

**ASSESSING THE INFRINGEMENT OF COPYRIGHT IN LIGHT OF THE DEFENCE  
OF FAIR DEALING IN THE DIGITAL AGE OF PHOTOGRAPHY**

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By

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## Declaration

I, SIGANGA CHRISTOPHER, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged

Signed ..... C.S. ....

Date ..... 22/03/2019 .....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed..... Ms Elizabeth Lenjo

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## List of Abbreviations

- CA – The Copyright Act (CAP 130 of 2014)
- CoK – The Constitution of Kenya (2010)
- IP- Intellectual Property

# Chapter 1: Introduction

## 1.1 Background

Photography is described as the art of taking photographs of different subjects which may include people, buildings, food, cars and other objects. Photography is also referred to as an original art, and, within the Kenyan Jurisdiction, arts of a photographic nature are protected by the CA of Kenya<sup>1</sup> as well as the CoK<sup>2</sup>.

However, with the advancements in technology and the digital media age where image sharing is encouraged across different platforms, there has been an increase in the risk involved with photographs and photographer's rights being infringed upon by others. This is aggravated by the fact that there is a sense of ignorance amongst the photographer community about the law and how they can protect the rights that are given to them by the CA of Kenya as well as the CoK.

The effect of photography rights being impeached upon is that it discourages photographers from creating fresh and new content which can be viewed as destructive/harmful. This is because the world contains many very talented and creative people whose pictures are protected but they are otherwise unaware of how to enforce their own rights.

Consequently, fair dealing is a defence to infringement and limits the rights of copyright holders by allowing users to copy certain works for educational and public information purposes such as news reporting, individual study, research and review. Legislation regarding this defence is very solid in countries such as Canada, England and the United States of America, who refer to the defence as fair use.

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<sup>1</sup> Copyright Act of Kenya (2014)

<sup>2</sup> Article 40(5), Constitution of Kenya (2010)

## **1.2 Problem Statement**

This study will look to address the problems faced by photographers regarding the violation of their rights.

This is a problem for those within the photographer society. The main problem faced with is the violation of their rights is regarding remuneration in which case the photographers may not be properly remunerated for their hard work or in some cases may not be remunerated at all. This in my opinion amounts to theft.

Furthermore, one of the main issues is that the Constitution does not list the rights that photographers have, but rather the photographers have to resort to the use of copyright law that is simply applied to the original art that photographers make.

## **1.3 Research Objectives**

Through this research, the intention is to educate photographers on matters relating with copyright infringement, how it is happening and how to face it through the legal instruments.

## **1.4 Hypothesis**

The hypothesis is that photographers are ignorant or are not knowledgeable about the laws available to protect them from violation and they thus allow themselves to be taken advantage of. So, in this case the independent variable would be education about the law on copyright and the dependant variable would be the ability to defend against infringement.

## **1.5 Research Question**

The paper will look to explore the copyrights of photographers and, furthermore the paper also seeks to answer the following questions:

1. What the relation between infringement and the defence of fair use is in the Kenyan jurisdiction?
2. What are the some of the methods currently used to infringe on the copyright in Kenya?
3. What are the steps that a photographer can take to secure his rights in Kenya?

## **1.6 Justification of Research**

This paper is influenced by personal experiences as a photographer, which inspired this investigation regarding issues of intellectual property rights in photography.

Furthermore, as a student of law, the chance of undertaking the intellectual property law course presented itself and allowed for learning about the existing copyright laws that support and protect photographers. This however is not the case for the majority of other photographers who do not have an inkling about copyright laws, or any other laws for that matter, that would protect them from infringement of their photography rights. There have been instances where large companies have used a photographer's pictures for one of their advertisements without obtaining the consent of the photographer or without giving due credit, which results in a financial disadvantage to the photographer.

Therefore, this research is important because photographers work hard for the art that they produce, and they should not constantly fear that there is no law or instruments available to protect their rights as content creators.

## 1.7 Literature Review

In line with my hypothesis that most photographers are uneducated on matters regarding photography rights and defending them there is also the dimension that the laws regarding photography rights may be inadequate.

According to Jeremiah A. Armstrong in his article "*The Digital Era of Photography Requires Streamlined Licensing and Rights Management*", as the digital age continues to develop in different ways including encouraging more people to share pictures online, there is a need to encourage education regarding licensing of pictures as well as the rights that each photographer has, in order to protect their art and to streamline systems that are adaptive and efficient to license copyrighted works as well to prove ownership of the copyright.<sup>3</sup>

Apart from the fact that photography rights are indeed meant to benefit the individual, there is also the recognition that creative works may be used for progression of science and useful arts for the benefit of the public. This was outlined by Robert S. Epstein in his article "*World's Fair Photography Rights Protected*" where it was thought that pictures of a building could not be licensed for copyright because they were considered a work of art in light of them being 'fair'.<sup>4</sup>

The use of artistic works for progression of science and useful arts is known as fair dealing as described by Richard A. Bernstein in "*Parody and Fair Use in Copyright Law*" where he outlines:

*"There are certain situations in which society wants to encourage individual expression but in which such full expression is impossible without access to another's work." And further goes on to state that: "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research."*

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<sup>3</sup> Armstrong, Jeremiah A. "The Digital Era of Photography Requires Streamlined Licensing and Rights Management," *Santa Clara Law Review* vol. 47, no. 4 (2007)

<sup>4</sup> McElhany, Myrna L. "World's Fair Photography Rights Protected," *Stanford Law Review* vol. 17, no. 5 (May 1965)

His opinion on fair use is an illustration where there is no copyright infringement on the part of a photographer's rights but instead fair use acts as a defence to infringement. This is important because a photographer would need to be in the know about what isn't considered infringement of his works.<sup>5</sup>

Lastly, Irene Otieno in "*The Efficiency of Copyright Law in the Digital Space in Kenya: A Case for the Making Available Right in Peer-to-Peer File Sharing*" notes that because the scope of the copyright rights is not sufficient to stop online dealings with copyright materials (photographs), therefore it would be difficult and costly for copyright owners to prove that a copyright violation did in fact take place online. This is where the difficulty usually lies in Kenya with regards to copyright infringement since most people are unaware of how to go about proving that copyright infringement actually exists.<sup>6</sup>

## **1.8 Research Design & Methodology**

This paper will look to examine copyright and infringement thereof. It will rely on case law as a demonstration of the different scenarios where infringement occurs, as well as on legislation.

