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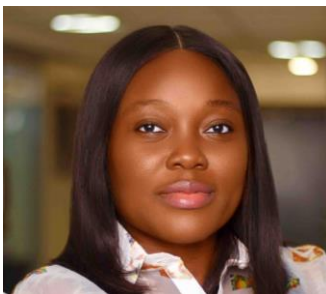
TEMPLARS ThoughtLab

# Is Fair Dealing protection enough for Gen-AI related infringement claims?

## Introduction



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This article aims to review the adequacy of the protection of fair dealing for generative AI (“**GenAI**”)-related infringement claims in Nigeria. As AI systems evolve and become more sophisticated, layers of complexities arise, and ensuring that the law and policy underpinning the technology evolves in a balanced manner becomes increasingly important. One such complexity is delineating creative rights to the training data and foundation models utilised in AI system training. Whether copyright holders /creators or AI systems promoters or developers, the economic interests and benefits from creative works are only bankable where each contribution is adequately rewarded, and personal interests in the copyright are balanced against public considerations arising in connection with the work(s).

Under Nigerian law, a copyright holder in any work is provided broad coverage to full and exclusive exploitation of the created work. By implication, any modification, publication, use, or alteration may only be done subject to the copyright holder's permission. As such, training models obtained without due authorisation fail the compliance test and are likely to give rise to liability for infringement claims.

We hold the view that one of the essential legal shields that will become pertinent in managing liability for breach as the digital economy evolves in Nigeria is the legal protection of “fair dealing” under the Nigerian Copyright Act (2022), also generally known as “fair use” in other jurisdictions. As is the case already, AI systems promoters will seek to avoid liability using this protection.

In this article, we shall review recent developments in relation to liability for adapting copyrighted work for GenAI and address the question of fair dealing to ascertain whether the current provisions of Nigerian law provide adequate protection from infringement claims involving AI's adaptation of copyrighted work and, where applicable, the adequacy of the protection provided by extant law. We shall also review the evolving legal landscape on copyright and its interplay with GenAI and assess how it will impact the exploitation of creative works.

## Regulation of AI systems and copyright

Given the speed of AI technology's evolution, the scurry towards AI regulation is on the ascent globally, starting with the European Union's Artificial Intelligence (AI) Act (the "EU AI Act"), which came into force on 1 August 2024. The EU AI Act is the first-in-kind comprehensive legislation on AI regulation and a forward marker for developments in AI regulation across different jurisdictions.

In Nigeria, while there are different laws that, by extension, regulate digital technology, comprehensive legislation on AI is necessary. In this regard, the *Control of Usage of Artificial Intelligence Technology in Nigeria Bill, 2023* (the "**AI Control Bill**") is pending before the National Assembly and is still awaiting its second reading. The AI Control Bill seeks to establish a framework for regulating and controlling AI systems developed, used, or deployed within Nigeria. Regrettably, the AI Control Bill does not address AI's intersection with copyright and how it impacts AI development and use. In the absence of comprehensive extant legislation, several pieces of legislation address the key regulatory issues arising with respect to AI regulation. For human rights, ethics, data protection, and related matters, recourse is to the provisions of the Nigerian Constitution.<sup>1</sup> The provisions of the National Information Technology Development Agency Act (2007) ("**NITDA Act**"), the Nigeria Data Protection Act 2023, the Nigeria Data Protection Regulation 2019, and its Implementation Framework made further to the NITDA Act; for safety, the Cybercrimes (Prohibition Prevention Etc.) Act (2015 as amended) as well as the Money Laundering (Prevention and Prohibition) Act (2022) and the Economic and Financial Crimes Commission ("**EFCC**") Act (2002 as amended) provide a framework for protection, and not in any way the least important, with respect to intellectual property, the Copyright Act (2022).

