

# **Fair Use under Copyright Law: Theoretical basis and Enforcement Approaches in Selected East African States**

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## **Abstract**

The provisions of fair use in the copyright legislation afford a requisite policy balance for achieving important public developmental goals, such as facilitating access to information. However, the exact scope of fair use differs depending on the underlying priorities in a particular jurisdiction. The theoretical underpinning that substantiates fair use are also variant. The different approaches are evident in the regulatory practices across the East African States. The statutory restrictions on the applicability of fair use have been variously interpreted within the region, hence potentially creating legal and regulatory dilemma. This trend is worrisome in the context of present regional initiatives to approximate intellectual property laws within the region. The threshold of assessing fair use as reflected in local and international copyright legal texts offers inconclusive clues on fair use. Ultimately, consideration of specific conditions obtaining in a particular jurisdiction is important in devising the appropriate regulatory model for fair use.

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## 1. INTRODUCTION

From its very inception, copyright law was carefully crafted to accommodate dual objectives; first, promoting authors' rights and secondly, encouraging public learning. These two subsets of copyright goals are inherently rival. Hence, the protection under copyright system has always been fashioned out with an attempt to achieve the rational equilibrium of these competing public goals.<sup>1</sup> This can be seen from the tone of the provisions in the early statutes of copyright which had an inbuilt theme centred along the lines of encouraging learning by permitting unauthorized uses in certain defined context.<sup>2</sup> Fair use was introduced so as to accommodate the divergent interest between the authors of published works, and users of such works. In most cases, public sentiments on the need for more liberal fair use provisions in the copyright legislation arises when the use is sought to be made for educational and teaching purposes.<sup>3</sup> Amid these competing interests, a balanced statutory approach is considered as crucial in making the copyright law appealing to the public, hence likely to

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<sup>1</sup>Asien, J.O., "Copyright and Related Rights: Nature, History and Justification," in Oyewunmi, A., et al (Eds), 2018. *Intellectual Property Law, Practice and Management: Perspectives from Africa*, Harare: Africa University, ARIPO and JPO, at pp. 211 -17.

<sup>2</sup> Atitle to the *Statute of Anne* which is also known as the Copyright Act of 1710 had these words: "An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or Purchasers of such Copies during the time therein mentioned." As it can be seen, the thrust and fundamental objective of the Act was on "encouragement of learning."

<sup>3</sup>Mahama, A., 2018. "Copyright Law: Implications of National and International Legislation for the Publishing Industry in Ghana," *Vo. 3 AJIP*, at p.7. Recently, there have been complaints in Tanzania from universities against an attempt by the Copyright Society of Tanzania (COSOTA) to order/bill the universities to pay fees or the use of the published materials for teaching and research.

be obeyed with little coercion.<sup>4</sup> The perceived fairness of a law is one of the important factors in shaping compliance, including in the realm of intellectual property law.<sup>5</sup> Arguably, people are more inclined to obey laws that they believe serves broader social purposes and that are not merely vehicles to create profits for special interest group.<sup>6</sup> Therefore, the incorporation of fair use provisions in the copyright laws is one of the measures tailored to offset the negative effects of excessive and absolute protection of copyrightable works. It is essentially a balancing act regulating the seeming irreconcilable frictions arising from the operation of the copyright protection.

The competing interests are evident not only in the copyright law, but also in other branches of intellectual property rights system such as patents and trademarks.<sup>7</sup> The legal regime governing copyright is predicated on two fundamental considerations; first to provide protection as an incentive to authors to create more work and second, not to excessively extend the scope of protection at the expense of justified public enjoyment.

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<sup>4</sup>Tyler, T., 2006. *Why People Obey the Law*, Princeton University Press, at p. 31.

<sup>5</sup>Tyler, T., and Jackson, J., 2004. "Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation and Engagement," *20(1) Psychology Public Policy and L.*, at p. 78.

<sup>6</sup>Simone, D., 2019. *Copyright and Collective Authorship: Locating the Authors of Collaborative Work*, London: Cambridge University Press, at pp. 236 -238.

<sup>7</sup>*Masterpiece Inc. v. Alavida Lifestyles Inc.*, [2011] SCC 27, where the Supreme Court of Canada stated: "Trademarks are an important tool to assist consumers and businesses. In the marketplace, a business marks its wares or services as an indication of provenance. This allows consumers to know, when they are considering a purchase, who stands behind those goods or services. In this way, trademarks provide a shortcut to get consumers to where they want to go. Where the trademarks of different businesses are similar, a consumer may be unable to discern which company stands behind the wares or services. Confusion between trademarks impairs the objective of providing consumers with a reliable indication of the expected source of wares or services." In the setting of this case, "business" represent private rights, while "consumers" represent public rights.

This paper delves into a jurisprudential and legislative investigation of the nature and context of the principle of fair use as applied in the copyright law in Tanzania and in other selected East African states. A glance at the operating legal frameworks regarding criteria used by the Courts in assessing applicability of fair use in other East African jurisdictions is made not only for comparative purposes; but also in the context of the ideals and objectives of the Treaty Establishing the East African Community.<sup>8</sup> One of the designated areas for collaboration within the Treaty is on intellectual property rights by harmonizing the promotion and protection of intellectual property rights.<sup>9</sup> Other Protocols of the East African Community have provisions which call for regional cooperation on matters of intellectual property rights.<sup>10</sup> As a measure designed to implement the regionalization of intellectual property regulation in East Africa, in 2017, the East African Community initiated the process of developing the regional intellectual property policy that will provide the general framework within which issues of intellectual property rights may be harmoniously addressed across all partner states.<sup>11</sup> The draft EAC

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<sup>8</sup> The Treaty was adopted on 30<sup>th</sup> November 1999. It has since been amended from time to time.

<sup>9</sup> Article 103(1)(i) of the *Treaty Establishing East African Community*, 1999. Accessible at: [http://www.eala.org/uploads/The\\_Treaty\\_for\\_the\\_Establishment\\_of\\_the\\_East\\_Africa\\_Community\\_2006\\_1999.pdf](http://www.eala.org/uploads/The_Treaty_for_the_Establishment_of_the_East_Africa_Community_2006_1999.pdf) (Visited on April 30, 2020).

<sup>10</sup> Article 38(1)(d) of the Protocol on EAC Customs Union of 2004 and Article 43 of the Protocol on EAC Common Market of 2009.

<sup>11</sup> WTO Report, 2018. *Status on Harmonization of Trade Regimes in East Africa*, WT/TPR/S/38, para 19. Accessible at [https://www.wto.org/english/tratop\\_e/tpr\\_e/s384\\_sum\\_e.pdf](https://www.wto.org/english/tratop_e/tpr_e/s384_sum_e.pdf) (retrieved on May 1, 2020). Along the same lines, there is already in place: EAC, 2013. *EAC Regional Intellectual Property Policy on the Utilisation of Public Health-Related WTO-TRIPS Flexibilities and the Approximation of National Intellectual Property Legislation, Arusha, East African Community*. Accessible at: <https://ipaccessmeds.southcentre.int/wp-content/uploads/2019/12/EACTRIPSPolicy.pdf>, retrieved on March 28, 2020)

Regional Intellectual Property (IP) Policy was submitted to the EAC Secretariat on 20<sup>th</sup> September 2018 and is still under deliberation. Thus, it is timely and appropriate to investigate the existing parameters of fair use as applied in specific context and conditions obtaining in Partner states to the East African Community so as appreciate the available legal and regulatory latitude in shaping and crafting this important copyright flexibility. In order to properly appreciate the nature and context of fair use provisions, it is fitting to start with laying out of the conceptual and theoretical issues of copyright generally and fair use specifically.