This study will also rely on secondary data which would include accounts from people who have experienced it personally, journal articles and books as well to guide the study.

## **1.9 Assumptions**

Through this study, it will be assumed that most photographers are ignorant of the law that protects their artistic works, and that this is the main basis for the problem of infringement in Kenya.

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<sup>5</sup> Bernstein, Richard A. "Parody and Fair Use in Copyright Law," Copyright Law Symposium (ASCAP) 31 (1981)

<sup>6</sup> Otieno, Irene. "The Efficiency of Copyright Law in the Digital Space in Kenya: A Case for the Making Available Right in Peer-to-Peer File Sharing," Strathmore Law Review vol. 1, no. 2 (June 2016)

## **1.10 Limitations**

The expected limitations to my research may include:

1. Few Kenyan reported cases are readily available for one to read up on the matter of infringement of copyright by photographers in Kenya as there have been only a few cases brought before Kenyan courts.
2. Lack of prior research studies on the topic of copyright especially in the Kenyan jurisdiction

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## Chapter 2: Theoretical Framework

The first violation that photographers constantly face is unfair remuneration - many photographers do not receive enough or any money for the hard work that they do. There are a couple of Theories that support the principle of fair remuneration.

### 2.1 The Fairness Theory of Copyright

This theory dictates that the law ought to give authors or a piece of art what they deserve. Furthermore, that hard work should be rewarded, thus allowing photographers to retain control of the fruits of their labour. The Lockean view on intellectual property dictates that creators acquire “natural rights” in their works due to the intellectual and physical involvement invested in the creative process. Furthermore, under the Kantian theory, creators of intellectual works have rights over their work due to the personhood interest that is held in their works. This theory illustrates many benefits if followed towards creatives.<sup>7</sup>

The first benefit is that where there is fairness in terms of copyright then this would motivate for more creative action.<sup>8</sup> This is due to the fact that if creatives know that their work is safe and protected from violation, then this would inspire them to work harder at their craft, even if the job may be considered more demanding, physically and mentally.

The second benefit is that fairness leads to better and more creative results. Artists are motivated to find new avenues to expand their craft beyond what they were already involved in. This would include enhanced task performance, greater organization commitment and greater fulfilment of

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<sup>7</sup> Stephanie Plamondon Bair, ‘Rational Faith: The Utility of Fairness in Copyright’ Boston University Law Review (2017), 97(4), 1487-1532.

<sup>8</sup> Stephanie Plamondon Bair, ‘Rational Faith: The Utility of Fairness in Copyright’, 97(4).

organizational procedures.<sup>9</sup> This benefit is psychological and brings about intrinsic motivation which is a behaviour that is driven by internal rewards which could be achieved by an opportunity to explore, learn and achievement of one's potential. This in turn inspires a person to achieve the external reward which is where the remuneration aspect comes in.

The third benefit is that fairness aligns with what the public believe is the purpose of Copyright Law. A study conducted by Gregory Mandel looked into the public's views of intellectual property law's purpose found that sixty percent of those who were surveyed believed that intellectual property entitlements are present to give creators' rights that they earned in their creations.<sup>10</sup> The public believe that fairness is a very important aspect of Intellectual property and that it actually may even be considered a priority.

But in order for these benefits to be achieved by creators, it is also important to understand what is meant by the term "fair". This however is not a straightforward task because there isn't one standard definition for the word. What may be fair to one person may not be fair to another and thus is a very subjective matter. Instead, to ascertain what is meant by the term "fair", we can look at particular psychological concepts to help give us the answer.

The first concept being whether we should follow philosophical fairness. In terms of Philosophical fairness, John Rawls's theory of justice as fairness argues that a society can only be just if it treats its member fairly. Rawls believed that a "fair" society is one where all goods are distributed equally. This is also described as egalitarianism, which is a doctrine that dictates that all people are equal and deserve equal rights and opportunities, which in my opinion is really what should influence the notion of what really is "fair" and what is not.<sup>11</sup>

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<sup>9</sup>Stephanie Plamondon Bair, 'Rational Faith: The Utility of Fairness in Copyright', 97(4).

<sup>10</sup> Stephanie Plamondon Bair, 'Rational Faith: The Utility of Fairness in Copyright', 97(4).

<sup>11</sup> Stephanie Plamondon Bair, 'Rational Faith: The Utility of Fairness in Copyright', 97(4).

The second concept is that copying is unfair. Many people are of the opinion that copied works are of lesser value than the original works.<sup>12</sup> This is further evidenced by the way plagiarized work is demonized by academics and those in the working class. By copying another person's work, there is an indication that one did not work very hard for what they have created and thus, should not enjoy the fruits of what they created especially when it is based on someone else's hard work.

The third concept is that respect and dignity are fair. This can be seen when employees respond positively when their interests, special needs and individual preferences are respected.<sup>13</sup> This is also seen when creators are involved in decision making and are treated with dignity and respect at their place of work.

The fourth concept is that money can both promote or undermine "fairness". This holds true especially as money can encourage somebody to work harder. In terms of creative work, one may get more creative in order to earn more money for themselves. The monetary aspect would promote fairness because people earn their dues for all the effort that they put into their creative works. However, money can also undermine fairness because one may feel that they haven't been adequately compensated for the work that they have done or if they aren't compensated at all. Furthermore, payment can be deemed to be unfair if there are varying levels of compensation among different individuals or groups - for instance if male creatives are paid more than female creatives, despite the fact that they are in the same line of work.<sup>14</sup>

The fifth concept is the importance of the procedures. Procedural fairness is concerned with the processes used to reach particular outcomes and asks whether people recognize these procedures as fair. Psychologist Gerald Leventhal identified six factors that influence perceptions of

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<sup>12</sup> Stephanie Plamondon Bair, 'Rational Faith: The Utility of Fairness in Copyright', 97(4).