In terms of AI strategy and policy, the National Digital Economy Policy and Strategy (2020-2030) lays out the framework for the digital economy and AI exploitation. The AI Strategy and policy lays out a comprehensive roadmap for harnessing AI utilisation to develop a distinctive course and tailored approach to optimise the benefits of AI. The AI Policy recognizes the Nigerian Copyright Act as one of the regulations underpinning creative works and innovation; however, as with the AI Control Bill, the criticality of copyright as a core pillar of AI development seems to be relegated. Additionally, by its mandate under the NITDA Act, the National Information Technology Development Agency, seeking to establish Standards, Guidelines, and frameworks for the development, standardization, and regulation of Information Technology practices in Nigeria, has released a draft of National Artificial Intelligence Strategy in August 2024 which is currently undergoing review. Nigeria is not logged out of regional developments and as a member of the African Union, Nigeria is a party to the Continental AI Strategy (2024), which seeks to guide African countries in harnessing artificial intelligence to meet Africa's development aspirations and the well-being of its people while promoting ethical use. The strategy identifies key priorities to ensure that AI for Africa is Africa-owned, people-centric, and development-oriented.<sup>2</sup>

<sup>1</sup> Constitution of the Federal Republic of Nigeria (1999 (as amended)).

<sup>2</sup> [African Ministers Adopt Landmark Continental Artificial Intelligence Strategy, African Digital Compact to drive Africa's Development and Inclusive Growth | African Union \(au.int\)](#)

Inherent in every copyrighted work is the general public's right to use creative work to advance society within well-defined legal boundaries, and those boundaries are urgently required to enhance the development and adoption of AI technology.

## The conflict between GenAI and copyright interests

Copyright has always evolved with technological innovations and, in many cases, has been fuelled by technology. However, the current modality for developing foundational processes for AI systems seems to consume copyright and economic opportunities as a consequence of continuous exploitation to the detriment of creators and the sustained value of creative works. The conflict between GenAI companies and creatives has escalated, with several leading AI companies facing lawsuits worldwide. Several of these lawsuits are infringement claims in defense of copyrighted work used without due authorisation or attribution by GenAI companies. The increasing number of such claims indicates the severity of the issue. This also raises questions about the adequacy of existing laws, both globally and in Nigeria, to protect intellectual property rights and their enforcement while balancing the public's right to use creative work to advance society, especially in cases of infringement attributable to the nuances that GenAI has now unraveled.

In September 2023, the Authors Guild in the United States filed a class action<sup>3</sup> against a GenAI company (the "**Class Action**") seeking redress for flagrant and harmful infringement of the plaintiff's registered copyright in the works of fiction that the GenAI company had published. The published works were used to develop large language model ("LLMs") algorithms for the training of the AI using text wholly imported from their published works. The plaintiffs claimed that this wholesale import also stole the opportunity to license their works to other interested writers and destroyed the economic viability of their works for further creative adaptations.

Some of these authors complained about finding books under their names that had not been written by them but appeared to have been AI-generated publications.<sup>4</sup> Several other creatives have brought infringement claims over the alleged misuse of their works to train AI systems and build the LLMs with which the AI engages its users<sup>5</sup>. An instance is The Centre for Investigative Reporting's case on similar terms for infringement of copyright asserting copyright protection under the Digital Millennium Copyright Act (DMCA) (the "**CIR Case**").<sup>6</sup> The Class Action and the CIR Case will likely be landmark decisions shaping thought on enforcing copyright for AI systems and the minimum standards for data traceability.

More recently, American actress Scarlett Johansson called out an AI company for the unauthorized use of her voice as one of the training voices for Chat GPT 4, which enables new user interfaces, including video and audio outputs. Ms. Johansson's grievance was that despite her disapproval following requests received, the company had utilised her voice for its conversational AI system without her consent, and she requested the suspension of the release of the chatbot. The company admitted that there was an uncanny resemblance between the training voice and Ms. Johansson's but insisted that

<sup>3</sup> Authors Guild v. OpenAI Inc., 23-CV-8292 (SHS) (S.D.N.Y. Apr. 1, 2024).

<sup>4</sup> [An author says AI is 'writing' unauthorized books being sold under her name on Amazon | CNN Business](#)

<sup>5</sup> Michael Chabon, David Henry Hwang, Matthew Klam, Rachel Louise Snyder, And Ayelet Waldman v OpenAI, Inc., ET AL, 3:23-cv-04625, (N.D. Cal.).

<sup>6</sup>The Center for Investigative Reporting v. OpenAI, Inc., 1:24-cv-04872 (S.D.N.Y. June 27, 2024).

this was only coincidental.<sup>7</sup> The change was made to the chatbot following Ms. Johansson's request. However, the questions raised by this incident require further scrutiny. This goes beyond adapting creative works for AI training and deploying foundational models; it introduces privacy issues and other digital rights, such as the legal personality of AI systems.

