to Education in Nigeria

1. Introduction

This chapter analyses international copyright law, mainly the Berne Convention and the TRIPS agreement, in an attempt to map out the policy space afforded to Nigeria in the design of its copyright law to facilitate A2E. Although the previous chapter laid the critical foundation for understanding the value of education, the approach was more normative and external to copyright law. In this chapter, the approach is more of legal analysis. The principal goal is the examination of the panoply of rights and limitations recognised in Nigerian copyright law that are germane to the developmental goal of A2E.

The structure of the chapter is as follows. The first part lays out the landscape of international conventions which Nigeria is party to that are critical in the governance of copyright works. A host of other issues are also considered including the status and justification for L&Es as well as the types of exceptions under the discussed multilateral treaties. The second part is more specific in that it examines the relevance of these identified L&Es to the goal of facilitating A2E in Nigeria. The third part considers how Nigeria can better utilise the flexibilities in the international copyright regime. The final part concludes.

2. International Copyright Law and A2E.

This section discusses the flexibilities in the international copyright treaties to which Nigeria is party to that are particularly relevant to the developmental goal of A2E. In

examining the flexibilities, the main objective is to answer the question: given the existing regime of international copyright law, what is the latitude afforded to a DC like Nigeria in facilitating A2E through its copyright law? Accordingly, the inquiry takes as a given the existing regime of international copyright law and does not seek to offer any recommendations on how international copyright law might be better reformed to facilitate the development needs of Nigeria in the area of A2E.[1] This inquiry is important for as Okediji states "the constraints in international copyright law considerably affect what [L&Es] a country may add to its domestic copyright legislation; they also curtail the possibility of altogether different [L&Es] for development progress."[2]

A. Nigeria and the Landscape of International Copyright Law.

Nigeria is party to a good number of multilateral agreements governing the creative products of the mind through the copyright regime.[3] The most important ones for present purposes are WIPO-administered treaties and WTO agreements.[4]

The pre-eminent WIPO-administered treaty is the Berne Convention (BC).[5] This treaty is of great importance in international copyright law because, apart from being the first multilateral treaty on copyright, other subsequent multilateral and bilateral treaties are based on it. As the preamble makes clear, the principal aim of the BC is "the desire to protect, in as effective and uniform a manner as possible, the rights of

[1] This is not to suggest that the regime of international copyright law cannot be improved upon, as we shall see, or that such inquiry is less worthy. Indeed, many scholars have examined the issue of reforming international copyright law. R.L. Okediji, 'The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries in the Digital Environment' UNCTAD-ICTSD Project on IPRS and Sustainable Development. Issue Paper No. 15, March 2006 (https://unctad.org/en/Docs/iteipc200610_en.pdf); S.I. Štrba, *International Copyright Law and Access to Education in Developing Countries: Exploring Multilateral Legal and Quasi-Legal Solutions* (Martinus Nijhoff Publishers, 2012); R.L. Okediji, 'Reframing International Copyright Limitations and Exceptions as Development Policy' in R.L. Okediji (ed.), *Copyright Law in an Age of Limitations and Exceptions* (CUP, 2017).

[2] Okediji, Reframing International Copyright Limitations and Exceptions, *Ibid*.

[3] 'Nigeria' WIPO Lex https://wipolex.wipo.int/en/legislation/profile/NG

[4] There are also continental and regional agreements in Africa relevant to IP-norm setting but they are not the focus of this chapter. See C.B. Ncube, 'Three Centuries and Counting: The Emergence and Development of Intellectual Property Law in Africa' in R.C. Dreyfuss and Justine Pila (eds.), *The Oxford Handbook of Intellectual Property Law* (OUP, 2018); C.B. Ncube, *Intellectual Property Policy, Law and Administration in Africa: Exploring Continental and Sub-regional Co-operation* (Routledge, 2015). The examination of these burgeoning regional agreements in Africa is not particularly useful in identifying the policy space afforded to DCs in designing copyright laws that facilitate A2E because members of these regional agreements are also signatories to multilateral treaties.

[5] Berne Convention for the Protection of Literary and Artistic Works (adopted September 9, 1886, entered into force on December 4, 1887, and revised July 24, 1971) 828 U.N.T.S 221.

authors in their literary and artistic works…" And the expression "literary and artistic works" is defined capaciously as it includes "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression…"[6] Although Nigeria as a politically independent country acceded to the BC on September 14, 1993, the treaty has always been applicable in Nigeria up until its independence in 1960 by virtue of the fact that Nigeria was a British colony, art.19 of the original BC providing that "the countries acceding to this Convention also have the right to accede at any time for their colonies or foreign possessions." Other important WIPO-administered treaties are the WIPO Copyright Treaty (WCT)[7], WIPO Performances and Phonograms Treaty (WPPT)[8], and Marrakesh VIP Treaty (MVIP).[9]

Both the WCT and WPPT, collectively known as WIPO Internet treaties, are responses to the challenges posed by ICTs for the exploitation of copyright works. The WCT enhances the protection afforded to authors of copyright works in the digital age whereas the WPPT is concerned with the enhancement of neighbouring rights in the digital age. Although the WCT is a WIPO-administered treaty and a special agreement under Art 20 of the BC[10], the preamble to the WCT is conspicuously different from Berne's. First, unlike the BC, the preamble to the WCT recognises "the need to maintain a balance between the rights of authors and the larger public interest…" Whether this objective is achieved by the provisions of the WCT is very questionable.[11] Second, the WCT reiterates the contested utilitarian theory that underpins modern copyright law thereby legitimising the narrative that copyright as a property right is necessary to incentivise the production of cultural

[6] BC, *Ibid*. art 1. Under Article 4 of WCT discussed *infra*., computer programs are protected as literary works.
[7] World Intellectual Property Organisation Copyright Treaty (adopted December 20, 1996, and entered into force on March 6, 2002) 2186 U.N.T.S. 121
[8] World Intellectual Property Organisation Performances and Phonograms Treaty (adopted December 20, 1996, and entered into force on May 20, 2002) 2186 U.N.T.S 203
[9] Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (adopted June 27, 2013, and entered into force on September 30, 2016.) https://wipolex.wipo.int/en/text/301019
[10] Art 20 of the BC provides that "The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention." The effect of this article is that the trajectory of subsequent international agreements/treaties is towards the onward and upward expansion of authors rights thereby paying lip service to the balance of authors' and users' rights in copyright law. As Okediji states, the addition of the clauses which were later codified to Art 20 "effectively foreclosed any legitimate possibility of reimagining international copyright as anything but an ever-increasing strengthening of authors' rights." R.L. Okediji, 'The Regulation of Creativity Under the WIPO Internet Treaties' (2009) 77 *Fordham L. Rev*. 2379, 2389.
[11] Okediji, *Ibid*.

works.[12] The MVIP treaty on the other hand takes a different approach to the regulation of copyright. It creates a set of mandatory L&Es for the benefit of the blind, visually impaired, print disabled or persons with a physical disability that prevents them from holding and manipulating a book. Accordingly, it is the first multilateral treaty in the international copyright system to adopt a human rights and development approach.[13] These treaties (WCT, WPPT, and MVIP) have been ratified by Nigeria. On October 4, 2017, Nigeria deposited the instrument of ratification of these treaties, including the Beijing Treaty on Audiovisual Performances which is yet to enter into force upon the ratification by at least thirty (30) parties.[14] Although the WCT, WPPT, and MVIP treaties have been ratified by Nigeria and are therefore binding[15], these treaties do not have any force of law in Nigeria unless they are incorporated into national law by an Act of the parliament or by incorporating their provisions into the Nigerian Copyright Act.

The only WTO-administered IP treaty is the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[16] Nigeria is a contracting party to the TRIPS agreement by virtue of the fact that it is a WTO member since January 1, 1995[17], and as we shall see in a subsequent section its copyright laws are compliant with the TRIPS agreement. The TRIPS agreement is the most comprehensive multilateral agreement on IP to date covering many areas of IP such as copyright, patent, trademarks, industrial designs, trade secrets, and geographical indications. There are however significant similarities between the TRIPS agreement and the BC. Like the BC, the TRIPS agreement sets out to lay down minimum standards of protection to be provided by each Member. Indeed, Article 9 of TRIPS incorporates Articles1-21

[12] See WCT treaty, *Supra*. n.7, pmbl.

[13] See Marrakesh VIP Treaty pmbl. The interface between the Marrakesh treaty and human rights is clear. See Convention on Rights of Persons with Disabilities (adopted December 13, 2006, and entered into force May 3, 2008) 2515 U.N.T.S 3, arts. 21, 24, and 30; International Covenant on Civil and Political Rights (December 16,1966, and entered into force on March 23, 1976) 999 U.N.T.S 171, art 19. *Cf*. S.Y. Ravid, 'The Hidden Though Flourishing Justification of Intellectual Property Laws, National Versus International Approaches' (2017) 21 *Lewis & Clark L. Rev*. 1 [Analysing MVIP as informed by distributive justice principles.]

[14] Beijing Treaty on Audio Visual Performances (adopted June 24, 2012)

[15] The treaties became binding on Nigeria on January 4, 2018 i.e. three months after the notification of ratification. WCT, art 20(ii); WPPT, art 30(ii); MVIP, art 19(b).

[16] Agreement on Trade-Related Aspects of Intellectual Property Rights (adopted April 15, 1994 and entered into force on January 1, 1995) Marrakesh Agreement Establishing the World Trade Organisation, Annex 1C, 1869 U.N.T.S. 299.

[17] Nigeria has been a member of the General Agreement on Tariffs and Trade (GATT), which later became the WTO, since November 18, 1960. Acceptance of the TRIPS agreement, amongst other WTO rules, is a precondition for becoming a WTO member.

of the BC thereby requiring that Members comply with these obligations.[18] Furthermore, both multilateral treaties are motivated by the primary concern of promoting and protecting private rights of exclusion. This is clear from the frameworks of both treaties which establish mandatory minimum rights to be protected while leaving L&Es optional. Perhaps, this is due to a lack of any clear articulation of public interest in international copyright law[19] or because adopting mandatory L&Es is contrary to international copyright norms.[20] Additionally, these treaties represent concerted efforts to globalise and harmonise copyright law and norms.[21]

There are differences though between the two multilateral treaties.[22] First, the TRIPS agreement goes beyond the substantive minima of the BC.[23] Second, TRIPS insists on the effectiveness of remedies and enforcement measures when IP rights are infringed. Third, disputes between WTO members regarding TRIPS obligations are subject to a dispute settlement procedure. Fourth, the TRIPS agreement being expressly linked to trade is a clear indication of the paramountcy of economic considerations as a guiding principle under the TRIPS regime. According to the preamble, the TRIPS agreement is animated by the desire to "reduce distortions and

[18] Exempted from this is Article 6bis of the BC concerning moral rights, as Members shall not have obligation according to art. 9 of the TRIPS agreement to protect such right.

[19] Okediji, Reframing International Copyright Limitations and Exceptions, *Supra.* n.1 ["No effort similar to that directed to establishing common ground for authorial rights was made then, nor has been made since, for the public interest."]

[20] J.C. Ginsburg, 'Do Treaties Imposing Mandatory Exceptions to Copyright Violate International Copyright Norms?' *The Media Institute: Intellectual Property Issues*, Feb 28, 2012, https://www.mediainstitute.org/2012/02/28/do-treaties-imposing-mandatory-exceptions-to-copyright-violate-international-copyright-norms/ [Stating that "mandatory exception treaties are profoundly inconsistent with the history and spirit of the Berne Convention because they would, for the first time, create an international instrument whose *sole purpose is to diminish the rights of authors*." Emphasis original]; Okediji, 'The International Copyright System: Limitations, Exceptions and Public Interest Considerations for Developing Countries in the Digital Environment', *Supra*. n.1 ["the absence of mandatory limitations and exceptions reinforces the dominant ethos of the international copyright system as *primarily* author-centric." Emphasis original]

[21] The globalisation of copyright law as a result of these treaties is easily comprehensible. For example, since July 2016 there are currently 164 member countries of the WTO thereby requiring that these countries accept the TRIPS agreement. Even though there are transitional arrangements for least developing countries (LDCs) by virtue of art. 61—i.e. LDCs are granted the privilege of a delayed implementation of the TRIPS agreement—these countries will eventually implement trips. The problem with the globalisation of copyright law through these multilateral treaties is not any different from what was pointed out in chapter 1 regarding the cultural values underpinning copyright law. Here the issue even becomes amplified because by requiring the global adoption of copyright law, the cultural norms and values underpinning this law become globalised. See M.A. Hamilton, 'The TRIPS Agreement: Imperialistic, Outdated, and Overprotective' (1996) 29 *Vand. J. Transnat'l L. 613*; Okediji, Reframing International Copyright Limitations and Exceptions, *Supra*. n.1 ["international minimum copyright standards are not culturally neutral, nor are they the result of scientific investigation."]

[22] Strictly speaking, I would refer to these differences as reinforcements of, or additions to, the BC. The TRIPS agreement is a predictable development in the trajectory of international IP law making insofar as its lodestar has been the protection of authors' rights.

[23] See for example arts. 10.1 and 10.2 TRIPS which respectively provide protection for computer programs as literary works and grants protection to databases.

impediments to international trade… and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade."[24] As one author suggests, the trade linkage of TRIPS could "push national laws toward greater commodification of intellectual property products."[25]

B. *Limitations and Exceptions in International Copyright Law for Facilitating A2E.*

I. *The Nature and Justifications for Limitations and Exceptions.*

a. *A Users' Rights Approach to L&Es*

L&Es[26] in copyright law are a feature in every nation's copyright system no matter its philosophical underpinning, whether the natural rights or utilitarian tradition.[27] On the one hand, one could view L&Es as limits to the rights of authors i.e. those legally defined uses/spaces which the exclusive rights of copyright owners/authors may not extend to. For example, an author's exclusive right of reproduction may not extend to the use of a work by a person, say Anthony, for the purposes of private research such as the photocopying of an article for private study.[28] Although there is nothing wrong as a descriptive matter in understanding L&Es this way, as a normative issue the challenge is that exclusive rights become central, leaving L&Es as mere exceptions only secondary to the goals of copyright.[29] On the other hand, one could understand L&Es as users' rights rather than as exceptions or defences to the

[24] TRIPS Agreement, *Supra*. n.16

[25] Pamela Samuelson, 'Implications of the Agreement on Trade Related Aspects of Intellectual Property Rights for Cultural Dimensions of National Copyright Laws' (1999) 23 *Journal of Cultural Economics* 95, 96. *Cf.* N.W. Netanel, 'The Next Round: The Impact of the WIPO Copyright Treaty on TRIPS Dispute Settlement' (1997) 37(2) *Virginia Journal of International Law* 441, 456-463 [Examining ways in which TRIPS differs from BC by supporting a maximalist approach to copyright.]

[26] In this chapter I use limitations and exceptions interchangeably as is customary in the literature although some scholars have sought to distinguish the two.

[27] D.J. Gervais, 'Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations' (2008) 5 *University of Ottawa Law & Technology Journal* 1, 12 ["Copyright whether viewed as an economic lever, a utilitarian construct, or a natural rights-based doctrine, intrinsically requires balance to achieve its stated purpose."]

[28] See *infra*. for a discussion of education related L&Es.

[29] For similar arguments see, Niva Elkin-Koren, 'Copyright in a Digital Ecosystem: A User Rights Approach' in R.L. Okediji (ed.), *Supra.* n.1.

exclusive rights of authors. In *CCH Canadian Ltd v. Law Society of Upper Canada*[30], a landmark judgment of the SC of Canada in copyright law, the court in adjudicating upon the issues before it had the opportunity to clarify the status of exceptions in copyright law, particularly the fair dealing exception in Canadian copyright law. The Law Society of Upper Canada, a statutory non-profit organisation, through its maintenance and operation of the Great Library at Osgoode Hall provides a request-based photocopy services for law society members, the judiciary and other authorised researchers. Under this photocopy service, legal materials such as statues, case summaries, reported decisions and articles are reproduced and delivered to requesters by staff of the Great Library. The Canadian publishers, CCH Canadian *et.al*., whose works were reproduced, brought a copyright infringement suit seeking a declaration that the Law Society had infringed its copyright when a copy of the works were reproduced by the Great Library. In holding that the Law Society did not infringe the copyright in the works of the Canadian publishers by virtue of the fair dealing provision for purposes of research or private study, what is interesting in the unanimous decision of the SC is its liberal interpretation of the nature of copyright exceptions. According to McLachlin CJ, delivering the judgment of the court, exceptions to copyright infringement should be more properly understood as users' rights.[31] McLachlin CJ. clarified that:

> The fair dealing exception, *like other exceptions in the Copyright Act*, is a users' right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively.[32]

The SC went on to quote with approval Professor Vaver's statement that "[u]ser rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that benefits remedial legislation."[33] Similarly, in the DU photocopy case discussed in the previous chapter, both the Single judge and the Division Bench of the Delhi High Court were in agreement that s.52—an exception to the exclusive rights of a copyright owner—should not be considered as just an exception or a proviso to the exclusive right of a copyright owner. While neither Justice Endlaw nor the Division Bench went as far as using the language of

[30] 2004 SCC 13
[31] *Ibid* at para 12
[32] *Ibid* at para 48. Emphasis added
[33] *Ibid*.

'users' rights', the Single judge opined, and the Division Bench agreed, that s.52 conferred rights which should be interpreted expansively.[34]

The rights approach to L&Es is a clear statement that users are not outliers in the copyright system. In insisting on a users' rights approach to L&Es, what is advocated for is "equality of treatment of both rights-holders and users in which neither interest takes precedence over the other."[35] In fact, the users' rights approach is not just a fad or a politically correct move to appease a segment of the society. There are strong normative, theoretical, practical and policy reasons for insisting on a users' rights approach to L&Es.[36]

As a theoretical matter, L&Es from an economic approach to copyright law are justified on the basis of market failure. The understanding is that L&Es exist where the social value of a use exceeds its private cost and market failure prevent the use from being licensed by the copyright owner. Beyond the fact that there are non-economic interests, this view is strikingly narrow and cannot represent a complete justification for L&Es in copyright law. The implication of this approach is that L&Es will cease to exist or form part of the copyright system once technology develops to reduce transaction costs. Descriptively, this is wrong because there are many instances where courts have found that a use is covered by an exception even though a market for licensing such uses exists. More fundamental for present purposes is the fact that the utilitarian theory of copyright, in which the economic approach derives from, speaks of a balance between twin concerns of public interest: providing incentive to authors and promoting wide dissemination of works for the benefit of the public.[37] It is in this balance—between protection and access—

[34] *The Chancellor, Masters and Scholars of the University of Oxford and Ors. v. Rameshwari Photocopy Services and Ors*. CS(OS) 2439/2012 at para. 41

[35] M.J. Tawfik, 'International Copyright Law and Fair Dealing as a 'User Right'' (2005) e-Copyright Bulletin 1 https://unesdoc.unesco.org/ark:/48223/pf0000262609. Geist has argued that the users' rights approach facilitated "the emergence of the broader public as a recognized stakeholder within the policy process" which in the author's view has been the "biggest shift within the Canadian reform framework…" Michael Geist, 'The Canadian Copyright Story: How Canada Improbably Became the World Leader on Users' Rights in Copyright Law' in Okediji (ed.), *Supra.* n.1. As I discuss in the next chapter, one of the issues preventing the design of a development-oriented policy to copyright law in Nigeria is the fact that stakeholders involved in copyright policy are the so-called creative industries who depend on the exclusivity granted by copyright. Perhaps this is because the vision of copyright law in Nigeria is based on the view that this regime exists for the benefit of authors/copyright owners alone. A users' rights approach, by showing why this is not the case, could shift the stakeholders imbalance in Nigeria.

[36] Many of these reasons provide justifications for the existence of L&Es in the first place.

[37] Both are public interest concerns. The incentive function of copyright law is to maximise the production of cultural works which is of benefit to the public while maximising the dissemination of cultural works ensures that the public has access to these works

that the SC of Canada found a users' rights approach to L&Es. In order to maintain this balance, the SC of Canada opined, exceptions to copyright must be understood as users' rights. Whether the balancing exercise required by the utilitarian calculus provides justification for users' rights is open to debate, but it certainly provides a solid foundation for the existence of L&Es. The important point though is that a market failure approach to copyright exceptions frustrates this balance.

External norms, on the other hand, including the purposes and interests advanced by different exceptions in copyright law, provide stronger and solid justifications for users' rights.[38] Under international human rights law, as discussed in chapter 3, the right to education, freedom of expression, and access to culture are well established rights. Additionally, these rights are also constitutional rights in many jurisdictions. Furthermore, the imperative of development requires the fulfilment of these rights. It is impossible to conceive of human development, or even development in its narrow sense, without A2E or freedom of expression. The important point is that whether we speak in the language of rights or development, these external norms provide solid justifications not only for the existence of L&Es but also users' rights.[39] The fundamental values served by human rights, or necessary for advancing development *cannot* be achieved by the mere recognition of L&Es. By insisting and requiring a users' rights approach, the achievement of these values becomes possible because copyright law becomes aligned with these external norms, and accordingly is able to take seriously the fundamental values advanced by these norms.

[38] Saleh Al-Sharieh, 'Securing the Future of Copyright Users' Rights in Canada' (2018) 35 *Windso Y.B. Access Just.* 11 [Grounding users' rights on a human rights perspective after concluding that reliance on "the notion of balance to change the label and weight of copyright exceptions in Canadian copyright law is problematic."]

[39] Exceptions in copyright law advance different values or public interest goals. The quotation right can be seen as advancing freedom of expression; private use exceptions for research and study advance access to education and protect privacy interests; exceptions for the blind or visually impaired recognise the principle of non-discrimination and the importance of human development for all; and exceptions allowing the reporting of current events advance access to information; and parody exceptions are a recognition of the important value of enabling access to and contribution to culture. See Pamela Samuelson, 'Justifications for Copyright Limitations and Exceptions' in Okediji (ed.), *Supra.* n.1 [Discussing the different goals served by L&Es mainly under US copyright law]

b. Querying the Compatibility of a Users' Rights Approach with International Copyright Norms.

One important question though is whether a users' rights approach is consistent with international copyright law norms. Given the general trajectory of international copyright law towards the expansion of private exclusive rights, the initial reaction is that users' rights are in conflict with the spirit of international copyright law. For example, art. 20 of the BC provides that contracting parties to the Berne union may enter into special agreements among themselves "in so far as such agreements grant to authors more extensive rights than those granted by the Convention…" In so far as users' rights extend the claims of users thereby affecting and shifting the way copyright law structures the relationship between users and authors, it could be argued that a users' rights approach reduces the scope of existing authors' rights. Additionally, the vision of copyright espoused in Berne and TRIPS is author-centric and owner-centric. As discussed, the BC is "animated by the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works."[40] Moreover, the structure of these treaties by stipulating mandatory minimum rights while leaving exceptions as discretionary further consolidates the view that the overriding concern is the protection of private exclusive rights. Collectively these reasons, in addition to the trade spin of TRIPS, suggest that a users' rights approach to L&Es is in conflict with international copyright norms.

But there are strong reasons which indicate that such conclusion is at best premature. Art. 31 of the Vienna Convention (VC) on the Law of Treaties, concerning the interpretation of treaties, provides that[41]:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preambles and annexes:

[40] BC, *Supra*. n.5, pmbl.
[41] Vienna Convention on the Law of Treaties (adopted May 23, 1969; entered into force January 27, 1980) 1155 U.N.T.S 331.

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

As is clear from the above, the object and purpose of a treaty are relevant to interpreting its terms. And the object of a treaty can be discerned from the preamble. First, and in this respect, it is important to note that the preambles to WCT and TRIPS explicitly recognise the importance of maintaining a balance between the interests of authors and users. As an instance, TRIPS recognises "the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives."[42] This should be read in conjunction with arts. 7 and 8 titled "objectives" and "principles" respectively. The former provides that "[t]he protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations."[43] And while Berne preamble does not recognise this balance, the WCT, a special agreement under art. 20 of the BC, in its preamble recognises "the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to

[42] TRIPS Agreement, *Supra*. n.16, pmbl.
[43] Art. 8 provides that:

> Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.

information, *as reflected in the Berne Convention*."[44] As the reader would recall, it is in this balance that the SC of Canada found users' rights. Second, the VC makes it clear that relevant rules of international law form part of the interpretive resources of a treaty. These rules of international law are external norms which bear on the interpretation of treaties. The question then is what rules of international law are relevant in interpreting Berne/TRIPS?[45] Clearly, these are rules that by virtue of the rights and obligations contained therein are directly or indirectly linked and implicated by the regime of rights in Berne/TRIPS. Examples of these are the UDHR and the ICESCR which guarantee the right to education and access to culture, discussed in chapters 3 and 5. The reliance on these external norms as an interpretive aid to Berne/TRIPS might require the adoption of a users' rights approach to L&Es in order to properly facilitate the objectives of these conventions. Third, WIPO which administers Berne and the WCT is a specialised agency of the UN. What this means is that development concerns—which shun an author-centric view for a more balanced approach to copyright— must be incorporated into the mandate and framework of WIPO. And as argued above, the imperative of development requires a users' rights approach to L&Es. Lastly, the MVIP treaty administered by WIPO is an overt move to allow external norms such as human rights and development inform copyright law. In order to take seriously the values embedded in these external norms, a users' rights approach to L&Es is required.

II. L&Es in International Copyright Law.

As "[t]he Berne/TRIPS framework determines what L&Es can be adopted at the national level"[46], this section shall focus on the L&Es available in international copyright law that are relevant to the issue of A2E. It lays the foundation for answering in the subsequent sections the following pertinent questions:

[44] Emphasis added

[45] The VC entered into force after the adoption of the BC, even its most recent version, and so is not applicable to the BC. However, the VC is in many ways a reflection and codification of customary international law and so the principles there are equally applicable to the interpretation of the BC. See *the Arbitral Award of 31* July 1989 (Guinea-Bissau v. Sen.), 1991 I.C.J 53 (Nov 12).

[46] R.L. Okediji, 'The Limits of International Copyright Exceptions for Developing Countries' (2019) 21 *Vand. J. Ent. & Tech. L.* 689, 710.

- Has Nigeria utilised fully the available L&Es in international copyright law in order to ensure that A2E is achieved?

- If the L&Es under Nigerian copyright law are inadequate to address educational needs, what can be done under Nigerian copyright law while staying compliant with Berne/TRIPS to enable copyright facilitate adequately A2E?

Some clarifications are necessary here in order to circumscribe the scope of this analysis. First, in dealing with the available exceptions relevant to the issue of A2E, the focus is on copyright rather than neighbouring/related rights. Accordingly, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisation (Rome Convention) and the WPPT will not be examined. Second, the focus is on literary works rather than any other subject matter.[47] Third, the WCT will not be examined to the extent that the focus is on the use and access to printed works in the analogue world.

a. Types of L&Es under Berne/TRIPS

There are broadly two categories of L&Es recognised under the BC. The first is limitations on copyright, which determine protectible subject matter or remove material from the ambit of copyright protection. The second pertains to limitations on the rights of authors/copyright holders.

Regarding the former, several limitations both expressed and implied are recognised under the BC. Art 2(8) provides that copyright protection shall not extend to "news of the day or to miscellaneous facts having the character of mere items of press information." This limitation is a recognition of the important principle that copyright does not protect facts; rather, expressions of facts are protected. So, while news of the day as facts are outside the protectible subject matter of copyright, the way it is expressed may be protected.[48] Significantly, this is the only mandatory limitation on

[47] Here I use literary works in a narrower sense, than as used in the BC, to refer to books and works of a similar nature.