<sup>13</sup> Stephanie Plamondon Bair, 'Rational Faith: The Utility of Fairness in Copyright', 97(4).

<sup>14</sup> Stephanie Plamondon Bair, 'Rational Faith: The Utility of Fairness in Copyright', 97(4).

procedural fairness, and these include the consistency of procedures, representativeness, lack of bias in procedures, accuracy of information used in procedures, correct ability and ethicality.<sup>15</sup>

Through these factors we can determine whether a procedure is fair or not. This concept can be seen even in the Kenyan constitution, where article 50 outlines the right to a fair hearing and dictates that every person has the right to have a dispute resolved in a fair and public hearing.<sup>16</sup> This concept is extremely important because without the right procedures in place, the benefits of the fairness theory cannot be achieved.

## 2.2 The Equity Theory

Following the Fairness Theory of Copyright, another important theory that is in support of fair remuneration is the Equity Theory. According to this theory, one deserves to be paid uniformly and in line with a particular pay structure of an employee's structure. The reasoning behind this is that if an employee doesn't feel like he is being paid fairly for the amount of work that was put in, then there is always the chance that in the future the employee will not work as hard and won't be as productive at their job and eventually leads to absenteeism. When translated to photographers, if not paid well they will not work as efficiently and will not be encouraged to tap into their creative abilities as they recognize that there is a high chance that they will not be properly rewarded for it.<sup>17</sup>

It is important to note that the remuneration should be in accordance with three types of equity.

The first being individual Equity where it should be recognized that an employee who has been doing the same job for a longer time cannot earn as much someone who's just started at the job. In most cases, the individual who has more experience at a job will receive a higher pay as

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<sup>15</sup> Stephanie Plamondon Bair, 'Rational Faith: The Utility of Fairness in Copyright', 97(4).

<sup>16</sup> Article 50, Constitution of Kenya (2010)

<sup>17</sup> 'Theories of Compensation', Business Jargons, <https://businessjargons.com/theories-of-compensation.html> on 9 January 2019

opposed to the individual with less experience. The thinking behind this is that the more experienced individual can do the job much better, with much more efficiently and can consistently give good results to whoever they are working for.<sup>18</sup>

The second being Internal equity where the employee must accept that what he is being paid is fair for the job that he is involved in. Because if he doesn't then he wouldn't be inclined to work at all.<sup>19</sup>

The third being external equity where the employee feels that what he is being paid is in line with what other people in the industry are also earning when doing the exact same job. This is why it is sometimes important to understand what other people in the same industry may be earning so that an individual doesn't receive lower pay than what he deserves.<sup>20</sup>

This Theory is of importance since Equity is a branch of law that is concerned with fairness and justice for everyone.<sup>21</sup> In the case of photographers, they deserve to be paid fairly for all the work that they are involved in.

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<sup>18</sup> 'Theories of Compensation', Business Jargons, <https://businessjargons.com/theories-of-compensation.html> on 9 January 2019

<sup>19</sup> 'Theories of Compensation', Business Jargons, <https://businessjargons.com/theories-of-compensation.html> on 9 January 2019

<sup>20</sup> 'Theories of Compensation', Business Jargons, <https://businessjargons.com/theories-of-compensation.html> on 9 January 2019

<sup>21</sup> 'Rosie Penny: What is Equity?', The Student Lawyer, 11 March 2014, <http://thestudentlawyer.com/2014/03/11/what-is-equity/> on 9 January 2019

### 2.3 The Welfare Theory of Copyright

The second violation faced by photographers is copyright infringement, where their pictures may be used without their consent and they may not be compensated for it. The Welfare theory of copyright attempts to protect the rights of copyright holders as it promotes the interests of society as a whole and favours the greatest good for the largest number of people, and in this case the greatest good relating to photographers is that they should enjoy the benefits of the copyright they own, which also include fair remuneration for the use of their work. This Theory therefore is related to the fairness theory of copyright. But apart from protecting copyright holders, the theory also looks to create a balance between aspects such as incentives to create and ways to make the works widely available for the benefit of all. This would be helpful for aspects such as educational use of the art and scientific progress through the art.<sup>22</sup>

It is important to note that this theory looks to protect the needs of the society in which everyone can stand to benefit instead of just a few benefitting, which is important for the aspect of copyright.

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<sup>22</sup> 'Jessica Meindertsma: Theories of copyright', The Ohio State University, 9 May 2014, <https://library.osu.edu/blogs/copyright/2014/05/09/theories-of-copyright/> on 9 January 2019

## Chapter 3 – Developed Legal Framework

Following the theories of copyright which support creators of different forms of art and that they need to be fairly remunerated for it, it is important to see how these theories are implemented in the Laws of different Jurisdictions which seek to protect photography rights from being infringed upon, especially in cases where the author stands to be on the losing end.

To put these theories into context, this paper shall review two jurisdictions that have made deliberate strides to develop rights in copyright and furthermore their legislation regarding fair dealing.

### 3.1 The United States of America

Infringement can be described as the action of breaking the terms of a legal agreement. This aspect is highlighted in the Kenyan Copyright Act.<sup>23</sup>

However, there are exceptions to infringement where a copyrighted material may have been used but for reasons that may not lead to financial gain. This is known as Fair Use.

Fair use is described as any copying of copyrighted material done for limited purpose which allows it to be commented and criticized upon by others.<sup>24</sup> It is limited to situations such as criticism, comment, news reporting, teaching, scholarship and research according to the American Copyright Act.<sup>25</sup>

However, following those limitations provided for by the American Act, it goes further by providing four factors that are used in evaluating whether fair use can be implemented.

