

The “Academic Crime” of Plagiarism and the Tenets of Fair Dealing: A Researcher’s Perspective.

Prudence Adula Okparavero (Mrs.) LL.M. (Legislative Drafting); Notary Public;
Research Fellow, Nigerian Institute of Advanced Legal Studies (NIALS)

ABSTRACT

Originality and integrity in research are key in academic culture and tradition. This tradition frowns on researchers who engage in the use of written works but fail to reference and acknowledge them in line with the tenets of copyright law. Copyright law in Nigeria, has played a great role in the protection of copyrighted works and has served as an unbiased umpire between the authors and the users of such works. This has no doubt assisted in the advancement of the academia by giving opportunities to persons researching in a particular field access to works as long as it is done within the ambit of the Copyright Act. The importance of this access cannot be over-emphasised as researchers must ‘publish or perish’, ‘write or get written off’. This has propelled continuous research and writing in academia, which in some cases leads to ‘academic crimes’ arising when care is not taken. There is a moral duty on all researchers to deal fairly and respect intellectual property. As a young researcher and writer by extension, the researcher has always wondered and questioned the rationale for the categorisation of the various acts that constitute ‘academic crimes’ and infringements of the rights of scholarly authors. There seems to be a thin and almost invisible line between them. In the opinion of the researcher, there is need for a paradigm shift from ‘academic crimes’ to copyright infringements because at present it appears that the designated ‘academic crimes’ are merely serving as a cloak to hide infringements of copyright. The paper seeks to, through doctrinal research, advocate for the promotion of innovations by protecting written works and ensuring that ‘fair dealing’ is always ‘fair’.

Keywords: Academic Crime, Plagiarism, Copyright, Fair Dealing

1. INTRODUCTION

The academic community has witnessed the increase of academic crimes¹ in general and plagiarism in particular (Berlinck- 2011). This could be attributed to the growth of the academic circle as research is usually built on the foundation of existing scholars. Ordinarily, this growth should not serve as a snag to scholars but most times their work may be cloned, remixed or recycled and are they given absolutely no credit for their hard work.

To take a look at and address this movement in the wrong direction, this paper seeks to deal with issues that are connected thereto. After this introduction, the emergence of Copyright will be looked at in the second part of the paper which discusses briefly the history of copyright. The timely intervention of the Copyright Act (Cap C28, Laws of the Federation of Nigeria, 2004) helps to, among other things, spell out the eligibility for various works that can be classified as a copyright work will be discussed in the third part of the paper.

Fair dealing² as an exception to copyright infringement is often breached and manifested in plagiarism which is a form of “academic crime”. The researcher feels undue advantage has been taken and it now serves as an antidote to copyright infringement. The fourth part of the paper will examine various activities that amount to “academic crime”, intellectual dishonesty or academic immorality as they are fondly referred to majoring on plagiarism.

The fifth part will look at what plagiarism and copyright have in common and what they don't. The distinction between these two-concept stem from the fact that plagiarism is a type of academic crime and fair dealing is an exception to the rules that govern copyright infringement. Once this has been achieved, the sixth part of the paper will analyse the concept of fair dealing and the new dimension it should take. The foundation for this analysis will primarily be the provisions of the Copyright Act, opinions of scholars and the researcher as well. Recommendations will be proffered, and conclusions made in the seventh and eighth part of the paper.

2. EMERGENCE OF COPYRIGHT

In early years, it was not out of place for authors to replicate the “masters” work in a bid to regulate new works (Lynch J, 2006) One of the schools³ of thought traces the history of copyright in Nigeria to traditional roots and as part of our culture as it is believed that originators of dances, songs, theatre works, etc., must be recognized in order for such performer to enjoy same privileges when the time is right (Adewopo 2012: 4).

¹ “Academic crimes” is basically a generally term that includes specific offences such as plagiarism, cheating on exams, falsifying records, handing in the same work more than once.

² This concept under copyright law allows the use of a particular work without the permission of the copyright owner.