[48] The BC does not expressly state the idea/expression principle recognised in every national copyright system but it is implicit in the originality requirement and art.2(8). It is also possible to see art.2(8) as a public-policy exception advancing the important interest of freedom of information. See Ricketson and Ginsburg, *International Copyright and Neighbouring Right: Berne Convention and Beyond* (Vol. 1, 2nd ed;

copyright protection recognised in the BC. Other limitations are phrased in non-obligatory or permissive terms. Art. 2(4) leaves it open to member States to decide whether to grant copyright protection to "official texts of a legislative, administrative and legal nature, and to official translations of such texts." Similarly, art. 2*bis* (1) allows member countries the discretion to decide whether to deny copyright protection to "political speeches and speeches delivered in the course of legal proceedings."[49] Beyond these limitations, copyright protection is not indefinite. The general term of copyright protection is life of the author plus 50 years after death[50], but given that the BC only lays out minimum standards this does not preclude member countries from exceeding this minimum term.[51]

The category of L&Es, on the other hand, which limits the right of authors or copyright owners as we shall see is more pertinent to the issue of facilitating A2E in Nigeria. These L&Es can be further classified as compensated or uncompensated.[52] Uncompensated L&Es permit free uses of works for purposes stated by the law without the permission of the copyright owner. They can be seen as either relating to specific uses such as the quotation right or to general uses like fair use or fair dealing. On the other hand, compensated uses exempt certain uses as provided by the law subject to payment of remuneration to the copyright owner. The right of the copyright owner in this instance is subject to a liability rule i.e. the right is a right to remuneration rather than to exclude.

Given that art. 9(1) of the TRIPS agreement requires members to comply with Arts. 1-21 of the BC, the limitations discussed above apply equally to members of the WTO even if they are not parties to the BC.[53]

b. Quotation Right: Nature and Scope.

Art. 10(1) of the BC provides that:

OUP, 2006)

[49] The justification for this optional exception would seem to be freedom of information. See *Guide to the Berne* Convention for the Protection of Literary and Artistic Works (Paris Act, 1971), (WIPO, 1978; Geneva).

[50] Art. 7(1)

[51] Art. 7(6)

[52] Okediji, *Supra*. n.46, 710-714; Sam Ricketson, 'The Boundaries of Copyright: Its Proper Limitations and Exceptions: International Conventions and Treaties' (1999) *Intellectual Property Quarterly* 56.

[53] J.A.L Sterling, *Sterling on World Copyright Law* (4th ed., edited by Trevor Cook; Sweet & Maxwell, 2018) 525.

> It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

The first thing to note about this exception is that it is obligatory. This is the only mandatory exception to author's rights under the BC. Accordingly, it is not open to member States to decide whether to implement this exception. However, the manner of implementation differs amongst Member states. Some countries subject it to the general fair use or fair dealing provision[54], while others provide for it as a specific exception.[55] By making the quotation exception mandatory, it is likely the nature of the exception has been transformed to a user right. Second, the exception applies to all works i.e. literary and artistic works as used in the BC.

A final issue is in regard to the breadth of this exception. Can one reproduce a whole work in the form of a quotation? This is very unlikely to be so. As is obvious, the exception concerns the making of quotations. The dictionary meaning of quotation does not allow for such interpretation given that a quotation is "a phrase or short piece of writing taken from a longer work of literature, poetry, etc. or what someone else has said."[56] It is difficult to imagine the reproduction of a literary work constituting a quotation as the word denotes the extraction of a small piece from a larger piece of work.[57] Perhaps the reproduction of a short poem might be justified but the conditions of the exception have to be satisfied. Particularly, the requirement that it be compatible with fair practice and it not exceed the extent justified by the purpose.[58] The former condition "implies that the use in question can only be accepted after an objective appreciation".[59] Beyond this assertion which is not very

[54] See Second Schedule of Nigeria Copyright Act; s.26(1)(a) of Kenya Copyright Act 2001; s.51(1) Irish Copyright and Related Rights Act 2000; s.15 Uganda Copyright and Neigbouring Rights Act 2006.
[55] Section 14 of Botswana Copyright and Neigbouring Rights Act 2000; Art 205 of Rwanda Law No. 31/2009 of 26/10/2009 on the Protection of Intellectual Property.
[56] "Quotation" in the *Cambridge English Dictionary* https://dictionary.cambridge.org/dictionary/english/quotation
[57] Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971), (WIPO, 1978; Geneva) 59 ["Neither in principle nor in practice is a quotation likely to be very long"]. *Cf*. Records of the Intellectual Property Conference of Stockholm 1967 (Vol. 1, WIPO; Geneva, 1971) Document S/1, 46 [Stating that in principle a quotation should be short but this "does not have universal validity"]
[58] The other condition that the work be "lawfully made available to the public" is a threshold limit i.e. its function is to determine *whether* a work can be quoted from and not *amount* to be quoted. The condition of lawfully made available to the public is broader than publications by the copyright owner and encompasses works made available through compulsory licensing. See *Ibid*.
[59] Records of the Intellectual Property Conference of Stockholm, 11 June—14 July 1967. Vol. 1 (Document S/1) 117.

helpful, it is not clear what this condition requires. Some authors consider it as requiring an investigation into whether the use interferes with the market for the original work.[60] Similarly, Ricketson and Ginsburg are of the view that art. 9(2) concerning the three-steps test, discussed below, would be applicable in determining whether a quotation is compatible with fair practice i.e. does the use conflict with a normal exploitation of the work and unreasonably prejudice the legitimate interests of the author?[61] Others have however queried this interpretation insisting that the three-step test is both inapplicable to the condition of fair practice and the exception in general.[62] The last condition, on the other hand, would seem to indicate that the legality of the amount extracted from a work would seem to depend on the purpose of the quotation: whether it is for educational, scientific or artistic purpose etc. In the end, the interpretation of these conditions is a matter for national courts.

Beyond the literal meaning of quotation, another support for the view that this exception hardly allows a substantial taking from a work is in the way it is implemented by some States. Some countries expressly and specifically restrict the exception to short quotations. Art. 205 of Rwanda Law on the Protection of Intellectual Property allows "the reproduction, in the form of quotation, of a short part of published work…"[63]

c. The Teaching Exception: Nature and Scope.

Art. 10(2) of the BC provides that:

> It shall be a matter of legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for

[60] P. Goldstein and B. Hugenholtz, *International Copyright: Principles, Law and Practice* (OUP, 2013) 392.
[61] Ricketson and Ginsburg, *Supra.* n.48 at 786.
[62] Lionel Bently & Tanya Alpin, 'Displacing the Dominance of the Three-Step Test: The Role of Global, Mandatory Fair Use' University of Cambridge Faculty of Law Research Paper No.33/2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3119056. See *infra*. section 3(A)(II) for a discussion of the relationship between the three-step test and L&Es in international copyright law.
[63] See also s.14 of Botswana Copyright and Neigbouring Rights Act 2000; and s. 29 Sierra Leone Copyright Act 2011. Aside the fact that only a short part from a work may be quoted, it would seem that the Rwanda copyright law is more restrictive than that required by the BC in that the quotation applies only to a published work whereas Berne extends to works lawfully made available to the public.

teaching, provided such utilization is compatible with fair practice.

This exception may be traced back to art. 8 of the Bern Act 1886 which states that: "As regards the liberty of extracting portions from literary or artistic works for use in publications destined for educational or scientific purposes, or for cresthomathies, the effect of the legislation of the countries of the Union, and of special arrangements existing or to be concluded between them, is not affected by the present Convention." This provision remained so until the minor change in the Brussels Revision of 1948 and in the Stockholm Revision of 1967 when it was modified to the current text.

Art 10(2) is clearly not a mandatory exception, leaving it open to member States or bilateral agreements between member States the decision whether to implement this exception. However, a member State that decides to implement the exception is bound by the limitations in the exception.

It is further clear that the exception is for the purpose of teaching i.e. any "utilization" of literary or artistic works "by way of illustration" for any purpose other than teaching is not justified under this exception although it may be saved under another exception. Accordingly, it is important to define the scope of teaching. Is "teaching" coterminous with "education"? In the Stockholm Conference Committee Report (SCCR), it was stated that:

> The wish was expressed that it should be made clear in this Report that 'teaching' was to include teaching at all levels— in educational institutions and universities, municipal and State schools, and private schools. Education outside these institutions, for instance general teaching available to the general public but not included in the above categories, should be excluded.[64]

It would therefore seem that teaching as used in the BC is not coterminous with education. For example, Ricketson and Ginsburg consider that this interpretation "clearly excludes the utilization of works in adult education courses…although it would seem to be otherwise if such courses were actually offered by the formal educational institutions themselves."[65] The verb "teach" however means to "impart

[64] Records of the Intellectual Property Conference of Stockholm, 11 June—14 July 1967, Vol. 1. Report on the Work of the Main Committee I (Substantive Provisions of the Berne Convention: Arts. 1-20) 1148.
[65] Ricketson and Ginsburg, *Supra*. n.48 at 792-3

knowledge or instruct someone"[66] and is neutral vis-à-vis where the act of teaching occurs. On the other hand, education means "the process of receiving or giving systematic instruction, especially at a school or university."[67] While the use of "especially at a school or university" is only an example and therefore illustrative, the fact that education involves "systematic instruction" means that it is narrower than teaching. Accordingly, if the dictionary definition of "teaching" is applied to the interpretation of art. 10(2) of the BC then the obvious conclusion is that teaching would be broader than that expressed in the SCCR.

As with the quotation exception, the teaching exception is broad enough to encompass literary and artistic works as used in the BC. Similarly, to "utilize" implies that the exception applies beyond the reproduction right to include public performance or communication to the public of such works for teaching purposes.[68] However, the utilisation must be "by way of illustration". This phrase imposes a limitation on the amount of work used. It is difficult to imagine the use of a work by way of illustration that would require the utilisation of the whole work. Perhaps as some authors argue, "in the case of an artistic work or short literary work it might be argued that it is necessary to reproduce the whole work if it is to be properly utilized for teaching purposes."[69]

In any event, the utilisation of the work by way of illustration must be "compatible with fair practice" and justified by the purpose for teaching. These two conditions ultimately determine the scope of the exception. As noted above, the concept of fair practice is unclear as there is no definition of what it constitutes, apart from the assertion that it "implies that the use in question can only be accepted after an objective appreciation." What this means or requires is unclear but the comments above regarding this statement under the quotation exception apply *mutatis mutandis*. Particularly, it has been suggested that the two conditions of "the extent justified by the purpose" and "fair practice" must be interpreted in accordance with

[66] "Teach" in Angus Stevenson (ed.), *Oxford Dictionary of English* (OUP, 2010) 1824
[67] "Education" *Ibid*. at 559.
[68] Raquel Xalabarder, 'Copyright Exceptions for Teaching Purposes in Europe' (2004) Working Paper Series: WP04-004 https://www.uoc.edu/in3/dt/eng/20418/20418.pdf; Ricketson and Ginsburg, *Supra.* n.48 at 794; S.V. Lewinski, *International Copyright and Policy* (OUP, 2008) 158.
[69] Ricketson and Ginsburg, *Ibid*. at 791. *Cf*. S.V. Lewinski, *Ibid*. [While author accepts that the exception might allow the utilisation of entire works "such as photographs or poems", he nevertheless concedes that "the condition to use the work 'by way of illustration' is limitative in principle; often, it will be sufficient to use a part of a work in order to illustrate the subject matter taught."]

the three-step test.[70] If this is so, then the policy space afforded to Nigeria in relying on the teaching exception to facilitate A2E is quite narrow.

d. Three-Step Test Under Berne and TRIPS.

Art. 9(2) of the BC provides that:

> It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

This provision was introduced in the Stockholm Revision Conference (SRC) of 1967 together with art. 9(1) which *explicitly* grants authors the right of authorising the reproduction of their literary and artistic works.[71] Unlike the specific quotation and teaching exceptions discussed above, art. 9(2) is a general exception to the reproduction right that is not tied to any particular purpose but instead relates to the circumstances of the use. More precisely, art. 9(2) allows countries of the Berne Union to carve out exceptions to the reproduction right should they decide to—given that the provision is optional—provided that the reproduction is in "certain special cases", does not "conflict with a normal exploitation of the work", and does not "unreasonably prejudice the legitimate interests of the author." This is known as the "three-step test".

The three-step test is now an international copyright norm having formed part of subsequent treaties—as well as regional and bilateral agreements—on copyright law. Specifically, variants of the three-step test are found in all the treaties discussed above that Nigeria is party to. Art. 13 of the TRIPS agreement in particular provides that "[m]embers shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder." Clearly, there are

[70] See Raquel Xalabarder, 'On-line Teaching and Copyright: Any Hopes for an EU Harmonized Playground' in Paul Torremans(ed.), *Copyright Law: A Handbook of Contemporary Research* (Edward Elgar, 2007).

[71] It is important to underscore that art. 9(1) is more of a codification of the reproduction right than its recognition given that most countries of the Berne Union recognised this right in their national laws prior to Stockholm 1967 in addition to the fact that the right existed in previous revisions of the BC in various forms, though not explicitly stated.

differences between the wordings of TRIPS at. 13 and Berne art. 9(2) although both are substantially similar. First, art. 13 applies to "exclusive rights" whereas art. 9(2) subjects the test to the "reproduction of such works". It follows then that the TRIPS three-step test is broader applying to all exclusive rights whereas the Berne three-step is only applicable to the reproduction right i.e. under the TRIPS agreement, the creation of L&Es by a member state must comply with the three-step test irrespective of whether what is being limited is the reproduction right or some other exclusive right.[72] This alone is enough reason—aside many others—to conclude that the inclusion of the three-step test in the TRIPS agreement by virtue of art.13 is not superfluous even though TRIPS art. 9(1) incorporates the Berne three-step test by requiring members to comply with arts. 1-21 of the BC.[73] Second, TRIPS art. 13 uses the language "confine" whereas "permit" is used in Berne. Several questions follow from this difference in terms, particularly whether TRIPS, in insisting that members shall confine L&Es to the three-step test, is stricter than Berne and the extent to which this enlarges the scope of TRIPS art.13 vis-à-vis L&Es. Third, TRIPS refers to the "legitimate interests of the right holder" whereas Berne is concerned with those of the author. Many have observed that TRIPS' focus on right holder instead of authors is a result of its trade linkage.[74] By shifting the focus to right holders, the economic interests of firms are likely to take centre stage in assessing whether L&Es comply with the TRIPS three-step test.[75]

Given that the three-step test circumscribes the discretion of nations in creating L&Es, a fundamental issue is whether the three-step test offers the flexibility needed

[72] TRIPS art.13 applies not only to new rights introduced in the TRIPS agreement but also to all the economic rights recognised in the Berne convention as incorporated by art.9(1) of TRIPS. See Report of the Panel, *United States—Section 110(5) of the US Copyright Act*, WT/DS160/R at 6.80 [In a case, discussed below, brought by the European Communities against the US, the European communities argued that TRIPS art. 13 applied only to the new rights added to the TRIPS agreement such as the rental right. The panel in interpreting the TRIPS agreement disagreed stating that "neither the express wording nor the context of Article 13 or any other provision of the TRIPS agreement supports the interpretation that the scope of application of Article 13 is limited to the exclusive rights newly introduced under the TRIPS agreement."]

[73] Report on the Panel, *US Copyright Ibid*. at 6.62 [Holding that the incorporation of arts 1-21 of Berne by TRIPS covered not only the actual texts of those provisions but also the entire Berne acquis relating to those provisions.]

[74] *Supra*. n. 25;

[75] Pamela Samuelson & Kathryn Hashimoto, 'Is the Fair Use Doctrine Compatible with Berne and TRIPS Obligations' (August 7, 2018) UC Berkeley Public Law Research Paper, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3228052 ; Bernt Hugenholtz & Ruth Okediji, 'Conceiving an International Instrument on Limitations and Exceptions to Copyright' (March 7, 2012) Amsterdam Law School Research Paper No. 2012-43, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2017629 ["This paradigm shift is not without consequences; it brings to the foreground the commercial interests of intermediaries… while downplaying the interests of authors."]

to create development enabling L&Es. In particular, is the three-step test flexible enough to allow Nigeria create L&Es that address developmental concerns of A2E? This specific issue will be addressed below.[76]

e. Special Provisions for DCs: The Berne Appendix

The development of international copyright law has for the most part been plagued by the need to reconcile the concerns of developing and developed countries. For DCs, the concern has been to ensure wider dissemination of and access to knowledge. These countries realised earlier on that the international regime of copyright with its focus on the protection of private exclusive rights posed serious challenge to the fulfilment of their concerns. In the Brazzaville Meeting, DCs were of the view that:

> International copyright conventions are designed, in their present form, to meet the needs of countries which are exporters of intellectual works; these conventions, if they are to be generally and universally applied, require review and re-examination in the light of the specific needs of the African continent.[77]

The first serious attempt to address the concerns of DCs was at the SRC which led to the adoption of the Stockholm Protocol, annexed to the Stockholm Act of the BC.[78] Following opposition from developed countries as it was considered that "the Protocol embodied too many concessions in favour of developing countries,"[79] the Protocol was revised at the Paris Revision Conference. This resulted in the incorporation of an Appendix for the benefit of DCs into the Paris Act of the BC.

Art. 21, titled "Special Provisions Regarding Developing Countries", makes reference to these provisions which are included in the Appendix to the Paris Act of the BC and

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[76] See *Infra*. section 3.

[77] Quoted in I.A. Olian Jr., 'International Copyright and the Need of Developing Countries: Stockholm and Paris' (1974) 7(2) *Cornell International Law Journal* 81, 95.

[78] The Stockholm Protocol made provision for specific reservations in favour of developing countries. The permitted reservations were: duration of protection; broadcasting right; a system of compulsory license for reproduction and translation rights; and a general right to restrict, "exclusively for teaching, study and research in all fields of education," the protection of all literary and artistic works. For a discussion of the Stockholm Protocol see, I.A. Olian Jr., *Ibid*.; Sam Ricketson and J.C. Ginsburg, *International Copyright and Neighbouring Rights* (Vol. 2, 2nd ed., OUP; 2006) 899-913.

[79] Ricketson and Ginsburg, *Ibid*. at 913.

confirms that it is an integral part of the Act. This express confirmation is important given that the actual provisions regarding DCs are included in an Appendix. By virtue of art. 9(1) which expressly requires that members shall comply with the Appendix, the TRIPS agreement also incorporates the Berne Appendix.

The principle underlying the Appendix is that DCs may for the purpose of teaching, scholarship and research subject the rights of translation and reproduction to a system of compulsory licensing provided the detailed conditions as discussed below are satisfied. Art I(1) of the Appendix lays down a threshold condition providing that the reservations i.e. the system of compulsory license for translation and reproduction rights, may only be availed of by "[a]ny country regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations… and which, having regard to its economic situation and its social or cultural needs does not consider itself immediately in a position to make provision for the protection of all the rights as provided for in this Act…" It has been suggested that the term "established practice" meant that the concerned country received assistance from the UNDP through the UN or its specialised agencies.[80] In order to avail of these reservations a DC must deposit a notification with the Director General (DG) declaring that it will avail of either of the reservations or both.[81] Once a country ceases to be a DC, the declaration shall no longer be effective i.e. the country shall no longer be able to avail of the reservations.[82] However, if a declaration ceases to be effective this does not preclude the distribution of existing copies in stock made under the license until they are exhausted.[83]

Specifically, with regards to the translation right reservation in favour of DCs, several detailed conditions apply in order to avail of the faculty. These are primarily in regard to time limits and notification requirements. The time limit in which a DC may subject the translation right to a system of non-exclusive and non-transferrable licenses depends on the distinction drawn in the Appendix between languages in general use in a DC and those which are not in general use in one or more DCs. In the former

[80] See Ricketson and Ginsburg, *Ibid*., at paras. 14.18 and 14.51
[81] Art. I(1)
[82] Art. I(3). This applies automatically whether the country formally withdraws the declaration or not. However, there is a stipulated time period before it comes into effect.
[83] Art. I(4)

case, it is provided that a license to make a translation of a work in that language may be obtained only after the expiration of three years, starting from the date of first publication of the work, where the owner of the translation right has not published a translation of such work in the said language in general use in the DC.[84] With the latter, the period is one year.[85] Additionally, a license will not be granted after the expiration of the three year or one year period unless a further time elapses in which the applicant can show that he cannot find the owner of the right or that he was denied authorisation by the owner of the right to make the translation.[86] In the case of the three year period the further time is six months while it is nine months for the one year period.[87] Furthermore, a license will not be granted if during these periods a translation is published by the owner of the right or with his authorisation.[88]

Aside these more specific conditions, general conditions also apply. The license can only be for the purpose of teaching, scholarship and research.[89] And only a national of the concerned DC may apply for the license.[90] Finally, the translation license is only available for "works published in printed or analogous forms of reproduction"[91] and the license may only be non-exclusive and non-transferrable.[92] It has been suggested that the condition that the work for which license is sought be published in printed or analogous forms of reproduction "would exclude such things as films and records."[93] No license shall be granted where the author withdraws from circulation all copies of his works.

Some of the conditions mentioned above, mainly the general conditions, are also common to the reproduction right reservation granted to DCs and so I shall focus on

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[84] Art II(2)(a)
[85] Art II(3)(a)
[86] Art. IV
[87] Art. II(4)(a)
[88] Art. II(4)(b)
[89] Art. II(5)
[90] The comment in the WIPO Guide regarding the interpretation of a "national" shows that it extends beyond a natural person:

> It was agreed during the Paris Revision (1971) that the term "national of such country" also covered legal entities including the State itself, its national or local authorities, and enterprises owned by the State or such authorities.

Guide BC, *Supra.* n.57 at 155.
[91] It is also important to point out that where the license is granted, the translation must also be published in printed or analogous forms of reproduction.
[92] Art. II(1)
[93] Guide BC, *Supra.* n.57 at 153.

conditions that apply specifically to this faculty.[94] First, the purpose for which the reproduction license may be granted— "for use in connection with systematic instructional activities"— seems to be different than that discussed above for the translation right. This is however only a matter of difference in the English language given that the French version of the BC uses the same phrase "l'enseignment scolaire et universitaire" for both reservations and art. 37(c) provides that "in case of differences of opinion on the interpretation of the various texts, the French text shall prevail."[95]

As with the translation right, there is also a time limit imposed in order to avail of the reproduction license. However, this depends on the type of work sought to be reproduced.[96] The relevant period for works of "the natural and physical sciences, including mathematics, and of technology" is three years starting from the date of first publication of a particular edition of the work where by this period copies of such edition have not been distributed in that developing country by the owner of the right or with his authorization "at a price reasonably related to that charged in the country for comparable works."[97] For "works of fiction, poetry, drama and music, and for art books…" the period is seven years; and for other works which do not fall into this category the period is five years. Similarly, as with the translation right, these periods are still subject to further time limits in order to comply with notice requirements in art. IV. For a license obtainable under the three-year period to be granted, a further six months must elapse; and for other periods it is three months, starting from the date the requirements of art. IV are complied with. However, no license will be granted if during these periods copies of the work are distributed in the developing country at a price reasonably related to that normally charged in the country for comparable works. The case is also provided for in the Appendix where copies of the work had previously been on sale in the DC but no longer available. In such cases, it is provided that after the expiration of the applicable period (i.e. three, five, or seven years) if no authorised copies have been on sale for six months, a compulsory

[94] The general conditions that the applicant be a national; that the work be published in "printed or analogous forms of reproduction"; that the license be non-transferrable and non-exclusive
[95] See also Guide BC, *Supra.* n.57 at 163.
[96] Art. III(3)
[97] Art. III(3)(i)

license may be issued.[98] Finally, no license will be granted if the author withdraws from circulation all copies of edition of the work for which license has been applied.[99]

3. L&Es Under International Copyright Law, A2E in Nigeria, and Nigerian Copyright Law: Challenges and Opportunities.

The previous section focused on the nature of L&Es and the examination of available L&Es under international copyright law, which Nigeria is party to, that may be considered relevant to the issue of A2E. In this part, the focus is two-fold. The first issue is the extent to which the examined L&Es under international copyright law may be useful to Nigeria in facilitating A2E. As such, it will be necessary as a preliminary matter to identify some of the issues that are specific to Nigeria in the area of A2E. Secondly, an attempt will be made to look at how Nigeria in its copyright law has made use of the existing L&Es under international copyright law to facilitate A2E.

A. Challenges for A2E in Nigeria.

The issues that face Nigeria in the area of A2E and learning materials have been discussed in more detail in the preceding chapter. Accordingly, the following discussion is mainly a summary.

The fundamental issue which substantially affects the prospects of A2E in Nigeria is the economic situation. Nigeria has surpassed India as the world poverty capital with almost 90 million people living under extreme poverty. The reality is that for majority of the citizens the cost of ALM is beyond their purchasing power. Furthermore, the gains of the digital revolution in ensuring broad and distributed access to informational materials have not been realised by the majority of the populace due to

[98] Art. III(2)(b)
[99] Art. III(4)(d)

the global digital divide primarily as a result of the greater number of Nigerians being unable to afford access to ICTs. As such, the primary means of accessing learning materials is through printed books. This means that provision for bulk access to printed materials must be made in order to ensure that students have ALM. Given the resource constraints of many Nigerian universities, this is certainly a difficult task. The challenge is—in addition to ensuring the adequate funding of higher institutions—to ensure that there are as few legal obstacles as possible, particularly in the area of copyright law, that prevent A2E for Nigerian students.

We have seen that copyright affects the price of books. And even where the price of books is affordable, which is unlikely to be the case for majority of students, copyright determines the conditions of use. This has serious implications for A2E because although the availability of learning materials is important, what is more important is the availability in sufficient quantity to cater for the growing number of students at Nigerian universities. Where one or two books on a particular subject area are available in the library for the use of a hundred students or more registered in a course, then the regime of copyright law takes on central importance given that the panoply of exclusive rights guaranteed by this regime determines how the books may be used. Can these books be reproduced and if so under what conditions? Is it possible to create course packs from the available books in the library and reproduce them? The creation of course packs is one important avenue for students in Nigerian higher institutions to gain ALM, and in subsequent sections I will examine whether L&Es in international copyright law provide opportunity for Nigeria to implement exceptions that can enable institutions create course packs for students.

B. Examining the Relevance and Flexibility of L&Es Under International Copyright Law in Facilitating A2E in Nigeria.

This section examines the principal issue of how relevant and flexible the international regime of L&Es examined above is, if properly utilised, in facilitating A2E in Nigeria having regard to its particular needs.

I. Limitations Pertaining to Protectible Subject Matter

As discussed above, some L&Es under the Berne/TRIPS framework are better categorised as limitations pertaining to protectible subject matter. These limitations are part of Nigerian copyright law.[100] For example, s.1 of the Copyright Act requires as a condition for the copyright protection of literary, artistic or musical work that "sufficient effort has been expended on making the work to give it an original character." This originality principle is not explicitly stated as a requirement for protection in any of the international conventions, but it is a well-established principle of copyright law in virtually every jurisdiction that a work must be "original" in order to be protected.[101] Similarly, the limitation that copyright protection is not indefinite is recognised in every national copyright law. While art. 7(1) of the BC provides for a minimum term of protection for life of the author plus fifty years after his death, the Copyright Act goes upward by insisting on a term of life of author plus seventy years after death for literary, artistic and musical works.[102] Also the only mandatory limitation in the BC regarding news of the day finds expression in the Second Schedule of the Copyright Act.

In any event, the crux of the matter is that these limitations on protectible subject matter, even though recognised in the Copyright Act, hardly advance ALM for students in Nigeria. Consider the originality requirement. While it is the case as a matter of legal principle that literary works which do not meet the originality requirement will not be protected, the reality is that the originality standard is low and almost any work will pass the threshold. Originality in copyright law is not synonymous with novelty and provided the work is independently created, it will satisfy the originality standard. The default position then is that virtually every literary work is 'original' and therefore copyright protected unless one can prove otherwise, a costly exercise to be adjudicated by the courts. And even though news of the day lies outside the circumference of copyright protection, such subject matter hardly fits the technical course syllabus of higher institutions. It would therefore seem that the only glimmer of hope in facilitating ALM, under the limitations pertaining to protectible subject matter, is the term of protection. After all, when the term of protection for a

[100] Nigerian Copyright Act, Cap C28, Laws of the Federation of Nigeria (2004)
[101] See Sterling, *Supra.* n.53 at 308-343 [Author examining the different approaches to originality in common and civil law countries]
[102] First Schedule, Copyright Act.

work expires anyone can do anything with it that copyright otherwise proscribes. But it is clear for obvious reasons that reliance on the expiration of copyright term as a way of facilitating ALM is anything but helpful. A2E requires immediate and timely ALM which is impossible through reliance on the expiration of copyright protection.

