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# BALANCING COPYRIGHT PROTECTION & CREATIVE FREEDOM IN THE DIGITAL AGE

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## 1.0 Introduction

*“If that happens, I’m done, I’m stopping.”* Those were the very words of the popular British musician, Ed Sheeran when he threatened to quit the music industry if he were found liable for copyright infringement in a lawsuit over his 2014 single, *“Thinking Out Loud”* for allegedly plagiarizing elements of Marvin Gaye’s, *“Let’s Get It On.”*

A new era of unmatched creativity and innovation has begun in the digital age, marked by the vast and unparalleled global proliferation of knowledge in human history, enabling people to share their creations with a global audience. What was once in the realm of pure fiction has transcended into stark reality. However, it has also raised complexities concerning copyright protection and creative freedom. *“I work really hard to be where I am,”* Ed Sheeran said describing the lawsuit as really insulting. In such an era, in which the lines between copyright protection and creative freedom have been blurred leading to numerous copyright lawsuits, a balance is desperately needed.

On this note, this essay seeks to explore the delicate balance required to harmonize copyright protection and creative freedom in the digital age.

## 2.0 Copyright Protection and Creative Freedom

The original purpose of copyright, which dates back to the Age of Enlightenment, was to safeguard the author's right to freely create while shielding him from outside influence and the dangers of censorship. It was intended for copyright to be "the engine of free expression."<sup>1</sup> To achieve this, a compromise between exclusive control and freedom was devised, with the overarching goal of safeguarding the common good. The establishment of a property right allowed authors to profit from their creations, but it also gave authors the freedom to improve upon previous works to forge the future.

Therefore, by restrictions on the exclusive right, some uses were preserved outside of the control of the copyright owner to foster future creativity. Along with the exclusive right, these

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<sup>1</sup> US Supreme Court in *Harper & Row Publishers Inc. v. Nation Enterprise*, 471 U.S. 539 (1985)

restrictions have always been crucial in fostering a vibrant and long-lasting creative environment.<sup>2</sup> Thus, copyright protection and creative freedom are two sides of a coin with the similar goal of promoting creativity.

Both copyright protection, which is “the exclusive right to reproduce literary, dramatic, artistic or musical work, given by law for a certain period to an author, etc.,”<sup>3</sup> and creative freedom, commonly referred to as freedom of artistic creativity which includes “the freedom to seek, receive and impart information and ideas of all kinds ‘in the form of art’, the right ‘to enjoy the arts’ and the creativity of others,”<sup>4</sup> are guarded by international human rights covenants.<sup>5</sup> The recognition of “(1) everyone's right to freedom of expression, (2) everyone's right to participate in community culture, enjoy the arts, and benefit from scientific advancement, and (3) the author's right to the protection of his moral and material interests resulting from his scientific, literary, or artistic productions” can all be found in these covenants.<sup>6</sup> They are also guarded by domestic legislation.<sup>7</sup>

However, in as much as copyright protection and creative freedom are two interconnected rights with similar goals, they are rights that have come to be in conflict, for instance, in the creative use of protected works. The balance between these two rights has become more endangered due to the exigencies of the digital space. This has led to the development of more stringent copyright policies. The balance that once existed has been tilted in the favour of copyright owners to the detriment of creative freedom.

### **3.0 Challenges of Copyright Protection in the Digital Age**

“*Work found on the internet is free and it belongs to nobody!*”. This is a misconception prevalent among the youth and dominant users of the internet. In a period marked by immense technological advancement - the digital age, copyright protection has been a major concern as

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<sup>2</sup> Christophe Geiger, ‘Freedom of Artistic Creativity and Copyright Law: A Compatible Combination?’ (2018) 8 *UC Irvine Law Review* 413.

<sup>3</sup> Greg Uloko, *Modern Approach to Intellectual Property Laws in Nigeria* (Princeton Publishing Co 2010).

<sup>4</sup> United Nations, ‘Artistic Freedom’ (OHCHR) <<https://www.ohchr.org/en/special-procedures/sr-cultural-rights/artistic-freedom>> accessed 3 October 2023.

<sup>5</sup> Article 19 ICCPR, Article 15 ICESCR, Article 19 & 27 UDHR

<sup>6</sup> Intergovernmental Copyright Committee, ‘*The New Challenges of Striking the Right Balance between Copyright Protection and Access to Knowledge, Information and Culture*’ (UNESCO) <<https://unesdoc.unesco.org/ark:/48223/pf0000187683>> accessed 3 October 2023.