Generally, AI systems are trained on a broad range of data, including publicly available content, licensed content, and content generated by human reviewers. However, it appears that training AI systems on publicly available content will continue to create conflict between creatives and promoters of AI systems as some of the publicly available content is subject to copyright and/or other protective measures, and the methodology currently applied for data mining for AI systems does not prioritize data traceability or compliance with existing copyright.

In the CIR Case, the Claimants, in making their infringement claim, stated with respect to the defendants that *"...when they populated their training sets with works of journalism, Defendants had a choice: to respect works of journalism, or not. Defendants chose the latter. They copied copyrighted works of journalism when assembling their training sets. Their LLMs memorized and, at times, regurgitated those works. They distributed those works and abridgments of them to each other and the public. They contributed to their users' unlawful copying. They removed the works' copyright management information. They trained ChatGPT not to acknowledge or respect copyright and did this without permission."*<sup>8</sup> This claim, as summarised, is not exceptional as this modality for adapting AI systems with creative works being sourced widely to train the data without a structure for ensuring copyright compliance is common and at the crux of most copyright infringement claims instituted against AI companies globally. In another case, an AI music startup admitted to using copyrighted music. However, it claimed that its actions did not constitute infringement because the AI was "learning."<sup>9</sup>

Lastly, there has been a raging debate on whether or not work created by GenAI can be copyrighted, and the U.S. copyright office has previously communicated its willingness to copyright AI-authored works on a case-by-case basis.<sup>10</sup> On the other hand, a U.S. court has ruled that creative works created by AI cannot be copyrighted because they are not authored under human guidance.<sup>11</sup> From all indications, a judicial decision that sets out holistic jurisprudence on copyright as it relates to GenAI, the limits and implications of transformative use, and "copying" as it relates to AI is urgently required to set the stage for equitable commercialization of the GenAI innovation. Pending this, the only protection available under the law is the doctrine of "fair use," and its adequacy to protect GenAI systems is already in question.

<sup>7</sup> [Scarlett Johansson Said No, but OpenAI's Virtual Assistant Sounds Just Like Her - The New York Times \(nytimes.com\)](https://www.nytimes.com/2023/06/27/technology/ai-chatbot-johansson.html)

<sup>8</sup> The Center for Investigative Reporting v. OpenAI, Inc., 1:24-cv-04872 (S.D.N.Y. June 27, 2024).

<sup>9</sup> UMG Recordings, Inc. v. Suno, Inc., 1:24-cv-11611, (D. Mass.), Filed 06/24/24.

<sup>10</sup> Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, A Rule by the Copyright Office, Library of Congress on 03/16/2023 (Library of Congress Copyright Office 37 CFR Part 202).

<sup>11</sup> Thaler V. Perlmutter Et Al, Docket No. 1:22-Cv-01564 (D.D.C. Jun 02, 2022).



## GenAI copyright interests and the defence of fair use

The foundation for this jurisprudence is set out in the U.S. Copyright law<sup>12</sup> with the four principal factors set out as (1) the character and purpose of the use, (2) the nature of the original work, (3) the amount taken from the original work, and (4) the market effect on the original work. The litmus test determining whether fair use protection would avail a defendant is subjective and determined on a case-by-case basis.

In the United States, specifically, the courts<sup>13</sup> have held that copying copyrighted works without authorization, which ordinarily should amount to infringement, may come under the exception of fair use. Some of the instances where this position has been taken include circumstances involving software reverse engineering, plagiarism detection software, and the digitization of millions of library books to enable meta-analysis and indexing. The primary consideration in the context of these decisions appears to have been the transformative use of this otherwise infringing content.

The court further expounded the jurisprudence in the landmark Warhol Foundation case,<sup>14</sup> especially as it relates to one of the fundamental components of fair use that is critical when considering Gen AI development and the “transformative use” quotient required to qualify for fair use protection. The appeal court reiterated a previous court decision<sup>15</sup> stating that “...the fair use doctrine “permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.” It is inferable that certain infringement claims brought against GenAI promoters may, because of this school of thought (subject to other relevant factors), be set aside on account of the transformative elements introduced by AI. Hopefully, the decisions in the CIR case and the Class Action will expand this jurisprudence adequately and set clearer yardsticks that obviate the difficulties introduced by AI learning/training models.