II. Facilitating A2E in Nigeria Through Specific L&Es: An Examination.

This section will focus on two specific L&Es, quotation and teaching exceptions, and the special provision regarding DCs. The objective is to consider if these L&Es, properly implemented, will facilitate A2E in Nigeria. Before proceeding, it will be necessary to consider as a preliminary issue whether the three-step test applies to the quotation and teaching exceptions. This is important because if it is found to be so then Nigeria must, in addition to the specific conditions that apply to each of these exceptions, ensure that the implementation of the exception complies with the three-step test.

a. The Applicability of the Three-Step Test to Specific L&Es.

In order to determine whether the three-step test applies as an additional requirement to specific L&Es, particularly the quotation and teaching exceptions, it is important to make a distinction between two things. The first is the Berne L&Es as they are in the BC i.e. Berne-in-Berne; and the second is the Berne L&Es as they are incorporated in TRIPS i.e. Berne-in-TRIPS. The fact that Berne provisions are incorporated without modification in TRIPS by virtue of art.9 does not necessarily mean that the interpretation accorded to Berne-in-Berne will be the same to that of Berne-in-TRIPS. One implication of art.31 of the VC, discussed above, is that in interpreting Berne-in-TRIPS, the interpretation accorded to Berne terms will be guided by its context i.e. TRIPS, as well as its object and purpose. Furthermore, TRIPS' three-step test differs in certain respects from Berne's which may lead to the conclusion that Berne's L&Es as incorporated in TRIPS are further subject to the three-step test.

Regarding Berne-in-Berne, the better view is that arts. 10(1) and 10(2) are not subject to the Berne three-step test.[103] Authority for this view comes from the Report of Main Committee I on the general comments on interpretation where it is stated that:

> The Drafting committee was unanimous in adopting, in the drafting of new texts as well as in the revision of the wording of certain provisions, the principle *lex specialis legi generali derogat*: special texts are applicable, in their restricted domain, exclusive of texts that are universal in scope. For instance, it was considered superfluous to insert in Article 9 dealing with some general exceptions affecting authors' rights, express references to Articles 10, 10*bis*, 11*bis* and 13 establishing special exceptions. [104]

The case is however different for Berne-in-TRIPS. There are three views as to whether Berne's art. 10, i.e. quotation and teaching exceptions, are subject to TRIPS three-step test. The first view is that they are. Proponents of this position point to Art.13 of TRIPS which requires that members "confine limitations or exceptions to exclusive rights" so that they comply with the three-step test. Given that the wording of Art.13 uses limitations or exceptions, and not some limitations or exceptions, there is a plausible case to insist that TRIPS three-step test applies to the quotation and teaching exceptions. This seems to be the position taken by the WTO Panel in the case brought by the European Communities (EC) against the US.[105]

The second view is that the L&Es permitted by the BC are already compatible with TRIPS three-step test. This view gains support from a WIPO publication in which it is stated that "there is no conflict between the Berne Convention and the TRIPS Agreement as far as exceptions and limitations to the exclusive rights are concerned."[106]

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[103] See Hugenholtz & Okediji, *Supra*. n.75 at 20 ["Given the structure of the Berne Convention, the three-step test does not extend to a State exercise of discretion pursuant to those articles where such discretion has explicitly been granted, such as articles 2*bis*, 10 and 10*bis*. Thus, States may freely enact legislation with respect to the subjects covered in these provisions without the restrictions of the three-step test."]; Ricketson and Ginsburg, *Supra*. n.48 at 763 [Authors stating that although article 9(2) of the BC makes no reference to articles 10, 10*bis*, 2*bis* (2), "it seems clear that their operation is unaffected by it, and that the uses allowed under them are therefore excluded from its scope."]

[104] Records of the Intellectual Property Conference of Stockholm, *Supra*. n.64 at 1134

[105] See Report of the Panel, *United States—Section 110(5) of the US Copyright Act*, WT/DS160/R at 6.79-6.80 [While the WTO Panel did not make a decision on the US contention that "the text of Art.13 is straightforward and applies to 'limitations or exceptions to exclusive rights. Not some limitations, not limitations to some exclusive rights", it nevertheless held that TRIPS art.13 applied to all economic rights recognised in the BC in addition to rights newly introduced under the TRIPS agreement.]

[106] Implications of the TRIPS Agreement on Treaties Administered by WIPO (WIPO Pub. No. 464, 1996) 52 https://www.wipo.int/edocs/pubdocs/en/wipo_pub_464.pdf

This is also the view of Ricketson and Ginsburg in which they state specifically for art.10(1) and (2) that "the references to 'compatible with fair practice' may correspond to the second and third steps of the three-step test, while the limited scope of those provisions undoubtedly brings them within criteria contained in the first step."[107] So according to this view, the Berne quotation and teaching exceptions are already TRIPS compliant.

The third and final view is that Berne art.10 is not subject to the TRIPS three-step test. In expressing this view, some commentators limit their view to art.10(1) of the BC, thereby implicitly expressing doubt whether such view extends to art.10(2), while others insist that TRIPS three-step test is not applicable to art.10 of the BC in general.[108]

The case for arguing that art.10(1) on its own is not subject to TRIPS three-step test is straightforward. Given that art. 10(1) is a mandatory provision requiring member States to create such exception—and such obligation incorporated in TRIPS by virtue of art.9(1)—any condition on the exercise of the obligation, such as compliance with the three-step test only waters down the obligation. In fact, art.2(2) of the TRIPS Agreement provides that "Nothing in parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits." This argument however does not apply to art.10(2) of the teaching exception given that it is an optional provision. However, some scholars have argued that art.10(2) is not subject to TRIPS by virtue of the legal doctrine of *lex specialis derogat legi generali*, which states that when faced with two rules governing a situation the more specific rule overrides the general rule.[109]

This lack of consensus regarding the scope of TRIPS three-step test is evident in the various approaches adopted in national copyright laws to implement L&Es. Some

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[107] Ricketson and Ginsburg, *Supra*.n.48 at 858.

[108] Gwen Hinze, 'Making Knowledge Accessible Across Borders: Mandatory Minimum International Copyright Exceptions for Education.' *Electronic Frontier Foundation*, October 30, 2008. https://www.eff.org/wp/making-knowledge-accessible-across-borders-case-ma [Concluding that the TRIPS three-step test is not applicable to arts. 10(1) and 10(2) of the BC.]

[109] Lawrence Liang, 'Exceptions and Limitations in Indian Copyright Law for Education: An Assessment' (2010) 3(2) *The Law and Development Review* 198, 220.

countries in their national copyright laws subject L&Es to the three-step test while others reproduce *verbatim* the Berne L&Es or subject the exceptions to a general fair use (dealing) doctrine. An example of the latter is found in Thailand's Copyright Act.[110] Section 32 provides for various acts that are exempted from copyright infringement such as "research or study of the work which is not for profit" but any exempted act is further subject to the condition that it "does not conflict with normal exploitation of the copyright work by the owner of copyright and does not unreasonably prejudice the legitimate rights of the owner of copyright…"

In summary, while it is generally agreed that the Berne-in-Berne L&Es are not subject to the three-step test there is no consensus as to whether the Berne-in-TRIPS exceptions, particularly art.10(1) and (2) are subject to the three-step test. If the US position on the WTO Panel decision is followed[111], then Berne permitted L&Es will be subject to the three-step test. But there are also sound reasons not to follow the US position.

In the next section, the quotation and teaching exceptions will be examined from the standpoint of A2E in Nigeria on the basis that they are not subject to the three-step test, which is not necessarily the case.

b. Quotation Exception in Nigeria.

As discussed, the implementation of the BC obligatory quotation exception differs in different jurisdictions with some countries preferring to implement it as a stand-alone exception while others incorporate it under the fair use (dealing) exception. The Copyright Act adopts the latter. It permits fair dealing with a work "for purposes of research, private use, criticism or review or the reporting of current events" provided where the use is public it is accompanied by an acknowledgement of the title of the work and its authorship.[112] While the Copyright Act does not use the word 'quotation', it is clear that criticism, review, or the reporting of current events requires

[110] Thailand Copyright Act (No. 2) B.E. 2558 (2015)
[111] See *Infra*. 3(IV)
[112] See Second Schedule, Copyright Act.

quotation from existing work or sources. Also, the determination of what is "fair" is a matter for the courts given that "[i]t is impossible to define what is fair dealing."[113]

The Copyright Act's implementation of the mandatory quotation exception is liberal in that there is no quantitative restriction. In contrast, Botswana's Copyright Act provides that "[t]he reproduction, in the form of quotation, of a *short part* of published work shall be permitted without authorization of the author or other owner of copyright, provided that the reproduction is compatible with fair practice and does not exceed the extent justified by the purpose."[114] In any event, the quotation exception even in the liberal form of the Copyright Act cannot facilitate ALM as required in Nigeria. While no quantitative restrictions apply to the quotation exception of the Copyright Act, it is hard to imagine that it will allow the reproduction of works beyond that which is necessary for criticism or review. Such reproductions are in general short extracts—thereby diminishing in substance the distinction between the Copyright Act and the Botswana Copyright Act—and will not satisfy the educational need of students in Nigerian higher institutions.

c. Educational Exceptions in Nigeria Copyright Act.

On the other hand, the teaching exception which gives members of the Berne Union the option to create educational exceptions provides a better opportunity than the quotation exception to facilitate A2E in Nigeria. In the Copyright Act, there are several educational exceptions. It is important to bear in mind though that not all these educational exceptions, examined below, follow from the implementation of the Berne teaching exception but rather could be seen as the utilisation of the latitude afforded to countries by virtue of the three-step test.

The Copyright Act exempts from copyright protection or control "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."[115] This

[113] *Hubbard v. Vosper* [1972] 2 QB 84. This case is a persuasive authority for interpreting the fair dealing provision of the Copyright Act because it is modelled on the UK Copyright fair dealing provision in addition to the fact that the UK is a common law jurisdiction.
[114] Section 14(1) Botswana Copyright and Neighbouring Rights Act, 2000. *Emphasis added*
[115] Second Schedule, Copyright Act.

exception under the Copyright Act is an implementation of art.10(2) of the BC although its wording more closely tracks art.8 of the Berne Act 1886, the earlier version of the teaching exception. The exception is obviously narrow, allowing only the inclusion of two excerpts in a collection of literary works designed for educational use. The same wording is employed in s.26 of the Kenya Copyright Act save that it uses "two short passages" rather than "two excerpts" as used in the Copyright Act.[116] The quantitative limitation of two excerpts is unnecessary given that art.10(2) BC has no quantitative restriction save the use of the phrase "by way of illustration" which, it has been suggested, "impose some limitation, but would not exclude the use of the whole work in appropriate circumstances."[117] Furthermore, the usefulness of the exception is further diminished by the lack of certainty involved in the term "excerpts." The Oxford Dictionary defines excerpt as a "short extract from a film, broadcast, or piece of music writing."[118] The question then is, for the purpose of the Copyright Act, what constitutes an excerpt? Is the extraction of a chapter from a book an excerpt? In the end, this is a matter for the courts to decide thereby further complicating issues.

One important issue is whether this exception as provided for in the Copyright Act can allow for the creation of course packs in Nigerian higher institutions. While the exception is intended to facilitate the creation of anthologies for educational use, it is very unlikely given the uncertainty and the quantitative restriction involved in the exception that it will allow the creation of course packs of the sort needed in Nigerian higher institutions. A prior issue though is whether art.10(2) provides the flexibility to enable member countries create exceptions that allow the creation of course packs. In this regard, Ricketson and Ginsburg comment that:

> As for chrestomathies and anthologies, while it is always possible that some may

[116] Copyright Act No. 12 of 2001, as amended up to Act No. 11 of 2017.

[117] Ricketson and Ginsburg, *Supra.* n.48 at 791. See Daniel Seng, 'WIPO Study on the Copyright Exceptions for the Benefit of Educational Activities for Asia and Australia' Standing Committee on Copyright and Related Rights, 19th Session Geneva, December 14-18, 2009, WIPO document SCCR/19/7, October 29, 2009, stating at p.167:

> To the extent that the aforesaid provisions are the general education exceptions in the countries' copyright legislation, an exception applicable only to a "short part" of a work for illustration purposes seems to be much narrower than the prescription in Article 10(2) of the Berne Convention that the utilization be "to the extent justified by the purpose", which would have permitted the use of the whole of a work in appropriate circumstances.

[118] "Excerpt" in *Supra*. n.66.

> fall within the scope of art.10(2), it is more likely that they will not, as it will be a distortion of language to describe an anthology of poetry (with the complete text of the poems) or a 'course pack' consisting of chapters taken from various books about the subject to be covered in the course, as being used 'by way of illustration…for teaching'. Such usages are well-developed forms of exploitation in many countries, subject to voluntary licensing agreements or even compulsory licensing schemes that meet the requirements of article 9(2).[119]

One commentator has however disagreed with this view pointing out correctly that "the fact that the existence of well-developed licensing schemes in some countries is not enough to support (let alone, justify) an interpretation against the express wording of Art. 10(2)" and that "the two specific examples chosen by the authors are not exemplificative or exhaustive of all teaching anthologies possible."[120] In a subsequent section, I will look at India's implementation of the teaching exception and how it has been interpreted by the courts regarding the creation of course packs.

Other educational exceptions, broadly construed, provided for in the Copyright Act are[121]:

a. 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 12 months after it was made.

b. any use made of a work by or under the direction or control of 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 therefrom and no admission fee is charged for the communication, if any, to the public of the work so use.

c. 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.

I will limit the discussion only to the first exception on the list. This is an interesting exception and would seem to be based on the latitude afforded to countries by the three-step test to devise exceptions. There are two obvious conditions to the exception. First, the act which the exception allows must occur in an "approved

[119] Ricketson and Ginsburg *Supra*. n.48 at 794
[120] Xalabarder, *Supra.* n.70.
[121] All the exceptions are contained in the Second Schedule of the Copyright Act.

educational institution". Second, it must be for "educational purposes" of the approved educational institution. Given that the first condition seems to impose a spatial limitation, is it the case that the reproduction of a work which occurs outside an approved educational institution, though to be used in the educational institution, will fall outside the scope of the exception? Provided the work is used in the educational institution, the act will seem to be saved by the exception. Suppose however that a copy shop outside the university premises is used in creating course packs for students will this be saved by the exception?

At first, the primary issue is whether this exception allows for the creation of course packs. In this instance, it is important to note the exception applies to "any use made of a work". This is broad and would even allow the performance or communication of the work. Given that the process of making course packs involves making use of existing works, the phrase "any use made of a work" would seem to cover the creation of course packs. It may however be argued that the exception covers only the use of a particular work and that such uses may not extend to the inclusion in a collection of works given that another exception already covers it. Even if this exception covers the making of course packs, there are still some limitations to be encountered. As noted above, there is still the unresolved issue if the course pack is created outside the university as this will generally be the case given that copy shops are located outside university campuses. This seems to be different from the situation where a reproduction of a work, which is to be used in the university, occurs in a copy shop outside the university campus. Here the reproduction only facilitates the ultimate use of the work which would occur in the approved educational institution. Whereas, the act of creating the course pack which occurs outside the university campus is the use itself.

Finally, the exception is subject to the condition that any reproduction that is made must be destroyed in accordance with the stipulated period or if there is none, before the end of 12 months after the reproduction is made.

III. The Berne Appendix and A2E in Nigeria.

The principal question is to what extent can these special provisions facilitate A2E in Nigeria.

At the outset, the threshold question is whether Nigeria is a DC, as the provision is only open to DCs.[122] Nigeria has been receiving assistance from the UNDP and so satisfies the first prong.[123] It is also clear that because of Nigeria's economic situation and socio-cultural needs, insisting upon the full protection of private exclusive rights will have adverse consequences for the developmental goal of A2E. Accordingly, Nigeria is a DC for the purposes of utilising the special provisions in the Appendix.

The provisions of the Berne Appendix regarding DCs are included in the Fourth Schedule of the Copyright Act, and it is in substance a reproduction of the Appendix. So, all the conditions discussed above apply *mutatis mutandis* in the Copyright Act. Maintaining compliance with the Berne Appendix, the Copyright Act provides that only a "qualified person" may apply for a compulsory license.[124] A qualified person under the Copyright Act covers not only a natural person— a Nigerian citizen or a person domiciled in Nigeria— but also a body incorporated in Nigeria.[125] The qualified person must apply to the NCC for a reproduction and/or translation license solely for the purpose of teaching, research or scholarship.

In order to avail of the reservations, Nigeria must deposit a notification with the DG declaring that it will avail of either the reservations or both. A review of the BC notifications registry however shows that Nigeria is yet to deposit any notification with the DG.[126] This is not surprising given the bureaucratic, complex, rigorous and

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[122] See *Supra*. ns.79-80

[123] 'UNDP in Nigeria' United Nations Development Programme http://www.ng.undp.org/content/nigeria/en/home/about-us.html

[124] Section 1, Fourth Schedule

[125] The definition of a "qualified person" under the Copyright Act seems to be broader than that of "national" as used in the Berne Appendix. Although a national as used in the Berne Appendix would cover a legal entity incorporated in Nigeria, it is a bit of a stretch to consider a person domiciled in Nigeria a national. See *Guide* to the Berne Convention *Supra*. n.57 at 155.

[126] Notification on the Berne Convention, WIPO, https://www.wipo.int/treaties/en/ShowResults.jsp?country_id=ALL&start_year=ANY&end_year=ANY&search_what=N&treaty_id=15

convoluted nature of the Appendix.[127] The conditions of the Appendix are so onerous that any meaningful use of it to facilitate A2E in Nigeria is impractical. In particular, the time limits and notification requirements amongst other conditions constrain the use of the Appendix to facilitate A2E in Nigeria. Consider some of the conditions, reproduced in full, that apply to the reproduction license under the Copyright Act:

> No license shall be granted to an applicant under this paragraph unless:
>
> a. the applicant has proved to the satisfaction of the Commission that he had requested and been denied authorisation by the owner of the copyright in the work to reproduce and publish such work or that he was, after due diligence on his part, unable to find such owner;
>
> b. where the applicant was unable to find the owner of the copyright, a copy of his request for such authorisation by registered air-mail post to the publisher whose name appears on the work not less than three months before the application for the license;
>
> c. the applicant had informed any national or international centre designated for this purpose by the government of the country in which the publisher of the work to be reproduced is believed to have his principal place of business;
>
> d. the Commission is satisfied that the applicant is competent to reproduce and publish an accurate reproduction of the work and possesses the means to pay to the owner of the copyright the royalties payable to him under this paragraph;
>
> e. the applicant undertakes to reproduce and publish the work at such price as may be fixed by the Commission, being a price reasonably related to the price normally charged in Nigeria for works of the same standard on the same or similar subjects;
>
> f. a period of six months in the case of an application for the reproduction and publication of any work of natural science, physical science, mathematics or technology, or a period of three months in the case of an application for the reproduction and publication of any other work, has lapsed from the date of making the request under sub-paragraph 5(a) of this paragraph, or where a copy of the request has been sent under sub-paragraph 5(b) of the said paragraph, from the date of sending a copy, and a reproduction of the work has not

[127] A.C. Silva, 'Beyond the Unrealistic Solution for Development Provided by the Appendix of the Berne Convention on Copyright' (2012) *PJIP Research Paper No. 2012-08*, American University Washington College of Law. https://digitalcommons.wcl.american.edu/research/30/; Joseph Fometeu, 'Study on Limitations and Exceptions for Copyright and Related Rights for Teaching in Africa' Standing Committee on Copyright and Related Rights, 19th Session Geneva, December 14-18, 2009, WIPO document SCCR/19/5, October 26, 2009, pgs. 19-25

been published by the owner of the copyright in the work or any person authorised by him within the said period of six months, as the case may be;

g. the name of the author and the title of the particular edition of the work proposed to be reproduced are printed on all the copies of the reproduction;

h. the author has not withdrawn circulation copies of the work; and

i. an opportunity of being heard given, wherever practicable, to the owner of the copyright in the work.

The reader will observe that the above conditions are mainly in regard to notification requirements. Before this stage, the applicant must show in order to be eligible to apply for a compulsory reproduction license that either three years or seven years have elapsed from the date of first publication of the literary work and that there are no copies available in Nigeria. The three years applies to works of natural science, physical science, mathematics and technology and the seven years to other works. This condition in itself is a clear testimony to the uselessness of the Appendix. In addition to this, an additional six or three months must elapse depending on the type of work, as stated in paragraph f above, before a license is granted. This time limit on top of the labyrinthine formalities of the Appendix pays lip service to the developmental importance of A2E. If students need approximately four years in order to gain access to material that is not available then there is a need to re-examine the commitment to A2E, expressed in both international copyright treaties and human rights conventions. While one author argues that the "first category of time limits is justified by the fact that there is a need, despite the necessities, to give the legitimate owners sufficient time to put copies of the work in circulation in countries where there is potential demand"[128], it is submitted that such extended time limit belies the necessity that gave rise to the need for the Appendix in the first place.

These conditions and formalities are further complicated by moral rights considerations. For example, paragraph h requires as a condition for the grant of the license that "the author has not withdrawn circulation copies of the work". Regarding this, one author thoughtfully considers:

[128] Fometeu, *Ibid*. at 23

> A question that could be asked is what would happen if the right to reconsider or of withdrawal was exercised after the granting of the license. The answer is simple *a priori:* the granting of a license may not paralyze the exercise of this right by the holder. Thus, we cannot rule out the case where one day someone might withdraw from circulation copies published under license in addition to copies produced with the author's authorization in and outside the territory for which the said license has been granted.[129]

Additionally, the license is only available for works published in printed or analogous forms of reproduction, thereby casting doubt on whether the Appendix applies to works published on digital platforms. Finally, the compulsory license is not free. The licensee will have to pay royalties to the owner of the copyright for every copy sold to the public.[130]

In sum, although some countries have implemented the Appendix in a liberal manner thereby giving rise to the concern whether it is compatible with the BC[131], it is very unlikely that the regime of compulsory licenses for DCs will facilitate A2E in Nigeria given the series of bottleneck formalities discussed above in making use of the provision.

IV. The Flexibility of the Three-Step Test in Facilitating A2E in Nigeria

The options available to Nigeria in facilitating A2E extend to the utilisation of the three-step test. As discussed, the legitimacy of L&Es in national copyright law depends on their compliance with the three-step test. As an example, any exception to facilitate A2E in Nigeria that does not fall under the L&Es discussed above will be subject to the three-step test. Accordingly, the principal issue in this section is whether the three-step test has the flexibility to allow DCs such as Nigeria to create exceptions that facilitate A2E. In order to answer this question, this section will look briefly at the official interpretation of the three-step test in the WTO Panel decision and whether such interpretation is binding on national courts.

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[129] *Ibid*. at 26

[130] Section 4(a), Fourth Schedule

[131] See Cuba Law No. 14 of December 28, 1977 on Copyright, Art. 37 (Under Cuba Copyright Act, compulsory license for reproduction and translation may be granted for social reasons which is broader than that stated in the Appendix or the Copyright Act. Furthermore, there is no requirement for remuneration.)

a. The WTO Panel Interpretation of the Three-Step Test.

There is no official interpretation of art.9(2) BC i.e. Berne three-step test. However, TRIPS three-step test has been officially interpreted by the WTO Panel under the TRIPS Dispute Settlement Understanding (DSU).[132] But given that the TRIPS three-step test derives from Berne art. 9(2), it is safe to argue that any authoritative interpretation accorded to TRIPS art. 13 will at least inform Berne art. 9(2).

Briefly, the dispute before the Panel was brought against the US by the EC. The principal issue concerned s.110(5) of the US Copyright Act. Section 110(5) A and B provided for so-called "homestyle" and "business" exceptions to the public communication right. The former permits small businesses to play radio or television for customers provided the equipment used is of a kind commonly used in private homes while the latter makes the exception dependent on the size of the establishment and number of loudspeakers. The EC argued that these exceptions violated arts. 11(1)(ii) and 11*bis*(1)(iii) of the BC as incorporated by art.9(1) of TRIPS. Given that both parties agreed that s. 110(5) breached arts. 11(1)(ii) and 11*bis*(1)(iii) of the BC, the pertinent question was whether s.110(5) is a legitimate exception. In order to answer this, the Panel decided that the standard to test the legitimacy of the exceptions is art.13 of TRIPS i.e. the three-step test. Accordingly, the Panel had to interpret the components of the three-step test.[133]

And for s.110(5) to be deemed legitimate, it must be shown that: (1) the exceptions are confined to certain special cases; (2) they do not conflict with normal exploitation of the work; and (3) they do not unreasonably prejudice the legitimate interests of the right holder.[134] In interpreting these conditions, the Panel noted first in agreement with both parties that "these three conditions apply cumulatively; a limitation or an exception is consistent with Article 13 only if it fulfils each of the three conditions."[135] It follows then that each step is decisive and determinative. If an exception or

[132] Art. 64(1) TRIPS Agreement.
[133] Report of the Panel, United States—Section 110(5) of the US Copyright Act, WT/DS160/R (June 15, 2000) at 6.80 [hereafter Report of the Panel]
[134] Art 13 TRIPS Agreement
[135] Report of the Panel, *Supra.,* n.133 at 6.74

limitation fails the first step, it is pointless if it passes the remaining two steps and vice versa. It is therefore important to understand the interpretation accorded to each step of the test.

With regard to the first condition, “certain special cases”, the Panel was content with the ordinary meaning of the terms and concluded that the term “certain” meant that an exception or limitation must be clearly defined.[136] As per the second term “special”, the Panel was of the view that this meant that “an exception or limitation must be limited in its field of application or exceptional in its scope.” This, according to the Panel, requires that the limitation or exception be narrow in a quantitative as well as a qualitative sense. The EC had argued that s.110(5) did not pursue any legitimate public policy objective, thereby implying that for the first condition to be satisfied a public policy objective is required.[137] The Panel however disagreed with this and stated that “certain special cases” should not be equated with “special purpose”.[138] For the Panel, “a limitation or exception may be compatible with the first condition even if it pursues a special purpose whose underlying legitimacy in a normative sense cannot be discerned.”[139]

Regarding the second condition, “normal exploitation of a work”, the principal issue for the Panel was what constitutes a normal exploitation which the use of a work should not conflict with. Dissecting the term “normal”, the Panel was of the view that its ordinary meaning has two connotations: empirical and normative[140], and that a harmonious interpretation was required in order to give effect to both connotations.

The US had argued that the condition of “normal exploitation” required an economic analysis of the degree of market displacement i.e. the foregone collection of remuneration by right owners caused by the free use of works due to the exemption at issue. In adopting this approach, “the essential question to ask is whether there are areas of the market in which the copyright owner would ordinarily expect to exploit the work, but which are not available because of this exemption.”[141] The

[136] *Ibid*., at 6.108
[137] This position was taken by Sam Ricketson, The Berne Convention for the Protection of Literary and Artistic *Works: 1886-1986* (IBIP; Geneva, 1986) at 9.6
[138] Report of the Panel, *Supra*. 133 at 6.111.
[139] *Ibid*. at 6.112
[140] *Ibid*. at 6.166 [Quoting the Oxford English Dictionary definition of normal as “constituting or conforming to a type or standard; regular usual, typical, ordinary, conventional…”
[141] *Ibid*. 6.177

Panel agreed with this definition of normal exploitation but insisted it only reflected the empirical aspect of "normal".[142] The normative aspect of normal exploitation was to be measured by considering "in addition to those forms of exploitation that currently generate significant or tangible revenue, those forms of exploitation which, with a certain degree of likelihood and plausibility, could acquire considerable economic or practical importance."[143] The Panel concluded that there would be conflict with normal exploitation:

> [I]f uses, that in principle are covered by that right but exempted under the exception or limitation, enter into economic competition with the ways that right holders normally extract economic value from that right to the work…and thereby deprive them of significant or tangible commercial gains.[144]

Regarding the last condition, the Panel noted that the terms, "interests", "legitimate", and "unreasonable", required definition. In line with the WIPO Guide to the BC, the Panel pointed out that the relevant question is not whether there is prejudice, given that any exception to an exclusive right would always involve some prejudice, but rather whether there is some unreasonable prejudice.[145] In analysing the term "interests", the Panel stated that interests should not necessarily be understood as "limited to actual or potential economic advantage or detriment", thereby paving the way for non-economic concerns.