## **2. THE CONCEPTUAL AND THEORETICAL BASE OF FAIR USE**

The theoretical and conceptual setting of the foundation of copyright law and its many other doctrinal postulations have attracted numerous debates over many years.<sup>12</sup> In relation to the fair use, there are several theoretical creeds that have been advanced in an attempt to explain its legal basis.

### **2.1 Defining the Terms: Free use, fair use or fair dealing**

In many cases, the terms fair use, fair dealing, or free use have been applied interchangeably to address similar issues and contexts. While the distinction between those expressions may be seen by some as immaterial, yet in legal terms, their underlying differences have significant effect. It has bearing on many legal and policy issues with far-reaching legal and practical implications in terms of the scope of limitations, and more importantly it may

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<sup>12</sup> Merges, R.P., 2011. *Justifying Intellectual Property*, California: Harvard University Press, at Ch. 8.; Yen, A., 1990. "Restoring the Natural Law: Copyright as Labour and Possession," *51 Ohio St. L.J.*, at p. 517; and Hughes, J., 1988. "The Philosophy of Intellectual Property," *77 Geo. L.J.*, at p.287, 350-53.

influence the judicial approach adopted by the courts of law in interpreting the fair use provisions in a particular jurisdiction.

### 2.1.1 *The Phrase “Free Use”*

As pointed out earlier, the Copyright statute in Tanzania use the term “free use” when referring to the limitations to the exclusive rights vested to the holder of copyright.<sup>13</sup> In view of the history of copyright law, is debatable whether it is legally appropriate, in the first place, to use the term “free use” in such provisions. From the perspective of the ordinary dictionary meaning, the term “free use” may loosely denote the allowance given to the public to use copyrighted work without any control or restriction or payment, able to do what one want.<sup>14</sup> Such connotation is not in line with how the limiting provisions operate under the copyright statutes – which has many restrictive terminologies accompanying the fair use provisions. Also, strictly stated, the term “free use” does not reflect well with the provisions of free use under the copyright law of Tanzania.<sup>15</sup>

The qualifying conditions for fair use in the copyright legislation in Tanzania includes: (1) that the use must not conflict with the normal exploitation of the work, (2) the use must not unreasonably prejudice the legitimate interest of the author, (3) the use must be compatible with the fair practice, and (4) the extent of use does not exceed the justifiable limits, and the obligation to cite the source.<sup>16</sup> A close look at these qualifying phrases in the copyright

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<sup>13</sup> See the side notes to Section 12 of the Copyright and Neighbouring Rights Act, Cap 218 [R.E. 2002].

<sup>14</sup> See the definition of the word “free” in the *Oxford Advanced Learner’s Dictionary of Current English*, 8<sup>th</sup> Ed, and Oxford: Oxford University Press, at p. 596.

<sup>15</sup> Section 12 of the Copyright and Neighbouring Rights Act, Cap 218 [R.E. 2002] contains several limitations and qualifying phrases that seek to careful control the enjoyment of the said exception.

<sup>16</sup> *Id.*

legislation, suggests that in the strict terms, the uses are not free! Such fair uses are a subject of both fine margins of statutory limitations and also subjective and objective controls by the adjudicatory organs such as the Courts of law.<sup>17</sup>

### 2.1.2 Fair Use and Fair Dealing- What is the difference?

While the concepts of *fair dealing* and *fair use* may be analogous, yet they are not synonymous.<sup>18</sup> There are several fundamental historical and legal differences between the two terms. From historical perspectives, the two concepts trace their origin from varied sources and legal systems. The concept of fair dealing is a common law creature.<sup>19</sup> It originated from the common law through the courts-made law and was first developed by courts in the United Kingdom (UK) in the 18<sup>th</sup> century.<sup>20</sup> Subsequently it was codified in 1911 through the U.K. Copyright Act of 1911.<sup>21</sup> In contrast, the doctrine of fair use which is a form of affirmative defence is a creature of the United States (U.S.) law and traditions and is widely attributed to Justice Story's decision in 1841 in *Folsom v. Marsh*.<sup>22</sup> Intriguingly, the decision in Folsom's case is said to be based on the English fair dealing case law, yet its reasoning and subsequent ruling brought to the fore a slightly

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<sup>17</sup>This is evident from the look of variety of interpretation approaches that has been applied by the Courts in different jurisdictions.

<sup>18</sup> Tobias Schönwetter, "Safeguarding a Fair Copyright Balance - Contemporary Challenges in a Changing World: Lessons to be Learnt from a Developing Country Perspective", *PhD Thesis*, University of Cape Town 2009) at Pg. 111.

<sup>19</sup> Owe, L., 2015. "Fair Dealing: A concept in UK Copyright Law," *Learned Publishing*, 28: 229–231, accessible at: <https://onlinelibrary.wiley.com/doi/pdf/10.1087/20150309> (Retrieved on April 2, 2020).

<sup>20</sup>*The Controller of Her Majesty's Stationery Office, Ordnance Survey v Green Amps Ltd*, [2007] EWHC 2755.

<sup>21</sup> See Section 2(1) of the Act.

<sup>22</sup> [1841]9 F. Cas. 342 (CCD Mass.). For a commentary on the legal relevance of the Court's opinion, read Patterson, L. R., 1998. "Folsom v. Marsh and Its Legacy," *5J. Intell. Prop. L.* 431.

twisted copyright jargon, phrased as *fair use*.<sup>23</sup> It is important to note that the difference of the two terms is not only a linguistic one; it has had significant impact in terms of the scope and interpretation approach adopted by the courts of law.

From a legal point of view, both concepts share the same fundamental idea of permitting certain uses which are considered to be fair. Yet, these concepts differ in their approach. The approach in fair dealing tend to be restrictive as it mainly focuses on the transactional side of the use; whereas the approach in fair use jurisdiction tend to be broader, objective and considerate to the public interest dimension of the limitations.

The term “fair dealing” generally refers to utilization of any exclusive right in a copyright work without the prior permission of the author or owner of the work. Traditionally, the two-step test is used to determine whether there is a fair dealing. First, it must be established that the dealing which is a subject of dispute falls within one of the specific types of uses listed in the copyright statute. Secondly, the Court must carry out an assessment on whether the use in question is fair. This is a subjective test to be determined by the court after carrying out both factual and legal enquiry. In most jurisdictions, there is no statutory guidance as to what constitute fairness. It is left to the Court to determine by looking at the degree of use.<sup>24</sup> The classic example on this restricted approach is the UK copyright law which has prescribed fair dealing provisions. The restricted approach adopted in the UK thus differs significantly from the position in US Copyright law, which has a general statutory defence of fair use in the copyright

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<sup>23</sup> Craig J, et al, 2006. *Copyright Law* (7th Ed), LexisNexis, at p 774.