<sup>7</sup> Section 39 CFRN; Copyright Act 2022

the period has revolutionized the creation, consumption, and distribution of content. While the digital age has provided unprecedented opportunities for creativity, like a double-edged sword, it comes with a price as creative works in the digital space face significant challenges so much that owners of creative works are wary of transforming their work into digital format.<sup>8</sup>

These challenges range from the relative ease of reproduction and dissemination of copyrighted material, the existence of cheap storage devices making it easy to reproduce large volumes of copyrighted works, the difficulty in tracking copyrighted works to the high cost of enforcement of copyright in the digital environment.<sup>9</sup> Every rose has its thorn and the digital space in as much as it has come with its roses, has been a thorn in the flesh for owners of copyrighted works.

#### **4.0 Effect of Copyright Protection on Creative Freedom in the Digital Age**

The vicissitudes of challenges that bedevil copyright protection in the digital age have spurred up several responses in the form of international and national legislation as well as technological measures. The WIPO<sup>10</sup> Copyright Treaty (WCT), and WIPO Performances and Phonograms Treaty (WPPT)<sup>11</sup> were birthed to salvage the issue of intellectual theft in the digital space. In Nigeria, the Copyright Act 2022, and the Copyright Regulation<sup>12</sup> exist to this effect. Contractual and technological overridability of copyright exceptions such as fair use are also measures that have been taken to address the challenges of copyright protection in the digital age. These measures have however upset the balance between copyright protection and public interest thereby stifling creative freedom in the digital age.

The digital age has given rise to remix culture, creative commons, and user-generated content among others which drives innovation and creativity.<sup>13</sup> However, the current trend of copyright protection has posed a barrier to creative freedom. For example, the sword of litigation hangs

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<sup>8</sup> Albert Adetunji and Nosakhare Okuonghae, 'Challenges of Copyright Protection in The Digital Age: The Nigerian Perspective' (2022) *Library Philosophy and Practice* 7159 <<https://digitalcommons.unl.edu/libphilprac/7159>> accessed 3 October 2023.

<sup>9</sup> Nikhil Bharadwaj, 'Copyright Protection in the Digital Age: Challenges and Solutions' (Legal Service India) <<https://legalserviceindia.com/legal/article-10639-copyright-protection-in-the-digital-age-challenges-and-solutions.html>> accessed 3 October 2023.

<sup>10</sup> World Intellectual Property Organization

<sup>11</sup> Commonly referred to as Internet Treaties

<sup>12</sup> Copyright (Optical Disc Plants) Regulation 2006

<sup>13</sup> Shandiesel, 'Does Copyright Limit Creative Freedom?' (Shannon's Blog, 23 February 2011) <<https://shandiesel.wordpress.com/2011/02/23/does-copyright-limit-creative-freedom/>> accessed 4 October 2023.

over the heads of innovators. Ryan Tedder<sup>14</sup> attests to this in the BBC Report where he claimed that there is “a copyright claim culture” within the music industry.<sup>15</sup> This is however not peculiar to the music industry, but all areas of works eligible for copyright. There have been several lawsuits brought by incumbent forces against start-ups for making substantial improvements to existing works.<sup>16</sup> Where do we draw the line? How much do you improve or change an existing work for it to be considered “different” enough? These are questions that beg for answers. All roads lead to the very question, “How do we balance copyright protection and creative freedom in this digital age?”

## **5.0 Balancing Copyright Protection and Creative Freedom in the Digital Age: Proposed Reforms**

In as much as there is a need to promote creative freedom, copyright also needs to be protected. In the same vein, to prevent copyright policies from killing the goose that lays the developmental eggs for innovation and creativity, a balance must be found as the pendulum has dangled enough. Therefore, to attain this much-needed balance, we need to adopt a triple-pronged strategy involving recalibrating the fair use doctrine, designing, and implementing a limitation for creative use, and expanding protection for innocent infringers and good-faith users.

### **5.1 Recalibrating Fair Use**

A comprehensive re-evaluation of fair use in copyright law is needed to better align it with the public interest, considering the profound changes brought about by the digital age. Fair use should expand its scope to encompass activities that promote self-expression, culture, and self-governance to protect the incentive to create. There should be a shift in focus from profit maximization to safeguarding creative motivation as the key factor in assessing fair use. A broader approach to fair use should be adopted. A liability rule approach should be adopted to distinguish fair from unfair uses, allowing for reasonable licensing fees instead of outright exclusion. However, “fair use” should not be replaced with “fared use” taking into consideration

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<sup>14</sup> A frontman of OneRepublic musical group

<sup>15</sup> Lacey-Smith Tracy, ‘*The Balance between Creative Freedom and Protecting Copyright*’ (World IP Review, 10 July 2019) <<https://www.worldipreview.com/contributed-article/the-balance-between-creative-freedom-and-protecting-copyright>> accessed 4 October 2023.