As for "legitimate", the Panel considered that the term relates to both a legal positivist and normative perspective, the latter "calling for the protection of interests that are justifiable in the light of the objectives that underlie the protection of exclusive rights."[146] Having examined both terms, the Panel had to decide how to measure legitimate interests i.e. what are the legitimate interests of a copyright holder to which an exception or limitation should not cause unreasonable prejudice. According to the Panel, one way of looking at legitimate interests is to focus on the economic value of the exclusive rights conferred by copyright while pointing out that legitimate interests are not limited to economic value, although it stopped short of identifying the non-economic values which constitute legitimate interest. Perhaps this

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[142] *Ibid*. at 6.178
[143] *Ibid*. at 6.180
[144] *Ibid*. 6.183
[145] *Ibid.* at 6.222. See Guide BC, *Supra*. n.57 at 55-56
[146] *Ibid*. at 6.224

non-economic value will align with the normative aspect of “legitimate” i.e. the objectives underlying the protection of exclusive rights.

Finally, the last question was what amount of prejudice to the legitimate interests of a right holder would be considered unreasonable. The Panel concluded that “prejudice to the legitimate interests of right holder reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner.”[147]

In summary, the sequence of this last condition must follow this pattern. First, one must identify the legitimate interests of a right holder implicated by the exception or limitation, bearing in mind that legitimate interests are not necessarily economic. Second, it must be ascertained whether there is prejudice to the legitimate interests, bearing in mind that a finding of prejudice is not fatal as there will always be some level of prejudice. Third, whether the prejudice is unreasonable, and this is ascertained in economic terms i.e. the effect or potential of causing an unreasonable loss of income to the copyright owner.

b. Commentary on the WTO Panel Interpretation of Three-Step Test.

As discussed above, none of the exceptions examined above under the Copyright Act allow for the creation of course packs. The legitimacy of such exception or limitation, if any, under the Copyright Act, will be determined by its compliance with the three-step test. Suppose there is an exception under the Copyright Act that allows for the creation of course packs without remuneration or even under a compulsory license, will this comply with the three-step test? Apart from this, it is necessary to understand the ambit and flexibility of the three-step test given that in general L&Es, in this context educational exceptions, will have to comply with it.

The first thing to note from the Panel’s report is that the three-step test has to be applied cumulatively. Unlike the fair use or fair dealing test which requires the balancing of various factors, each step or condition is separate and must be

[147] *Ibid*. at 6.229

satisfied. This makes the test difficult to satisfy. As some commentators note, this cumulative application "heavily tilts the balance in favour of the right holders."[148]

Second, the Panel's interpretation of the three-step test is predominantly economic.[149] In particular, the Panel's interpretation of the second condition is narrowly economic, and it is difficult to imagine a use which does not conflict with "normal exploitation" on this interpretation. As discussed, normal exploitation involves a consideration of not only those forms of exploitation that currently generate tangible revenue but also those forms that would, with some degree of plausibility, be economically tangible for the right holder in the future. On this understanding of normal exploitation, it is difficult to disagree that the only reason traditionally grounded exceptions, such as quotation right or private use, exist is because of the absence of licensing mechanisms that reduce transaction costs. Consider the hypothetical situation where an exception exists under the Copyright Act for the creation of course packs. Such an exception will not pass the second condition. The reproduction of textbooks is a form of exploitation that currently generates tangible revenue for the right holder and even if its exploitation in Nigeria is hampered by transaction costs, the fact remains that it is a form of exploitation that could acquire considerable economic importance. And even if the exception is subject to a compulsory license, it will not survive the condition for it is accepted that a compulsory license will not cure or resolve a conflict with normal exploitation.[150]

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[148] Hugenholtz & Okediji, *Supra*. n.75 at 17.

[149] Many commentators agree on this point. See Annette Kur, 'Of Oceans, Islands, and Inland Water—How Much Room for Exceptions and Limitations Under the Three-Step Test?' (2009) 8(3) *Richmond Journal of Global Law and Business* 287; C. Geiger, D.J. Gervais, and M. Senftleben 'The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law' (2014) 29(3) *American University International Law Review* 581; J.C. Ginsburg, 'Toward Supranational Copyright Law? The WTO Panel Decision and the "Three-Step Test" for Copyright Exceptions' (2001) *Revue Internationale du Droit d'Auteur* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=253867; Jo Oliver, 'Copyright in the WTO: The Panel Decision on the Three-Step Test' (2001) 25(3) *Columbia Journal of Law & the Arts* 119.

[150] The Panel quoted with approval a statement from the Main Committee I of the Stockholm Diplomatic Conference to the effect that:

> If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory license, or to provide for use without payment.

See the Records of the Intellectual Property Conference of Stockholm, Supra. n.64 at 84.

The major problem with the Panel's interpretation of the second condition of the three-step test is the absence of non-economic or normative considerations.[151] By focusing on narrow economic considerations, the Panel pushed upward the trajectory that has led to the expansion of exclusive rights.[152] This exclusive economic focus is surprising given the equally non-economic objectives of the TRIPS agreement.[153] On the other hand, and as noted above, the TRIPS agreement is a trade agreement and accordingly might privilege economic considerations. In order to prevent this predominant economic focus, Ginsburg has argued that for cases presenting normative difficulties such as speech or scholarship motivated exceptions, the WTO Panel "should consider whether, as a normative matter, there is a "market" for criticism and similar kinds of uses that the copyright owner should control."[154]

The third stage, on the other hand, is the only step where the Panel entertained non-economic considerations. As discussed above, the Panel insisted that satisfaction of the first stage did not require any legitimate policy objective. In the third stage, the Panel asserted that interests should not be limited to economic concerns and that the normative aspect of legitimate interests calls for the protection of interests that are justifiable in the light of the objectives that underlie the protection of exclusive rights. One might argue that the incorporation of non-economic concerns in the third stage rectifies the imbalance of the second stage. This is wrong, however, for it is well settled that the second stage must be satisfied before moving to the third stage. It is not really obvious though that the third stage goes beyond the narrow economic considerations of the second stage. In fact, it seems that the same economic analysis underpins both stages of the three-step test. According to the Panel, the issue of whether prejudice rises to an unreasonable level depends on whether an exception or limitation causes or has the potential to cause an unreasonable *loss of income* to the copyright owner. It is hard to imagine an exception or limitation that does not cause a loss of income to the copyright owner in so far as it is possible to develop a licensing mechanism that captures the economic value of the use enabled

[151] Kur, *Supra*. n. 149 at 320 ["No room is left in the assessment undertaken in the second step for consideration of policy aspects."]
[152] Perhaps this narrow focus might be due to the nature of the case which was mainly economic. See Ginsburg, *Supra*. n.149 [Observing that "the case before the WTO Panel did not present significant normative difficulties."]
[153] Geiger, Gervais, and Senftleben, *Supra*. n.149 at 598.
[154] Ginsburg, *Supra*. n.149.

by the exception or limitation. Although the loss of income must be unreasonable, nowhere in the Panel's report is there an indication of what this means. The conclusion is that despite the Panel's seemingly broader approach to the third stage, both the second stage and third stage of the three-step test are in effect two sides of the same coin.

c. The Three-Step Test in the DU Photocopy Case

The facts of the DU photocopy case have been discussed extensively in the previous chapter and so will not be rehearsed here. The goal here is to test further the flexibility of the three-step test, particularly how Member state courts have interpreted the test.

In the DU photocopy case, one of the contentions of the plaintiff publishers was that India, being bound by the international conventions on copyright, specifically the BC and TRIPS Agreement, failed in its obligations by enacting s.52(1)(i) of the Indian Copyright Act. As recalled, this section provides that "the reproduction of any work by a teacher or pupil in the course of instruction" does not constitute an infringement. It was held by the DHC that the making and distribution of course packs to students did not constitute an infringement as it was protected by this exception. The argument of the plaintiff publishers seemed to be that even if this is so, s.52(1)(i) was not compatible with international conventions, particularly the teaching exception and the three-step tests in BC and TRIPS. It was now left for the Single Judge to decide whether India by virtue of s.52(1)(i) failed to comply with its obligations under these international conventions.

The Single Judge essentially took a deferential approach. After reviewing the relevant provisions of the international conventions, the Single Judge held that the only binding obligation to signatory countries was (1) not allow reproduction of a work conflict with a normal exploitation of the work and to unreasonably prejudice the legitimate interests of the author and (2) reproduction for teaching purposes must be limited to the extent justified by the purpose.[155] Similar restrictions apply to the

[155] *The Chancellor, Masters and Scholars of the University of Oxford and Ors. v. Rameshwari Photocopy*

TRIPS Agreement. According to the Single Judge, India's legislators "are deemed to have kept the said international covenants in mind", and have "permitted reproduction of any work by a teacher or a pupil in the course of instructions."[156] The Single Judge finally concluded that:

> The legislators have found reproduction of the copyrighted work in the course of instruction to be justified for the purpose of teaching and to be not unreasonably prejudicing the legitimate interest of the author. It is not for this Court to impose its own wisdom as to what is justified or what is unreasonable, to expand or restrict what the legislators have deemed fit.[157]

Before the Division Bench of the DHC, the Court concluded similarly that "[n]othing much turns on Article 13 of the TRIPS Agreement and Article 9 of the Berne Convention for the reason that the contents thereof are merely directory and have enough leeway for the signatory countries to enact the copyright law in their municipal jurisdiction concerning use of copyrighted works for purposes of dissemination of knowledge."[158]

d. Summary

It is obvious that the Panel's interpretation of the three-step test is narrow. In particular, it is not only that the cumulative application of the three-step test favours the interests of right holders but also the predominant economic focus of the Panel's interpretation closes whatever policy space was hitherto available to DCs such as Nigeria to create L&Es that facilitate A2E. But neither the objectives of the TRIPS agreement nor the phrasing of the three-step test requires such narrow interpretation. There is much leeway for a broader interpretation of the three-step test that does not privilege right holders at the expense of users' rights and development goals.

In fact, the Panel's interpretation is not binding on member states courts, and future panels are not legally obliged to follow it.[159] Accordingly, the Indian court in the DU

Services and Ors. CS(OS) 2439/2012 at para. 95.

[156] Ibid.

[157] *Ibid*. at para. 97

[158] *The Chancellor, Masters and Scholars of the University of Oxford and Ors. v. Rameshwari Photocopy Services and Ors*. RFA(OS) No. 81/2016 at para. 63

[159] Oliver, *Supra*. n. 149 at 132-133; Geiger, Gervais, and Senftleben, *Supra*. n.149 at 600 ["[T]here is no formal principle of *stare decisis* in WTO law." Emphasis original]

case did not find it useful to engage in any exhaustive analysis regarding the meaning of the three-step test but instead deferred to the legislature regarding the scope of the test and insisted that the test provided enough leeway to create exceptions that facilitate A2E, in this case s.52(1)(i) of the India Copyright Act.

4. Aligning The Copyright Act to Better Facilitate A2E: Some Thoughts

A. The Architecture of L&Es Under the Copyright Act

As discussed above, there are essentially two ways of looking at the status of L&Es in the architecture of copyright law. First, as limits to the exclusive rights of authors. Second, as users' rights. The latter recognises that L&Es are of equal importance in achieving the goals of copyright and thereby requires that they not be relegated to a secondary status.

Although there is no decision yet by the Nigerian courts regarding the status of L&Es, it is quite obvious from the architecture of the Copyright Act that L&Es are subsidiary to exclusive rights. Under the Copyright Act, L&Es are relegated to the Second Schedule whereas exclusive rights are positioned in the body of the Copyright Act. If there is any commitment to facilitate A2E through the regime of copyright, then this approach definitely needs to be abandoned. As we have seen, the commitment to development and social goals requires that L&Es are placed on same pedestal as exclusive rights which entails a users' rights approach. Furthermore, integrating copyright with the constitutional right to education—a key strategy to facilitating A2E—requires a users' rights approach.

Interestingly, the Draft Copyright Bill 2015 avoids this subsidiary positioning of L&Es. Part 2 under the Bill is titled "Exceptions from Copyright Control." This is certainly a positive step. It is hoped that this repositioning of exceptions by the Copyright Bill, should it be passed by parliament, will buttress the case for treating L&Es as users' rights under Nigerian copyright law and policy.

B. *Flexibilities in International Copyright Law: Creating Educational Exceptions that Promote Developmental Goals.*

It is obvious that the regime of international copyright law limits the freedom of member states to create exceptions that facilitate developmental goals such as A2E. What is debatable is the level of freedom open to countries to create these L&Es, for it is not argued that a certain measure of flexibility exists. Accordingly, the crucial issue is how Nigeria can utilise the available policy space afforded to it by the flexibilities in the international copyright regime.

This section discusses briefly what can be done under the Copyright Act to move forward the goal of A2E.

I. *Duration of Copyright*

The first thing to consider is the term of protection afforded to literary works under the Copyright Act. As discussed above, the term of copyright protection defines the limit of copyright protection i.e. as a matter of copyright law, once the stipulated time for which copyright protection is available expires, the protectible work is automatically removed from the sphere of copyright protection and the exclusive rights which would have otherwise applied will no longer be exercised in respect of that work. In copyright jargon, it is said that once the term of protection expires the work falls into the public domain. As noted above, this is beneficial from an access standpoint because users may now use the work, once they have access to a copy, without fear of copyright restrictions. For educational purposes, however, relying on the term of protection to facilitate this development goal as pointed out above may not be the most effective way but it is still useful to explore all avenues.

Art. 7(1) of the BC provides for a minimum term of protection for life of the author plus fifty years after his/her death. The Copyright Act goes beyond this minimum term and insists on a term of life of author plus seventy years after death. This additional twenty years is unnecessary and does not serve the goals of copyright. If

the key concern in determining the term of protection is to enable authors/publishers recoup the costs of creating and distributing the work thereby giving them the incentive to create the work in the first place, then it is certainly the case that seventy years overcompensates for such endeavour. The real question is this: suppose we cut down the term of protection from seventy years to the minimum of fifty years plus life of author, will this reduce the incentive of authors or the amount of works that would have been produced? This is very unlikely for it is hard to imagine a fiction writer who would cease to write novels because the term of protection has been cut down to 50 years plus life. Neither is it the case that if the term of protection is increased from fifty to seventy years plus life, then more works would be created than would have been the case but for the term extension. It seems then that the purpose of the seventy plus life term of extension under the Copyright Act is to maximise value rather than provide incentives to authors.

The seventy-year duration is unnecessary and limits ALM. In fact, some DCs have opted for a lesser term. For example, s.19 of the Thailand Copyright Act provides for a term of protection for fifty years plus the life of the author. Similarly, s.23(2) of the Kenya Copyright Act provides also for fifty years plus the life of the author. The same term also applies to South Africa by virtue of s.3(2) of the South Africa Copyright Act. And for India, s.22 of the India Copyright Act provides for a term of protection of sixty years plus the life of the author.

Nigeria can make use of the flexibility afforded to it under the BC by cutting down the term of protection as it is not necessary to incentivise the production of cultural works. Unfortunately, the Copyright Bill continues to insist on a term of protection for seventy years plus the life of author.[160]

II. The Adequacy of Educational Exceptions in the Copyright Act

The teaching exception and the three-step test remain the most effective arsenal for Nigeria under the international regime of copyright to facilitate A2E. Hence, this

[160] Section 19(1) Draft Copyright Bill 2015

section will look at ways Nigeria might better utilise the flexibilities afforded to it by these exceptions to facilitate A2E.

As stated above, the teaching exception under the BC is implemented in the Copyright Act by providing that "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." As discussed above, the Copyright Act's implementation of the teaching exception is obviously narrow given that art.10(2) of the BC imposes no quantitative restriction save the use of the phrase "by way of illustration." As such, the Copyright Act does not utilise fully the flexibility in the BC. Unfortunately, this is also the case in the Copyright Bill.[161]

In the DU photocopy case, the Single Judge seemed to suggest that the impugned provision s.52(1)(i) was compatible with the teaching exception in conjunction with the three step-test. While the Single Judge did not analyse the teaching exception on its own, the learned Judge seemed to suggest that there is enough leeway to enable legislators create sound educational exceptions and whether reproduction of copyrighted work in the course of instruction is justified for the purpose of teaching is a decision for the legislators. And given that parliament had enacted s.52(1)(i), it is deemed that the provision is compatible with the teaching exception. In other words, it seems that the teaching exception can provide the basis for exceptions in national law that allow for the making of course packs.

One way of making sure the policy space afforded to Nigeria in implementing the teaching exception is well utilised is to reproduce the exception verbatim. This is the approach taken by South Africa[162], Ghana,[163] and the Philippines.[164] Alternatively, Nigeria can adopt the broad approach used by Malaysia. Section 13(2)(f) of the Malaysian Copyright Act provides that the exclusive rights guaranteed by copyright do not include the right to control "the inclusion of a work in a broadcast performance, showing, or playing to the public, collection or literary or musical works, sound recording or film, if such inclusion is made by way of illustration for teaching

[161] Section 20(1)(f) Copyright Bill 2015
[162] Section 12(4) South Africa Copyright Act, 1978
[163] Section 19(1)(c) Ghana Copyright Act
[164] Section 184(1)(e) Philippines Intellectual Property Code.

purposes and is compatible with fair practice." It is therefore clear that there are different ways of implementing the teaching exception to better utilise the flexibility and therefore facilitate A2E in Nigeria. The present implementation in the Copyright Act and that proposed in the Copyright Bill 2015 do not take full advantage of the flexibility in the BC teaching exception. Once these exceptions are flexibly implemented, it is also important that Nigerian courts interpret the exceptions broadly to promote A2E.[165]

Regarding the three-step test, we have seen that the Panel's interpretation is predominantly economic and therefore narrow. But it is also the case that the Panel's interpretation, for reasons given above, should not be accorded too much weight and is not the only interpretation. Indeed, the DU Photocopy case is an example where the courts have insisted that the three-step test offers enough leeway to allow DCs create exceptions that facilitate A2E. The important point is that Nigeria can rely on the three-step test to create educational exceptions. However, this does not seem to be the case in the Copyright Act. In the Copyright Bill though there is an interesting exception for education. Section 20(1) of the Copyright Bill provides that the rights granted by copyright does not include the right to control the doing of any act for the purposes of education. This is certainly a broad exception, but it proceeds to subject it to the general fair dealing test. According to s. 20(1) of the Copyright Bill, the factors to be considered for fair dealing include the following:

a. the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
b. the nature of the work;
c. the amount and substantiality of the portion used in relation to the work as a whole;
d. the effect of the use upon the potential market for or value of the work; and
e. if the use does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the owner of copyright.

It is clear that factor 'e' is a reproduction of the latter conditions of the three-step test. This immediately raises questions regarding interpretation. What is clear though is that none of the factors are decisive and there is no cumulative application. It is not clear however why 'd' and 'e' are both included as factors to be considered for fair dealing. The existence of 'd' should preclude 'e' and vice versa, for it is hard to see

[165] M.M. Billah and S. Albarashdi, 'Fair or Free Use of Copyrighted Materials in Education and Research and the Limit of Such Use' (2018) 17 *Chi.-Kent J. Intell. Prop*. 422.

how the existence of both factors will not lead to a narrow interpretation of the fair dealing exception for education.

Nigeria needs to utilise the three-step test effectively to create L&Es that facilitate A2E. One way is to employ the Indian approach as discussed above and in the previous chapter. On the other hand, Thailand provides for an interesting exception that would allow for the creation of course packs. Section 32(7) of the Thailand Copyright Act provides that "reproduction, adaptation in part of a work or abridgment or making a summary by a teacher or an educational institution so as to distribute or sell to students in a class or in an educational institution provided that the act is not for profit" shall not be deemed an infringement of copyright, subject to the condition that it does not conflict with a normal exploitation and does not unreasonably prejudice the legitimate rights of the owner. Some countries however adopt what I refer to as a "half-way" approach i.e. the educational exception is dependent on the existence of a license mechanism. An example is s.25(6) of Zimbabwe Copyright and Neighbouring Rights Act which provides:

> Copyright in a literary or musical work shall not be infringed by an educational establishment which, by reprographic copying, makes copies of passages from the work for purposes of instruction provided that:
>
> (i) the extent of such copying shall not exceed such limits as may be prescribed; and
>
> (ii) no such copying shall be authorised by this subsection if, or to the extent that, a license or a license scheme is available authorising the copying in question and the person making the copies knew or ought to have been aware of that fact.

As pointed out in several chapters, copyright exceptions especially those that facilitate development goals should be independent of the existence of license mechanisms. Otherwise, we would reach a point where all exceptions are abolished because there is a license scheme in place. This approach presupposes, as I have pointed out severally, a narrow economic justification for exceptions i.e. market failure. Of course, as we have seen, there are different values that underpin the various exceptions that exist in the regime of copyright. Clearly, this is not to suggest though that licenses have no place in the scheme of L&Es. But it is rather the specific point that the existence of a license scheme should not invalidate an

exception, especially a development-oriented one. On this basis, it is doubtful whether the Zimbabwe provision utilises the full flexibility of the international conventions to facilitate A2E.

5. Conclusion

In this chapter, I have extended the analysis of the previous chapter to analyse the 'wriggle room' or policy space afforded to Nigeria in the international conventions which it has ratified for the purposes of facilitating A2E. In analysing the landscape of international conventions which Nigeria is party to, particularly the BC and TRIPS agreement, it is obvious that these conventions are motivated by the concern of protecting private exclusive rights. Furthermore, the TRIPS agreement is principally a trade agreement thereby arguably relegating broader development concerns to the background. Nevertheless, both conventions contain objectives which at least signal the need to take into account in the governance of copyright works other values such as access to information and education.

As such the BC and TRIPS agreement, provide several L&Es. Some of these L&Es, particularly those pertaining to protectible subject matter, are not relevant to the goal of facilitating A2E in Nigeria. Others are relevant, particularly the teaching exception, the Berne Appendix, and the three-step test. These are avenues open to Nigeria to create education-oriented L&Es in its national copyright law. However, the fact that these L&Es are relevant does not mean that they offer the same, or even enough, flexibility to enable Nigeria create exceptions that facilitate A2E while complying with its international obligations. This is so with the Berne Appendix which involves a maze of formalities to be complied with aside other issues. As such the Berne Appendix is unlikely to be useful in promoting the developmental goal of A2E.

Accordingly, the teaching exception and the three-step test are the two concrete options open to Nigeria taking into account its educational needs. But these options have not been properly utilised by Nigeria. In regard to the teaching exception, Nigeria has not utilised the full flexibility afforded to it under the BC and much can be done in this area to creatively adapt this exception in the Copyright Act to facilitate the goal of A2E. Similarly, the three-step test can better be utilised by Nigeria to

effectuate development goals. While it is the case that the WTO Panel's decision is predominantly economic, it should also be remembered that the Panel's decision has little or no precedential value. Indeed, there is scope to interpret the test expansively and accommodate other normative concerns. And as the Indian court in the DU photocopy case noted, there is enough leeway in the three-step test for signatory countries to enact copyright law that promotes A2K. In fact, as we have seen some countries have relied on the three-step test to create effective exceptions that promote development goals.

Finally, in addition to properly utilising the teaching exception and the three-step test Nigeria must take a broader understanding of L&Es as users' rights in order to facilitate A2E.

CHAPTER 5: THE FUTURE OF COPYRIGHT LAW AND POLICY IN NIGERIA.

> Progress can only occur when changes are made simultaneously in the economic, socio-political and cultural spheres; that any progress restricted to one sphere is destructive to progress in all spheres.*

1. Introduction

That Nigerian copyright law lags behind vis-à-vis the regulation of informational works in the digital age is not new. In this regard, the sense of urgency towards the reform of Nigerian copyright law precipitated by calls from stakeholders is understandable. The digital age provides opportunities and challenges for the monetisation, consumption, use, and distribution of copyrighted works. Not only has there been a substantial alteration in the economics of production and distribution of informational works leading to what some call a "democratisation" in content creation and distribution[1], but also the consumption patterns and behaviours have changed leading to the strengthening of, and extension of the uses covered by, copyright law. Additionally, new categories of works—or at least the application of digital technology to existing categories— are emerging in the digital space and these pose challenges for the application of copyright law.[2] Furthermore, digital technology has complicated the extent to which traditional

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* Eric Fromm, *The Sane Society* (Routledge & Keegan Paul, 1956)

[1] See Tal Shacar & Mathew Ball, 'Age of Abundance: How the Content Explosion Will Invert the Media Industry' *REDEF* January 5, 2016, http://redef.com/original/age-of-abundance-how-the- content-explosion-will-invert-the-media-industry 'Democratisation' in this context refers to the sociological fact, and its implications, that the material means of cultural production is by and large in the hands of individuals as a result of the broad distributedness of digital technology.

[2] An example is recycled music i.e. the use of pre-existing music to create new music. Although this approach to music creation has long existed prior the advent of digital technology, it is certainly the case that it has enabled the prevalence and creation of different forms of recycled music. For a typology of recycled music, see Christine Boone, 'Mashing: Toward a Typology of Recycled Music' (2013) 19 *Music Theory Online* 1.

L&Es are applicable to uses of work in the digital space.[3] In the multilateral norm-setting framework, the WIPO Internet treaties are an attempt to address some of these concerns.

But the concern for reform extends beyond the need to address the technicalities of digital technology and their ensuing implications for the rights of creators and users. The need to address the challenges and opportunities brought about by digital technology is rather seen, at a broader level, as an attempt to confront the larger issues implicated by copyright law. These larger issues are linked and overlapping though fundamentally different in their conceptual frameworks and emphases.[4] For example, copyright law is seen at one level as crucial to the facilitation of a sustainable creative economy. On the other level, the binary frameworks—copyright and development; copyright and human rights— are emerging as alternative conceptual and analytical perspectives in the study of copyright law and policy. These conceptual frameworks are not exhaustive but simply illustrative of the growing trend to employ interdisciplinarity in an attempt to unravel and address the big issues implicated by copyright law. This interdisciplinarity in copyright scholarship is also mirrored in the diverse, often polarising, 'voices' in think tanks, civil society, creative industries, and IP commissions, and representative of the increasing politicisation of IP in the global space.[5] At the core of the copyright debate then is not just the need to adapt this institution to changing technological conditions but also, at a broader level, the importance of designing it to respond to socio-economic and cultural realities.

The basic, yet often neglected, point however is that copyright is an institution for advancing a policy objective. Accordingly, the legal rules generated by copyright regimes are not set in stone and will depend on the preferred policy directions and sound normative frameworks that in turn inform them. The contestations and debates around copyright law are therefore best seen as attempts to influence

[3] See Capitol Records, LLC v. ReDigi Inc., 910 F.3d 649 (2018)
[4] See Chidi Oguamanam, 'Intellectual Property: The Promise and Risk of Human Rights' in B.C. Doagoo et.al. (eds.), *Intellectual Property in the 21st Century: Interdisciplinary Approaches* (Irwin, 2014)
[5] See Christopher May, 'Why IPRs Are a Global Political Issue' (2003) 1 *EIPR* 1

the policy direction of this area of law.[6] Yet, it is not clear what is Nigeria's national copyright policy.[7] But to avoid inefficacy and inconsistency in the generation, application and administration of rules governing the regulation of informational works, it is necessary that Nigeria be clear about the policy framework that will guide its copyright regime. It is not enough, for example, to adopt the vague label of 'development' without any analysis of what this means for designing a copyright regime.

It is fair to say that much of the scholarship in Nigerian copyright law—as noted in several parts of this thesis— emphasises on the one hand the disconnect or gap between copyright norms and actual social behaviour and, on the other hand, the inadequacy of existing copyright rules to bridge this gap. Of course, underlying the treatment of these issues is a preferred policy direction, but it is often unstated and unanalysed. This emphasis on the inadequacy of existing copyright rules on policing social behaviour has several consequences for Nigerian copyright law and policy. First, there is a loss of interdisciplinarity in Nigerian copyright scholarship and policy, and this has led to a disengagement and "shrinking" of the big issues implicated by copyright law. Second, the dominant narrative of copyright in Nigeria, which has infiltrated the public consciousness, is that strict copyright protection is "the panacea to economic and social development challenges in the polity."[8] This policy direction is geared towards the commodification of informational works, which is palpably in contradistinction to the IP and development debate in which the shared understanding is the need to "balance" the IP system and to avoid the polar extremes of IP maximalism and minimalism.[9] Properly understood then, the

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[6] See P.J. Weiser, 'The Internet, Innovation and Intellectual Property Policy' (2003) 103 *Columbia Law Review* 534 (Characterising the problems posed by the regulation of "information platforms" on the internet as one of intellectual property policy.). *Cf*. Siva Vaidhyanathan, *Copyright and* Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity (NYU Press, 2001) 15 ("Copyright should be about policy…")

[7] In discussing copyright policy, I use IP policy and copyright policy interchangeably as it is not uncommon for countries to discuss the latter under the family-sized umbrella of IP and innovation policy.