<sup>24</sup>Brenncke, M., 2007. *Is “Fair Use” an Option in UK Copyright Legislation?* Heft 71, at p. 14.



legislation. Further, the US Copyright Act has set defined factors to be considered in the assessment of fair use.<sup>25</sup>

Over the years the Courts of law have delineated the parameters of assessing whether the use is fair or otherwise. In the process of so doing, the platform of assessment of fair use has been expanded.<sup>26</sup> In the end, the exact scope of how the fair use concept is set and applied in a particular case it is a matter of national law.<sup>27</sup>

## 2.2 Non-absolutism of Copyright

Copyright as a subset of intellectual property rights system is tailored and structured so as to confer certain private or monopoly rights to authors and owners of literary and artistic works. The monopoly rights are in the form of statutory exclusive rights granted to the author or owner of copyright for a limited period of time.<sup>28</sup> There two types of monopoly rights under copyright;

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<sup>25</sup> Section 107 of the US Copyright Law.

<sup>26</sup> See for instance in *Fraser-Woodward Ltd v. British Broadcasting Corporation Brighter Pictures Ltd* [2005] EWHC 472 in which the Court listed six factors to be considered in assessing whether the use is fair. These includes: Assessing the motive of the user, impression created by the use, degree/frequency of use (extent), purpose of use, amount of work used, and nature or medium of work.

<sup>27</sup> For instance in *Communications Commission of Kenya & 5 Others v. Royal Media Services Limited & 5 Others* [2014]eKLR, the Supreme Court of Kenya adopted a six factor test in assessing fair use claim and arrived at a conclusion that taking into account broader public interest which were at stake in implementing the dictates of the Kenya Communications (Amendment) Act of 2009 and Kenya Information and Communications (Broadcasting) Regulations of 2009 which introduced the must-carry rule compelling a signal contributor to carry a prescribed minimum number of Kenyan Free to Air (FTA) broadcasting channels as a prerequisite for retaining broadcasting licence, the compulsory broadcasting of FTA was in line with fair use and did not infringe copyright of FTA broadcasters.

<sup>28</sup> See Article 6 of the *Berne Convention for the Protection of Literary and Artistic Works*, 1886 Accessible at:

<https://www.wipo.int/export/sites/www/treaties/en/documents/pdf/berne.pdf>  
(Visited on April 30, 2020)

namely economic rights and moral rights.<sup>29</sup> However, these rights are not absolute at least in two ways: (1) these rights are protected for a specific duration, and (2) the statutes provides for instances when such rights may be are put in suspense for broader public interests. The latter is usually done through imposition of certain limitations and exceptions in the copyright statutes.<sup>30</sup> These statutory restrictions are couched in many forms; one of those forms is by the inclusion of fair use provisions in the copyright legislation. It is a means through which the copyright law strikes the equilibrium between the interest of the authors and that of the public to have unfettered access to information in the published materials.<sup>31</sup>

### **2.3 Utilitarianism as a Theoretical Basis for Limitations in Copyright**

The utilitarian or otherwise incentive-based theory posits that the protection of copyright serves as an incentive to encourage authors to publish more because they feel that there is a guarantee for recouping the investment they have made in researching and publishing their works. Conversely, in addressing

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<sup>29</sup> Section 9 and 11 of the Copyright and Neighbouring Rights Act, Cap 218 [R.E. 2002]

<sup>30</sup> Article 10, *Berne Convention*, above note 28.

<sup>31</sup> Holland, J., 2016. "Limitations and Expectations under Copyright Law in Relation to Libraries and Archives: Botswana Copyright and Neighbouring Rights Act 2000", *Vol. 1 AJIP*, at p 27. Interestingly, the Supreme Court of Canada in *Theberge v. GalerieD'Art Du Petit Champlain Inc.*, 2002 SCC 34., pointed out that: "The Copyright Act is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated). This is not new. The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to over-compensate artists and authors for the right of reproduction as it would be self-defeating to under-compensate them."

the public rights to access copyrightable works for educational purposes, this theory employs a familiar utilitarian yardstick requiring policy and lawmakers to put thrust in the quest for maximization of net social welfare when shaping property rights.<sup>32</sup> In early copyright decision of *Wheaton v. Peters*, 33 U.S.591 (1834) the Court treated copyright as statutory creation designed primarily to enhance the public interest and only secondarily to confer a reward upon authors.<sup>33</sup> The Court described the basic purpose of copyright in the following terms:

The limited scope of the copyright holder's statutory monopoly, like the limited duration required by the Constitution, reflect a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music and the other arts. The immediate effect of our copyright law is to secure a fair return to an author's creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.

Therefore, in the context of copyright law, this theoretical base is generally posited as requiring policy and lawmakers to strike an optimal balance. The balance between the power of exclusive rights to stimulate the creation of new published works and works

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<sup>32</sup> For instance Article I, § 8, cl. 8 of the *Constitution of the United States of America*, grants powers to the Congress to enact copyright laws in order to promote "progress of science and useful arts."

<sup>33</sup> Menell, P.S., Lemley M.A., Merges, R. P. 2017. *Intellectual Property in the New Technological Age: 2017, Vol. II: Copyrights, Trademarks & State of IP Protections*, California: Clause 8 Publishing, at p 499.

of art and the partially offsetting tendency of such rights to curtail widespread public enjoyment of those creations.<sup>34</sup>

## 2.4 The Natural Right Theory as a basis for Fair Use Prescription

According to this theoretical conjecture, copyright deserves protection because “it is right and proper to do so.” It originates and finds a proxy in the writings of, among others, John Locke who, presumably, had no copyright in mind when he posited his natural rights theory as generally applied to property, yet his theoretical proposition has been widely used to justify copyright protection.<sup>35</sup> The theory springs from the proposition that a person who labours upon resources that are either unowned or “held in common” has a natural property right to the fruits of resulting work from his or her efforts – and that the State has a duty to respect and enforce that natural right. These ideas are widely thought to be especially applicable in the field of copyright, where the pertinent raw materials (facts and concepts) do seem in some sense to be “held in common” and where labour seems to contribute to the value of finished products [new publications and other works of Art].<sup>36</sup>

Furthermore, the natural right theory posits that private property is a combination of naturally existing ideas (property in commons) combined with human ingenuity (intellectual contributions of the

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<sup>34</sup> Fisher, W., 1987. “Theories of Intellectual Property,” *Essay Series*, (Accessed through: <https://cyber.harvard.edu/people/tfisher/iptheory.pdf>. Visited on 10th December 2019).

<sup>35</sup> Menell, P.S., 2014. “This America Copyright Life, Reflections on Re-Equilibrating Copyright for the Internet Age,” *61 J. Copyright Soc. of USA*, at p. 235.

<sup>36</sup> Fisher, W., “*Theories of Intellectual Property*”, above note 34.

individual), hence the resulting work is a natural right/property.<sup>37</sup> The theory further maintains that protection should be extended in so far as enough is left in the commons for others to use. It further asserts that it is only in this way the statutory protection of private rights will not exhaust the pool of commons. Thus, the conceptual base of copyright protection system is predicated on the need to draw a delicate optimal equilibrium between private rights and public rights.<sup>38</sup> One of the ways this objective can be achieved is by providing for statutory limitations to the exclusive rights conferred to the authors. Also, by defining the extent within which those exclusive rights can be enjoyed by the public (in which case it amounts to “leaving enough in the pool of common”) without retribution from the authors – hence vindicates the concept of the fair use.