³ there is another school of thought that traces the history of copyright to the English Copyright Act of 1911 which extended to Nigeria before Independence as it relates to the use of Literary works and cinematography for the promotion of Western education.

Prior to the 1988 Copyright Act, there was no structure for the administration of copyright. But sec. 34 and 35 Of the 1988 Act created the Nigerian Copy Rights Commission and its governing board and extended the actions that can be brought against a defaulter. Under the 1970 Act what arises from a breach of copyright was a civil suit by virtue of sec. 12. This is because the question of imprisonment or fine, 2months or N0.5 – N10, only arose upon a second offence (Babafemi 2007: 4).

Conversely, the 1988 Act now allows the Commission to pursue criminal suits against offenders and both criminal and civil suit can commence simultaneously (Sec. 24). Going forward, further amendments have been made by virtue of the 1992 and 1999 amendments of the Act which now provide for copyright inspectors who have same powers as the police (Sec. 39 LFN C28 2004).

3. COPYRIGHT IN A NUTSHELL UNDER THE COPYRIGHT ACT

For a proper understanding of the concept of fair dealing, it will be important at this juncture to discuss copyright where fair dealing originates from. Copyright is the right of a person as it relates to a thing or property. This thing or property is of such person's mental and intellectual effort of which he has absolute ownership of (T.O. Dada 2013, 421). This right is protected by the copyright Act 1988 and by virtue of section 1 literary, musical and artistic works, cinematography films, sound recording, broadcast and other auxiliary matters are eligible for copyright. However, they will not be eligible on two grounds.

1. Except sufficient efforts have been made to give it an original character.

For the purpose of what this paper seeks to address, the question must be asked: what are such efforts?

In the *locus classicus* of *Cramp & sons v Frank Smythson Ltd* ([1944] A.C. 329) the learned judge pointed out that "there was no evidence that any of the tables were composed specially for the respondent's diary. There was no feature of them which could be pointed out as novel or especially meritorious or ingenious from the point of view of the judgement or skill of the compiler..." In other words, there was no element of originality.

In contrast with the case of *Alexander v Mackenzie* (8 S.C. Cass. 2nd Ser 748), the case of an author of collection of precedents following the direction of Statutes. Lord Fuller held that since the statute gave very general directions and descriptions of the styles to be used, the precedents requires care and exertion of mind which requires industry and knowledge.

In ascribing originality to the work, it must be noted that it does not apply to the thought or idea, it is the expression of such thought or idea by putting pen to paper that matters.

2. The work has been fixed in any definite medium of expression now known or later to be developed from which can be perceived, reproduced or otherwise communicated either directly or with the aid of any machine or device.

In the United States it is by publication with notice of copyright affixed to each copy published and registration of same. However, an accidental omission of the copyright notice doesn't invalidate it and in an action for breach, the provision of the certificate of registration is sufficient (Dada 2013, 12).

Once the above criteria have been met, works can be said to be eligible for the copyright status. Some of the elements that constitute the subject matter for copyright include textbooks, treaties, histories, biographies, essays and articles (Sec. 39(e) CA).

An infringement may occur by way of reproduction of the work in any material form, publishing the work, etc, when this occurs, an action may be brought in the Federal High Court and there are reliefs of damages and injunctions as provided by Sec. 15 of the Act. Where the defendant can successfully prove ignorance or lack of knowledge of subsisting copyright, there will be no damages awarded but the plaintiff will be entitled to:

- a. Accounts of profit;
- b. Equipment, appliances, master tapes which becomes the property of the plaintiff. He can then sue for recovery of possession by means of "*Anton Piller Injunction*" (T.O. Dada 2013).

In the case of criminal action,⁴ a person guilty under the section is criminally liable on conviction to a fine not exceeding N1000 (one thousand naira) for every copy dealt with in contravention or to a term of imprisonment not more than 5 years or both (Sec. 18 C).

4. PLAGIARISM AS AN "ACADEMIC CRIME"

Academic crimes may be found in almost all levels of education and for the purposes of this paper types of academic crime will exclude the various examination malpractices.