<sup>16</sup> For example, Viacom’s copyright suit against YouTube, the popular Marvin Gaye’s estate against Robin Thicke and Pharrell Williams, etc.

those who cannot afford licensing.<sup>17</sup> In addition, copyright holders should only be compensated when genuine harm to creative incentives occurs. Transitioning from a property rule to a liability rule approach in copyright law may help resolve conflicts between copyright protection and creative freedom in the digital age.

## 5.2 Designing and Implementing a Limitation for Creative Use

Copyright law serves a dual purpose: fostering creativity while safeguarding creators' interests. A statutory license, based on limitations but coupled with remuneration, could maintain creative freedom while respecting creators' rights. The current system, although equipped with legal mechanisms to handle derivative works, lacks compensation for original creators. This absence often forces lawmakers and courts to narrowly interpret limitations, discouraging creative use and causing uncertainty. Consequently, artists may avoid incorporating existing works, stifling innovation. Additionally, non-commercial creations can become commercially significant over time. While initial creators shouldn't impede such developments, they could fairly share in the new work's success.

One solution is implementing a specific statutory license for derivative works, balancing remuneration and exclusivity. This approach is consistent with "limitation-based remuneration rights" or "statutory licenses." This entails statutory licenses or negotiated agreements within a statutory framework that permit public interest uses while compensating creators. Ginsburg<sup>18</sup> differentiates between "distributive uses" (non-creative reuse) and "productive uses" (creative reimagining). According to her, for the latter, fair use "for free" should still apply.<sup>19</sup> In essence, statutory licenses provide a middle ground, promoting creativity and protecting artists' rights.

## 5.3 Expanding Protection for Innocent Infringers and Good Faith Users

Tijjani Abubakar, JCA in *Skin Beauty Ltd v. Okoro*<sup>20</sup> affirmed the position of the law, where he stated: “Section 16 (3) of the Copyrights Act [now Section 37(5) Copyright Act 2022] provides as follows: *Where, in an action for infringement of copyright, it is proved or admitted that an infringement was committed but that at the time of the infringement the defendant was not aware*

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<sup>17</sup> Amanda Reid, ‘Copyright Policy As Catalyst and Barrier to Innovation and Free Expression’ (2019) 68 (1) *Catholic University Law Review* 33.

<sup>18</sup> Jane Ginsburg, an international copyright scholar.

<sup>19</sup> Geiger (n 2).

<sup>20</sup> (2017) LPELR-46285(CA)

*and had no reasonable grounds for suspecting that copyright subsisted in the work to which the action relates, the plaintiff shall not be entitled under this section to any damages against the defendant in respect of the infringement, but shall be entitled to an account of profits in respect of the infringement, whether or not any other relief is granted under this section.”*

However, in the same case, the Honourable Justice also held that the defendant must provide evidence of inquiries made for confirmation as the mere assertion that the infringement was inadvertent would not suffice.

This provision only provides thin protection for innocent infringers and good-faith users. It is suggested that where a defendant asserts innocent infringement and sufficiently proves that he believed and had reasonable grounds for believing that “his or her use of the copyrighted work was a fair use”, it should be enough to establish innocent infringement. However, innocent infringement by reason of good faith as to fair use should be distinguished from innocent infringement concerning other reasons. These circumstances differ. Good faith elevates fair use into prominence. This paper advocates that the proof of good faith as regards fair use should be enough to establish innocent infringement. This proposed reform furthers the goals of copyright by promoting creative freedom.

## **6.0 Conclusion and Recommendations**

From the foregoing, it is as clear as broad daylight that as a result of the inevitable permeation of the digital age, the scales tipped, and the ship sank. The delicate balance between the private interest of copyright protection and the public interest of creative freedom can be likened to walking a tightrope without a net. Nevertheless, “*ubi jus ibi remedium*” – where there is a right, there is a remedy. This paper then recommends the following. First, the proposed reforms as earlier elucidated centred on recalibrating our copyright policies should be adopted. Second, to avoid contractual and technological overridability of copyright exceptions, these contractual or technological provisions impeding the normal exercise of these exceptions particularly those having root in our fundamental rights should be deemed null and void. Third, the approaches of updated copyright laws, education and awareness, encouragement of the use of creative commons and open source, technological solutions such as digital watermarking, and increased investment in research and development by relevant stakeholders are apposite. Lastly, this paper

concludes with the evergreen words of the Digital Media Ethics text, “*One must remember not to always think in either/ors.*”