The preceding discussion on the conceptual issues and theoretical tenets of the doctrine of fair use suggests that it is always important to resonate public interest considerations in devising appropriate model of copyright protection for greater public benefits. The dimension and element of public interest consideration is one of the fundamental pillars of the fair use exception.

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<sup>37</sup> For a thorough discussion about the theoretical basis of copyright law see: Hughes, J., *The Philosophy of Intellectual Property*, above note 11.

<sup>38</sup> *Twentieth Century Music Corp v. Aiken*, 422 U.S. 151 [1975], Justice Stevens pointed out that: “The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide special private benefits. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of the authors and inventors by the provision of a special reward, and to allow the public access to the products of this genius after the limited period of exclusive control has expired.”

### 3. PUBLIC INTEREST DIMENSIONS OF FAIR USE

The concept of fair use under copyright law is triggered and structured along the lines of public interest considerations of the intellectual property rights system. In particular, the quest for creating a balanced approach that take care of the interest of the authors and the right of public access to the use of protected works in certain defined and justified circumstances. The reflection of the fair use as a corner stone of the copyright law is evident based on the fact that the concept is manifested in all key international copyright conventions.<sup>39</sup> The inclusion of such limiting provision in the copyright statutes has been done partly because of the growing disillusion among the public that the prevailing copyright principles, practices, and policies have fostered inequality rather than addressing the need to build domestic capacity in publishing industry or greater access to published books, particularly to the low income countries.<sup>40</sup> This is succinctly postulated in the provisions of Appendix to the Berne Convention in which developing countries are allowed to, *inter alia*, adopt compulsory licensing regimes that limits the controlling powers of the copyright owners over reproduction and translation of their works.<sup>41</sup> Yet, the circumstances under which a copyright

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<sup>39</sup> See Article 10 of the Berne Convention and Article 13 of the TRIPS Agreement. In addition, it is important to note that the TRIPS Agreement contains provisions which are of broad application and which by necessary implication attracts the inclusion of fair use provisions in the national laws. For instance, Article 8(1) of the TRIPS Agreement gives permission to member states while formulating or amending their laws to adopt measures which are necessary to promote public interest in sectors of vital importance for their socio-economic and technological development. Furthermore, Article 9(1) of the Agreement has wholly adopted the provisions of the Berne Convention and its Appendix, including those on fair use.

<sup>40</sup> See the Appendix to the Berne Convention which seeks to facilitate bulk access of certain types of copyrighted material, including educational materials in developing economies.

<sup>41</sup> See also Article V (2) of the Universal Copyright Convention of 1952 which was adopted under the auspices of the United Nations Educational, Scientific

compulsory licensing may be invoked and issued are quite restricted and complex.

#### **4. THE OPERATING LEGAL FRAMEWORK OF FAIR USE IN TANZANIA**

In Tanzania, matters of copyright are governed and regulated by the Copyright and Neighbouring Rights Act of 1999.<sup>42</sup> The Act repealed and replaced the Copyright Act of 1966 which was the first post-independence copyright legislation. Tanzania is a member of the Berne Convention for the Protection of Literary and Artistic Works of 1886 as revised at Paris in 1971.<sup>43</sup> To a larger extent, the copyright legislation is framed in the context and spirit of both the Berne Convention for the Protection of Literary and Artistic Works,<sup>44</sup> and the Agreement on Trade-Related Aspects of Intellectual Property (TRIPs Agreement).<sup>45</sup> Therefore, a proper account of the operating framework of fair use in Tanzania can only be fully appreciated by examining both the international

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and Cultural Organization (UNESCO) relating to the restrictions on the right to translate a publication into a national language after a lapse of 7 years from the date of publication, subject to a just compensation and restriction of the use within the relevant territory. The Universal Copyright Convention is not a substitute instrument of the Berne Convention; rather it is complementary to it. Article XVII recognizes and subjects the Convention to the provisions of the Berne Convention.

<sup>42</sup> Cap 218 [R.E. 2002].

<sup>43</sup> Tanzania accessed to the Berne Convention on April 25, 1994 and the Convention became operational in Tanzania on July 25, 1994. (This information was accessed through: [https://www.wipo.int/treaties/en/notifications/berne/treaty\\_berne\\_156.html](https://www.wipo.int/treaties/en/notifications/berne/treaty_berne_156.html). Visited on 12th December 2019).

<sup>44</sup> The Convention was adopted in 1886.

<sup>45</sup> It was adopted in 1994 as one of the Annexed agreements to the World Trade Organization (WTO) Agreement of 1994. Tanzania has been a member to WTO since 1 January 1995 (Visit: [https://www.wto.org/english/thewto\\_e/countries\\_e/tanzania\\_e.htm](https://www.wto.org/english/thewto_e/countries_e/tanzania_e.htm). visited on 12th December 2019).

copyright legal instruments to which Tanzania is a member, and the attendant domestic copyright legislation in Tanzania.

#### **4.1 The Perspectives under International Copyright System**

One of the major features of the international intellectual property legal instruments lies in the inclusion of provisions that allow member states to introduce necessary flexibilities in the protection of intellectual property within their local laws.<sup>46</sup> States are required to do so by taking into account their specific socio-economic circumstances. The Berne Convention sets minimum standards for the protection of copyright. It also contains provisions for several flexibilities which member states are at liberty to implement through their national legislation. Article 10 of the Berne Convention provide for limited freedom to freely use copyrighted works under certain prescribed conditions, otherwise referred to as fair use. For the use to be fair it must satisfy three tests: (1) the use must be reasonable, (2) not in conflict with the normal exploitation of the work, and (3) not unreasonably conflict with the legitimate interest of the author.<sup>47</sup> The type of uses covered within the purview of Article 10 of the Berne Convention includes quotations,<sup>48</sup> use of works by way of illustration for teaching,<sup>49</sup> use in broadcasts and newspapers,<sup>50</sup> and reporting

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<sup>46</sup> See Article 10(2) of the Berne Convention for the Protection of Literary and Artistic Works and Article 7 and 8 of the TRIPs Agreement which imposes an obligation to the Member states to formulate intellectual property laws in a manner that are promoting transfer and dissemination of knowledge and promotion of public interest in sectors of vital importance for their socio-economic and technological development.

<sup>47</sup> See Article 13 of the TRIPs Agreement, Article

<sup>48</sup> This type of use is expressly permitted under the Convention. The discretion on the scope of use is not left to the national laws.