[8] Jeremy de Beer & Chidi Oguamanam, 'Open Minds: Lessons on Intellectual Property, Innovation and Development from Nigeria.' in M. Smith & K. Reilly eds., *Open Development: Networked Innovations in* International Development (MIT Press, 2013)

[9] *Ibid;* See also Daniel Gervais, 'IP and Development' in Mathew David & Debora Halbert (eds), *The Sage*

fundamental issue in copyright law and policy—at least from a consequential perspective— is not whether there should be balance but rather what normative framework should inform the balance and how to implement it.[10] These normative and interdisciplinary perspectives are best understood as responding to the big issues implicated by copyright law: free speech, A2K, creative freedom, economic empowerment, distributive justice, welfare etc.[11]

The fundamental point here is that copyright scholarship and policy has gone beyond the narrow utilitarian analytical lens, although it still remains the dominant mode of analysis. The utilitarian-economic frame is narrow for understanding or analysing the larger issues in copyright law today. Different perspectives have emerged and the *cri de coeur* for multi-perspectives is ongoing.[12] In fact, a brief look at the WIPO journal shows volumes specially devoted to analysing IP and copyright from different disciplines, such as history, culture, politics and international relations, economics, and, recently, development.[13] Nigerian policymakers need to at least be aware of the variegated issues implicated by, and implicating, copyright law and policy in order to craft a copyright law that adapts to its socio-economic and cultural realities. In particular, a copyright law that facilitates A2E.

Handbook of Intellectual Property (Sage Publications, 2015); Daniel Gervais, 'TRIPS 3.0: Policy Calibration and Innovation Displacement' in N.W. Netanel (ed.),*The Development Agenda*: *Global Intellectual Property and Developing Countries* (OUP, 2009); *Cf.* S.A. Pager, 'Accentuating the Positive: Building Capacity for Creative Industries into the Development Agenda for Global Intellectual Property Law' (2012) 28 *AM. U. INT'L L. REV*. 223.

[10] Pager, *Ibid*, at 225 (Stating that "[w]hile a broad consensus has emerged over the need to restore balance to the global intellectual property system, sharp differences remain as to how to conceptualize "balance" and how best to achieve it."); *Cf*. Steven Ang, *The Moral Dimensions of Intellectual Property Rights*, (Edward Elgar, 2013) 104-105; Oren Bracha and Talha Syed, 'Beyond Efficiency: Consequence Sensitive Theories of Copyright' (2014) 29 *Berkeley Tech. L.J.* 229 [Considering whether the application of some of the different normative frameworks will generate different copyright rules.]

[11] One separate issue though is whether copyright law can accommodate all these concerns. Accordingly, Some have engaged their analysis beyond the institution of IP. Amy Kapcyznski, 'The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism' (2012) 59 *UCLA L. Rev.* 970; L.L. Ouellette, 'Innovation Law Beyond IP: Introducing the Blog Symposium' March 11, 2014 *Balkinization* http://balkin.blogspot.ie/2014/03/innovation-law-beyond-ip-introducing.html

[12] See, e.g., Madhavi Sunder, *From Goods to a Good Life: Intellectual Property and Global Justice* (YUP, 2012) (Arguing for a broader normative framework of IP that incorporates the capabilities approach to human development); R.R. Perschbacher, 'Welcoming Remarks: Intellectual Property and Social Justice' (2007) 40 *U.C. Davis L. Rev.* 559; P.S. Menell, 'Property, Intellectual Property, and Social Justice: Mapping the Next Frontier' (2016) UC Berkeley Public Law Research Paper No.2736517, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2736517

[13] See WIPO Journal. https://www.wipo.int/publications/en/series/index.jsp?id=132

Writing in the context of Nigerian property law, professor Chinwuba has warned:

> The Land Use Act, 1978 and all other land regulating laws in the country are merely laws aimed at preserving or authenticating title and revenue generation of government. There is no organized or articulated policy towards empowering the people through property rights, ownership, redistribution, or readjustment of rights for enhancement of the self to reflect 'oneness' and emancipation of humanity.[14]

The same can be said of Nigerian copyright law subject to the issue of consensus on where the policy direction should be faced. On this issue also, Chinwuba's has cautioned that:

> Without an ideology and philosophy on property, rules regarding same are made without a basis or referral point entrenching a Hobbesian society of 'might is right.' A philosophical based approach to policies and laws advances legitimacy of outcomes and responses.[15]

To achieve this though, it is necessary to understand the policy space afforded to the crafting of Nigerian copyright law which I have endeavoured to outline in the previous chapter with a particular focus on A2E. The reason for this is simple: the latitude afforded to the design of Nigerian copyright law and property law is significantly different because the regulatory regimes underpinning the former are contingent on a history of a neo-liberal political economy of information goods that has led to the mushrooming of multi-lateral, bi-lateral, and regional treaties as models of governance. Consequently, the usefulness of any approach that seeks to re-orient Nigerian copyright law and policy is contingent on the space available for its implementation.[16]

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[14] N.N. Chinwuba, 'Concept and Conception of Property in Law: the link with Shelter in Nigeria' in A.A. Utuama (ed.), *Critical Issues in Nigerian Property Law*, (Malthouse Press Limited, 2016)

[15] *Ibid*.

[16] But see R. Giblin & K. Weatherall, 'If we Redesigned Copyright from Scratch, What Might it Look Like?' in Giblin & Weatherall (eds.), *What if We Could Reimagine Copyright* (ANU Press, 2017), in which the authors set themselves the innovative exercise of "imagin[ing] what copyright law might look like if we designed it from scratch in today's socio-technological environment, unconstrained by existing international treaties and other law and practice." While the usefulness of this approach is almost without doubt to the extent it forces us to imagine the kind of copyright regime we would establish but for political constraints and thereby serves as an ideal or transcendental model, it is still the case that any shared outcomes of such imaginations—assuming there is one— will hardly be implemented due to international obligations. Accordingly, a more effective approach at least in the short term is to carry out the re-imagining of copyright within the context of the existing political and legal obligations.

So, the principal objective of this concluding chapter is to lay the foundation, or at least invite a discussion, for the development of a sound copyright policy in Nigeria that is sensitive to development. This commitment to ensuring that copyright law facilitates development must proceed from a foundational level. Although the first two chapters proceeded from this level, that task cannot be completed without the development of a sound copyright policy that takes development seriously.

The structure of the chapter is as follows. Section **2** discusses the need for a foundational inquiry in copyright. Section **3** examines some institutional challenges and viewpoints that prevent the formulation of development-oriented copyright policies in Nigeria. Section **4** provides an account of the theory of network society, outlining the centrality of information production as its mode of development, and its relevance for copyright law and policy. Section **5** concludes.

2. Foundational Inquiries in Copyright Discourse.

Copyright is a hot topic and it is everywhere. A striking feature of this area of law is its polarising tendency in key spheres of human interaction. Academically, the debates are polemical; socially, we interact with copyrighted works on a daily basis and the divisiveness associated with their use is replicated in acts of online infringements, which could be interpreted either as instantiations of challenge to the legitimacy of copyright norms or sheer incredulity as to the acts restricted by copyright[17]; within the political sphere, the disputations are mirrored in the various interest groups backed by lawyer-qua-activists contesting for relevance in the direction of copyright law and policy; and in the market arena, various business models—whether proprietary or open source—are vying to capture the value of copyrighted works.

[17] Many people are amazed to learn of what copyright restricts them from doing. See chapter 1 for the conversation between Professor Bob and Emeka.

What then is it about copyright that gives rise to these conflicts? My own sense is that the thing which copyright deals with i.e. its subject matter, occupies a multi-dimensional role in society: it is at the intersection of economy and culture. In addition, the idea of property ownership does not fit nicely with the asomatous nature of copyright's subject matter.[18] Coupled with the third industrial revolution, characterised by the prevalence of digital technologies, these issues and conflicts become amplified. So then, the conflicts generated by copyright issues are best considered as by-products of diverse attempts to govern copyright works. Yet, very little effort is put into understanding the nature of copyright's subject matter beyond the economic understanding that they are public goods.[19]

I suggest however that the conflicts encountered in copyright discourse might diminish or, at least, be better managed if we come to a shared understanding of copyright and its subject matter. More importantly, this shared understanding will lead to the formulation of coherent copyright policies. However, this will only be accomplished if the right questions are asked. Žižek has argued that "[t]here are not only true or false solutions, there are also false questions. The task of philosophy is not to provide answers or solutions, but to submit to critical analysis the questions themselves, to make us see how the very way we perceive a problem is an obstacle to its solution."[20] Žižek is supposedly referring to the *kind* of—i.e. its substantive content— questions we ask, but it is also the case that the hierarchy of the questions, foundational or higher level, is equally crucial to how a problem is perceived. This is important for contemporary copyright discourse where there is a certain hastiness to evade the more foundational issues in order to proffer solutions to the more technical questions.

Accordingly, this chapter will critique the way we think and talk about the subject matter of copyright law as a foundational inquiry. It is both an instantiation that

[18] See, for instance, E.C. Hettinger, 'Justifying Intellectual Property' (1989) 18(1) *Philosophy & Public Affairs* 31 (Finding it difficult to square the traditional justifications of property with copyright based on, amongst other things, the nonexclusive nature of intellectual objects.)
[19] See Chapter 2
[20] Slavoj Žižek, 'Philosophy, the "unknown knowns", and the public use of reason' (2006) 25 *Topoi* 137

language matters in copyright discourse and an attempt to move towards a unified theory of copyright's subject matter. The importance of this critique is that once a shared understanding of copyright subject matter is formed, it is then possible to make progress in designing a copyright policy conducive to Nigeria's technological and socio-economic realities. The need for a sensible copyright policy is without doubt, but very little can be achieved if we do not pierce through the veil of ignorance imposing a distorted reality on how we discuss and think about copyright law and its subject matter. There is nothing controversial about this point. If one were tasked with designing a system for managing some resources, the starting point would be to inquire about the nature of those resources. Indeed, it is often a departure point in copyright discourse to emphasise the public goods nature of copyright works. But this is not sufficient.

This chapter claims that cultural works are the subject matter of copyright and they form a unique subset of information goods. It is often the case that commentators equate copyright subject matter with information goods or information and cultural goods without any analysis as to whether the two are different. Admittedly, cultural works are information goods but unless we have a reductive understanding of cultural works—in which case cultural works are nothing more than information goods—there is something uniquely distinctive about cultural works that is neither captured by, nor part of, the term informational goods. Once this is understood, it becomes clear that the universe of informational goods exceeds that of cultural works. Put differently, although all cultural works are informational goods the reverse is not true. As will be shown below, the implications of this proper understanding of copyright's subject matter are significant for copyright law and policy. In fact, this re-understanding provides another powerful arsenal to debunk the myth that because informational goods are valuable then it should be propertised. Of course, this inference is *simpliciter* a *non sequitur.* Nor is it even desirable and efficient that every valuable resource be governed under a private property regime.[21] While it is sufficient—as an

[21] It simply does not follow, whether as a descriptive or normative argument, that if a resource is valuable

exercise in logic and for academic discourses—to dispose of the validity of this argument by pointing out that it is a *non sequitur*, and several authors have made similar arguments[22], the transference of its implications into copyright doctrine and policy is unlikely to take hold for several reasons. First, in contemporary sociological theories economic value and growth are considered to be centred on a different mode of development, the production of information. While of course this does not necessarily imply that informational goods be privately owned, as pointed out, it is the case that a combination of theory, economics, and ideology has come to consolidate this assertion as gospel. In addition to sociological theories laying down a descriptive account of the importance of information as a source of economic value in our contemporary society, the hegemonic appeal of welfare economic theory has led to a preference for private property and markets as regimes for governing valuable resources.[23] On the other hand, the ideas that animated classical liberalism—private property, markets, and individualism—in Western societies are still very much part of the core commitments of neoliberalism informing the international economic order.[24] Second, the

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then private property regime is the right institutional device for governing the resource. As a matter of fact, commons ownership regimes have been, and are still being, used to govern valuable resources. See Elinor Ostrom, *Governing the Commons* (CUP, 1990). And a wealth of scholarship has followed Ostrom's path-breaking work on commons ownership as an alternative between private property and public property for governing not just material resources but also intangible goods. See Hess & Ostrom (eds.),*Understanding Knowledge as a Commons* (MIT Press, 2011); Yochai Benkler, 'The Political Economy of Commons' (2003) 4(3) *Upgrade* 6. For work discussing the meanings of commons in political, legal and economic theory see John Cahir,'The Withering Away of Property: The Rise of the Internet Information Commons' (2004) 24 *Oxford Journal of Legal Studies* 619, 621-629. Normatively, the superiority of private property over commons governance is not a given, and much will depend on the kind of resources governed. In fact, many have asserted the superiority of commons in governing intangible resources: Jeremy Rifkin, *The Zero Marginal Cost Society: The Internet of Things, The Collaborative Commons, and The Eclipse of Capitalism* (Palgrave Macmillan, 2014).

[22] The view that a property right should be conferred because something has economic value is at best what one author describes as "transcendental nonsense". F.S. Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35(6) *Columbia Law Review* 809, 815 [Law "purports to base legal protection upon economic value, when, as a matter of actual fact, the economic value of a sales device depends upon the extent to which it will be legally protected."]

[23] See Amy Sinden, 'The Tragedy of the Commons and the Myth of a Private Property Solution' (2007) 78 *U. Colo. L. Rev.* 533. (Explaining the assumptions of neoclassical welfare economics and why privatization is the preferred solution.)

[24] On the link between IP rights and liberalism, see Kurt Burch, 'Intellectual Property Rights and the Culture of Global Liberalism' (1995) 17(2) *Science Communication* 214; On liberalism as a political theory, see Adrzej Rapacznski, *Nature and Politics: Liberalism in the Philosophies of Hobbes, Locke and Rousseau* (Cornell University Press, 1987) On classical liberalism as a branch of liberalism and its core commitments, see Gaus, Courtland and Schmidtz, 'Liberalism' In Edward N. Zelta(ed.) *Stanford Encyclopedia of Philosophy* (Spring 2015 Edition) https://plato.stanford.edu/archives/spr2015/entries/liberalism/;
For the roots of neoliberalism see, J.F. Henry, 'The Historic Roots of the Neoliberal

ascendancy of markets and market values in our contemporary society seem to indicate that this sphere of human interaction has penetrated, or dominated, other spheres thereby conditioning our worldviews.

Once copyright's subject matter is characterised simply as informational goods, this interplay between economics, theory and ideology projects a 'phantom reality' and imposes a hold on us that the privatisation of informational goods is desirable and a logical consequence, and this is so for obvious reasons. Information has economic value; markets are sites for capturing this value, and private property is the best tool for capturing it.

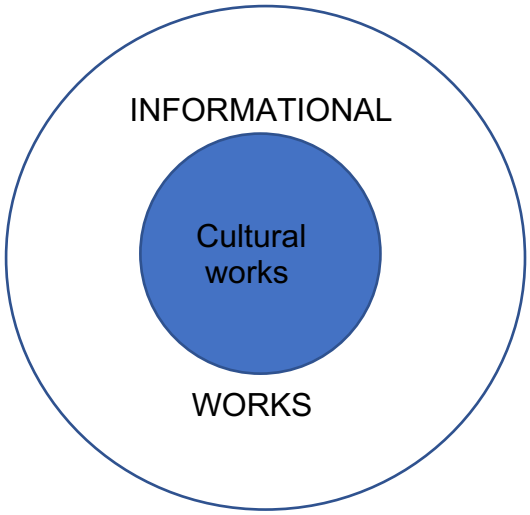

FIGURE 2 Cultural works as a subset of informational works

Program' (2010) 54 *Journal of Economic Issues* 543; *Cf.* J.T. Harvey, 'Neoliberalism, Neoclassicism and Economic Welfare' (2010) 44 *Journal of Economic Issues* 359 (Explaining the justificatory link between neoclassical welfare economics and neoliberalism)

3. No Need for National Copyright Policy? Think Twice

Copyright policy refers to the guiding principles embodied in a set of statements outlining coherently the purposes and objectives of copyright law and how they are to be achieved through the protection, administration, and enforcement of copyrighted works. It is an expression of national priority—where we stand, where we are going, and how to get there—vis-à-vis the role and purposes of copyright in the governance of cultural works. While it is the case that these expressions are best articulated in a policy document, they can also be discerned by looking at the practices and acts of various countries. For example, treaty ratification, international and regional agreements, positions taken by country delegates and representatives in IP norm-setting institutions such as WIPO, IP office orientation, and judicial judgments can all provide pointers to a country's copyright policy.

Clearly, there is no need to 'think twice' before appreciating the importance of a national copyright policy (NCP) given the complexity and multi-dimensional aspects of issues implicated by, and implicating, copyright law. The need however arises when formulating policies in order to avoid the transplanting of policy models developed by foreign nations. A "one-size-fits all" policy framework is inadvisable because of "the human, cultural, social, technological, and historical dimensions of the communities in which the [intellectual] resources are situated…"[25] For instance, the previous chapters have pointed out the socio-economic realities of Nigeria and the dire need for A2E. Additionally, a NCP is necessary to avoid fragmentation of interests and purposes between national agencies concerned with copyright matters; and without the co-ordinated effort fostered by a NCP, there will be a lack of solid representation of a country's

[25] Menell, *Supra.* n.12; *Cf*. David Vaver, 'Need Intellectual Property be Every Where? Against Ubiquity and Uniformity' (2002) 25 *Dalhouise Law Journal* 1

national interests at the regional and international stage. Consequently, it is the content of a NCP that raises the need to think twice.

This section highlights briefly the peculiar case of DCs in formulating copyright policies. In particular, the concerns prompting, as well as challenges facing, the development of NCPs.

A. Copyright Policy in Developing Countries: A Special Case

Although it is not wise to paint DCs with one brush, they face numerous concerns that bring copyright policy to the fore. Education, access to knowledge, economic empowerment, and human rights are key issues. The challenge these countries face is in drafting and implementing copyright policies that respond to *their* development needs within the multi-lateral and non-multi-lateral agreements they are party to.[26]

This part briefly highlights the difficulties encountered by DCs at the global and national stage. It argues that while DCs are largely united in asserting a preference for a pro-development approach to copyright at the international stage, the transference of this approach into concrete policy framework remains a difficult task at the domestic level. This could lead to a negative feedback effect. On the one hand, the lack of a concrete policy framework could send the wrong signals to government delegates dealing with copyright discourses in different international IP fora, thereby projecting a fragmented vision and weakening the preference for a development-oriented approach to copyright; on the other hand, the inability to present a coherent vision at the global stage of copyright discourse and regulation could constrain the policy space available for formulating a development-oriented policy framework at the national level.

[26] Although the discussion in this section seems to suggest that *all* DCs are united in a pro-development approach to copyright or IP in general, this is not accurate as tensions also exist amongst DCs vis-à-vis their position on IP regulation. See Carolyn Deere, *The Implementation Game*: *The Trips Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (Electronic Version OUP 2011) 470-471 https://play.google.com/store/books/details?id=lMqEw6fqt7kC&hl=en

I. *Developing Countries and the Global Governance of IP: Development Concerns*

Given the governance model of global IP law and its constraining effect on national IP law and policy, DCs understand that the battle for a development approach to copyright must also be fought on the international stage. Accordingly, in pressing forward for a pro-development approach to copyright, and IP in general, DCs have sought to emphasise the role of IP as a strategic tool for development and to insist that the multi-lateral norm-setting framework incorporate and effectuate development concerns. For example, the establishment of the WIPO Development Agenda (WIPO-DA) in 2007 following proposals by Argentina and Brazil, and subsequently other DCs represents an "important milestone for WIPO" and DCs.[27]

Although developed countries continue to contest the development concerns—at least how international copyright law should effectuate these concerns[28]—of DCs, several factors might seem to suggest that the gains recorded by the WIPO-DA are a foretaste of the trajectory of global IP governance. First, WIPO is a specialised UN agency and therefore is committed to development.[29] The adoption of the SDGs in 2015 by the UN underscores this commitment. Second, the concerns that initiated WIPO-DA as several commentators note are not unprecedented but rather symbolise a high point, if not an apogee, for DCs in the IP and development discourse.[30] Development concerns have always existed

[27] "Development Agenda for WIPO" World Intellectual Property Organisation. http://www.wipo.int/ip-development/en/agenda/index.html. See also N.W. Netanel (ed.), *The Development Agenda Supra*. n.9

[28] The replacement of the 1967 Stockholm revision of the Berne convention—otherwise known as the Stockholm protocol—which guaranteed enhanced access to copyrighted works to developing countries by the Paris Appendix to the Berne convention in 1971 is one of many instances of developed countries contesting how international copyright law should effectuate the concerns of developing countries. See chapter 4.

[29] For a history of WIPO and its transformations, see Christopher May, *The World Intellectual Property Organisation: Resurgence and the Development Agenda* (Routledge, 2006); D.J. Halbert, 'The World Intellectual Property Organisation: Past, Present, and Future' (2007) 54 *J. Copyright Soc'y* 253; Chidi Oguamanam, *Intellectual Property in Global Governance: A Development Question* (Routledge, 2012)

[30] P.K. Yu, 'Déjà Vu in the International Intellectual Property Regime' in Mathew David & Debora Halbert (eds.), *Supra.* n.9.; P.K. Yu, 'Five Decades of Intellectual Property and Global Development' (2016) 8(1) *The WIPO Journal* 1; Deere, *Supra* n.26, Chapter 2. On the development concerns of DCs giving rise to the Stockholm protocol, see I.A. Olian Jr., 'International Copyright and the Needs of

since WIPO's inception unless it is forgotten that "WIPO was born into the controversy of how intellectual property would impact the developing world."[31] Third, the landscape of global IP governance in recent times has witnessed increased mobilisations from civil society, academia and NGOs seeking a balanced approach to IP rights. The A2K movement and the Geneva Declaration on the Future of WIPO are exemplary manifestations.[32]

This observation is however premature as it is based on an incomplete and peripheral analysis of the global governance of IP rights. In particular, it fails to capture the complexities in the global governance of IP. A full appreciation of the global regulation of IP and copyright will take into account other sites, apart from WIPO, for shifting the balance of IP rights such as WTO-TRIPS, which adopts a trade-based conception of IP rights; the various strategies for re-negotiating the policy space, such as non-multilateral agreements[33]; the range of actors from developing and developed countries involved in the IP rights negotiation process; and the history and institutional cultures of the IOs tasked with regulating IP. In fact, it is unlikely that this complexity will abate as:

> Nations in the North with an interest in commodifying their knowledge-based output will continue to shop for (or create new) institutions that will endorse or develop higher standards of intellectual property protection, while those countries at the opposite end of the development spectrum will not abandon the search for fora more solicitous to user interests, distributive justice, health and development.[34]

Developing Countries: The Awakening at Stockholmn and Paris' (1974) 7 *Cornell Int'l L.J.* 81; C.F. Johnson, 'The Origins of the Stockholm Protocol' (1971) 18 *Bull. Copyright Soc'y U.S.A* 91. For the significant role played by India, see Prashant Reddy T. & S. Chandrashekaran, *Create, Copy, Disrupt: India's Intellectual Property Dilemmas* (OUP, 2017) 18-139.

[31] Halbert, *Supra.* n.29 at 262

[32] On A2K movement see Gaelle Kirkorian & Amy Kapcyznski (eds.), *Access to Knowledge in the Age of Intellectual Property* (Zone Books, 2010); Amy Kapcyznski, 'The Access to Knowledge Mobilization and the New Politics of Intellectual Property' (2008) 117 *Yale L.J.* 804. For the Geneva Declaration, see 'Geneva Declaration on the Future of World Intellectual Property Organization'. http://www.cptech.org/ip/wipo/genevadeclaration.html. For an account of the numerous actors in global IP regulation, see Deere, *Supra.* n.26 at 203-12

[33] On the non-multilateral approach to intellectual property rights regulation, see P.K. Yu, 'The Non-multilateral Approach to International Intellectual Property Normsetting' in D.J. Gervais (ed.), *International Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar, 2015)

[34] G.B. Dinwoodie & R.C. Dreyfuss, 'An International *Acquis*: Integrating Regimes and Restoring Balance' in Gervais (eds.) *Ibid.*

Nevertheless, WIPO as a multi-lateral institution is not the only forum for shifting the balance of copyright and while it may be committed to development based on its specialised agency status with UN, it is hard to come to this conclusion from its enabling instrument which maintains that one of its principal objectives is "to promote the protection of intellectual property throughout the world…"[35] Moreover, the history of WIPO confirms this objective[36] and as Halbert states, "[i]nternational organizations are bound by their histories and the cultures created by those histories and institutional structures."[37] Similarly, Deere agrees that IOs have distinct institutional cultures conditioning their views on IP issues and that the "concept of 'path-dependence' alerts us to the ways that a particular organisational culture can permeate and prevail in an international bureaucracy over many years."[38]

II. A Brief Remark on the Development Agenda

In summary, development concerns have always featured in the international fora for copyright regulation and while DCs have made important strides toward a development-oriented approach to copyright, the significance of these as epitomised by the WIPO-DA for the trajectory of global IP regulation and its consequent impact on the policy space is uncertain given the complexity of global IP discourse and regulation. In fact, if any firm conclusion is to be drawn from the WIPO-DA, it is that a well-coordinated and collaborative effort to achieve a unified purpose can yield positive results. But of course, this conclusion only reinforces the point that the regulatory course of global IP rights regimes is up for grabs in as much as there is nothing precluding the synergic efforts of those campaigning for stronger IP rights. This complexity and uncertainty highlight the need for preparedness on the part of DCs and one of the ways this can be

[35] Convention Establishing the World Intellectual Property Organisation, (signed at Stockholm on 14 July 1967 and as amended on 28 September 1979.), pmbl.
[36] See *Supra*. n.30
[37] Halbert, *Supra*. n.29 at 283.
[38] Deere, *Supra*. n.26 at 211. Path dependence refers to the phenomenon of past actions constraining subsequent actions even though the circumstances are different and no longer relevant.

achieved is through the formulation of concrete development-oriented copyright policies.

B. Challenges for a National Copyright Policy & Strategy

While it is the case that the global regulation of copyright dictates the policy space afforded to the design of national copyright laws, the crucial and practical issue remains the formulation of development-oriented policy framework and its implementation at the national stage. It is of little value—no matter the policy space afforded to the design of national copyright laws—if DCs committed to a pro-development approach cannot map out policies that advance their interests. Yet, scholars and commentators are mostly concerned about the available wiggle room in the global copyright regime with little articulation as to how to leverage these policy spaces in the form of national policy prescriptions.

In order to counter this trend, this section notes some issues that prevent the development of effective and development-oriented policy frameworks.

I. Copyright in the Umbrella of IP Policy

Two separate but related issues that affect the formulation of a pro-development policy framework are the institutions concerned with the formulation of copyright policy, and the way policy makers understand the goals and subject matter of copyright. They are related because the former affects the latter. But the latter is mainly as a result of the pre-eminent understanding pervading the IP/copyright community. While institutions can structure this understanding thereby elevating and advertising a preferred conception of copyright in the IP community, in other cases the relationship is *vice-versaed* because the prevailing discourse in the IP community can structure the copyright institutions. The important point however is that IP institutions *and* communities do impact the trajectory of national copyright policies. Furthermore, the role of IP communities and institutions in promoting a development–oriented conception of copyright can depend

significantly on its interdisciplinary make-up. This is a problem for DCs, and I show this using the case of Nigeria. As Deere aptly cautions:

> Too often, the IP community within developing countries is well trained in the technicalities of IP law, but has little exposure to broader public policy considerations. The result is an approach to IP decision-making driven by the drive to comply swiftly with international obligations rather than to tailor implementation to advance national development needs.[39]

In particular, the Nigerian case tells two stories: a representation of the general observation that institutional arrangements can impact on the course of national copyright policies and the more specific one that the interdisciplinary make-up of an IP community or institution can elevate a particular conception of IP. But first, the next sub-section will discuss the organisational variations obtainable in the copyright offices of African, Asian and South American DCs.

a. Organisational Arrangements of IP Office in Developing Countries: An Overview

Copyright offices in many countries are charged with the development of policy. Within developed and DCs, the organisation of these offices varies considerably.[40] These organisational variations can be understood along three dimensions: the status and type of body charged with the copyright office, whether independent or a ministry; the general affairs of the body, whether culture, trade or mainly IP; and the scope of the body, whether concerned with copyright or other IP.