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<sup>23</sup> Section 35 of the Copyright Act of Kenya

<sup>24</sup> 'What is Fair Use?', Stanford University Libraries, <https://fairuse.stanford.edu/overview/fair-use/what-is-fair-use/>

<sup>25</sup> Section 107 of the U.S. Copyright Act, 17 U.S.C. §§ 101

The first factor is *the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes*.<sup>26</sup> This would allow for courts to look at how the copyrighted work is being used by other parties. The courts will go on to balance the purpose and character of the use against the other facts. Furthermore, Transformative uses which are more likely to add something new, with a further purpose or different character will most likely be considered to be fair.

The second factor is *the nature of the copyrighted work*.<sup>27</sup> This looks at the amount to which the work that was used relates to copyright's purpose of encouraging creative expression. This would mean that for example a more creative work such as a novel, movie or song is less likely to support a claim of fair use in comparison to a factual work such as a technical article or news item.

The Third factor is *the amount and sustainability of the portion used in relation to the copyrighted work as a whole*.<sup>28</sup> The courts would look at both the quantity and quality of the copyrighted material used. Therefore, if there was a large portion of the copyrighted work then fair use is less likely to be found but if a small portion of the copyrighted work is used then fair use is more likely.

The fourth factor is *the effect of the use upon the potential market for or value of the copyrighted work*.<sup>29</sup> The courts review whether, and to what extent, the unlicensed use harms the existing or future market for the copyright owner's work. Courts also look at how the use would affect the current market for the original work and if the use could cause substantial harm if it spread at a very large scale.

The importance of these factors is that they help to serve creative minds and protect their work as they are quite rigorous and don't leave much room for mistake on the part of the court, which would ultimately help to secure copyrights and subsequently photography rights.

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<sup>26</sup> Section 107(1) of the U.S. Copyright Act, 17 U.S.C. §§ 101

<sup>27</sup> Section 107(2) of the U.S. Copyright Act, 17 U.S.C. §§ 101

<sup>28</sup> Section 107(3) of the U.S. Copyright Act, 17 U.S.C. §§ 101

<sup>29</sup> Section 107(4) of the U.S. Copyright Act, 17 U.S.C. §§ 101

**a) The Associated Press vs Fairey<sup>30</sup>**

Shephard Fairey was a popular street artist who created “the Hope” posted during President Barack Obama’s first run for presidential election in 2008 and the design rapidly became a symbol for Barack Obama’s campaign and was approved by his campaign team.

In January 2009, the photograph on which Fairey based the image was revealed to be shot by a free-lancer known as Mannie Garcia who worked under Associated Press. Associated Press demanded for compensation for its use in Fairey’s work, but Fairey raised a defence of fair use, claiming that his work didn’t reduce the value of the original image.

The two parties however reached an out of court settlement in January 2011, which included the agreement that they would split the profits for the work.

The basis for the settlement is due to the fact that it would be unlikely that Garcia’s work would have reached the level of fame it did without the existence of Fairey’s poster. But at the same time, it is important to recognise that without Garcia’s picture then they would have been no poster at all and thus no success. This goes to illustrate that both parties are very important and that the photographer deserved credit for it as well as monetary returns for his original work.

**b) Rogers vs Koons<sup>31</sup>**

Photographer Art Rogers shot a photograph of couple holding a line of puppies in a row and sold it for use in greetings cards and other similar products. Jeff Koons, who is a well-known artist, decided to use the photograph to create a set of statues based on the image for use in an exhibit.

Koons sold several of the structures and therefore made major profits from them. Upon discovering the copying, Rogers sued Koons for copyright infringement. The matter was proceeded to hearing before the court.

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<sup>30</sup> Shephard Fairey vs Associated Press, No. 09-01123 (S.D.N.Y. 2010)

<sup>31</sup> Rogers v. Koons, 960 F. 2d 301 – Court of Appeals, 2<sup>nd</sup> Circuit 1992

The court found the similarities between the two were too close and that a “typical person” would be able to recognise the copy. Furthermore, the defence of Fair use could not be applied to this case because Koon could have used a more generic source as inspiration without directly copying Rogers’ work. Koons was made to pay a monetary settlement to Rodgers.

Similar to the *Associated Press vs Fairey* case, the two types of art are mutually inclusive in that without the original photograph taken by Rogers, then the statues off of which are based on the photograph could not exist. Therefore, apart from receiving the credit there also needs to be remuneration provided to the person who created the original art.

### c) **Cariou vs Prince**<sup>32</sup>

Photographer Patrick Cariou published a book in 2000 named ‘Yes, Rasta’ which was a book of photographs of the Rastafarian community in Jamaica. Richard Prince in 2008 created Canal Zone which was a series of art works that used Cariou’s photographs. His works involved copying the original pictures and transforming them to create some new art form. He would achieve this transformation by printing the pictures out, increasing the size, blurring or sharpening, adding some content such as colour and sometimes putting many of the photographs together or with other works. He then went to exhibit this collection in New York at Gagosian Gallery as appropriation art.

In 2009, Cariou filed a copyright infringement suit against Richard prince and in March 2011, the Southern District of New York Court held that Prince’s works were infringing on Cariou’s copyright and consequently ordered that Prince’s unsold works be impounded and destroyed. The court found that the works were not transformative.

Prince appealed to the Second Circuit because he recognized that his works were very valuable and in April 2013, the Second Circuit reversed the original decision, finding that most of Prince’s work was indeed transformative to a reasonable observer, meaning that according to the

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<sup>32</sup> Cariou v. Prince, 714 F. 3d 694 – Court of Appeals, 2<sup>nd</sup> Circuit 2013

reasonable observer, they probably would recognize that it was Prince's work and Cariou and this amounted to fair use. Furthermore, the court found that the works had presented a new aesthetic which supported the defence of fair use.

The case was finally settled on March 18<sup>th</sup>, 2014.

#### **d) Blanch vs Koons<sup>33</sup>**

Jeff Koons who was a prominent visual artist decided to make a collage using various photographs for an exhibit commissioned by the Guggenheim. This collage included a copyright photograph taken by fashion photographer Andrea Blanch, which featured in the fashion magazine *Allure* and depicts a woman's legs reclining on a man's lap in an airplane cabin.