<sup>49</sup> The language applied for this type of use under Article 10 (2) of the Convention is different from the one used in Article 10(1). Under Article 10(2) it starts with the words: "it shall be a matter for legislation in the country of the Union..." In other words, the details on how the structure and scope of this exemption are



current events.<sup>51</sup> However, the Convention puts three broad parameters or tests that must be taken into account in assessing lawfulness of the alleged permitted uses. The first is that the work which is a subject of permitted use must have been lawfully made available to the public, secondly the use must be compatible with the fair practice, and thirdly, the use must be to the extent justified by the purpose.<sup>52</sup>

The other relevant international legal instrument is the Agreement on Trade-Related Aspects of Intellectual property Rights (TRIPs Agreement). Within the framework of the TRIPs Agreement, members States are given the mandate to provide for certain limitations on the exclusive rights. However, there are three restrictions: First, the limitations or exceptions must be confined to certain special cases; second, the limitations must be applied or used in such a way that it will not conflict with a normal exploitation of the work by the owner of copyright, and third, the extent of use should not unreasonably prejudice the legitimate interests of the right holder.<sup>53</sup>

Other important international legal instruments on copyright are: The World Copyright Convention of 1952 and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who

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left to be decided by the national laws. The only limitation on this type of use is that the use must be "to the extent justified by the purpose."

<sup>50</sup> This is also left to be determined based on the attendant national laws. The only condition under Article 10*bis*(1) is that the source must be clearly acknowledged.

<sup>51</sup> The exact scope of this exception is left to the national laws. Under Article 10*bis* (2) puts a restriction that free use for the purposes of reporting current events must be to the extent justified by the informatory purposes.

<sup>52</sup> It is to be noted that these restrictive parameters are specific to certain type of uses, they do not apply in every type of use.

<sup>53</sup> See Article 13 of the Agreement.

Are Blind, Visually Impaired, or Otherwise Print Disabled of 2013.<sup>54</sup>

## **4.2 The Fair Use Provisions under Domestic Laws**

The statutory provisions on limited freedoms to use copyrighted works have been variedly adopted and applied in copyright legislation in different countries. As stated in the preceding sections, the terminology used also differs. In some countries they use the term “fair use”, while others use “free use” or “fair dealing”. The copyright statute in Tanzania uses the phrase “free use” referring to the provisions that implements the limited freedoms to use copyrighted works under the Berne Convention.<sup>55</sup>

## **4.3 The Scope of Fair of Use in Tanzania**

Under the copyright statute in Tanzania, there are specific categories of uses which are exempt from copyright protection. These uses are: personal or private use, use by way of quotations, use by way of illustration in publications or broadcasts; distribution by cable or broadcast where beneficiaries are in the same building, use by way of reporting current event, also reproduction of an article published in the newspaper or periodicals on current economic, political or religious topics. Also exempted are the uses relating to reproduction of works which are permanently affixed in public place by way of background or as incidental, reproduction by photography or electronic storage by public libraries, non-commercial documentation centers, scientific

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<sup>54</sup> Key copyright provisions in these international instruments have been discussed in other sections of this article. It is worth noting that in East Africa, it is only Kenya and Rwanda that have specific provision on free use for visually impaired persons in their copyright statutes.

<sup>55</sup> See Section 12 of the Act. The side notes to the said provision use the phrase “free use” whose contents are synonymous to the “fair use” provisions.

institutions and educational establishments of literary and artistic works, reproduction in press or communication to the public of political speech delivered in public, any speech delivered during the legal proceedings, public lectures, sermon, address which is used for the purposes of current information.<sup>56</sup> The crux of these exemptions lies on, among others, the need to promote education and learning by having a coordinated access to information. The learning component has always been at the foundation of the exceptions under the copyright regime.<sup>57</sup> The jurisprudence of copyright law is gradually growing in Tanzania with the increase of awareness on matters on intellectual property; however, we are yet to have a clear-cut precedent of the Court which has judiciously assessed the fair use provisions.<sup>58</sup>

#### 4.4 Statutory Limitations on Fair Use

As stated before, the copyright statute in Tanzania employs the term “free uses” in accommodating the limitation under copyright protection. A close examination of the contextual use of the term “free use” in the copyright legislation informs that it is used as synonymous to “fair use.” However, the use of the term “free uses” is subtle and potentially put users in a very precarious position, particularly when the said provisions are assessed in their holistic context. The free use provisions in the copyright statute have been couched with carefully designed limiting terms. The inhibiting terms which have been deployed under the Act include phrases

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<sup>56</sup> Section 12 of the Copyright and Neighbouring Rights Act, Cap 218 [R.E. 2002]

<sup>57</sup> Bracha, O. (Ed), 2018. *The History of Intellectual Property Law- Volume 1*, Cheltenham, Edward Elgar Publishing Ltd, at p. 592.

<sup>58</sup> See the recent cases on copyright such as: *Hamisi Mwinjuma, Ambwene Yessayah v. MIC Tanzania Limited*, Ilala District Court Civil Case No. 17 of 2012; and the criminal dimension of the copyright law particularly for foreign owned copyright as adjudicated in *The Republic v. Ajay AmarshChavda*, Ilala District Court Criminal Case no. 814 of 2011. We are yet to have a case that has delved in the thorough assessment of the doctrine of fair use as is provided under the Copyright statute in Tanzania.

such as: (1) such use must not conflict with normal exploitation of the work and not unreasonably prejudice the legitimate interest of the author; (2) that such quotations must be compatible with fair practice and their extent does not exceed that justified by the purpose, (3) provided that such use is compatible with fair practice and that the source and the name of the author are mentioned; and (4) in case of reproduction for teaching purposes, such reproduction, the number of copies made, and the use thereof must be limited to the needs of the regular activities of the entity reproducing the work and neither conflict with the normal exploitation of the work nor unreasonably prejudice the legitimate interests of the author.<sup>59</sup>

These statutory terms that tends to limit and regulate the fair use exception are susceptible to multiple and broad interpretation which may render the permission to use copyrighted works practically to nullity. As previously stated, in Tanzania, there is no clear-cut authoritative text in the legislation and case-law that has set clear parameters on the applicability of the fair use exception. Yet, a recent enactment of copyright Regulations threatens the enjoyment of fair use exceptions by the educational institutions in Tanzania. In 2014, Tanzania enacted the Copyright and Neighbouring Rights (Licensing of Reproduction and Rental Rights) Regulations of 2014.<sup>60</sup> These Regulations, which were drastically amended in 2018, vide the Copyright (Licensing of Reproduction and Rental Rights) (Amendment) Regulations, 2018,<sup>61</sup> have introduced a royalty payment framework for various categories of institutions including universities, religious

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<sup>59</sup>Mwakaje, S. J., 2007. "Copyright Law in Tanzania: Some of the Issues you need to Know," *The Tanzania Lawyer*, Vol. 1, No 2, at p. 31.

<sup>60</sup> G.N. No. 234 of 2014.

<sup>61</sup> G. N. No. 668 of 2018.

organizations, primary and secondary schools.<sup>62</sup> The imposition of an obligation to pay royalties based on the use of published educational materials has attracted criticism from different quarters. A most recent example comes from the expressed reservations against the new Regulations and the Demand Notice from COSOTA requiring universities to pay rental fees (royalty) from the use of published materials. The reservations were aired during the meeting of the Committee of Vice Chancellors, Principals of Public and Private Universities in Tanzania (CVCPT) which was held on 27<sup>th</sup> February 2020 in Morogoro, Tanzania.