In *Authors Guild v Google Inc.*, after over a decade in court, Google's attempt to transform digital libraries by unauthorized scanning of books and publishing them without the permission of the original creators was adjudged to be fair use of the creative works. Though the court ruled that the Author's Guild case tested boundaries, Google's action in transforming digital libraries was fair use. According to the court, it used them to create a new and valuable product, the Google Books service, which did not compete with the existing books market. Obtaining specific licenses across the board for such transformative work would be impracticable. Drawing parallels, GenAI developers appear to be relying on the same defense to allege fair use as the basis for the unauthorized use of generally available content that is not licensed.

## Copyright under Nigerian law

The Nigerian Copyright Act 2022 (the “Act”) expressly prohibits the unauthorized reproduction of copyrighted material. The Act defines reproduction as the making of one or more copies of a literary, musical, or artistic work, audiovisual work, or sound recording and further reiterates that “copy” includes digital copies. Failure to obtain consent in the

<sup>12</sup> 17 U. S. C. §107

<sup>13</sup> [Copyright Safety for Generative AI | Published in Houston Law Review](#); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 100–01 (2d Cir. 2014); *Authors Guild v. Google, Inc.*, 804 F.3d 202, 225 (2d Cir. 2015).

<sup>14</sup> *Andy Warhol Foundation for Visual Arts, Inc. v. Goldsmith*, 598 U.S. (2023).

<sup>15</sup> *Stewart v. Abend*, 495 U. S. 207, 236 (1990).

manner prescribed by law for the use of any creative work may successfully ground infringement claims.

The Act prohibits anyone from making any adaptation of a protected work. The Act defines adaptation as the modification of a pre-existing work from one type of work to another or altering a work within the same type to make it suitable for different conditions of exploitation. It may also involve altering the composition of the work. From this definition, outputs from GenAI models that rely on a protected work may infringe on an individual's rights in an adaptation.

From the above, infringement appears to be more likely the norm for AI adaptation of publicly available content. The question arises whether the exploitation of copyrighted content falls within the protection of fair dealing as provided by the Nigerian Copyright Act.

## **The Fair Dealing Defence under the Nigeria Copyright Act and Applicability to Generative AI**

GenAI companies' counterarguments to accusations of copyright infringement have often been that GenAI models trained on copyrighted materials do not infringe the rights in those works as the outputs do not copy their training data but are designed to detect associations between the data, "learn" and generate an entirely new output as outlined above in the Warhol case.

Under Nigerian law, eligible works are protected automatically upon their creation as long as they meet the threshold of original works of authorship fixed in a tangible medium. Copyright confers certain rights to the author of the eligible works. Any person who carries out any actions violating the author's rights without the author's consent would be considered to be violating the author's copyright. However, not all actions inconsistent with copyright holders' rights will be considered infringing. The law provides for certain exceptions, including the defence of fair dealing. The Act provides that there would be no copyright infringement in any work where the alleged infringing act occurs in the following instances:

- private use.
- parody, satire, pastiche, or caricature.
- non-commercial research and private study.
- criticism, review or the reporting of current events, etc.

Considering the provisions of the Nigerian Copyright Act, the factors to be considered in court will be:

- (a) purpose and character of its usage;
- (b) nature of the work;
- (c) amount and substantiality of the portion used in relation to the work as a whole; and
- (d) effect of the use upon the potential market or value of the work.

Notably, these factors are identical to those considered in the US Copyright Act, and the jurisprudence applied in the Google case aforementioned may serve as guidance.

It is important to highlight that the current provisions of the Act do not contemplate or make provision for use cases such as GenAI purports to do with the LLMs and the general approach to machine learning for its AI systems. Except for the general evaluations in a-

d above, there are no clear indicators to be relied upon. Also, Nigerian courts are yet to consider and determine the adequacy of the defense of fair dealing for GenAI content at the time of this article. There is no better background for legal engineering as this creates the opportunity for both regulators and the courts to set the stage for balancing the business interests of creators vis-à-vis the Gen AI adaptations of copyrighted work and minimise the risks arising as it relates to copyright-protected works.