Koons cropped and re-oriented the photo before including it in a painted collage among other pairs of legs. Initially, the district court granted Koons summary Judgement, holding that the use of Blanch's photograph in his collage constituted fair use and not copyright infringement. The Court used the four-part test as highlighted in the Copyright act<sup>34</sup> and held that:

- 1) The purpose and character of Koons' use was "transformative"
- 2) Blanch's copyright work was banal rather than creative
- 3) Blanch's photograph was of limited originality
- 4) Blanch's photograph could not have captured the market occupied by Koons' work

The Court of Appeals went on to confirm the District Court's grant of summary judgement. Koons' work here was different from the issues in *Rogers vs Koons*' because Koons' collage uses Blanch's photograph to create a new work of art that had a unique meaning, message and character as opposed to being a complete reproduction. The Court of Appeals also recognised that using Blanch's picture was reasonable as the purpose of Koon's collage was to offer a critique of media and advertising culture.

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<sup>33</sup> Blanch v. Koons, 467 F. 3d 244 – Court of Appeals, 2<sup>nd</sup> Circuit 2006

<sup>34</sup> Section 107 of the U.S. Copyright Act, 17 U.S.C. §§ 101

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## 3.2 The United Kingdom<sup>35</sup>

The defence of fair use is known as fair dealing in this Jurisdiction but is subject to controversy as some scholars have argued that the doctrine offers no principles or vision and that it contains many barriers undermining its operation and that its purposes are too rigid in comparison to fair use.

The Copyright, Designs and Patents Act is the leading legislation that covers the defence of fair dealing and its provisions stipulate enumerated purposes that include:<sup>36</sup>

**a) Research or private study<sup>37</sup>**

The English courts have claimed that the research and private study must be for non-commercial purposes but this becomes problematic due to the difficulty in determining what is meant by commercial. The Information Society Directive states that one must look at the activity rather than the organizational structure and the means of funding of the establishment. Thus, in the case of market testing for a new drug, this may be considered as non-commercial as it aims at improving the general health of the public in the long term.<sup>38</sup>

**b) Criticism or review<sup>39</sup>**

For a dealing to fit into the category of criticism or review, the work would have to be made available to the public, be a fair dealing, and have sufficient acknowledgment of its source. In the case of *Silitoe vs McGraw-Hill Book Company*, no fair dealing was found when there was use of original summaries that were incorporated into issues of *Coles Notes*. The court found that the authors used long extracts without sufficient acknowledgement, and that including brief

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<sup>35</sup> Giuseppina D'Agostino, 'Healing Fair Dealing? A Comparative Copyright Analysis of Canada's Fair dealing to U.K. Fair Dealing and U.S. Fair use' McGill Law Journal (2008), Volume 53, Page 337-343

<sup>36</sup> Chapter 3 of the Copyright, Designs and Patents Act (U.K.), 1988, c. 48 [CDPA]

<sup>37</sup> Section 29 of the Copyright, Designs and patents Act (U.K.), 1988, c. 48 [CDPA]

<sup>38</sup> Section 42 of the Information Society Directive, 2001/29/EC

<sup>39</sup> Section 30 of the Copyright, Designs and patents Act (U.K.), 1988, c. 48 [CDPA]

commentaries under only some of the reproduced summaries was not enough to qualify as criticism or review.<sup>40</sup>

**c) Reporting current events<sup>41</sup>**

This has generally been established as news reporting by the case of *Pro Sieben Media Ag vs Carlton U.K. Television Ltd* where Pro Sieben had broadcast an interview on Taff with Mandy Allwood, a woman who was pregnant with octuplets. Carlton Television produced a current affairs program that used the 30 seconds interview and had copied the entire program. Pro Sieben Media sued Carlton claiming copyright infringement while Carlton argued that the extract constituted fair dealing as it was for the purposes of criticism or review or for reporting current events. Initially Carlton lost in the High Court but the court of appeal confirmed that criticism or review as a concept did not necessarily require criticism or review of the work being copied but could also cover social or moral implications of the work and ideas found within it and as such the Carlton program was allowed to claim fair dealing as a valid defence.<sup>42</sup> This case was a clear illustration of how difficult it is to define what makes up a “current event” and how undesirable it is to dismiss the validity of a fair dealing claim based on enumerated purposes without also weighing fairness.

Once the work has been proven to fall into an enumerated purpose, then it must be shown that the dealing was fair and the test of fairness is found in the case of *Hubbard vs Vosper*.<sup>43</sup> In this case Cyril Vosper who was a former member of the Church of Scientology, wrote a book that relied extensively on a book written by Lafayette Ronald Hubbard, the founder of the Church. The issue in dispute was whether Vosper’s use infringed Hubbard’s copyright. Lord Denning stated that whether a dealing is fair is a matter of fact and degree and all the circumstances of a particular case must be taken into account. This argument basically means that a court must weigh the extent and proportion of the work used in relation to the original work and uses made.

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<sup>40</sup> *Sillitoe vs McGraw-Hill Book Company*, [1983] FSR 545

<sup>41</sup> Section 30 of the Copyright, Designs and patents Act (U.K.), 1988, c. 48 [CDPA]

<sup>42</sup> *Pro Sieben Media AG vs Carlton UK Television Ltd*, [1999] 1 WLR 605

<sup>43</sup> *Hubbard vs Vosper*, [1972] 2 Q.B. 84

Especially since the courts needs to be flexible and considerations of public interest are of utmost importance according to the Humans Rights Act.

Guided by the judgment of Lord Denning, the fair dealing test was separated into the following factors:<sup>44</sup>

- 1) **Nature of the work** – If the work is unpublished, it will weigh against the defendant and furthermore where confidential works weigh more against fair dealing than official reports of public importance.
- 2) **How the work was obtained** – If the work was leaked or stolen then its use is unlikely to be fair. This point goes to point towards the fact that the work was also probably private
- 3) **Amount taken** – If a small amount of work has been taken then fair dealing is more likely to be favoured compared to using a large amount of work
- 4) **Uses made** – The more transformative the use of the work then the more it will favour fair dealing. Therefore, the more original the work is then the more likely it is that fair dealing will be allowed.
- 5) **Commercial benefit** – If the work is being used for commercial benefit, the less likely that fair dealing will be allowed because this would ultimately go against the interests of the creator of the work and it wouldn't benefit the public in the long term.
- 6) **Motives for the dealing** – The courts would employ an objective standard and decide whether the intention behind the use of the work is harmful or beneficial.
- 7) **Consequences of the dealing** – This mainly concerns how the dealing will affect the original works in the market. Therefore, if the new work acts as a substitute for the original then this would go against fair dealing.