In the absence of express statutory texts or local case-laws that has expounded the exact scope of fair use; we can borrow a leaf from the jurisprudential extensions from other jurisdictions as they have dealt with the issue. The Court in *Canadian Copyright Licensing Agency v. York University*<sup>63</sup> gave guidelines regarding the analytical benchmarks that should be applied when the Courts are dealing with fair use provisions. The Courts' analysis of fairness requires a balancing of interests. The Court further stated that the fairness analysis engages six non-exhaustive factors: purpose of the dealing, the character of the dealing, the amount of the dealing (amount of copying), alternatives to the dealing, the nature of the work, and the effect of the dealing on the work. It will be interesting to observe how the Court in Tanzania will interpret the provisions of fair use when the opportunity presents. With plethora of precedents on the subject from other jurisdictions, there no doubt the Courts in Tanzania will have plenty of persuasive legal authorities to draw inspiration from.

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<sup>62</sup> Regulation 14(a).

<sup>63</sup> [2017] FC 669.

## **5. APPROACHES IN OTHER SELECTED EAST AFRICAN COUNTRIES**

A brief account on the attendant regulatory framework within East African countries informs that there are marked differences in term of scope, structure, applicability and the jurisprudential progress made with regards to the fair use exception under the copyright law.

### **5.1 A Look at the Position in Uganda**

In providing for limitations and exceptions to the exclusive rights of the author, the Copyright and Neighbouring Rights Act of Uganda uses the term “fair use”.<sup>64</sup> The fair use covers uses such as private personal use of the copyright work, quotation from a published work, use of works for teaching in educational settings, and news reporting.<sup>65</sup>

However, the Act contains carefully constructed limitations which restrict the manner in which fair use may be exercised by the public. These limiting provisions are in the form of drawback provisions containing qualifying phrases in cases the use is claimed to be made within the tenets of fair use. The restraining statutory terms includes a requirement that the use must be compatible with fair practice, and should not exceed what is justified for the purpose of the work, provided there is an acknowledgement. Cognizant of the inherent economic interest of the authors in the copyright works, the Act has added other dimension of restriction on the fair use by positing that the claimed fair use must not conflict with the normal exploitation of the work

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<sup>64</sup> See Section 15 of the Copyright and Neighbouring Rights Act, 2006 which became operational on 4<sup>th</sup> August, 2006.

<sup>65</sup> *Ibid.*

reproduced and should not unreasonably affect the right of the author in the work.<sup>66</sup>

Further to the above, perhaps one of the peculiar features of the copyright legislation of Uganda when compared to other East African countries, is the inclusion of the statutory factors that will be used by the Courts in assessing whether there is fair use or otherwise.<sup>67</sup> These factors are: (a) the purpose and character of the use, including whether the use is of a commercial nature or is for non-profit educational purposes; (b) the nature of the protected work; (c) the amount and substantiality of the portion used in relation to the protected work as a whole; and (d) the effect of the use upon the potential market for value of the protected work.

By specifying the factors to be used in assessing fair use, the copyright law of Uganda has set a defined and predictable statutory standard for the Courts to follow. In contrast, in other jurisdictions such as Tanzania and Kenya, it is left to the Courts to determine the factors, and in most cases the Courts have stated that the assessment is both factual and legal, hence it is to be decided on case to case basis.<sup>68</sup>

In 2014, the High Court of Uganda had the opportunity to determine the context and the limits of the fair use provisions in the case of *Angella Katatumba v. The Anti-Corruption Coalition of Uganda (ACCU)*.<sup>69</sup> Briefly, the facts were that: The Plaintiff has been carrying on the business as an artist, composer, singer and performer in Uganda and all over the world since the year 2005.

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<sup>66</sup>Ibid., Section 15(1(c) and (d).

<sup>67</sup>Ibid., Section 15(2).

<sup>68</sup> See for instance, the six factor-test adopted by the Supreme Court of Kenya in *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others* [2014] eKLR.

<sup>69</sup> Civil Suit No 307 OF 2011.

She is a composer, producer and copyright holder of a musical production entitled "Let's Go Green" both in a recorded audio and visual form. In or about April and May 2011, the Plaintiff discovered that a substantial portion of the lyrics and content of the above-mentioned production were prominently incorporated into and released as part of an advertisement by the Defendant. The Plaintiff alleged that the advertisement and publication by the Defendant amounts to infringement of her copyright in the production "Let's Go Green". In reply the Defendant denied the Plaintiff's claims. The Defendant contended that a very unsubstantial portion of the Plaintiffs work was used, and if at all, the Defendant sought refuge from the defence of fair use under the copyright law.

Among the issues that the Court was called to determine was whether the Defendant's actions fall within the fair use exception. The Court assessed both the character of use by the Defendant using the 11 factual confinements under the Copyright statute of Uganda and in case the finding was in the affirmative, the Court assessed whether such use was in line with the statutory qualifying restraints. The Court stated that:

In Uganda the parameters of fair use are spelt out by section 15 (1) of the Copyright and Neighbouring Rights Act. Therefore, the four principles are used in determining whether the use as stipulated by section 15 (1) which spells out what amounts to fair use is indeed fair use according to the further principles for determining the question set out in subsection 2 of section 15 of the Act.

The Court made a very interesting interpretation of the doctrine of fair use as applied in the context of Ugandan copyright law. The



Court stated that, as a rule, for one to invoke the provisions of Section 15(2) of the Copyright statute, he must first satisfy the requirements of Section 15(1) which according to the Court is the critical entry point for enjoyment and reliance of the defence of fair use.<sup>70</sup> In the opinion of the Court, Section 15 (2) of the Copyright and Neighbouring Rights Act which has itemized the principles to be used in determining whether the use is fair, cannot be considered in isolation of subsection 1 of section 15 of the Act which give particular instances of types of uses that may attract the application of fair use.

Predicated on the above interpretation approach, the Court finally found that Plaintiff's song "let's go green" was used for the advertisement purposes and that there was substantial use of it beyond the precepts of the doctrine fair use, hence the Defendant was found liable for the infringement of the Plaintiff's copyright in the song "let's go green" within the dictates of section 46 (1) of the copyright statutes of Uganda.

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<sup>70</sup> Section 15(1) of the Copyright law of Uganda lists down eleven types of use that a defence of fair use may be claimed on by the Defendants. These are: (1) the production, translation, adaptation, arrangement or other transformation of the work is for private personal use only; (2) a quotation from a published work is used in another work; (3) a published work is used for teaching purpose; (4) the work is communicated to the public for teaching purposes for schools, colleges, universities or other educational institution or for professional training or public education, (5) the work is reproduced, broadcast or communicated to the public as a current topic, (6) any work that can be seen or heard is reproduced or communicated to the public by means of photograph, audio-visual work or broadcast; (7) reproduction of any permanently affixed work of art or architecture in a photograph or an audio-visual or television broadcast is included by way of background; (8) for the purposes of current information, a reproduction in the press, broadcast or communication to the public is made; (9) reproduction for the purpose of a judicial proceeding, (10) a reproduction of a literary, artistic or scientific work by a public library, a non-commercial documentation centre, a scientific institution or an educational institute; (11) any work is transcribed into braille or sign language for educational purpose of persons with disabilities.

This ruling in Uganda sets at least two important legal principles regarding the doctrine of fair use as applied in copyright law. First, for interpretation purposes of fair use provisions under copyright law, there is a need for a holistic interpretation approach; that is to say, the provisions of fair use under the copyright law must be read in conjunction with each other. Secondly, for the use to be fair, the extent and magnitude of use by the Defendant is an important factor to be considered by the Court.