As jurisprudence progresses, we expect to see Nigerian courts balance local legislation with the global guidance on AI regulation in their case-by-case assessment of such matters pending enactment of the AI Control Bill and finalization of the NITDA draft National Artificial Intelligence Strategy. It would be ideal if this core economic issue of the interplay between AI systems and copyright in existing work is equally considered and clarified in the forthcoming legislation.

The EU AI Act provides, amongst other specific conditions, a transparency framework for disclosure of training data sets<sup>16</sup> and clear requirements on open-sourced information. The EU AI Act also provides a good foundation for policy articulation and customization. Seeing as templates for disclosure are to be provided, this should enable data traceability. There is currently no resolution to the issues relating to AI's subsequent modification of copyrighted works. This may be rooted more in privacy than copyright. Some scholars advocate that at some point, AI systems must be given some form of legal personality to enable clear delineation of creative works by human authors and those developed or modified, as the case may be, by AI systems<sup>17</sup>.

As Nigeria begins to develop its AI policy, it is useful to review the recommendations made in the EU AI Act and adapt some for Nigeria; more importantly, pending the enactment of local legislation, we recommend that filtering out data sources be frowned at. Algorithms are to leave markers of relevant copyrighted materials and developers are to ensure to obtain licenses where applicable.

Additionally, it may be useful to develop economic modules for addressing post-licensing modifications to protect authors who licence creative works and have to grapple with the attribution of AI modifications to them without actual input on their part. A more stringent approach may also be the mandatory exclusion of copyrighted material from training data compelling developers of AI systems to be more intentional about traceability of the data sets. While the mechanics of it appear to be quite difficult, it is not farfetched as training data currently excludes toxic and antisocial material. This could on the other hand most likely impact and distort the output of these GenAI models because only a limited percentage of the world's content is in the public domain.

Businesses that rely on output that could be AI-generated could consider setting up a disclosure system that mandates indemnities that protect them against and give them a

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<sup>16</sup> Article 107 EU AI Act. "...In order to increase transparency on the data that is used in the pre-training and training of general-purpose AI models, including text and data protected by copyright law, it is adequate that providers of such models draw up and make publicly available a sufficiently detailed summary of the content used for training the general-purpose AI model. While taking into due account the need to protect trade secrets and confidential business information, this summary should be generally comprehensive in its scope instead of technically detailed to facilitate parties with legitimate interests, including copyright holders, to exercise and enforce their rights under Union law, for example by listing the main data collections or sets that went into training the model, such as large private or public databases or data archives, and by providing a narrative explanation about other data sources used. It is appropriate for the AI Office to provide a template for the summary, which should be simple, effective, and allow the provider to provide the required summary in narrative form".

<sup>17</sup> [ARTIFICIAL INTELLIGENCE AND THE LIMITS OF LEGAL PERSONALITY | International & Comparative Law Quarterly | Cambridge Core](#)

right of reversion to the promoters or developers of AI systems in the event of a copyright claim.

## Conclusion

The Copyright Directive<sup>18</sup> issued by the European Union states that "Rapid technological developments continue to transform the way works and other subject matter are created, produced, distributed and exploited. New business models and new actors continue to emerge. Relevant legislation must be future-proof not to restrict technological development."

This must be the mindset with which the assertion and protection of copyright are implemented as AI systems expand their penetration. Failure to update our system of laws to enable data traceability and adequate protection of copyright interests could stifle innovation and the economic benefits of AI development.

Additionally, businesses with extensive bodies of work will experience economic loss where the confluence between these rights and AI exploitation is not spelled out. Pending the expansion of the scope of the law, the stage can be set for the jurisprudence that will shape the law with all stakeholder interests addressed. Considering the evolution of fair use as espoused in the Warhol case, it is our considered view that as these claims and disputes begin to emerge in commerce, policymakers and the courts need to take a leaf from the balanced approach recommended to ensure that both personal rights and inherent public rights in copyrighted work have room for expression. The policy, law and jurisprudence must evolve to enable the adequate compensation of copyright and derivative works without stifling new expressions of such works or modifications as would be the case with AI.

<sup>18</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (OJ L 130, 17.5.2019, p. 92).