In DCs, many copyright offices are under the ministry of culture, some with the ministry of justice or some other ministry but rarely with the ministry of trade, and a few under an independent IP office. Furthermore, there is even greater

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[39] Carolyn Deere, 'The Politics of Reform in Developing Countries' in Ricardo Melendez-Ortiz and Pedro Roffe (eds.), *Intellectual Property and Sustainable Development: Development Agendas in a Changing World* (Edward Elgar, 2009).

[40] "Directory of Intellectual Property Offices" *World Intellectual Property Organization*. http://www.wipo.int/directory/en/urls.jsp

variation between African and Asian DCs than exists within developed countries. The main difference is that with many African countries, the copyright office is a ministry of culture parastatal. For example, the copyright offices of Algeria, Angola, Burkina Faso, Gabon, Gambia, and Senegal are under the supervision of the various ministries of culture. A few others such as Nigeria, Kenya and Ghana choose to have it under a different ministry. In general, the approach of African countries is to have two separate ministries and/or departments for copyright and industrial related IP with the latter consigned to the ministry of trade, industry or commerce. The practices of Botswana, Rwanda, and South Africa represent an exception to this general approach though. For Botswana, one authority, the Companies and Intellectual Property Authority, is charged with the administration of copyright and industrial related IP; *and* it is under the ministry of trade and industry. Similarly, in South Africa the Companies and Intellectual Property Commission which is part of the department of trade and industry is charged with the administration and policy development of all IP matters.

On the other hand, Asian DCs differ widely in the organisation of their IP offices especially with respect to the affairs and scope of the body. In general, the picture that emerges is that either a single ministry, usually the ministry of commerce or trade, is charged with the oversight of all IP rights; or a separate independent body is created that oversees all IP rights. The main difference between the former and latter is in regard to the level of independence and specialised focus of the bodies charged with the administration of IP rights. What is common between the two, and therefore broadly representative of Asian DCs, is that there is a move towards an integrated approach to the administrative organisation of IP rights. For instance, in Kuwait, Oman, UAE, and Qatar the office(s)[41] in charge of copyright and other IP rights are all under the oversight of the ministry of trade, commerce or economy although not necessarily in the

[41] *Supra*. n.40.

same department. In Pakistan, Malaysia, and Philippines, a separate body is created to oversee all IP rights. The Philippines' approach is closely similar to South Africa's whereby its IP office, the Intellectual Property of the Philippines, is an agency of the department of trade and industry. There are however exceptions that track the African countries' general approach. Bangladesh, Saudi Arabia and Yemen have different ministries that deal with copyright and industrial related IP rights, with the ministry of culture having oversight for the former and the ministry of trade or industry for the latter. A unique approach is Indonesia's organisation of copyright and IP offices which is overseen by the Ministry of Law and Human Rights.[42] Although not investigated in this thesis, this approach is likely to be conducive to a development-oriented approach to copyright law in as much as it provides the forum for the interaction between the regimes of human rights and copyright.

Regarding South American countries, there is no general approach as such. What emerges in this region is a somewhat equal representation of the approaches dominant in the African and Asian DCs. In Brazil, Uruguay, Chile, and Colombia separate ministries deal with copyright and industrial related IP rights. For Brazil and Uruguay, the copyright office is attached to the ministry of culture while for Colombia it is the ministry of interior. And for industrial related IP rights, the office is attached to the ministry of industry or some other related ministry. On the other hand, countries such as Peru, Bolivia and Venezuela have specialised public agencies dealing with the administration of all IP rights. In Peru, the agency is the National Institute for the Defense of Free Competition and Protection of Intellectual Property and it is attached to the office of the prime minister.

The conclusion that emerges from this review is that there is a unanimous understanding amongst the DCs that copyright is a different issue from other IP rights. Even those countries that adopt an integrated approach, such as Peru and Philippines, place the administration of copyright under a different directorate or

[42] *Ibid.*

office. However, the reasons for this understanding would seem to align with the approach adopted and therefore differ amongst the regions/countries analysed. For countries with the integrated approach, such understanding is premised largely on a legal and technical view i.e. as a matter of law, as well as technicalities involved, copyright is different from other IP rights. Furthermore, this understanding has little to do with the policy goals underlying both regimes. In fact, the IP offices of these countries are usually attached to the ministry/department of trade or a related ministry, an indication of not only the overarching policy goal but also the view that the policy goals for both copyright and other IP rights are the same. Indeed, the IP offices of these countries are usually staffed with lawyers. One effect of this would be to ensure the maximum compliance and ratification of copyright laws and treaties.

On the other hand, countries that place copyright and other IP rights in different ministries seem to appreciate that the subject matters of these regimes are different and as such different policy goals should inform them i.e. for these countries, it is not simply as a matter of law that these regimes differ but also of policy given their respective subject matters. Furthermore, as the case of India and Nigeria will show, copyright policy and discourse in a country might depend on the ministry that is charged with supervising the copyright office.

b. Nigerian Copyright Commission and Policy Framework: The Creative Industries Club

The body charged with the administration and enforcement of copyright law in Nigeria is the NCC by virtue of the 1999 Copyright (Amendment) Decree to the Copyright Act as contained in the Laws of the Federation of Nigeria 2004, chapter 28. Section 34 of the Copyright Act provides that the NCC shall:

a) be responsible for all matters affecting copyright as provided for in this Act;

b) monitor and supervise Nigeria's position in relation to international conventions and advise Government thereon;

c) advise and regulate conditions for the conclusion of bilateral and multilateral agreement between Nigeria and any other country;

d) enlighten and inform the public on any matters relating to copyright;

e) maintain an effective data bank on authors and their works;

f) be responsible for such other matters as relate to copyright in Nigeria as the Ministry may, from time to time, direct.

Although the development of policy is not explicitly stated as one of the functions of the NCC, the combined effect of these provisions makes it so. Apart from being responsible for *all* matters affecting copyright, its advisory role to the government effectively extends its jurisdiction to the arena of policy formulation. In fact, the NCC was the principal institution involved in the drafting of the Nigerian copyright bill.

There are several factors that affect, or even suggest, the NCC's policy priority. First, the institutional make-up of the NCC is significantly bent towards copyright protection and enforcement as displayed by the NCC's governing board membership imbalance. Section 35 of the Act establishes a governing board of the NCC which amongst others consists of a representative of the Nigerian Police Force, Nigerian Customs Service, and six persons representing authors of the categories of work covered by the Act. Although membership of the board includes a representative of the Ministry of Education, there is no representative of users' rights as such. Second, the NCC is under the supervision of the Ministry of Justice. Prior to this, the NCC was at its inauguration attached to the Ministry of Information, Culture and Tourism. This transfer to another ministry would suggest a change in the policy direction of copyright. Indeed, it is stated on the NCC's website that "the objective of the transfer was to properly align the mandate of the commission with the overall administration of justice in Nigeria as well as ensure conformity with international best practices with the copyright

system."[43] This statement projects a narrow conception of copyright as simply a legal issue with the NCC's role being to update the law to match international best practices, supposedly international treaties including the copyright laws and norms of developed nations. In fact, this perspective dovetails with the approach taken by those that place copyright and other IP rights under an overarching policy framework but consider that the regimes differ only as a matter of law. Not surprisingly, the NCC places an unbalanced emphasis on copyright as a tool for economic development. It is not even clear, without being informed, if the NCC is an agency charged with the administration of "piracy law" or copyright law. In short, it is either the NCC has failed to incorporate development concerns into its policy framework or it has adopted a narrow version of development focusing on economic aspects alone. Either way, this is bad news given the NCC's mandate to "enlighten and inform the public on any matters relating to copyright."

For example, a brief look at the NCC's website would suggest that it is concerned primarily with the interests of rights owners, even though its mandate, that it be responsible for all matters affecting copyright, means that it should protect the interests and rights of users. Its motto is "protecting creativity." Of course, this itself does not suggest a focus on rights owners or an unbalanced approach to copyright law and policy. But coupled with other statements, it is hard to arrive at a different interpretation. For instance, the mission of the NCC is "to advance the growth of the *creative industry* in Nigeria through the dissemination of copyright knowledge, efficient administration and protection of rights."[44] Clearly, this is a narrow mission that focuses only on the creative industry. It is not surprising then that amongst the strategies for achieving this mission are to strengthen the policy and legislative framework for a more effective copyright protection; promote effective and proactive enforcement of rights; and maintain a policy of strategic engagement with stakeholders.[45] In its 2016 annual report, the NCC makes clear

[43] http://www.copyright.gov.ng/index.php/about-us/ncc-historical-background
[44] http://copyright.gov.ng/index.php/about-us/ncc-vision-mission-statement
[45] *Ibid.*

its preferred policy direction when it states regarding its engagement with stakeholders, which merits full quotation, that[46]:

> [It] continued to engage with its strategic stakeholders in Nigeria in order to enthrone a sound copyright system that maximally benefits owners of copyright works and boosts investors' confidence in the copyright-based industries in Nigeria. Some of these stakeholders are the Nigeria Police Force (NPF), Nigerian Customs Service (NCS), Nigerian Security and Civil Defense Corps (NSCDC), Google Nigeria, MultiChoice Nigeria, Microsoft Nigeria, Nigerian Publishers Association, Book Sellers Association of Nigeria, Audio-visual Rights Society of Nigeria (AVRS), Directors Guild of Nigeria; Copyright Society of Nigeria (COSON), Association of Movie Producers; Business Law Section, Nigerian Bar Association; Association of Nigerian Authors (ANA), Music Label Owners and Recording Industries Association of Nigeria (MORAN); etc.

Of course, the stakeholders involved are those that would "maximally benefit owners of copyright works", mainly government enforcement agencies, entertainment companies, collecting societies, industry associations, and technology companies. On this landscape of policy framework, it is hard to imagine the development of a truly "sound copyright system" that is public regarding and caters to the interests of users. In fact, under the NCC's current policy orientation the concept of public interest, which generally acts as a balancing concept in the exercise and grant of exclusive rights[47], does not seem to differ from the interests of the creative industries. This is not surprising, however, as:

> The notion of 'public interest' is not a single or unified concept— its content will vary depending upon who is considered to make up 'the public' and who is articulating its interests.[48]

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[46] Annual report on file with author.

[47] Although this author is not aware of any published Nigerian copyright decision that discusses where the public interest is located, the *dominantly* expressed view in foreign judicial decisions and academic commentaries is to consider it as the aggregate of interests external to those of authors. Isabella Alexander, *Copyright Law and the Public Interest in the Nineteenth Century* (Hart Publishing, 2010) [Noting that commentators "position [the public interest] as a counterweight to the interests of authors in copyright's famous balancing act."]. The public interest, however, is not the same in all countries and will depend on social, economic, and cultural priorities. William Patry, *How to Fix Copyright* (OUP, 2011) 131.

[48] Alexander, *Ibid*, at 16. The notion of public interest in legal, philosophical and policy discourse is imprecise and ambiguous. Virginia Held, *The Public Interest and Individual Interests* (Basic Books, 1970); Glendon Schubert, *The Public Interest: A Critique of the Theory of a Political Concept* (Free Press, 1962). In copyright scholarship, scholars have noted the slipperiness of the concept and its amenability to co-optation by, and for the benefit of, different stakeholders. See Giblin & Weatherall, *Supra*. n.16 [Stating

Furthermore, and as some media and communication scholars have noted, the concept of "creative industries" as used in policy discourses is ideologically loaded.[49] Often the amorphous and ambiguous labels of "creative economy", "creative industries", "copyright industries", and "knowledge industries" are used to garner support for a policy framework that privileges the strengthening and expansion of copyright.[50] The gist is simple yet with an almost irresistible allure: creative industries contribute significantly to the economy and they depend on the protection of copyrights for the generation of this economic value. Indeed, the UK Government's Department for Culture, Media, and Sport defines creative industries as "those industries which have their origin in individual creativity, skill and talent and which have a potential for wealth and job creation through the generation and exploitation of intellectual property."[51] Unfortunately, many countries and organisations have based their copyright policy frameworks on

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that the concept's "shortcomings are well and truly evident when people debate copyright." And that "more often, copyright's various constituencies will give the concept of the public interest *in copyright* a meaning consistent with their own visions of copyright…" In particular, the relevant issue here is if the notion of public interest must serve as a meaningful and determinate operational guide to copyright law and policy, then whose interests constitute the public interest? There is no consensus on this issue even though the ascending view would seem to place the public interest with users' interests.

[49] See Nicholas Garnham, 'From Cultural to Creative Industries: An Analysis of the Implications of the "Creative Industries" Approach to Arts and Media Policy Making in the United Kingdom' (2005) 11 *International Journal of Cultural Policy* 15 (Arguing mainly that the shift from "cultural industries" to "creative industries" is a "shorthand reference to the information society and that set of economic analyses and policy arguments to which that term now refers."); For the history, debates, and policy implications of the term see Terry Flew, *Creative Industries: Culture and Policy* (SAGE, 2012); John Newbigin, 'What is the Creative Economy: From 'Creative Industries' to 'Creative Economy'— How the Idea of Creative Industries and the Creative Economy has Changed in the Last 20 Years' in John Newbigin (ed.) *New and Changing Dynamics: How the Global Creative Economy is Evolving*, (British Council, 2016) http://creativeeconomy.britishcouncil.org/guide/

[50] Garnham, *Ibid*.; Fiona Macmillan, 'Copyright, the Creative Industries, and the Public Domain' in Jones, Lorenzen, and Sapsed (eds.) *Oxford Handbook of Creative Industries* (OUP, 2014) ["The consequent dominance of the creative industries over cultural output has had the effect of contracting the public domain and potentially restricting creativity."]; *Cf*. Terry Flew, 'Copyright and Creativity: An Ongoing Debate in the Creative Industries' (2015) 2(3) *International Journal of Cultural and Creative Industries* 4. Although the approaches amongst government agencies and supranational institutions differ on the labelling, classification, and mapping of these industries, the objectives and arguments are the same. See UK Department of Media, Culture and Sports, *Creative Industries Economic Estimates: Full Statistical Release* (8 December, 2011) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/77959/Creative-Industries-Economic-Estimates-Report-2011-update.pdf [using the label of creative industries]; United Nations Development Programme, *Creative Economy Report 2008: The Challenge of Assessing the Creative Economy: Towards Informed Policy Making* (UNCTAD & UNDP, 2008) [Creative economy and creative industries]; WIPO, Guide on Surveying the Economic Contribution of Copyright Industries (World Intellectual Property Organization, Geneva; Revised ed. 2015) [Copyright-based industries]

[51] UK Department of Media, Culture and Sport, *Ibid*. at 6

these dubious assertions.[52] This is also the case with Nigeria in its recent Draft Copyright Bill 2015 where it attempts to articulate a copyright policy. As stated in the Copyright Bill, the key objective of the reform which led to the Copyright Bill was to "reposition Nigeria's creative industries for greater growth; strengthen their capacity to compete more effectively in the global market place, and also enable Nigeria to fully satisfy its obligations under the various International copyright instruments, which it has either ratified or indicated interest to ratify." Nowhere does this objective include the rights of users. To be fair though, there is some minimal recognition of the importance of L&Es when the NCC further articulates its policy objectives. According to the NCC, the preparation of the Copyright Bill was guided by the following policy objectives:

a. To strengthen the copyright regime in Nigeria to enhance the competitiveness of its creative industries in a digital and knowledge-based economy.

b. To effectively protect the rights of authors to ensure just rewards and recognition for their intellectual efforts while also providing appropriate limitations and exceptions to guarantee access to creative works, encourage cultural interchange and advance public welfare

c. To facilitate Nigeria's compliance with obligations arising from relevant international copyright treaties; and

d. To enhance the capacity of the Nigerian Copyright Commission for effective administration and enforcement of the provisions of the Copyright Act.

Even if the so-called copyright industries or creative industries contribute significantly to the economy, this does not tell us anything about the impact of copyright on these industries. As one author notes, "[t]he size of so-called 'copyright industries'… says nothing about the economic impacts of copyright in

[52] S.E. Siwek, *Copyright Industries in the U.S. Economy: The 2016 Report* (Intellectual Property Alliance, December 2016). http://www.iipawebsite.com/pdf/2016CpyrtRptFull.PDF ; "The Economic Performance of Copyright-Based Industries" *World Intellectual Property Organization*. http://www.wipo.int/copyright/en/performance/ (listing 48 national studies that have been carried out using WIPO's methodology.)

general or any particular or legal policy reform."[53] Furthermore, some of the industries used to substantiate these claims cannot be accurately labelled as copyright industries in so far as their business model is remotely dependent on copyright protection. The fact that these industries are concerned with the production and distribution of copyright subject matters does not make them copyright industries since the goal should be to ascertain the economic impact of *copyright protection*, not copyright subject-matters, on these industries. Unfortunately, some of these reports misleadingly define the copyright industries to be "those industries whose primary purpose is to create, produce, distribute or exhibit copyright materials."[54] With this definition, they obscure and evade the real object of inquiry which is to understand the impact of copyright protection on these industries and consequently on the economy. Additionally, some of the industries classified by these reports as copyright industries are less concerned with the production or distribution of copyright subject matters than the production of the technical/material means for facilitating the use of copyright works.[55]

Apart from these biased policy implications, the "copyright and creative industries" trope potentially alters the goals and purposes we generally ascribe to copyright law. The justification for copyright law, whether the utilitarian or natural law version, has creativity at its core. As applied to Lockean theory, copyright law rewards the intellectual labor invested in the creation of intellectual products; and although what is directly rewarded is intellectual labor, the indirect effect is

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[53] Jeremy de Beer, 'Evidence-Based Intellectual Property Policymaking: An Integrated Review of Methods and Conclusions' (2016) 19 *The Journal of World Intellectual Property* 150, 168

[54] Siwek, Copyright Industries in the U.S. Economy, Supra. n.52 at 2; But Cf. WIPO, Copyright Industries, *Supra*. n.50 at 51 [Defining the core copyright industries as those "industries which are wholly engaged in the creation, production and manufacture, performance, broadcasting, communication and exhibition, or distribution and sale of works and other *protected* subject matter." Emphasis added] Although this definition makes an attempt to link the core copyright industries with copyright protection, it is still misleading given the nature of copyright protection. In many jurisdictions, copyright protection starts off automatically once that work satisfies the statutory criteria. And so the fact that an industry is engaged in the production and distribution of a protected subject matter does not mean that the industry relies on copyright protection as a business model.

[55] In the WIPO model, the copyright industries include not just the 'core' copyright industries but also the 'partial', 'non-dedicated', and 'interdependent' copyright industries. The function of the interdependent copyright industries is to "facilitate the creation, production, or use of works and other protected subject matter." WIPO, Copyright Industries, Ibid.

supposed to be the advancement of creativity. With the utilitarian theory, copyright law directly incentivises creativity by granting authors and creators exclusive rights. This focus on supporting creativity shifts to supporting investment in distribution when creative industries become the operative label. Not surprisingly, the copyright-made-for-creative-industries mission has led the NCC into a one-sided policy framework that privileges the so-called creative industries at the expense of authors, users and broader public interest concerns, such as A2E and A2K.

On the other hand, the NCC states that its vision is "to harness the potentials of creativity for national development." Clearly this is broad and would provide support for a development-oriented approach to copyright. But it is not clear how its stated mission actualises this vision. In other words, its mission and vision are not in agreement unless we interpret "national development" narrowly to mean the development of the creative industries.[56]

Given this focus on creative industries and the goal of maximally benefiting owners of copyright works, one must conclude that the NCC has adopted a narrow conception of development and a misguided view regarding the role of copyright in advancing that conception. Of course, the concern for creative industries is not in itself misguided but given that Nigeria is a DC, the concerns of education and A2K are equally important.[57] Besides, there is no empirical evidence to support the view that increased copyright protection supports the growth of creative industries.[58] On the contrary, there is consensus that such expansive protection hinders A2K and A2E.

[56] In comparison, see Venezuela IP office's harmonious statement of its mission and vision. http://sapi.gob.ve/?page_id=32

[57] See Toyin Falola and Jamaine Abidogun (eds.), *Education, Creativity, and Economic Empowerment in Africa* (Palgrave Macmillan, 2014)

[58] Alexander Peukert, 'Intellectual Property and Development—Narratives and their Empirical Validity' (2017) 20 J. *World Intellect. Prop.* 2, 9 [Analysing the relationship between IP and development in light of historic-empirical and economic research and concluding solidly that "the hypothesis that increasing legal protection fosters economic development can now be considered refuted."]

This parochial view is further enhanced by the NCC's attachment to the ministry of justice which considers copyright merely a legal issue, its role being simply to update the law to match international standards. In this crusade, the NCC is transformed into an agency for combating piracy rather than a parastatal for the administration, regulation and policy development of copyright law.

c. The Pendulum Swings in Indian Copyright Policy

India is another DC that strengthens the case that the ministerial and organisational arrangements of a country's IP or copyright office can determine, or at least influence, its policy trajectory.

Until recently, the Indian copyright office was attached to the Ministry of Human Resources Development formerly known as the Ministry of Education. As Reddy points out, this arrangement coincides with the active campaigns to reform international copyright led by actors in the ministry, such as M.C. Chagla and T.S. Krishnamurti.[59] The approach of the ministry was to emphasise A2E as a guiding principle in copyright law reform; and strategies for achieving this included reforms that favoured a reduced term for copyright duration and diluted translation rights. Buttressing his argument for the copyright office to remain with the Ministry of Human Resources and Development, Reddy states that "[t]he only reason that such a strong effort had been made by the Copyright Office was because it was located in the same Ministry which had to foot the bill for the more expensive educational text-books."[60]

On May 12, 2016, the Government of India released a National Intellectual Property Rights Policy (NIPRP).[61] India's copyright office has been shifted to the Department of Industrial Policy and Promotion (DIPP) which is under the Ministry

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[59] See Prashant Reddy, 'Keep the Copyright Office with HRD' *Spicy IP* April 11, 2016, https://spicyip.com/2016/04/keep-the-copyright-office-with-hrd.html; Prashant Reddy & Sumathi Chandrashekaran, *Supra.* n.30 at 128-139.

[60] Prashant Reddy, *Ibid.*

[61] 'Cabinet Approves National Intellectual Property Rights Policy' *Press Information Bureau, Government of India*. http://pib.nic.in/newsite/erelease.aspx?relid=145338. NIPRP document on file with author.

of Commerce and Industry. According to the NIPRP, this shift will "lead to synergetic linkage between various IP offices under one umbrella, streamlin[e] processes, and ensur[e] better services to the users."[62] This approach of bringing the different IPOs under one umbrella is similar to the Philippine and South African practice discussed above. It is worthwhile to note that this shift had been carried out several months prior to the release of the NIPRP and given that the DIPP "shall be the nodal point to coordinate, guide and oversee implementation and future development of IPRs in India"[63], it would not be wrong to think that the DIPP had a substantial input in the development of the NIPRP.

The content of the NIPRP raises several issues worth discussing mainly in regard to how the policy addresses development concerns. First, the NIPRP does not make a strong case for the transfer of the copyright office to the DIPP. In preferring a holistic approach to be taken on IP institutional and administrative matters, it is true as the policy document states that "[l]egal, technological, economic and socio-cultural issues arise in different fields of IP which intersect with each other and need to be addressed and resolved by consensus…"[64], but it is equally accurate that the different fields of IP have issues that are peculiar to each and do not necessarily intersect. For example, the A2E frame is dealt with in copyright law and policy; similarly, the access to medicine frame is within the purview of patent law and policy. Of course, these issues can be analysed under the broader frames of IP and development or human rights, but this does not mean that the prescriptions of one would suffice for the other. The failure here is the lack of appreciation that copyright and patent deal with different subject matters and concerns; and this is generally representative of the approach by policymakers. The strategy, as always, is to use the knowledge economy or similar label as a departure point in which the different fields of IP play identical roles in the advancement of this new economy. Furthermore even if the issues do intersect, the need for the harmonious implementation of the legal provisions

[62] NIPRP, pg. 11
[63] *Ibid*. at 28
[64] Ibid.

underpinning the different IP regimes in order to avoid conflict or inconsistency, including the development of a common national position, as the framers of the NIPRP seem to think, does not necessitate the transfer of the copyright office to the DIPP. The same objectives can be attained if the separate ministries responsible for the different IP offices are autonomous but well-coordinated.

Putting aside the issue of institutional choice, the NIPRP represents a swing in Indian copyright, and generally IP, policy. Of course, a policy shift in itself is not problematic given the need to tailor IP policy to different levels of socio-economic and technological development. As the NIPRP recognizes, the IP legal framework reflects "the underlying policy orientation and national priorities, *which have evolved over time*, taking into account development needs and international commitments."[65] Hence, the issue is not with the shift in policy but rather whether the NIPRP engages meaningfully with Indian development needs and its understanding of the extent to which IP can facilitate those needs having regard to, amongst other things, international commitments. The NIPRP fails in these crucial aspects. It adopts a pro-IP approach that undermines development needs and makes grand statements that exaggerate or misplace the role of IP in facilitating development needs. In particular, there are two fundamental problems with the NIPRP. First is its stated goal of an "all-encompassing IPR policy." While a lofty objective, it makes a caricature of the different fields of IP. By employing the monolithic labels of knowledge and information as an encompassing subject-matter to the different fields of IP and therewith deriving its policy recommendations, it elides the differences, concerns and subject matters of the different IP regimes. Second, it worryingly misunderstands the social psychology of creativity and consequently exaggerates the role of IP in advancing creativity. In fact, although the NIPRP talks about "Creative India; Innovative India" as a slogan, a more accurate description of the NIPRP orientation would be the "generation, protection and promotion of IP" rather than the protection and promotion of creativity.

[65] *Ibid* at 3

The NIPRP has seven objectives and the usual vision and mission statements. These objectives underscore the stated rationale of the NIPRP which is to "create awareness about the importance of intellectual property rights (IPRs) as a marketable financial asset and economic tool."[66] Clearly, the NIPRP has a limited aim: creating an awareness about the economic importance of IP rights and the need to capture its economic value. Apart from the oft-cited knowledge economy, one reason for this rationale is its vision statement for "[a]n India where creativity and innovation are stimulated by Intellectual Property for the benefit of all…" The idea here is simple but very misleading. The drafters of the NIPRP not only assume that creativity and innovation can be unleashed only by IP but also that this will be achieved if the economic value of IP rights is advertised to the public. Apart from this uncritical embracement of an empirically falsified view on the psychology of creativity[67], it accords undue primacy to IP. By asserting IP's pre-eminence in stimulating creativity in India, the policy not only fails to understand the limited role of IP in incentivising creativity but also overlooks other institutional mechanisms for advancing creativity. This unbalanced focus on IP rights and the interests of IP creators is evident from even a casual reading of the NIPRP objectives. For example, the first objective is about IP rights promotion and awareness; the second about stimulating the generation of IP rights; and the fourth and fifth are respectively for the commercialisation of IP rights and the increased enforcement of IP rights. While the third objective has the worthy goal of "strong and effective IPR laws, which balance the interests of right owners with larger public interests", it is not clear how this is to be achieved. In particular, how are the various interests to be balanced and what interests constitute the public interest? The NIPRP does not give a clue apart from the further hackneyed statement that "[i]t is an acknowledged fact that a strong and balanced legal framework encourages continuous flow of innovation and is among the bare

[66] *Ibid* at 1

[67] On the psychology of creativity, see T.M. Amabile, *The Social Psychology of Creativity* (Springer, 1983); Mihaly Csikszentmihaly, *Creativity: Flow and the Psychology of Discovery and Invention* (Harper Collins, 2013) [Authors discussing inherent motivation]; D.L. Zimmerman, 'Copyright as Incentives: Did We Just Imagine That?' (2011) 12 *Theoretical Inquiries in Law* 29

necessities to fuel a vibrant knowledge economy."[68] One is still left clueless what a balanced framework would entail. What norms should inform the balance? And even though the NIPRP restates India's commitment to the Doha Declaration on TRIPS Agreement and Public Health, thereby indicating the sort of concerns that might inform the balance, this hardly sheds any light. In fact, a complete reading of objective 3 suggests that the goal is the protection and promotion of IP rights rather than a balanced legal framework as it suggests. The policy lacks coherence. Even more troubling is objective 2 which focuses on the generation of IP rights. The stated steps for the achievement of this objective have the potential to restrict A2E and A2K. In particular sections 2.4, 2.5, 2.6 and 2.7 of objective 2 have this effect. In combination, these sections encourage the acquisition and enforcement of IP rights by public-funded institutions and their researchers. For example, section 2.5 "encourage[s] researchers in public funded academic and R&D institutions in IPR creation by linking it with research funding & career progression." Putting aside social and development concerns of A2K and A2E, the vigorous acquisition of IP rights on public funded projects raises issues of distributive inequity given that these projects have already been paid for by the public.