## 5.2 The Legal Position in Rwanda

Similar to Tanzania, the copyright legislation of Rwanda applies the term “free use” when referring to the imposed limitations on copyrights.<sup>71</sup> The copyright legislative framework in Rwanda contains careful tailored inhibiting terminologies when affording such rights for free uses. The inhibiting terminologies include reference to uses which does not exceed the extent justified by the purpose.<sup>72</sup> Also in case the free use is made by the library or archive the user must satisfy that the copy will be used solely for the purposes of study, scholarship or private research, and the act of reproduction is an isolated case.<sup>73</sup> In the context of academic institutions, the reprographic reproduction, for teaching or for examinations in educational institutions should not serve direct or indirect commercial gain to the institution.<sup>74</sup> The use by way of quotation is also allowed provided that the reproduction is

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<sup>71</sup> See Articles 203 to 215 of the Law No. 31/2009 of 26/10/2009 on the Protection of Intellectual Property. The scope of free use extends to uses such as personal use, use for information purposes, use for educational purposes and special exemption is done for reproduction of works for the use of visually impaired persons.

<sup>72</sup>Ibid., Article 208.

<sup>73</sup>Ibid., Article 207.

<sup>74</sup>Ibid., Article 206.

compatible with fair practice and does not exceed the extent justified by the purpose.<sup>75</sup>

The context and scope of free use provisions in the copyright law of Rwanda is a reflection of the underlying national policy framework on intellectual property.<sup>76</sup> The section on rationale of Rwanda Intellectual Property Policy, partly reads: “While rights must be protected, the optimal time period for this should be finite. Since for the greater good and the improvement of public welfare, the ideas produced may need to be widely available in order for science, technology and commerce to progress and create new wealth.”<sup>77</sup> The policy and therefore the law of Rwanda are founded on the need to protect copyright while at the same time appreciating the inherent public interest attached to it. The Policy further maintains that the ideal intellectual property rights system should create incentives for firms to innovate, without limiting access for consumers and follow-on innovators. It must attain the right balance in a world that is rapidly changing so that innovators can invest in their own ideas and creations, while benefiting by “standing on the shoulders of giants” in the form of the ideas of others.<sup>78</sup>

The Rwanda Intellectual Property Policy focuses on how the private-public rights paradox is resolved on the treatment of copyright protection in libraries, educational and teaching institutions, use by visually impaired and other disabled people,

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<sup>75</sup>Ibid., Article 205.

<sup>76</sup> Republic of Rwanda, 2018. *Revised Intellectual Property Policy for Rwanda*, Kigali.

<sup>77</sup>Ibid., p. 4.

<sup>78</sup> Ibid. The Public centric nature of the copyright system in Rwanda can also be noted from the stated vision of the Policy which partly reads: “An environment in which the Rwandan sectors of business, Government and culture, create ideas and innovations that are protected in a way that ensures *the greater prosperity of the Rwandan people ...*” [Emphasis supplied].

computer programmes, as well as issues touching on folklore and public domain. The law permits the free reproduction of a work, specifically for visually impaired persons in an alternative manner or form which enables them to read the work. The exception also includes the distribution of the copies, including copies made outside Rwanda.<sup>79</sup>

While there are no local case-laws in Rwanda that has determined the exact strictures of the concept of free use, the provisions in the law are very elaborate and detailed enough to give the Courts the requisite assessment platform on how the free use provisions should be interpreted mindful of the ideals and objectives of the operating national policy framework on intellectual property rights.

### 5.3 Recent Legislative Developments in Kenya

In Republic of Kenya, the statute use the term “fair dealing” when referring to the exceptions to copyright protection.<sup>80</sup> Recently, Kenya enacted the Copyright (Amendment) Act, 2019,<sup>81</sup> with the objective of providing a more explicit regime on copyright limitations and exceptions and also to realign its copyright law with the international principles governing copyright as reflected in various international legal instruments on copyright.<sup>82</sup>

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<sup>79</sup>*Ibid.*, p. 17.

<sup>80</sup> Section 26(1) (a) of the Copyright Act, Cap 130 of 2001.

<sup>81</sup> Act No. 20 of 2019. The Act became operational on 2<sup>nd</sup> October 2019.

<sup>82</sup> See Articles 9 (2), 10, 10*bis* and 11*bis*(2) of the Berne Convention for the Protection of Literary and Artistic Works which permits member states, through national legislation, to exclude copyright protection on certain specified cases based on the conditions obtaining in their territories. The Amendments were done to comply with the obligations under the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled of 2013 whose Article 4 requires Contracting Parties to provide in their national copyright laws for a limitation or exception to the right of reproduction, the right of distribution, and the right of

Furthermore, the Act has clarified on the scope of copyright subject matter and the rights accorded thereunder,<sup>83</sup> the regulatory and management of copyright.<sup>84</sup>

However, one of the notable additions in the Act is the addition of clarified instances of “fair dealing” exemption from copyright protection.<sup>85</sup> The Second Schedule to a new section 26 of the Copyright Act of Kenya has provided detailed provisions relating to exemptions to copyright protection. These exemptions are in the following main clusters: general exemptions and limitations, exemptions relating to educational institutions, libraries, archives, and broadcasting. The expression used to refer to the exceptions to copyright protection in both repealed section 26 and the Second Schedule to the newly introduced Section 26 is “fair dealing”.<sup>86</sup>

The exact contours of the fair dealing provisions was tested by the Supreme Court of Kenya in *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others*.<sup>87</sup>

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making available to the public as provided by the WIPO Copyright Treaty (WCT), to facilitate the availability of works in accessible format copies for beneficiary persons.

<sup>83</sup> See Section 14 of the Act which has wholly replaced section 26 of the Copyright Act of 2001.

<sup>84</sup> See Section 10 of the Act which has introduced a new section 22A providing for the mandate of the Board to register copyright work. Also, Section 24 of the Act has introduced new sections 35A, 35B, and 35C covering protection of internet service providers, which is a wholly new framework under the copyright law of Kenya.

<sup>85</sup> See Section 14 of the Act which has introduced a new section 26 and the Second Schedule to the Copyright Act of 2001, Section 15 of the Act which has introduced to the Copyright Act of 2001 new sections 26B and 26C covering allowed technological protection measures and special exemptions for reproduction, distribution, importation, or conversion of copyright works into a format that can be used by persons who are visually impaired.

<sup>86</sup> Section 26(1)(a)[Repealed] and the new section 26(3) read together with item A(1)(a) of the Second Schedule to the Act.

<sup>87</sup> [2014] eKLR. For an extensive discussion on the jurisprudence of this case, see Nzomo, V. B., 2016. “In the Public Interest: How Kenya Quietly Shifted

Central to the Supreme Court's decision was the determination on the exact scope of the 'limitations and exceptions integrated into the copyright system to safeguard public interest'. As alluded above, based on the language used in the relevant statutory provisions, Kenya is a fair dealing country, but line of enquiry adopted by the Supreme Court in this case suggests that the Court used the analytical platform and benchmarks used to assess fair use as opposed to fair dealing. One need to note that as opposed to fair dealing, the fair use framework is normally couched with an open-ended base of analysis; it uses the test of degree of fairness which may become very subjective in certain cases.