One of the most talked about and committed academic crime is plagiarism. Plagiarism, referring to it in its noun form but defined as a verb, to plagiarize simply means to copy another person's work and pretend that it was yours (Oxford Advanced Learner's Dictionary, 9th Edition). That is, without acknowledgement. Having a Latin origin, it is simply kidnapping, stealing and transcription a person's viewpoint in writing. By way of origin, plagiarism can be traced back to the mid-1600s where ideas were stolen as a result of scholars being recognised for their achievements (K.R. Vinod 2011, 2; Bailey 2011; McKay 2009).

In the course of this research, the researcher is of the opinion that it is the most popular academic crime that is committed ignorantly. This is because more often than not people's ideas are influenced by their environment and what they come in contact with.⁵ And no sooner than later they write or speak out of the abundance of knowledge they have derived from other sources. Most times it seems to be their idea when in fact it is not. This is

⁴ See Sec. 18 CA

⁵ For example, a scholar may be inclined to a particular field of study based on his training and mentors.

because, even foundational and basic thoughts are influenced by their mentors, but their interrogation of the thoughts and ideas are usually theirs.

The following example seeks to demonstrate when plagiarism may occur. Source: Dele Peters, "Feminism and The Institution of Polygamy: a Forward-looking Approach" in I.A. Ayua (ed), *Nigerian Current Legal Problems* (NIALS 2000) 5.

Original Version:

Some cultural and religious norms as well as some traditional practices often provide a premise for the perpetration of systemic and egregious discriminatory practices against women thereby reducing them to a subservient and subordinate position.

Plagiarised version:

The discriminatory treatment of women in most societies is usually backed up by the culture, beliefs and principles of that society. This more often than not portrays the female folk as a second-class citizen and relegates her to the background.

Suitable Version:

It is trite that the ill treatment and discrimination of women can be far reaching, Dele Peters suggest that traditional practices, culture and religious norm serve as a basis for such act which in turn makes them a vulnerable specie (D. Peters 2000).

Some other academic crimes include:

- a. Fabrication: providing false information or citation in an academic exercise.
- b. Sabotage: hindering others from completing their work e.g. tearing out pages of library books.
- c. Fictitious referencing.
- d. Collusion: this could either be:
 - i. Paying or asking someone to do your work for you
 - ii. Allowing someone to copy your work.
- e. Purloining: taking the work of another person

There should be an urgent call for stiffer punishment for plagiarism. This should be taken more seriously in the academic circle as it is claimed that the language exists only in the academic circle (Oloyede, 2016). Even those outside the circle have gone steps ahead to see that persons guilty are adequately punished.⁶

⁶ In the academia it could be grounds for expulsion or terminating teaching contract. Conversely, there was an investigation carried out on the Director who wrote President Mohamadu Buhari's speech that was an item of plagiarism. Also, the popular blogger, Linda Ikeji, had her own fair share when her blog was shut down. Fareed Zakaria had also faced suspension from his employers, CNN and Time magazine after he had admitted having plagiarised a writer's article. See Paul Farhi, "Fareed Zakaria Suspended by CNN, Time for plagiarism" (August 10 2012) <https://www.washingtonpost.com/lifestyle/style/fareed-zakaria-suspended-by-cnn-time-for-plagiarism/2012/08/10/f6315e96-e335-11e1-ae7f->

5. DIFFERENCES AND SIMILARITIES BETWEEN PLAGIARISM AND COPYRIGHT

Though these two concepts may seem similar and intertwined, they are different. Some of the differences include (Hawkins 2018):

	PLAGIARISM	COPYRIGHT
1.	Not stating where you took it from	Taking without permission
2.	Author cannot sue for Plagiarism under the Copyright Act (this necessitates this paper)	Author can sue for copyright infringement under the Copyright Act
3.	It occurs where the author was not properly cited	Infringement can still occur even when the holder was cited
4.	Moral violation	Violation of law
5.	It is against the author	It is against the holder who may not be the author

The two major similarities of these concepts are:

- a. In both, you take part of a work without permission and pass it off as yours.
- b. Both are intellectual property of the author (Bailey 2018).