In the end, a complete reading of the NIPRP shows a policy swing that emphasises the pre-eminence, protection and promotion of IP rights rather than a balanced approach that incorporates development concerns as was the case when the Indian copyright office was attached to the ministry of education.

II. Summary: Walking the Development Talk.

There is a shared emphasis amongst DCs that copyright law should be a strategic tool for achieving development concerns. These concerns are manifest in the economic, social, cultural and political domains. Which concerns are dominant and how countries choose to incorporate them into their copyright law

[68] NIPRP at pg. 14.

and policy are national issues subject to international commitments. But the development concerns of education, access to information and economic empowerment are near universals and pressing in DCs, and they bring copyright law and policy to the fore. DCs understand that a one-sided focus on copyright protection and promotion is not conducive to development. But as the cases of Nigeria and India show, this shared consensus on a development-oriented approach to copyright law has not been readily translated into development-friendly copyright policies. In order to walk the development talk, DCs must be able to narrow the gulf between their NCPs and development commitments.

This section has sought to provide answers for this gulf in formulating development-oriented copyright policies at the domestic stage. Although it is possible to proffer several answers, the cases of India and Nigeria bear striking similarities and seem to point to several reasons. First, in analysing the organisational arrangements of IP offices in DCs it is clear that different approaches are adopted amongst different countries and regions regarding the institutional choice of their copyright office. Given the statutory roles of these offices in the development of copyright policies, it has been suggested that the ministry/department supervising the copyright office might have an influence on its copyright policy orientation. To be clear, this is not a reductive argument that the institutional arrangement of a country's copyright office *determines* its copyright policy. Nor is it the converse, though conceivable given that the relationship between the institutional arrangement and copyright policy is not one-dimensional. Rather, the point canvassed is that the ministry/department charged with supervising the copyright office can provide indications as to where the copyright policy is headed. This is so as different ministries are tasked with different concerns. In the Indian case, it was shown that its copyright policy was guided by the norms of A2E while the copyright office was attached to the ministry of education. In shifting the copyright office to the department of industry and commerce, the emphasis has shifted to IP promotion and protection. Again, this is not a suggestion that the shift in copyright policy is as a result of a change

in institutional arrangement. Several reasons could be proffered, such as a country's perceived level of economic and technological development. Whatever the reasons, it is certainly the case that the institutional choice of a country's copyright office could certainly provide indications vis-à-vis its copyright policy orientation. The recommendation, however, is not to suggest a preference for a particular ministry/department in supervising a DC's copyright office. Development is multi-dimensional and cuts across all spheres—technological, economic, social, cultural and political. Rather, the suggestion is that in order to formulate development-oriented copyright policies, the task must not be left to a particular ministry. Development of copyright policies should be a coordinated effort between various ministries.

Second, an examination of the Nigerian and Indian policy frameworks show that they are largely based on borrowed ideas and concepts that are not properly examined. This has led to certain mistaken or exaggerated assumptions about the relationship between copyright, creativity and economic growth. Chief amongst these ideas is the knowledge economy and other related labels such as creative economy, information economy, creative industries. The ideas informing these labels are used to justify expansive protections for copyright and IP rights in general. It is not surprising then that the policy orientations of Nigeria and India are easily justified by latching on to these labels. For example, in justifying its IP rights policy, the NIPRP states proudly:

> The 21st century belongs to the knowledge era and is driven by the knowledge economy—an economy that creates, disseminates and uses knowledge to enhance its growth and development. Traditionally, monetization of knowledge has never been the norm in India. While laudable and altruistic, this does not fit with the global regime of zealously protected IPRs. Hence, there is a need to propagate the value of transforming knowledge into IP assets.[69]

Similarly, the Nigerian copyright office appeals to the creative industries concept in justifying its copyright policy. The next section will examine properly the ideas

[69] *Ibid.* at 5

underlying the knowledge society/economy and suggest reasons why they have been used incorrectly to justify expansions of copyright.

Third, the Indian IP Policy in particular overlooks the ways in which the different IP regimes differ and consequently how they affect development concerns. By setting itself the lofty task of developing an all-encompassing IP rights policy, it treats the regimes as if they were the same and therefore pays lip-service to the separateness of these regimes. Again, the concepts of information and knowledge economy are used as devices for this purpose. The idea seems to be that the different IP regimes are connected by their subject matters i.e. information goods, and that this requires treating the different IP rights the same.

Fourth, there is a lack of interdisciplinary analysis on the relationship between IP/copyright and other domains such as human rights. As discussed in chapters 3 and 4, copyright law and policy will benefit substantially from a human rights analysis, particularly in the advancement of a users' rights conception of L&Es and the developmental goal of A2E. However, in the Nigerian and Indian policy frameworks, much emphasis is laid on economic growth. Of course, economic growth is an invaluable dimension of development. But unless development is understood narrowly, copyright law and policy must explore its interface with other domains and be informed accordingly.

4. Copyright & the Network Society.

A. Network Society: Information as a Source of Economic Value

In this section, I draw on the work of prominent social theorist Manuel Castells to show why in the global political economy information has increasingly become a source of economic value and consequently the role of copyright in extracting

this value.[70] I point out though that the increasing emphasis on information as a source of economic value and copyright's role in internalising this value has led to the myth that the subject-matter of copyright law is solely concerned with informational works. This understanding has consequences for the way the subject matters of copyright are governed. First, given the link on the one hand between information and economic value and, on the other hand, information as the subject matter of copyright law, the focus is on propertisation of information in order to extract this economic value. Second, the myth that the subject matter of copyright is concerned solely with informational works leads to the privileging of market as a site for producing these works. Lastly, copyright law treats its subject matters as if they are functionally the same. This section will expose the descriptive, explanatory and normative weaknesses of equating copyright with information goods.

Due to the limits of this thesis, what is offered is an abbreviated account of Castells' theory, emphasising how, if any, the network society is different from previous societies, and the relevance of these differences for our mode of development.

I. What is the Network Society?

The theory of network society is a species of theories of the information society, although it differs significantly from those theories.[71] Theories of information society generally emphasise discontinuity i.e. they assert that our contemporary society is a 'new society' in the sense that it is radically different from previous societies.[72] Underlying these information society theories is the assertion that the increasing intensity of information activities permeates all spheres in society.

[70] Although this section draws primarily from Castells' work due to its breath in covering the information society and economy theses, the core insights presented here are shared by various information society theorists.

[71] For a classification of information society theories based on the dimension of society focused on by these theories, see Frank Webster, *Theories of Information Society* (Routledge, 2002).

[72] But see Christian Fuchs, *Digital Labour and Karl Marx* (Routledge, 2014) 137 (Classifying information society theories as either discontinuous or continuous.)

Although Castells contends that we live in a 'new form of society'[73], he rejects this characterisation of society as an information society because, according to him, it is an "empirical and theoretical error" on the basis that "all known societies are based on information and knowledge as the source of power, wealth, and meaning."[74] For Castells then, what is actually new in society is a new technological paradigm "built around microelectronic-based information technologies."[75] And it is this paradigm that enables the *increasing reliance* on information production as a source of value and wealth. This new technological paradigm, which Castells calls 'informationalism', provides the basis for the emergence of a new social structure in society, the network society.[76] This new social structure is centred on networks—what Castells calls the 'networking logic'—powered by the new technological paradigm, which re-organise in substantial ways the dominant spheres of activities and relationships underpinning society.

Thus, Castells states that "[n]etworks constitute the new social morphology of our societies, and the diffusion of networking logic substantially modifies the operation and outcomes in processes of production, experience, power, and culture."[77] What Castells simply means is that the network society and its accompanying transformations (economic, social, cultural) are characterised by the pervasiveness of the networked form of social organisation. For example, Castells refers to what he calls "the network enterprise" as the new economic organisational form in the informational economy underlying the processes of

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[73] Manuel Castells, 'Preface'. *The Information Age: Economy, Society, and Culture: The Rise of the Network Society*, Vol. 1 (2nd ed., Blackwell 2000)

[74] M. Castells, 'Informationalism, Networks, and the Network Society: A Theoretical Blueprint' in Manuel Castells (ed.), *The Network Society: A Cross-cultural Perspective*, (Edward Elgar, Massachusetts 2004). It is on this basis that Castells favors, for analytical purposes, the usage of 'informational society' rather than 'information society' because the former "indicates the attribute of a specific form of social organization in which information generation, processing, and transmission become the fundamental sources of productivity and power because of new technological conditions emerging in this historical period."

[75] *Ibid.*

[76] It is important to note that Castells eschews technological determinism as the basis for the emergence of the network society. According to Castells, the emergence of the network society is based on the interaction between three independent processes, which the technological revolution is only a part: the information technology revolution; the economic crisis of both capitalism and statism, and their subsequent restructuring; and the blooming of cultural social movements. M. Castells, *The Information Age: Economy, Society, and Culture: End of Millennium*, Vol. 3 (2nd ed., Blackwell 2000) 367.

[77] Castells, *Rise of the Network Society*, Supra. n.73 at 500.

production, consumption and distribution. In other words, this network enterprise is the dominant organisational logic of the modern version of capitalism and it is made of networks. Similarly, just as networks characterise the transformation of work in the network society, the organisational forms of global social movements have become network-based i.e. the networking-logic of decentralised, horizontally distributed coordination modifies the operation of these social movements.[78] It is important to emphasise that although networks underpin this new social structure Castells describes, what is specific to this new society is not the networked form of social organisation. According to Castells, this form of social organisation existed in the past.[79] What is specific then, together with the new technological paradigm (informationalism), is the "*pervasive expansion* [of the networking form of social organization] throughout the entire social structure."[80] This pervasive expansion of networks is made possible by the diffusion of informationalism. So, in short, what is new is the dominance or pervasiveness of the network form of organisation in the social structure, *and not the form itself*. And according to Castells, networks are a more efficient form of social organisation.[81]

In summary, the network society is a new social structure characteristic of the Information age. This social structure is based on networks that are (1) powered by the new technological paradigm, microelectronics-based information and communication technologies and (2) increasingly permeated in the institutions and practices that underlie the relationships of production, experience, power, and culture in society.[82]

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[78] *Ibid*. at 216

[79] Castells, *supra.* n.74; *Cf.* Fritjof Capra, 'Living Networks' in McCarthy, Miller, & Skidmore (eds.), *Network Logic: Who Governs in An Interconnected World* (Demos 2004). [Discussing the relevance and fundamental role of networks in the organisation of living systems and not just in the social domain]

[80] Castells, *Rise of the Network Society*, *Supra* n.73 at 500.

[81] Manuel Castells, 'Materials for An Exploratory Theory of the Network Society' (2000) 1 *British Journal of Sociology* 5.

[82] See Castells, 'A Network Theory of Power' (2011) 5 *International Journal of Communications* 773 (Author developing a network theory of power on the basis that in the network society, "social power is primarily exercised by and through networks."); *Cf.* M. Castells, *Communication Power* (2nd ed. OUP, 2013)

II. How is the Network Society Different?

Some of the ways the network society differs from previous societies have been pointed out above. However, for the purposes of this chapter the technological and economic transformations of the network society require emphasis. These transformations are central to what Castells terms "relationships of production" and, along with other relationships (power and experience), they form the basis of a new social structure.

These relationships of production are analytically divided by Castells into what he terms "modes of production" and "modes of development".[83] The former refers to the rules of appropriation, distribution, and uses of surplus that underpin a production process (i.e. capitalism or statism), and the latter to the technological arrangements powering this production process. Although Castells does not offer a technologically deterministic account of the network society[84], his analysis of the emergence of the networked society revolves substantially around the new technological paradigm. It is this new technological paradigm that constitutes a new mode of development, informationalism. And, according to Castells, the emergence of the network society is in part associated with the reciprocal interaction between the informational mode of development and the capitalist mode of production, a techno-economic paradigm which he terms "informational capitalism".[85] Four characteristics of this technological paradigm require emphasis.

First, the raw material of this new paradigm is information i.e. it acts upon information. As Castells states, "*these are technologies to act on information*, not

[83] Castells, *Rise of the Network Society*, Supra. n.73.
[84] Castells, *Ibid.* at 5, fn. 3, ("Technology does not determine society: it embodies it. But nor does society determine technological innovation: it uses it."); *Cf*: Castells, 'Introduction to the 2013 Edition'. *Communication Power* (2nd ed., OUP, 2013) ["No technology determines anything, since social processes are embedded in a complex set of social relationships."]
[85] Castells, *Supra*. n.74.

just information to act on technology…"[86] These technologies—computers, smartphones, camcorders and the Internet etc.— act on information in the sense that their core function is to process, store and transmit information. This feature of the new paradigm is foundational to the economic model of the network society. Productivity in the informational mode of development lies in the "technology of knowledge generation, information processing, and symbol communication" and "what is specific to the informational mode of development is the action of knowledge upon knowledge itself as the main source of productivity."[87] The point is that information/knowledge generation becomes a source of wealth and productivity in our contemporary world, the network society. Of course, this is not to say that information or knowledge has not heretofore been a source of productivity, but rather the emphasis is on the unprecedented economic salience accorded to knowledge generation as a result of the new technological paradigm. Similarly, Castells states that "the emergence of a new technological paradigm organized around new, more powerful, and more flexible information technologies makes it possible for information itself to become the product of the production process."[88] But the increasing reliance on knowledge generation as a source of economic productivity is due not only to the power inherent in these technologies, but also on their near universal availability i.e. their distributedness. These technologies of information production are enhanced and broadly distributed such that the primary material capital for production in the network economy is in the hands of many individuals. This ensures the decentralisation of information production and distribution and is in contradistinction to the previous paradigm—industrialism— in which the material capital for economic production was relatively centralised. Accordingly, the technological paradigm underpinning the network society is characterised not only by technologies whose core function is to act on information but also offer a decentralised means for information production. Castells is not unique in making this sociological observation. In his important work, Benkler uses the term

[86] Ibid.
[87] Castells, *Rise of the Network Society*, Supra n.73 at 17.
[88] *Ibid*. at 78

"networked information economy" in which what is unique about this economy is "that decentralized individual action—specifically, new and important cooperative and coordinate action carried out through radically distributed, nonmarket mechanisms that do not depend on proprietary strategies—plays a much greater role than it did, or could have, in the industrial information economy."[89] According to Benkler, this networked information economy represents a new stage in the information economy and what enables it is the distributedness and availability of communication technologies. Benkler, however, is particularly concerned about how this technological paradigm alters information production, a term he uses to encompass cultural works.[90]

Secondly, the technical architecture of this new paradigm not only facilitates information production and distribution in an unprecedented low-cost manner, but also ushers in a qualitatively and efficiently new way of creating and exchanging information.[91] In particular, the digitisation[92] of informational and cultural goods facilitates the competency of sharing, modifying, and collating informational works in a fast and easy way. And most importantly, the accessibility of information by virtue of technologies embodying this new paradigm is

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[89] Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (YUP, 2006) 15.

[90] Yochai Benkler, 'Freedom in the Commons: Towards a Political Economy of Information' (2003) 52 *Duke L.J.* 1245.

[91] There are numerous examples that illustrate this statement, but I mention a few. One is music production and distribution. Prior to the Internet, musical works were embodied in audiotapes or CDs i.e. in material copies. Distribution of these works was therefore largely dependent on delivery of the physical copies to their physical destinations. Furthermore, because material copies are fixed and may not be tinkered with without affecting negatively their quality, it may be difficult to experiment with them. With the advent of the Internet, different modes facilitating the distribution of musical works have proliferated mainly due to the technological capability to compress a song to an MP3 file and the networked form of communication facilitated by the new technological paradigm. Notable examples of music sharing sites are Soundcloud and YouTube. Moreso, the distribution and accessibility of informational works have been enhanced efficiently by cloud computing technologies that enable space-shifting. For example, one can access informational works on different platforms (computer, tablet, smartphone etc.) by logging in to a web-based application (e.g. Dropbox and Netflix). With regards to production, several factors combine to lower the cost and increase the quality of producing informational works. First, the increased accessibility due to enhanced distribution and the networked environment means that new creators can build on the works of previous creators with reduced cost. This is because the search cost for finding informational works is substantially reduced in comparison to the previous technological paradigm. One need only conduct a search in a search engine like Google. Secondly, the cost of modifying or editing a digitised informational work (in its finished or unfinished form) is reduced due to its alterability. Lastly, the material capital needed to produce these works are relatively cheap and almost universally accessible.

[92] Digitisation refers to the numerical representation of information. One of the consequences of this is that digitised information becomes alterable and programmable in the sense that one can modify an informational product with ease.

unparalleled. There are mainly three reasons for this: first, digital technologies, with the aid of the Internet, enable the compression of time and de-territorialisation of places.[93] Once content is digitised and uploaded to the Internet, it becomes immediately accessible irrespective of one's geographical location subject, of course, to access to the Internet and control measures (censorship, copyright law etc.). Second is that this technological paradigm provides the infrastructure to exploit the non-rivalrous nature of information and by so doing, it accentuates this character of information, a public good. For example, once information is digitised any number of people can use, download, or read that information without diminishing the stock of information available to others. The point here is not that information is non-rivalrous by virtue of the new technological paradigm; rather, it is the crucial fact that this new paradigm reduces substantially the marginal cost of producing informational works and, thereby, has an impact on the potential to exploit the non-rivalrous character of information. Consider the following example in three different technological paradigms—manual, industrial, and digital—vis-à-vis their impacts on the non-rivalrous character of information. Assume I authored a non-fictional medical book, on the cure for cancer, and deposited the only copy in a library in my hometown without any limitations or restrictions on access to the book. The information contained in the book is of course non-rivalrous because anyone who has access to read the book in the library does not subtract from another person's subsequent use. Of course, there are issues of space and material embodiment limiting the accessibility of this medical book but these issues do not diminish the fact that the information contained in the book is non-rival.[94] In order

[93] Castells uses the terms "timeless time", and "space of flows" to describe the transformations of time and space in the network society. Castells, *Supra*. n.73.

[94] The issue of space concerns (1) the spaciousness of the library to accommodate everyone wishing to read the book and (2) the distance between the location of the book and the location of the interested parties. Material embodiment concerns the availability of scarce material embodying the information. Both issues—space and material embodiment—combine to exclude some people from having access to the information. So there is a problem of excludability which prevents people from enjoying the benefits that come from information being non-rival. The excludability problem in this instance is not artificially caused but rather the result of technical and material incapacities. Vis-à-vis the issue of material embodiment, the introduction of a new technological paradigm would reduce the relative cost structure of reproduction (i.e. marginal cost of production), thereby ameliorating the excludability problem with a consequent effect on the utilisation of the non-rival character of information.

to increase accessibility of this book, we introduce the first technological paradigm, the manual paradigm (i.e. the paradigm in which production is largely dependent on direct human labour). In this paradigm accessibility is not greatly improved because the issues of space and material embodiment are still persistent. For instance, dissemination of the book would be hampered by the cost and time of producing copies of the book due to the fact that reproduction would be largely dependent on direct human labor. The logical consequence is that there would be less creativity and innovation in the knowledge ecosystem as very few people would be able to build on this medical book. And the overall effect is that the non-rivalrous character of information would be under-utilised due to the excludability problem caused by the issues of space and material embodiment.

In the industrial paradigm, space and material embodiment become relatively less problematic due to new technologies (printing press and means of transportation). But these technologies—printing press— are centralised and do not facilitate a common platform to access content independent of spatial location. Hence the excludability problem, although partly addressed, is still persistent in the industrial paradigm. The digital paradigm, on the other hand, revolutionises the way informational and cultural content is accessed. In this paradigm, spatio-temporal issues are virtually annihilated by the logic and power of the new technological paradigm; and, the digitisation of content subjects the issue of material embodiment to ephemeralisation. What is new to this paradigm, therefore, in this context is that it provides a platform for the accessibility and dissemination of the medical book that is not contingent upon space and material embodiment. Hence, the shrinkage of the excludability problem.

At this juncture, it is important to emphasise the implication of this example: although information is characteristically non-rivalrous, this aspect of information would be under-utilised and therefore yield minimal value if there is obstructed access, an excludability problem. The excludability problems encountered in the

first and second paradigms are not artificially created but mainly due to lack of technological infrastructure. The digital paradigm supplies this technological infrastructure, but there is an artificially created exclusion through copyright laws and technological protection measures that restrict A2K. The effect is as if we are still in the industrial paradigm.

The third characteristic of this technological paradigm, stated by Castells, is that it facilitates networking logic.[95] Castells defines networks as "a set of interconnected nodes."[96] A node or vertex is a distinct connecting point in a network that connects to at least one other point. These vertices are connected by links or edges. What a node is depends on the type of network, whether it is a social, technological, or biological network. In social networks, the vertices could be individuals, groups of individuals or organisations and the links or edges connecting these vertices could be political ideologies, academic relationships etc. A network has no centre and is relatively flat. And because networks are decentralised, there is in principle increased participation and equality between the nodes. As noted above, a topos in Castells' work is that networks are the dominant forms of organisation in our contemporary society. Thus, the title "Network Society."

III. Why the Network Society Matters for Copyright Law & Policy

In summary, the implications of the network society for the political economy of information production are as follows:

1. The currency in the new economic paradigm of the network society is increasingly reliant on information production and use; and this implicates copyright laws and policies to the extent that it is concerned with the production and dissemination of information in the cultural sphere.
2. The technological architecture of the network society facilitates information production and distribution in the ways discussed above and, as such,

[95] Castells, *Supra.* n.74
[96] *Ibid*.

copyright law is relevant to the extent that an equitable and efficient institution of knowledge governance would ensure that the potentials of these technologies are utilised to facilitate the wide dissemination and use of knowledge, while at the same time ensuring that all those responsible for the production and dissemination of content are fairly compensated.

3. The networked architecture facilitated by the new paradigm opens up new opportunities regarding how information can be produced and distributed while taking into account the norms of equity and efficiency.[97]

B. Information, Markets, and Economic Value: Piercing Through the Veil of Ignorance.

The veil of ignorance has a different objective in social and political theory.[98] It employs thought experiment as a method of reasoning in order to determine or resolve issues of morality. A key feature of this thought experiment is that an individual is presumed or situated in an "original position" to be ignorant of personal biases and prejudices. The value of the thought experiment is to render inadmissible information that is irrelevant to, but that might affect, the adjudication of social issues. Such information might corrupt the adjudication of such issues.

I am however not interested in conducting a thought experiment and so do not employ the veil of ignorance in the sense it has been used in classical social and political theory. The more modest concern is to reveal the ways our construction of reality in the sphere of cultural production distorts reality with a consequent effect on our cultural ecosystem. The point of the veil of ignorance is that the outcome of our ruminations is dependent on the gap between the ruminations and the consequent decision, and in turn this gap is dependent on the information we possess. As the veil of ignorance shows, certain information

[97] Amy Kapczynski, 'Order Without Intellectual Property Law: Open Science in Influenza' (2017) 102 *Cornell L. Rev.* 1539; See generally Benkler, *Supra.* n.89

[98] See John Rawls, *A Theory of Justice* (6th ed. Cambridge, Mass: Belknap Press, 2005) [Using the veil of ignorance to derive principles of justice]; Jean Tirole, *Economics for the Common Good* (Princeton University Press, 2017) [Using the veil of ignorance to identify the common good]

might be irrelevant and even corrupting to the adjudication of social issues and, in such cases, it is vital that such knowledge be excluded. But it is also equally true, and more important for present purposes, that some knowledge might be relevant to our construction of social reality and as such we need to pierce through our self (externally) imposed veil of ignorance.

In this vein, the way we think of, and about, copyright law is bad for our cultural ecosystem and development. Not only is it normatively unattractive, it is descriptively flawed. The main problem is the conception of copyright law as concerned mainly with the production, distribution and use of information. This narrative must be changed in order to align copyright with reality.

I. Copyright and Information Goods: The Blueprint for Propertisation?

It is not uncommon to find treatises on IP generalising and categorising this broad area of law as concerned with information production and use.[99] It is true that this broad categorisation is analytically useful, but it is not without significant costs. It leads to an epistemological consciousness in which copyright law *can only* be conceived of as protecting the right to extract economic value. This is so because a convergence of opinion exists amongst information society theorists, despite the different labels, that information and knowledge are sources of economic value and wealth. Once this connection is made, copyright then as a marketplace framework exists to enable the realisation of this value through property rights. Indeed, the justification for copyright is often premised on some version of this view.[100]

Consider, for example, Boutang's insightful work.[101] The core thesis of Boutang's work is that society is experiencing a third kind of capitalism, which he terms

[99] See, e.g., James Boyle, *Shamans, Software and Spleens: Law and the Construction of the Information Society* (HUP, 1996); See also discussions on NIPRP and NCC supra. Section 3.
[100] See Stan Liebowitz, 'The Case for Copyright' (2017) 24 *Geo. Mason L. Rev*. 907
[101] Y.M. Boutang, *Cognitive Capitalism*, (tr. Ed Emery; Polity Press, 2011)

"cognitive capitalism." [102] For Boutang, every kind of capitalism is characterised by "a type of accumulation, a mode of production, and a specific type of exploitation of living labor."[103] Accumulation is the same thing as "mode of development" which Castells uses in his work.[104] So, Boutang must tell us how the type of accumulation in this supposedly third capitalism differs from previous ones otherwise there is nothing new. And he does not fail:

> By cognitive capitalism we mean, then, a mode of accumulation in which the object of accumulation consists mainly of knowledge, which becomes the basic source of value, as well as the principal location of the process of valorization.[105]

Although Boutang uses knowledge-goods more frequently, he does not distinguish between knowledge and information and considers the principal trading goods in this third capitalism as information and knowledge goods. And despite the different labels employed by Castells and Boutang, they both agree that information and knowledge have increasingly become sources of economic value and wealth. The important point however is that the dominant site for this process of valorisation, alluded to by Boutang, is the market and it is achieved through property regimes, such as copyright. Accordingly, it requires very little mental effort to see that when copyright is associated solely with information goods, the process of valorisation dictates the commodification of information in order to capture the economic value.

It is true, however, as Boyle notes that liberal society conceives of information differently in different spheres and that this raises tensions as regards how information should be governed:

> But what does it mean to say that information presents special problems? I do not mean that the regulation, ownership, and control of information presents special *technical* or *functional* difficulties, though that is sometimes true. The "problems" I refer to are problems in the realm of

[102] *Ibid*. at 47
[103] *Ibid*. at 56
[104] See *Supra* n.83 and accompanying text
[105] Boutang, *Supra*. n.101 at 57.