The Supreme Court acknowledged that the copyright legislation of Kenya does not define what constitutes 'fair' in terms of section 26 [now repealed and replaced by a new provision]<sup>88</sup> of the Copyright Act, 2001 which encompasses the 'fair dealing' provision. Thus, the Court stated that the meaning of the term 'fair' is subject to the factual scenario presented in each case. Endorsing the framework of analysis adopted by the Supreme Court of Canada in *CCH Canadian Ltd. v. Law Society of Upper Canada*,<sup>89</sup> the Supreme Court in Kenya went on to adopt the six-factor test used under the Canadian copyright law in assessing whether the dealing in question is fair or otherwise. It is to be noted that the Supreme Court of Canada, inspired by the doctrine of fair use as applied in the U.S,<sup>90</sup> proposed that the following factors should be considered in assessing whether a dealing was fair: (1) the

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from Fair Dealing to Fair Use," *WIPO-WTO Colloquium Papers*, at p. 49-57. [Accessible at: [https://www.wto.org/english/tratop\\_e/trips\\_e/colloquium\\_publication\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/colloquium_publication_e.htm) (visited in October 12 2019)].

<sup>88</sup> See Section 14 of the Copyright (Amendment) Act, 2019.

<sup>89</sup> [2004] SCC 13.

<sup>90</sup> Section 107 of the US Copyright Act.

purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work. These factors were tailored in the context of jurisdictions that uses the doctrine of fair use, which though may loosely be considered as synonymous with the concept of “fair dealing”, yet strictly put, the two concepts are different in terms of scope of applicability and the appropriate legal analytical terrain.

Therefore, based on the above analysis, it remains unclear on whether Kenya is a fair dealing or fair use jurisdiction. The letter of the copyright law suggests that it applies fair dealing test, yet the jurisprudence in the Court points to the fair use test. The enactment of the Copyright (Amendments) Act, 2019 which introduces detailed provisions on exemptions and limitations has not helped in resolving this legal conundrum.

The limitation imposed under the doctrine of fair use operates as claw-backs. It has the effect of technically taking back the rights granted under the fair use. Henceforth, a brief examination on how the limiting provisions affect the scope of fair use is necessary in understanding the precincts of fair use.

## **6. POLICY OPTIONS OF FAIR USE FOR THE EAST AFRICA COMMUNITY**

The discussion above points out that generally in all partner States of the East African Community, the copyright legislation has provisions for fair use as one of the fundamental flexibilities under the copyright system. However, the statutory structure and scope of fair use differs from each State. Furthermore, the developing jurisprudence through case-laws indicates that there is

a trend through which the parameters of fair use has been amplified and, in the process, expanded.

The existing variance in the scope and the approaches used with regards to fair use within the region suggest that there is a need for constructive dialogues and consultation at the level of the East African Community so as to have a harmonized approach.<sup>91</sup> Immediate intervention is needed in view of the fact that the subject of fair use touches on a number of issues which are at the fulcrum of the areas of collaboration within the region. Some of these regional areas of cooperation whose proper functioning somehow depends on the structure and scope of fair use are: education and training,<sup>92</sup> science and technology,<sup>93</sup> and culture.<sup>94</sup> Thus, it is important to have a harmonized framework in terms of the exact scope of the provisions of fair use. Having in place a defined scope of fair use provisions in a formal instrument at the regional level will provide a requisite policy and legal platform to guide policy and law makers at the national levels.

In devising the policy and legal approach for fair use within East Africa, it is advisable to take advantage of the allowable flexibilities under the Berne Convention,<sup>95</sup> and the Marrakesh Treaty. The Secretariat to EAC may draw inspiration from the already established guidelines on the effective use and domestication of the obligations under these key copyright international legal

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<sup>91</sup>Ncube, C. B., 2016. *Intellectual Property Policy, Law and Administration in Africa: Exploring Continental and Sub-regional Cooperation*, London: Routledge, p. 145 where there is a discussion on Key Considerations in the development of IP harmonization models.

<sup>92</sup> Article 102 of the Treaty Establishing East African Community.

<sup>93</sup>*Ibid.*, Article 103.

<sup>94</sup>*Ibid.*, Article 119.

<sup>95</sup> The Appendix to the Berne Convention.



instruments within the region.<sup>96</sup> There is a policy and legislative space for the EAC to tailor the copyright regime in a manner that best suits broader national developmental goals of the partner States including facilitating easy access to educational materials while at the same time retaining the rights of the authors.<sup>97</sup> It is part of the efforts of the framers of copyright policy and law to strike a balance between owners of copyright and the users for the good of the public.<sup>98</sup>

## 7. CONCLUSION

The expounding of the theoretical basis of copyright generally and fair use in particular, have amply shown that there is a need for policy and law makers to strike a balance. The intricate balance between the urge to encourage creativity by protecting authors and on the other, minimizing the excessive monopoly of authors which have the offsetting tendency to public rights of access to information. Such a balanced approach is vital for countries in EAC who are either developing or least developed countries who may find that the overreaching effect of monopoly rights granted under copyrights may result into excessive costs in the acquisition of important copyrightable works such as educational reference materials.

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<sup>96</sup> ARIPO, 2016. *ARIPO Guidelines for the Domestication of the Marrakesh Treaty*, Harare: African Regional Intellectual Property Organization.

<sup>97</sup> See the ruling of the Court in *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, in which the Supreme Court of Canada ruled that copyright materials for teaching in the classrooms would pass the permissible test of fair use under the Canadian laws.

<sup>98</sup> A clear-cut public consideration approach on copyright law was demonstrated by the recent decision of the Court of Appeal in India in the case of *Authors Guild Inc. v. Hathi Trust*, 755 F. 3d 87 (2<sup>nd</sup> Cir. 2014). In this case Authors Guild sought to restrain Hathi Trust from digitizing literary works for the purpose of creating a full-text digital database, to provide access to print for disabled and general preservation of the published materials. The Court ruled in favor of Hathi Trust allowing the Trust to digitize works on the ground that, in view of broader public interests at stake, such use was well within the limits of fair use.

The differences in the structure and scope of fair use provisions in the national copyright statutes in the partner States to EAC is an indication of the legal and regulatory disharmony within the region. In some countries such as Kenya and Rwanda there are defined margins of the fair use doctrine, while in Tanzania and Uganda the statutes do not shed much light on specific contours of the fair use provisions. It should serve as a reminder of the urgent need for fast-tracking the ongoing initiatives within EAC to develop and adopt a model instrument on copyright. In the spirit of the harmonized framework and collaboration in the protection of intellectual property rights as envisaged by the Treaty establishing East African Community, it may be worth to undertake a thorough and an in-depth study on the ramifications of having varying framework on copyright protection within the region.

The extent within which the fair use limitations may be applied and appreciated in a particular country depends on many variables; including but not limited to the underlying national policy objectives, the proactiveness of the law makers, and the boldness of the Court. In the final analysis, the differences in the terminology used, whether fair use, fair dealing or free use, may be of little significance, yet the term chosen may provide the necessary insight in terms of the underlying scope of right and judicial approach in determining fairness or otherwise of the uses.