It is straight forward and can therefore be said that *“If you plagiarise a copyright protected work, there’s a decent chance that you infringed it as well”* (Hawkins 2018).

6. HOW FAIR IS FAIR DEALING

The relevant exception to the general rule in copyright is fair dealing amongst other things. Its basic principle is to create a balance between the general public’s interest and that of the author. They are otherwise known as the defence to copyright infringement (Kevin Garnett et al).

It may be impossible to define Fair Dealing. This is because it is a concept that is made by judges (Guobadia, D., 1989). “Fair dealing” simply means integrity; and the determination of what is fair and unfair would be left to the discretion of the court based on the degree of excerpts and proportions of the work used, as long excerpt may appear to be unfair (*Hubbard v Vosper* (1972) 2 QB 84).

Under the Copyright Act the permitted acts that are exempted from copyright control are grouped into nineteen categories (2nd Schedule of the Copyright Act). This paper is most concerned with the first category as contained in Paragraph (a) of the 2nd Schedule of the Act. It provides:

[d2a13e249eb2_story.html?noredirect=on&utm_term=.d93f3fdf7dba](#) accessed 10 August 2018; see also C.A. Oloyede, “Can Legal Action be Taken Against Plagiarism? n.27

“the doing of any of the acts mentioned in the said section 6 by way of fair dealing for purposes of research, private use, criticism or review or the reporting of current events, subject to the condition that, if the use is public, it shall be accompanied by an acknowledgement of the title of the work and its authorship except where the work is incidentally included in a broadcast”

The above provision is basically saying fair dealing is recognised for the purpose of:

- a. Research for private study;
- b. Criticism and review; and
- c. News reporting.

The main aim of the first category is to see that researchers and students have unhindered access to published works without getting into copyright trouble. This is because; post graduate education amongst other things aims to develop legal thought in the interest of the society through investigations and research. The product or result of these works is documented by way of article or any other form the written work may take. This can then be said to be the sweat and work of the researcher (Obilade, 2000).

It is not enough to say that the Act permits the use of certain literal materials for research and exempt it from copyright. Before this will suffice, the condition precedent is that the user must acknowledge the maker by way of citation and referencing style that is applicable to the field of research and the jurisdiction.⁷ It should be noted that acknowledgement alone is not sufficient as the user must be “fair” in its usage as well (Adewopo 2012: 4).

The Act does not provide a parameter or yard stick for the determination of what is fair use. In some jurisdictions, there are guidelines to consider when determining if there was fair use.⁸ It should be borne in mind that these are just guidelines and not cast in stone as each case is peculiar. Some higher institutions even put a check to such defaulters by drawing up honour codes to be abided by, which serve as administrative checks (McCabe et al, 1993: 532). But in cases of extreme plagiarism, the copyright laws should be invoked.

Taking a cue from the copyrights guidelines for staff and students of the University of Witwatersrand, Johannesburg (WITS) on when to apply for permission:

“Researchers, lecturers and students should be careful when using third party intellectual property. Copyrights infringement relates to a ‘substantial portion’ being copied without the rights owner’s permission. However, quality rather than quantity generally applies e.g. if the crux or essence of a work is captured in one page and it is copied without permission, this would be copyright infringement, one has to use one’s discretion”

⁷ Some of them include: NALT (Nigerian Association of Law Teachers) Uniform Citation, OSCOLA (Oxford University Standard for Citation of Legal Authorities), HAVARD, MLA (Modern Language Association of America), CSE (Council of Science Editors), etc.

⁸ For example, in the United States of America the factors considered are the purpose for which it is used for; the nature of the copyrighted work; the portion taken; the effect of the use on the original work.

It is trite that plagiarism is not a crime but just hovers in the realm of morals (Green, Stuart 2003: 167-242). It may be time to take it to the next level and brand it as a copyright infringement where adequate. It may be inferred that the defence of fair dealing or permitted act arises in civil suits. However, this perception should be corrected as it can be sustained in criminal suits because the express non-permission of the act makes it subject to a criminal action (Garnett et al 2013).