> ideas, paradoxes, or tensions in our assumptions, brought to the surface when the subject is information. To put it more specifically, as a form of wealth, a focus of production, and a conception of value, information is a problematic category within our most basic ways of thinking about markets, property, politics, and self- definition.[106]

What Boyle is getting at is that the commodification of information is not a given in society because different spheres conceive of information differently. For example, access to information is privileged in the political sphere in order to enhance democratic culture and some have developed democratic theories of copyright.[107] The relevant question then is this: if information is conceived of differently in different spheres, then how come the assertion that copyright is concerned with information goods leads to the commodification of information? Is it also not possible that the political sphere conception of information might lead to the "de-commodification" of information? Accordingly Boyle sees conflicts and tensions in the way information is conceived of—both within and between spheres— in liberal society and his goal is to investigate how these conflicts are resolved or concealed.[108] He argues that these contradictions are concealed, rather than resolved, by the romantic conception of authorship by privileging the propertisation of information.[109] This view has been criticised by Lemley on descriptive, normative, and explanatory grounds.[110]

Putting Lemley's criticisms aside, the mistake Boyle makes is to think that the different conceptions of information matter *equally* in a liberal society. As such, Boyle thinks that there are *real* conflicts or tensions in the way liberal society conceives of information. To be clear, it is not disputed that liberal society conceives of information in contradictory ways. The point is that such contradictions or aporias are exaggerated and in every society there are hierarchies of conceptions. Furthermore, the different spheres in society do not

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[106] Boyle, 'Preface' *Supra.* n.99.
[107] See N.W. Netanel, 'Copyright and a Democratic Civil Society' (1996) 106(2) *Yale L.J.* 292
[108] Boyle, *Supra*. n.99 at 29.
[109] *Ibid*. See also Keith Aoki, '(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship' (1996) 48 *Stan. L. Rev.* 1293, 1329.
[110] M.A. Lemley, 'Romantic Authorship and the Rhetoric of Property' (1997) 75 *Texas L. Rev.* 873; see also Oren Bracha, 'The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright' (2008) 118 *Yale L.J.* 186.

structure our lives equally. Some spheres are more important or dominant than others in the sense that they have 'infiltrated' other spheres and accordingly structure our worldviews. This is the main theme of Sandel's work in which he argues authoritatively that "[t]he most fateful change that unfolded during the past three decades was not an increase in greed. It was the expansion of markets, and of market values, into spheres of life where they don't belong."[111] And that "[t]he reach of markets, and market-oriented thinking, into aspects of life traditionally governed by nonmarket norms is one of the most significant developments of our time."[112]

Once Boyle recognises this, the distorted reality around which the propertisation of information is constructed would no longer be the romantic author but rather the equation of copyright with information goods. It is this valorisation of information in the market sphere through the copyright regime that is responsible for the propertisation of information.

II. Did We Just Imagine That? Copyright is Not About Information Goods!

The concern in the previous section was to provide an *explanatory* account why there is an increasing trend towards the propertisation of copyrighted works. In the information society, as theorised by Castells and many others, the valorisation of information has taken supreme importance and it is through markets using copyright that this valorisation occurs. But the equation of information goods with copyright law is also descriptively flawed and normatively dangerous. This section turns to these aspects.

Copyright is concerned with cultural works, not information goods. Culture in all its ubiquity is a notorious concept to define, and it has been subjected to different

[111] M.J. Sandel, *What Money Can't Buy: The Moral Limits of Markets* (Penguin Books, 2013) 7
[112] Ibid at 7; also, Yanis Varoufakis, *Talking to My Daughter: A Brief History of Capitalism* (Random House, 2019) (describing our contemporary world as a market society.)

usages and definitions.[113] Although different definitions emphasise different aspects of culture (symbolic[114], cognitive[115], comparative[116], or interpretive[117]), it is clear that the concept refers to a total way of life informed by a set of beliefs, ideas, and values that are distinctive of or exclusive to a group of people. This way of life is not static; it is dynamic and changing. These beliefs, ideas and values are embodied in cultural or social artefacts (books, magazines, movies, music, art, etc). These artefacts are meaning producing in the sense that they are subject to different interpretations, thereby conditioning our worldviews. It is in this sense that I use the term cultural work i.e. *culture as expression rather than identity*. In this sense, cultural work is any work that is expressive and meaning producing, whether in the form of images, symbols, sounds, or signs, and it need not be produced by an indigenous community or traditional people. This understanding of culture aligns with that of the CESCR. The CESCR in *General Comment No. 21*, while commenting on art 15(1)(a) of the ICESCR which deals with the right to participate in culture, explains that culture encompasses:

> [W]ays of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives.[118]

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[113] For instance, Kroeber and Kluckhohn discovered more than150 definitions of culture. See Alfred Kroeber & Clyde Kluckhohn, *Culture: A Critical Review of Concepts and Definitions* (Cambridge, Massachusetts; Papers of the Peabody Museum 1952).

[114] David Schneider, *American Kinship: A Cultural Account* (Chicago University Press,1968) [Defining cultural system as a "system of symbols".]

[115] "Culture has been defined in a number of ways, but most simply, as the learned and shared behavior of a community of interacting human beings." See John Useem, *et.al*., 'Men in the Middle of the Third Culture: The Roles of American and Non-Western People in Cross-Cultural Administration' (1963) 22(3) Human Organization 169.

[116] G.H. Hofstede, *Culture* and *Organizations: Software of the Mind* (McGraw-Hill, London 1991) [The "collective programming of the mind which distinguishes the members of one category from another."]

[117] J.A. Banks et.al. (eds.), *Multicultural Education: Issues and Perspectives* (7th ed., Wiley & Sons, 2010) 8.

[118] Committee on Economic, Social and Cultural Rights, *General Comment No. 21: Right of Everyone to* Take Part in Cultural Life (art. 15, para. 1(a), of the International Covenant on Economic, Social and *Cultural Rights)*, UNESCOR, 43rd Sess, UN Doc E/C. 12/GC/21 (2009), para.13.

Also, UNESCO defines culture as “the set of distinctive spiritual, material, intellectual and emotional features of a society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.”[119]

When these definitions and understanding of culture are mapped onto copyright law, it is hard to dispute that the subject matters of this area of law are indeed concerned with cultural works as I have defined it. This is axiomatic. What is less obvious are the implications of such assertion, which I discuss briefly.

First, there is too much talk of copyright and information goods. Analytically and descriptively, this is problematic. True, the content of copyrighted works is information in that it is composed of data. But the information or data is cultural because they are meaning producing and not just a set of numbers. The authors of these works are culturally situated in that they write ‘within’ a society. Their writings, expressions, art, music etc., are as a result of shared collective experience. It is therefore logical to assert that the tangible goods in which the content of so-called information goods are embodied are carriers of cultural content.

Second, cultural works are functionally different. Writings are not the same with musical works, nor are paintings the same with films. We generally read books in order to educate ourselves; whereas, we watch movies and listen to music for entertainment. This suggests that the treatment of these works by copyright law should differ.[120] For example, the case for A2K is much stronger for writings and books than it is for music. But when copyright law is equated with information goods, we are simply asking policy makers to treat the subject matter of copyright law in a monolithic fashion.

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[119] UNESCO Universal Declaration on Cultural Diversity, UNESCO Res 25, 31st Sess., UN Doc 31 C/25 (2001) 1, pmbl.

[120] See e.g. R.E. Suggs, ‘A Functional Approach to Copyright Policy’ (2016) 83 *U. Cin. L. Rev*. 1293. (Arguing for a functional approach to copyright policy that takes into account the content of cultural works)

Third, cultural works are works for more than their economic value. The cultural economics perspective is that cultural goods have value beyond the economic ones. And that the sites or modes (market, government, community etc.) for realising these values *differ* and matter for the valuation of the good.[121] This same idea can be extended to the subject matter of copyright law. The main point is that when we focus on information goods as the subject matter of copyright law, we are drawn into thinking inevitably that markets are the only sites for producing this good and that the only value that matters is economic. This in turn means that the production of cultural works must operate under the market logic of commodification and that a property approach to copyright law must be utilised.

Fourth, if cultural works have value beyond the economic, then what are these values and how can they be captured. Collectively, they are social values.[122] Take for example a book on constitutional democracy. The value of the book is not simply the price—its economic value—one is willing to pay for the book's informational content. Certainly, the value extends beyond this market transaction. The non-economic value derives mainly from the fact that this book is meaning producing and, because such works can change one's world view, it can alter not only the individual's perceived reality but also that of others. Suppose after reading the book, I understand that the rights of a minority group have been violated. I therefore proceed to seek redress in a court for this group and after much litigation win a substantial compensation for this group. Or say after reading the book, I engage in a debate with some students in which I convince them of the merits of constitutional democracy over an absolute monarchy. It is clear from this example that the value of this book has been captured not just by me but also by the minority group and students. More importantly, this value is non-economic because it cannot be captured through the price mechanism as such. In fact, the price mechanism prevents the

[121] Arjo Klamer, 'Cultural Goods Are Good for More than Their Economic value' in Rao and Walton (eds.) *Culture and Public Action* (Stanford University Press, California 2004)
[122] See chapters 1 and 2.

capturing of this non-economic value because it is based on exclusivity. This reinforces the fundamental point that access is a core value in the governance copyright works.

Finally, the understanding that copyright is principally concerned with cultural works in conjunction with art.15(1)(a) of the ICESCR, which guarantees the right to participate in cultural life, provides a sound basis as discussed in chapter 4 for a users' rights approach to L&Es.[123] And although Nigeria is yet to domesticate the ICESCR, it is still of persuasive authority.[124]

5. The Future of Copyright Policy in Nigeria: The Draft Copyright Bill 2015

The nature of the inquiry in this chapter warrants, even briefly, an investigation of the Copyright Bill and whether it ushers in a new era in the copyright policy of Nigeria. Particularly, whether it pays attention to broader development concerns or continues to advance a narrow understanding that undermines access and users' rights at the expense of development goals such as access to education.

The Copyright Bill is not yet law as discussed in a previous chapter.[125] But it is the latest and most comprehensive instalment in Nigeria's attempt to revamp its copyright law. It has 11 parts and 88 sections. Although the NCC's introductory note accompanying the Copyright Bill lays emphasis on the protection of creative industries and the need to update Nigeria copyright law to comply with international copyright treaties, it is fair to say that some of the substantive provisions of the Copyright Bill represent commendable attempts to take

[123] See Chapter 4, section 2(B)(I)
[124] See Enyinna Nwauche, 'The Nigerian Fundamental Rights (Enforcement) Procedure Rules 2009: A Fitting Response to Problems in the Enforcement of Human Rights in Nigeria?" (2010) 10(2) *African Human Rights Law Journal* 502.
[125] See Chapter 1, section 3(D)(ii)

seriously broader development concerns and users' rights generally. I highlight briefly some of the improvements of the Copyright Bill before moving to its shortcomings.

As mentioned elsewhere[126], the Copyright Bill redraws the architecture of L&Es by placing its provisions in the body of the Copyright Bill.[127] Under the Copyright Act, L&Es are relegated to the Second Schedule whereas exclusive rights are positioned in the body of the Copyright Act. To be clear, this is not just a matter of form or structural arrangement. It is a clear statement and representation that L&Es are indispensable to the advancement of copyright's purpose and therefore should enjoy the same standing, not relegated, with exclusive rights. Another area where the Copyright Bill represents an improvement from the Copyright Act and seeks to facilitate development concerns is in its fair dealing provision. Section 20(1)(a) of the Copyright Bill includes "teaching" and "education" as purposes that fall outside the acts controlled by copyright provided that the otherwise impugned act for such purpose is by way of fair dealing. To quote fully, s.20(1)(a) provides that copyright does not include the right to control:

> the the doing of any of the acts mentioned in the said sections by way of fair dealing for purposes of research, *teaching*, *education*, private use, criticism, review or the reporting of current events, subject to the condition that, if the use is public, where practicable, 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…[128]

It is important to emphasise that the fair dealing provision under the Copyright Act does not include teaching or education.[129] Accordingly, this provision, afforded by the Copyright Bill, is an important tool for the advancement of access to education. This would seem to suggest that the Copyright Bill is informed by a development-oriented copyright policy. This is, however, a hasty conclusion

[126] See Chapter 4, section 4(A)
[127] See Part II, Draft Copyright Bill.
[128] Emphasis added.
[129] See Second Schedule, CA 2004.

given that there are some shortcomings of the Copyright Bill, and the fair dealing provision in particular, which will be discussed below.

In addition to the fair dealing provision, another provision which walks the development talk is s.31 of the Copyright Bill. Section 31(1) of the Copyright Bill provides that:

> Notwithstanding any other section of this Act, the Commission may authorize the use of a work by any person for the following purposes—
>
> (a) to rectify abuse of dominant market position;
> (b) to remedy abuse of rights;
> (c) *to promote public interest.*[130]

The essence of this provision is that the NCC might issue a compulsory license for the use of a work in order to promote public interest. Notwithstanding the conditions required to be met in order to enjoy this compulsory license,[131] this provision is broad. The Copyright Bill does not define "public interest" and would not seem to be interpreted narrowly by the courts. In fact, it is hard to imagine uses of a work for the purpose of education or teaching not being in the public interest. As such, this provision is a commendable utilisation of the policy space afforded by international copyright law to advance development goals.[132]

There are several weaknesses in the Copyright Bill. I mention a few that are relevant due to space. The first is in regards to the factors to be considered in determining whether a use constitutes fair dealing. Section 20(1)(a) provides that:

> […] in determining whether the use made of a work in any particular case is fair dealing, the factors to be considered shall include—
>
> (i) the purpose and character of the use, including whether such use is

[130] Emphasis added.
[131] Section 31(2), the Copyright Bill.
[132] See Chapter 4.

of a commercial nature or is for non-profit educational purposes;
(ii) the nature of the work;
(iii) the amount and substantiality of the portion used in relation to the work as a whole;
(iv) the effect of the use upon the potential market for or value of the work; and
(v) if the use does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the owner of copyright.

In other words, if a person wants to make use of a work, say for the purpose of education or teaching, under the fair dealing provision, it must satisfy the above conditions. There are two issues with this. One of the problems has been discussed elsewhere.[133] The other concern is that s.20(1)(a)(v), which replicates the three-step test, narrows the interpretation of the fair dealing provision for two reasons. First, if the WTO Panel interpretation is to be followed then it means that s.20(1)(a)(v), will unduly restrict the interpretation of the fair dealing provision given the Panel's predominant economic focus.[134] Second, the inclusion of the three-step test as captured by s.20(1)(a)(v), is unnecessary as it not required by any of the international copyright treaties. The fair dealing provision is already compatible with the three-step test and there is no need to subject it further to another three-step test.[135] These fair dealing conditions are not part of the Copyright Act.[136] In other words, the Copyright Bill both *expands* and *narrows* the scope of the fair dealing provision by including "education" and "teaching", as purposes covered by fair dealing, which are not in the Copyright Act; and requiring the satisfaction of conditions which also are not part of the Copyright Act. Finally, s.20(1)(f) provides that copyright does not include the right to control:

> the inclusion in a collection of literary or musical works which includes not more than two excerpts from the work, if the collection bears a statement that it is designed for educational use, includes an acknowledgment of the title and authorship of the work and does not materially impinge on the economic interest of the owner of copyright.

[133] See Chapter 4, s.4(B)(II).
[134] See Chapter 4, s.3(B)(IV)(a)
[135] *Ibid*. and Chapter 4 generally.
[136] See Second Schedule, CA 2004.

This is an already narrow exception that does not take advantage of the policy space in the Berne Convention.[137] And so requiring further that the inclusion "does not materially impinge on the economic interest of the owner of copyright" is unduly restrictive, narrow, and unnecessary. The requirement that the inclusion in a literary and musical work not include more than two excerpts of the work is enough to satisfy the prohibition on impingement of economic interest. Again this condition is not part of the comparable provision in the Copyright Act.[138]

In conclusion, there are certain improvements in the Copyright Bill that take seriously a development-oriented understanding of copyright that pays attention to the socio-economic needs of Nigeria. But there are also weaknesses in the Copyright Bill that detract from this pursuit.

6. Conclusion

The objective of this chapter has been to lay the foundation that will enable Nigeria develop a coherent and sound copyright policy that is sensitive to its development needs.

In pursuit of this objective, I have deemed it important first to deal with the myths that continue to impose a distorted reality on the ways in which we understand copyright law and construct the landscape of our cultural sphere. A development-oriented policy framework cannot be devised without unpacking these myths. Copyright is an area of law that is replete with myths that revolve around these labels: creative industries, creative economy, information goods, property, and development.

[137] See Chapter 4, s.4(B)(II)
[138] Second Schedule, CA 2004.

By situating the political economy of cultural production within the tectonic shifts of the information society and cognitive capitalism, this work has shown the reasons behind the increasing relevance of information as a source of wealth and value and why the regimes of copyright have become the dominant mode of internalising this value. Of course, this is a welcome development.

But the contradictions replete in this new paradigm suggest that we should be careful before using labels. The first label is the equation of copyright with information goods. As argued, the consequences are great. Not least because the valorisation of information is fought out in the market through copyright regimes and this can only mean bad news for our cultural ecosystem when we equate copyright with information goods. A policymaker that starts first with the understanding that copyright is concerned with cultural works, and not information, has the basic tools to construct a normatively attractive policy framework. And as this chapter has shown, it is this 'unholy' alliance between copyright and information goods that is responsible for the commodification of information, which puts private exclusive rights before access rights. Specifically, in regard to Nigeria, it is important that in developing a NCP that attention be paid to the fact that different categories of work might require different approaches. Where the goal is to facilitate A2E, then a policy that privileges access to literary works would be appropriate. It is also worthwhile to consider how the African conception of the person, Ubuntuism, discussed in chapter 1 can inform the development of a NCP in Nigeria.

In the end, Nigeria needs to be critical about those labels that have been and continue to be used to justify the expansion of copyright as property. It needs to be aware of its development stage and the needs of A2E. A foundation for a sound copyright policy can only be laid once these factors are keenly considered.

Conclusion

The central issue that has principally informed and animated this project is the role and limits of copyright law in facilitating A2E in Nigeria. Nigeria is a unique case study in examining this issue for socio-economic, legal and cultural reasons. First, Nigeria is a DC and so the issue of A2E is a developmental imperative. Second, the origin and development of copyright law in Nigeria is inseparably tied to its transplant from Britain. Perhaps for this reason, Nigeria has grappled with aligning copyright law with developmental needs. Third, Nigerian copyright scholarship is predominantly focused on norm-conforming behaviour analysis i.e. the overriding concern is whether Nigerian copyright provisions are complied with by individuals and institutions.

This peculiar situation of Nigeria alongside the institution of copyright, which is concerned with governing the production and use of cultural works, provided the departure point for this project. At the onset, it was clear that a purely legalistic analysis will not proffer answers or solutions to the difficult issues raised by this project. The issues implicated by, and implicating, the regime of copyright law cannot be adequately captured through the purely legal analysis lens. Many agree that copyright law is no longer an esoteric subject to be tortuously mined by lawyers. With the regime fractures in copyright law, it is therefore not surprising that this institution has become a battlefield site reminiscent of the legendary battle of cúl Dreimhne case. The effect is that the boundaries and contours of copyright law are not only drawn by lawyers qua lawyers. Given the multiplicity of issues and issue linkages in copyright law, it was necessary analytically to approach this thesis from different levels: historical, normative/theoretical, practical/legal, and policy. These levels were informed by

three questions to enable the thesis achieve its principal objective: what legal and cultural norms inform the regime of copyright law, and what are the effects of these on A2E?;can copyright law be integrated with the constitutional right to education?; and what are the legal and policy reforms needed for a development-oriented copyright law that facilitates A2E in Nigeria?

The historical and normative analysis of chapters 1 and 2 respectively provided the tools to answer the first question. On the historical inquiry, the examination of the origin and development of literary property, starting from ancient civilisations, enabled the interrogation of certain narratives and assumptions that have conditioned our understanding of copyright with a consequent effect on a development-oriented vision of copyright. Regarding the issue of incentives, the historical account showed that there has always been abundant literary production even in the absence of literary property. In fact, it was not until 1586 that the Company of Stationers first articulated the incentive argument in a desperate bid to maintain its monopoly. This is important. The traditional justification of copyright as incentives for cultural production has always been used to support the increased and continuous expansion of copyright to the detriment of development goals. Instead of its purported incentive function, the history and development of copyright has shown that, apart from the incentive argument being a retrofitted rationale, the function of copyright has been the economic one of enabling capitalists in the book trade to capture the economic value of copyright works through commodification. The incentive argument legitimises this commodification. This is not to suggest however that copyright does not play any role as incentives in the production of creative works. Indeed, the limited scope of the historical inquiry in chapter 1 is not enough to completely dismiss the incentive argument. Rather, the specific lesson of chapter 1 on the issue of incentives is that given that there has been, and continues to be, evidence of cultural production in the absence of copyright incentives, the reliance on the incentive argument as a justification for expanding copyright protection should be viewed with scepticism. Instead of a blanket expansion that

targets all categories of works, a more informed analysis should identify those categories that rely on copyright incentives.

The incentive argument, however, is not the only way in which the expansion of copyright is packaged or justified. Throughout the body of this work, many of the justifications, assumptions and narratives informing copyright were discussed. In chapter 5, one important contribution of this work is to bring attention to the way in which the subject-matter of copyright is mischaracterised, and to seek for a more normatively attractive and descriptively accurate characterisation. It was argued in that chapter that the understanding that copyright is concerned with informational goods is not only flawed but also reinforces the view that copyright is about capturing the economic value of copyright works, a view, as we have seen, legitimises the expansion of copyright. Chapter 5 however argued and showed that copyright's subject matter is best understood as cultural works. This understanding allows for a more refined analysis of copyright law and policy. Under the informational goods view, a one-size-fits-all approach to copyright law and policy is justified or even required; whereas, the cultural view appreciates that there are differences in the classes of copyright works which could have legal and policy implications. Particularly, this is relevant to the issue of A2E in Nigeria. The works that are germane to the issue of A2E in Nigeria are literary works and given their development importance, a strong case can be made for a different approach to this category of works. As one commentator observes:

> There must be a recognition that all knowledge products are not the same, and that while it may be justified to insist on commercial terms for Nintendo games, some flexibility for scientific materials, textbooks and the like is appropriate. The owners of knowledge must modify their purely profit-oriented approach to certain segments of the knowledge industry.[139]

On the cultural norms issue, and moving back to chapter 1, the inquiry revealed that copyright is not a transcendent moral idea but rather the product of a specific culture informed by possessive individualism. This conclusion is sustained by the

[139] P.G. Altbach, 'The Subtle Inequalities of Copyright' in P.G. Altbach, *Copyright and Development: Inequality in the Information Age* (Bellagio Publishing Network; 1995)

top-down and bottom-up analysis employed in chapter 1. The importance of this conclusion is in bringing attention to and exposing the interests that have informed copyright law, and how they might operate differently from those that inform A2E, thereby providing the needed insights that would allow countries, where copyright is a transplanted institution, such as Nigeria, to rethink copyright law in ways that would align with their socio-economic and development needs.

The principal task of this thesis was further taken up in chapter 2 where the main inquiry was whether the dominant normative/theoretical account informing copyright law can be justified in its own terms. The critical and detailed analysis in this chapter on the efficiency theory of copyright law, whether as Pareto optimality or KH-WM, showed that its application to copyright law is infeasible. One important contribution of this chapter is in revealing the aporias and inadequacies of economic analysis, in which the efficiency theory of copyright law is packaged, in dealing with social concerns. Consequently, a normative rethinking of copyright law was embarked on in which copyright law was better understood as an institution of social development. The fruits of this understanding led to the search for a normative framework that will guide copyright law as an institution of social development. In navigating through DS and the contested notion of development, it was concluded that a HDA should inform copyright law principally because, amongst other reasons, it is human-centred. The principal objective of this project, the advancement of A2E, is about the developmental prospects of humans rather than the technical objective of efficiency.

This issue of A2E was specifically discussed in chapter 3. The value of education was interrogated, tracing and locating its fundamental value in international instruments, national constitutions, and global initiatives. The conclusion reached is that the value of education is both economic and social, and that it creates positive externalities. Lack of education is life-threatening. In fact, education is correlated with positive outcomes. Alongside this, the peculiar socio-economic situation of Nigeria was discussed, and it was found that based on UN HDI, A2E

is a critical issue in Nigeria. This situation is adversely impacted by the poverty statistics in Nigeria which drastically reduces the purchasing power of students and affects the funding available for tertiary institutions in Nigeria, thereby impeding ALM. Given that copyright is a market institution and education is a non-market good, chapter 3 underscored the fact that there might be limits in the institution of copyright law, operating alone, in advancing A2E. Furthermore, copyright's L&Es, already narrow, continues to be interpreted narrowly as it panders to private interests.

Accordingly, one of the important contributions of chapter 3 is in considering whether copyright law can be integrated with the constitutional right to education. In taking this approach, various jurisdictions were examined in order to identify the status of this constitutional right and how it has been used to advance A2E. In particular, the case of India and Brazil showed that it is possible to integrate copyright law with the constitutional right to education. The benefit of this strategy is that apart from copyright law ceasing to be the sole turf for the determination of contested issues, the constitutional right to education introduces external norms that supress the private interests partitioning copyright law from developmental objectives. There are challenges however in employing this strategy, primarily due to the nature and scope of the constitutional right to education. Regarding the nature of the constitutional right to education, it was shown that some DCs relegate the right to education to the DPSP which are not justiciable mainly because they require resources and are classified as ESC rights. Furthermore, for many countries, the scope of the constitutional right to education, even when justiciable, does not go beyond the right to basic education. In the case of Nigeria, the conclusion is that neither these challenges nor the public/private distinction divide is enough to prevent the integration of copyright with the constitutional right to education.

In the final two chapters, the legal and policy aspects of copyright law and A2E in Nigeria were examined. On the legal issue, chapter 4 was principally concerned with examining what Nigeria is legally able to do within the constraints of the

international regime regulating copyright law. The analysis led to the understanding that the main treaties, TRIPS and Berne, are mainly concerned with protecting private exclusive rights. Nevertheless, in navigating through the landscape of international treaties, it was understood that, despite the predominant concern of protecting private exclusive rights, there is also a remnant of social concerns in the international regime. In examining the available L&Es under the TRIPS and Berne treaties that may be used by Nigeria in its copyright law to facilitate A2E, it was considered that the teaching exception and the three-step test were the key relevant and effective L&Es for advancing A2E in Nigeria. The Berne Appendix is heavily bureaucratic, and the quotation exception does not address the concern of bulk ALM or the major issue of course packs in Nigerian tertiary institutions. Nigeria however needs to effectively utilise the teaching exception to advance A2E. The same applies to the three-step test despite the predominant economic interpretation of the WTO panel, which is not binding. In addition to these, a more liberal understanding of L&Es— that reinterprets them as users' rights instead of mere defences or exceptions to copyright's exclusive rights—is necessary. The embracement of L&Es as users' rights is anchored in sound normative, theoretical and policy reasons. This rights approach to L&Es, in addition to fully utilising the flexibilities in the international regime, provides another arsenal Nigeria can use to facilitate A2E.

Returning to the policy aspects of chapter 5, the principal contribution of this chapter was to show that copyright policy matters significantly in the quest for a development-oriented copyright that facilitates A2E. This thesis is unique in this aspect given that there are very few works that discuss the policy aspects of copyright. In examining this issue, several understandings and insights were gained on how a narrow understanding of copyright reduces the policy space and leads to policy formulations that hardly walk the development talk. As mentioned above, the understanding that copyright is mainly concerned with informational works is descriptively inaccurate and normatively unattractive. This inaccurate understanding of copyright's subject matter coupled with the creative-industries

thesis is one of the ways in which a development-oriented vision of copyright law is shelved aside. These inaccuracies and myths are represented as foundational truths in the examined Indian copyright policy document, Nigerian copyright scholarship, NCC website, and even the Draft Copyright Bill. The problem is that these flawed understandings serve as organising framework in the formulation of copyright policies. The well-informed understanding of this chapter however is that copyright works are mainly cultural works. Furthermore, the assertions informing the creative-industries thesis are at best flawed. If Nigeria proceeds from this more informed analysis, rather than myths that pervade copyright discourse, it will be possible to develop a copyright policy that is development-oriented and facilitates A2E.

Another original contribution of this chapter concerns the organisation of IP, and specifically copyright, offices. It was considered whether the arrangements and organisation of copyright offices might have anything to do with the orientation of NCPs or how copyright is understood. The focus was mainly on DCs. Although the findings of the research carried out are not conclusive, it would seem that the organisational arrangements of copyright offices affect the trajectory of copyright policy. This is an interesting area in which more research needs to be done.

Finally, although much work needs to be done in the area of copyright and A2E in Nigeria, it is hoped that this work will provide the foundational departure point to examine this issue. Particularly, attention should be paid to the understanding in this thesis that the foundational issues of copyright law are as important as well-designed rules.

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