In the English jurisdiction, there are not many reported cases regarding fair dealing and the infringement of Photography rights but the case of Fraser-Woodward Ltd vs BBC & Brighter Pictures Ltd<sup>45</sup> stands out in this respect. In this case the claimant company brought copyright infringement proceedings against the defendants for the use of 14 photographers of the Beckham's in a television programme. The defendants relied on the defences of fair dealing for

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<sup>44</sup> Hubbard vs Vosper, [1972] 2 Q.B. 84

<sup>45</sup> Fraser-Woodward Ltd vs BBC & Brighter Pictures Ltd, [2005] EWHC 472 (Ch)

the purposes of criticism within the Copyright Designs and Patents Act<sup>46</sup>. The issues were whether the use of the pictures was for the purpose of criticism and review, and if the dealing as fair which would allow for the use of the defence of fair dealing. The Court dismissed the claim in the respect of all but one of the photographs, which was for the purposes of criticism and review of other works namely the tabloid press and magazines. The rule in *Pro Sieben AG vs Carlton UK TV Ltd*<sup>47</sup> was used and it was established that the use was fair.

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<sup>46</sup> Section 30 of the Copyright, Designs and patents Act (U.K.), 1988, c. 48 [CDPA]

<sup>47</sup> *Pro Sieben Media AG vs Carlton UK Television Ltd*, [1999] 1 WLR 605

## Chapter 4 –Infringement of Photography Rights and Fair Dealing in Kenya

### 4.1 Infringement

Infringement of copyright occurs where a third party performs any of the exclusive acts granted to the author without the authority of the said author and the said acts do not fall within the exceptions and limitations provided for under section 26 of the Copyright Act<sup>48</sup>. These exclusive acts include the right to reproduction, distribution, communication to the public, broadcasting, making available, rental or hire, sale, adaptation and translation.<sup>49</sup>

Photographers in Kenya constantly experience situations where their pictures are used without their consent. This is subject to the Copyright Act which identifies the author as the first owner of the copyright and furthermore addresses the fact that being an owner of copyright infers particular rights such as economic rights. This dictates that the author has the right to gain economically from his works.<sup>50</sup>

In a majority of the cases, the people who use the picture without permission are able to gain financially from its use. The issue is that the photographers are not always remunerated for their work. This has been a growing trend in the industry and this section will look to show particular instances where this happened. It is important to note that these cases were settled out of court.

#### a) Mwarv vs Land Rover<sup>51</sup>

Mwangi Kirubi, who is better known as Mwarv, is a Kenyan photographer who has been in the business for 13 years and owns the firm Click PictureWorks Ltd. He had taken an image in

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<sup>48</sup> Section 26 of the Copyright Act of Kenya

<sup>49</sup> Section 35 of the Copyright Act of Kenya

<sup>50</sup> Section 31 of the Copyright Act of Kenya

<sup>51</sup> 'The Case Against Land Rover', Click, October 23 2015, <http://mwarv.click.co.ke/2015/10/23/the-case-against-land-rover/>

February 2014 during an expedition to the Amboseli National Park. During the drive, he stopped to take pictures of the Kilimanjaro and he captured an image of a Land Rover Defender right in front of the mountain.

The picture was then uploaded onto 500px, which is a website that photographers use to upload their pictures.

Following this in April 2015, he found out that somebody from Land Rover had taken the said picture from 500px and posted it on the Land Rover Facebook page without Mwarv's consent.

He had attempted to get in touch with Land Rover's representatives in Kenya to help establish what was going on. The response given to him was that the photo was part of a series that they had shot in 2014.

He then sought legal assistance and his legal team got into contact with the Land Rover's legal team in South Africa and informed them that there had been copyright infringement with evidence to prove the same.

Two months later the case was settled out of court and Mwarv had been informed that the individual responsible for the infringement had been let go.

#### **b) Mwarv vs Easy Taxi<sup>52</sup>**

Mwangi Kirubi was also involved in another copyright infringement case with another company known as Easy Taxi in 2015. At the time, the company claimed that they were the number one mobile taxi application available in Kenya.

In order to promote their application, they created an advertisement that was posted onto Facebook. Within the advertisement was an image of Nairobi that had been taken by Mwarv. Furthermore, the picture had been edited to mask the ownership of the pictures.

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<sup>52</sup>'Easy Taxi. Easy Steal', Click, February 9 2015, <http://mwarv.click.co.ke/2015/02/09/easy-taxi-easy-steal/>

They were able to gain profit from the use of his image without his consent and he wrote a blog post about it. Shortly after the blog post, the Easy Taxi management got in touch with him and admitted that they were on the wrong and wanted to resolve the matter.

There had been many attempts to have the case settled out of court but it didn't seem to come to anything so Mwarv decided that his legal team should pursue the matter in court.

Finally, in 19<sup>th</sup> August 2015, the two parties reached an agreement and were able to settle out of court.

### c) **Wangechi vs Tecno**<sup>53</sup>

Wangechi, a Kenyan rapper, discovered in June 2016 that Tecno, a cell phone manufacturer, was using her image in their campaign without her knowledge or consent. The campaign was done on social media sites Facebook, Instagram and Twitter, suggesting that it had a wide reach to many different people. The photograph was taken by Rogers Ouma, thus he owned the copyright to the picture.

Tecno was running a competition led by the hashtag #see9seeKenya and in order to compete, the competitors would have to post pictures or videos that they felt represent Kenya using the hashtag and share the pictures on Facebook, Twitter and Instagram. The top 3 would win a Tecno Camon 9 and that one out of the top nine winners would get a gift hamper and have their picture showcased at the campaign.