The Emergence Of the Internet

With the advent of the internet, works can easily be accessed. This may act as a snag in the application of the Berne Convention for the Protection of Literary and Artistic Works. This is because tracing the original author of the work is usually a daunting task.

Article 5(2) of the Berne Convention excludes and prohibits all forms of formalities imposed by member states as a prerequisite for the enjoyment of copyright in foreign works in that country.⁹

Article 3(3) of the convention defines a published work as “work published with the consent of their author whatever may be their means of manufacture of the copies, provided that the availability of such copies has been such as to satisfy the reasonable requirements of the public...”

From the above definition with emphasis on the underlined words, it goes without saying that an article or a write up on the internet can pass for published works by virtue of the Convention as long as they are made public. This is because the era we are now makes room for new forms of publication in addition to the old forms (WIPO 1996).

7. RECOMMENDATIONS

It may be perceived that failure to address the issue at hand is fear of retaliation. It may also end up being a death letter. Refusal to cast the first stone may be justified but the stone must be cast. This means that persons who intend doing so must have the moral justification to do so. Once these hurdles have been scaled, the resultant effect is a more innovative and original intellectually driven academia. To achieve this, it is recommended that:

1. Less importance should be placed on degrees and certificates as representing the knowledge of the graduate.
2. Publications that are found wanting should be formally retracted.

⁹ For example, the United States copyright Act 1976 requires that works be registered with the Copyright Office before an author can commence action for infringement.

3. Scholars should think out of the box and strive for originality in their work. This in turn will broaden the scope of education.
4. Academic Institutions should give proper orientation to their scholars on the tenets of proper writing skills and the dos and don'ts in the academia.
5. Authors who are not properly acknowledged should take up necessary actions to the later against such persons to avoid reoccurrence.
6. A uniform referencing style should be adopted for a particular field in a jurisdiction to avoid a mismatch of citations.
7. Scholars in a particular field should be bold enough to challenge mechanisms to check academic crimes that do not suit their field.
8. Plagiarism should not be seen as a mere intellectual dishonesty but as a crime which should have a fitting penalty.

8. CONCLUSION

Persons who have carried out research or worked in a particular area deserve the right and reward for such work (J. Ginsburg, 1990). Looking at the economic angle, it basically ensures the existence of new works i.e. creativity. This creativity is then rewarded which gives room for more creativity. On the other hand, where such works are created, the unauthorised use of same by a third party hinders the creation of more works (Ouma – 2012: 68).

Though copyright may seem a grave crime, the researcher opines that plagiarism is way graver. This is because in the case of copyright there is no doubt as to the original author, but in the latter case, plagiarism makes it seem like they are the original author of the work. According to Garnett, James and Davies, copyright springs to life immediately on creation of the work it is distinct from its other intellectual property rights that require registration of rights. In the case of copyright, the issue of registration arises where an enforcement action comes up. This is as a result of the English Copyright Act of 1842 and the 1911 Act that out rightly abolishing registration in order to comply with the UK's international Obligation under the Berlin Act of the Berne Convention.

Advantage should be taken of the World Intellectual Property Organisation (WIPO) Copyright Treaty and the WIPO Performance Phonograms Treaty popularly known as the Internet Treaties which are in place to address copyright protection problems, and by extension plagiarism, in the digital age.

References:

Books

Commonwealth:

F.O. Babafemi, *Intellectual Property The law and practice of Copyright, Trademarks, Patents and Industrial Designs in Nigeria* (Justin Books Limited, 1st ed.) 2007.

K.R. Vinod, "Plagiarism-History, Detection and Prevention" [2011] HJDM Vol. 3 pg. 2.

Marisella Ouma, "The Role of Copyright in Economic Development: A Review From Kenya" NJIP vol 1, no. 2 (2012)(ed) (NIALS Press) 68

Oxford Advanced Learner's Dictionary, 9th Edition

A. Adewopo, *Nigerian Copyright System Principles and Perspectives* (Odade publishers Lagos 2012) 4

Kevin Garnett, Jonathan Rayner James and Gilian Davies, *Copinger and Skone James on Copyright*

T.O. Dada, *General Principles of Law* (3rd Ed, Lagos 2013) 421

Blogs:

Plagiarism – an Academic Crime <<http://helpdesk.eliademy.com/forums/193876-ideas-forum/suggestions/10963992-plagiarism-an-academic-crime>>

Guobadia, D, "Fair Dealing and Copyright in Nigeria" (1989) 2/4 cited in Johnson Bryant, The Defence of Fair Dealing in Nigeria Copyright Law: Trade-offs Between Owner and User <https://www.johnsonbryant.com/the-defence-of-fair-dealing-in-nigeria-copyright-law-tradeoffs-between-owner-and-user/>

C.A. Oloyede, "Can Legal Action be Taken Against Plagiarism?" Published September 27 2016 <<https://www.dailytrust.com.ng/news/law/can-legal-action-be-taken-against-plagiarism/163976.html>>

Articles

Commonwealth:

A.O. Obilade, "Postgraduate Teaching and Research: The Functions and Challenges of Postgraduate Education and Advanced Research in Law" in I.A. Ayua and D.A. Guobadia(eds), *Legal Education for Twenty-First Century Nigeria* (NIALS Press Lagos 2000) 78

Donald L. McCabe and Linda Klebe Trevino, "Academic Dishonesty: Honor Codes and Other Contextual Influences", *The Journal of Higher Education* 64, no. 5, (September–October 1993), 532

Green, Stuart P. (2002–2003). "Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights". *HLJUC* (2013). 54: 167–242.

J. Ginsburg, (1990): A tale of Two Copyrights: Literary Property in the Revolutionary France and America, 64, *Tul L. Rev.* p991-992) cited in Marisella Ouma, "The Role of Copyright in Economic Development: A Review From Kenya" *NJIP* vol 1, no. 2 (2012)(ed) (NIALS Press) 68

Lynch J, 'the Perfectly Acceptable Practice of Literary Theft: Plagiarism, Copyright, and the Eighteenth Century'. *The Journal of the Colonial Williamsburg Foundation.* 24. pp. 51–54.

WIPO, Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to be Considered by the Diplomatic conference (CRNR/DC/4) at 16 (August 30 1996)

Blogs:

Copyrights guidelines for staff and students of the University of Witwatersrand, Johannesburg (WITS) <[http:// libguides.wits.ac.za/c.php?g=145347&p=952629](http://libguides.wits.ac.za/c.php?g=145347&p=952629)>

Guide to Referencing and Citations for Law Essays <https://www.lawteacher.net/law-help/essay/referencing-and-citations-guide-for-law-students.php>

Jonathan Bailey

<https://www.google.com.ng/amp/s/www.plagiarismtoday.com/2013/11/11/plagiarism-copyright-infringement-common/amp/>

NLIP Watch," Copyright Protection and Exceptions"<https://nlipw.com/copyright-protection-exception/>

Plagiarism – an Academic Crime, <<http://helpdesk.eliademy.com/forums/193876-ideas-forum/suggestions/10963992-plagiarism-an-academic-crime>>

Plagiarism & Academic Integrity: Types of Academic Dishonesty
<<https://spcollege.libguides.com/c.php?g=254383&p=1695452>>

R.G. Berlinck, 'The Academic Plagiarism and its Punishment – A Review' (2011) RBFJ vol. 21 no.3 <http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0102-695X2011000300003>

Saraf Hawkins attorney at law <https://sarafhawkins.com/difference-copyright-and-plagiarism/>

Types of Plagiarism and Academic Cheating <<https://www.geteducated.com/elearning-education-blog/10-types-of-plagiarism-and-academic-cheating/>>

University of Toronto www.cs.toronto.edu/~clarke/acoffences/whatisanoffence.html
accessed 10 September 2018

Legislation

Copyright Act, Cap C28, Laws of the Federation of Nigeria, 2004

Cases

Cramp & sons v Frank Smythson Ltd (1944) A.C. 329

Hubbard v Vosper (1972) 2 QB 84