The photographer, Rogers Ouma, went on to upload the picture and it was posted on the campaign. However, it is important to note that, Tecno was making financial gain from the advertisement without providing remuneration to the creator of the picture, in this case Rogers Ouma.

After 8 weeks of the campaign running, Wangechi's image was pulled down but by then the damage would have already been done as many people would have already seen the picture and they would have gained their profits from the campaign.

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<sup>53</sup> 'Who owns the rights to a photo? The case of Wangechi vs Tecno', Hapa Kenya, <https://hapakenya.com/2016/09/02/who-owns-the-rights-to-a-photo-the-case-of-wangechi-vs-tecno/>

## 4.2 Fair Dealing

But apart from infringement cases, it is important to note just as done in Chapter 3, that there is also the defence of fair use in the Kenyan Jurisdiction.

Within the Copyright Act there is no defence of fair use, but instead the concept is referred to as fair dealing. It is a very small provision, which is more limited in scope when compared to fair use. It states that:

*Copyright in a literary, musical or artistic work or audio-visual work shall be the exclusive right to control the doing in Kenya of any of the following acts, namely the reproduction in any material form of the original work or its translation or adaptation, the distribution to the public of the work by way of sale, rental, lease, hire, loan, importation or similar arrangement, and the communication to the public and the broadcasting of the whole work or a substantial part thereof, either in its original form or in any form recognizably derived from the original; but copyright in any such work shall not include the right to control the doing of any of those acts by way of fair dealing for the purposes of scientific research, private use, criticism or review, or the reporting of current events subject to acknowledgement of the source.*<sup>54</sup>

Regardless of the limitation in reference to the Kenyan legislation on fair dealing, the Supreme Court of Kenya in the ruling of the case of the digital migration<sup>55</sup>, made reference to a Canadian case that adopts a test for fair dealing.

The test for fair dealing is broken down into six factors which seem to be similar to the factors in fair use.

The first factor is *the Purpose of the Dealing*, where the court has to determine whether the use is allowable. These allowable uses include research, private study, criticism, review or news reporting but it is important to note that these allowable uses should not have a restrictive interpretation which could result in the restriction of users' rights.<sup>56</sup>

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<sup>54</sup> Section 26(1)(a) of the Copyright Act of Kenya

<sup>55</sup> Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others [2014] eKLR

<sup>56</sup> CCH Canadian Ltd v Law Society of Upper Canada, 1 SCR 339

The second factor is *the Character of the Dealing*, where the court has to decide how the works was dealt with and how the dealing was undertaken. For example, one way to look at it would be to determine how many copies of the works were made.<sup>57</sup>

The third factor is *the amount of the Dealing*, where the court has to determine if the amount of work used was fair to the creator.<sup>58</sup>

The fourth factor is *the Alternatives to the Dealing*, where the court would have to resolve whether there were other alternatives that may have been used instead of said copyrighted work and these would have been taken into consideration.<sup>59</sup>

The fifth factor is *the Nature of the work*, where the court would have to establish if the work being published or unpublished is worth consideration in determining whether it may be viable for fair use.<sup>60</sup>

The sixth factor is the *effect of the dealing on the work*, where the court has to determine if the reproduced work will compete with the market for the original work and thus cancelling out the chance for fair use.<sup>61</sup>

But even though one may consider the fact that there are more factors present for fair dealing as compared to the factors present for fair use, the basic fact is that in the Kenyan jurisdiction, the law is still vague on the definition of fair use and to the fact as to whether the list provided is exhaustive. These were two of the issues that the Supreme Court of Kenya attempted to address through the CCH Canadian case with the use of the six-factor test to help decide the CCK case.

Those two issues relate to photography rights because it means someone might use the fair dealing defence in a scenario where it might not apply. Furthermore, the defence may be used by

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<sup>57</sup> CCH Canadian Ltd v Law Society of Upper Canada, 1 SCR 339

<sup>58</sup> CCH Canadian Ltd v Law Society of Upper Canada, 1 SCR 339

<sup>59</sup> CCH Canadian Ltd v Law Society of Upper Canada, 1 SCR 339

<sup>60</sup> CCH Canadian Ltd v Law Society of Upper Canada, 1 SCR 339

<sup>61</sup> CCH Canadian Ltd v Law Society of Upper Canada, 1 SCR 339

the court as a result of the loop holes in the law which could possibly leave many photographers vulnerable to exploitation and infringement.

Victor Nzomo, who argued that the Supreme Court shifted from fair dealing to fair use, recommends legislative or policy interventions which would assist in strengthening the fair dealing provision by giving three valid recommendations that include:

1. Expand the list of enumerated allowable purposes;
2. Codify the fair use approach in the CCK case;
3. Codify the two-step approach adopted in the CCH case.<sup>62</sup>

With the first option, it would mean that Kenya would distance itself from the Supreme Court's fair use approach in the CCK case<sup>63</sup> and decide to instead to expand the existing fair dealing framework. It should be noted that the current fair dealing is identical to the UK Copyright Act and thus we must recognize that there is a need to continuously review and update it for the new uses and new technologies over time that may overlap with the current legislation. This option would mean that the list would have to be expanded with both general and specific exceptions and limitations.

With the second option, Kenya would have to take into consideration the Supreme Court's fair use approach that was taken in the CCK case<sup>64</sup> and seek to codify it specifically by amending Section 26 of the Copyright Act, which highlights the nature of copyright in literary, musical or artistic works and audio-visual works<sup>65</sup>. This would mean that there would have to be more of an open-ended fair use system sanctioned by the court that would be very similar to section 107 of the American Copyright Act.<sup>66</sup> Under this option, it is important that there be a list of purposes that is open ended so that the analysis may apply to uses for purposes that may not specifically

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<sup>62</sup> "Victor B. Nzomo: In the public interest: How Kenya Quietly shifted from fair dealing to fair use", WIPO-WTO Colloquium Papers, 2016

<sup>63</sup> Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others [2014] eKLR

<sup>64</sup> Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others [2014] eKLR

<sup>65</sup> Section 26 of the Copyright Act of Kenya

<sup>66</sup> Section 107 of the U.S. Copyright Act, 17 U.S.C. §§ 101

be enumerated in the law. This option would allow for flexibility of the law when it comes to dealing with fair dealing cases.

With the third option, Kenya would have to adopt the two-step fair dealing approach that was highlighted in the CCH case<sup>67</sup> and aim to codify it by amending section 26 of the Copyright Act<sup>68</sup>. This option would be a hybrid of the two other options and would mean the implementation of a two-stage analysis where firstly, it has to be established whether the intended use would qualify for one of the permitted purposes and secondly, whether the use itself would meet the six factor fairness criteria as established by the CCH case<sup>69</sup>.

It would be sensible to agree with Victor Nzomo that the third option would be the most viable option as it puts together two very important features of the fair dealing and fair use approaches. Firstly, there is a kind of security feature when one involves the list of enumerated allowable purposes which would protect the rights of the copyright while simultaneously allowing there to be legal certainty within the legislation. Secondly, there would be a flexible and balanced factor analysis that protects the user rights which would address and protect public interest.

It is important that this exception be updated and continuously reviewed because some people may use it maliciously when in fact it may not actually apply. This can be seen in the *Associated Press vs Fairey*<sup>70</sup> case, where Fairey attempted to claim the defence of fair use when he knowingly knew that he had made money off of his adaptation of Mannie Garcia, whose picture was the basis of the poster and was not transformative in that it resembled the picture almost exactly.

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<sup>67</sup> CCH Canadian Ltd v Law Society of Upper Canada, 1 SCR 339

<sup>68</sup> Section 26 of the Copyright Act of Kenya

<sup>69</sup> CCH Canadian Ltd v Law Society of Upper Canada, 1 SCR 339

<sup>70</sup> *Shephard Fairey vs Associated Press*, No. 09-01123 (S.D.N.Y. 2010)

## Chapter 5 – Conclusions and Recommendations

### 5.1 Conclusions

Infringement is a very serious problem in Kenya especially towards Kenyan photographers who remain unaware of ways that they may use the law to protect themselves from it. Furthermore, they remain prone to misuse of the fair dealing defence which they also do not understand.

This however shouldn't be the case according to the Fairness Theory of Copyright which dictates that authors of art deserve to be given their dues, the Equity Theory which dictates that authors deserve to be paid uniformly according to the work that they put in and the Welfare Theory of Copyright which protects the interest of society as a whole in terms of copyright protection.

Furthermore, the Constitution of Kenya states that *the State shall support, promote and protect the intellectual property rights of the people of Kenya* which means that it is an important aspect within the Kenyan Jurisdiction.<sup>71</sup> This is the same sentiments within the American Constitution which grants Congress the enumerated power *to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.*<sup>72</sup>

The problem of infringement of these rights inevitably spills over to the defence of fair dealing in the Copyright Act, which is not a very definite and consistent legislation. It has many loopholes within it and would need to be refined in order for it to be effective. This can be done especially when you take account of the development of Copyright laws in the American, English and Canadian jurisdictions, with particular focus on the defence of fair dealing.

This can be achieved by following the stand that the Supreme Court had taken in the CCK case<sup>73</sup>, which would mean that the legislation would be made to be similar to the Canadian law on Fair dealing. A hybrid system would be developed as was recommended by Victor Nzomo which would have factors of both fair dealing and fair use to protect creators copyright.

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<sup>71</sup> Section 40(5) of the Constitution of Kenya

<sup>72</sup> Article I, Section 8, Clause 8, of the United States Constitution

<sup>73</sup> Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others [2014] eKLR

## 5.2 Recommendations

In order for Kenyan Photographers to protect themselves they would need to first be on the right side of the law. Therefore, they would need to go register their copyright which can be done at the Kenya Copyright Board (KECOBO), whose functions include the directing, co-ordination of the implementation of laws and international treaties and conventions relating to copyright<sup>74</sup>. This would provide the photographers with extra protection in a much faster way as opposed to going to court. The process of Registration involves the following for each individual picture:

- i) Collect Registration forms from the Kenya Copyright Board offices or from the website.**
- ii) Fill in the Relevant details in the forms**
- iii) Have the forms commissioned by a commissioner for Oaths**
- iv) Attach two original copies of the work**
- v) Deposit the prescribed registration fee in the bank account of the Kenya Copyright Board**
- vi) Present Bank Deposit Slip at the KECOBO reception, where a receipt of registration will be issued**
- vii) Original Certificate of Registration will be issued within 5-7 days from the date of registration. This period of time allows for rigorous process of verification of the copyright works offered for registration done by KECOBO's legal department.<sup>75</sup>**

Additionally, to enforce their copyrights, there are two ways that photographers can secure their rights even if the copyright may not necessarily have been registered.

The first is that one can prove that they are the owners of their pictures by adding copyright information to the Exchangeable image file format metadata of the photograph as this makes it easier to trace the picture back to the photographer if any unauthorized copies are being spread

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<sup>74</sup> 'Who we are', Kenya Copyright Board, <https://www.copyright.go.ke/about-us/who-we-are.html>

<sup>75</sup> Kenya Copyright Board, <https://www.copyright.go.ke/#>

around online and one can be recognized as the original copyright holder. This enables the photographer to prove that the picture is indeed theirs.

The second is that a complainant can only lodge a complaint in the event where a photographer does not have a contractual agreement with another party, in which case the photographer would lose his photography and copyrights as a result. Therefore, it is important for photographers to form contracts before they take picture which would establish their authorship.

In regard to fair dealing, as stated in the previous chapter, the best option would be adopting the two-step fair dealing approach that was established in the CCH case while simultaneously codifying it by changing section 26 of the Copyright Act<sup>76</sup>.

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<sup>76</sup> CCH Canadian Ltd v Law Society of Upper Canada, 1 SCR 339

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