Open Access and the Public Interest in Copyright

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Abstract

In this paper I argue that the open access movement is a later reaction to the failure of the public interest in copyright. The difference between the two is that while open access is voluntary the public interest is mandatory. Because the two concepts are related, it is important to interrogate the objectives and process of the public interest in copyright so that the lessons that may be learnt can be applied to the open access movement. Even though the wide recognition due to increased citation of open access literature is a major incentive for authors and publishers of open access journals, it is ultimately access to the information contained in open access journals that is of critical importance to developing countries in general and Africa in particular. The paper therefore interrogates the judicial and legislative mechanisms framed by human rights such as the freedom of expression that ensure access to information and examines how they apply to different open access models.
I. Introduction

Since information is the building block of knowledge, it is of such crucial importance that its availability or otherwise is of concern to all societies. Accordingly since copyright instrumentally affects how information is available, every society and its legal system must address how proprietary systems such as copyright are conceived sustained and elaborated. The ability of copyright to guarantee access to information is multidimensional. On one hand copyright protection is an incentive for creative minds to continue in their work ensuring that there are more works in the market with all the information that they bring. This is a crucial public interest. On the other hand, the economic rights of copyright owners provided by copyright protection can inhibit access because these economic rights restrict access to the copyright work except with the consent of the copyright owner. These rights which enable access barriers such as the price of the work and other permissions constitute the private interests of the author. It is also a public interest that in certain defined circumstances the public should have free access to copyright works because this sustains the innovation cycle which is important for societal renewal. It is therefore obvious that most legal systems must engage in a balancing exercise that ensures that the private interest of copyright owner is given as much priority as the public interest. Over the last couple of decades the private interest in copyright has been dominant such that at first blush most people believe that copyright is only about the interests of the copyright owner. That is why essentially because of the price of copyright works there is much restriction to copyright works as teachers libraries and other repositories of knowledge increasingly discover that they are unable to access information contained in copyright works.

It could have been predicted that one of the fundamental attribute of property which is the willingness of the property owner to enforce available economic rights would be a principal line of attack on the restrictions imposed by copyright protection. Open Access which is built around the relinquishment of material economic rights is therefore a later reaction against copyright protection but is limited in many circumstances. It is because Open Access did not bring an end to copyright that it is important to examine how the mandatory nature of the public interest in copyright expressed in human rights is able to overcome some of the limitations of the Open Access.

In the next part of the paper I examine copyright practices that lead to Open Access. In part three the paper examines the public interest in copyright and in part four discusses the public interest in copyright as a human right. Part five examines how collective management societies in Africa may affect Open Access, while concluding remarks are made in part six.

II. Copyright Practices and Open Access

The Budapest Open Access Initiative describes Open Access as follows:

“An old tradition and a new technology have converged to make possible an unprecedented public good. The old tradition is the willingness of scientists and scholars to publish the fruits of their research in scholarly journals without payment, for the sake of inquiry and knowledge. The new technology is the internet. The public good they make possible is the world-wide electronic distribution of the peer-reviewed journal literature and completely free and unrestricted access to it by all scientists, scholars, teachers, students, and other curious minds. Removing access barriers to this literature will accelerate research, enrich education, share the learning of the rich with the poor and the poor with the rich, make this literature as useful as it can be, and lay the foundation for

1 Available at www.soros.org/openaccess/read.shtml (last accessed 18 September 2008)
uniting humanity in a common intellectual conversation and quest for knowledge. For various reasons, this kind of free and unrestricted online availability, which we will call open access, has so far been limited to small portions of the journal literature...The literature that should be freely accessible online is that which scholars give to the world without expectation of payment. Primarily, this category encompasses their peer-reviewed journal articles, but it also includes any unreviewed preprints that they might wish to put online for comment or to alert colleagues to important research findings. There are many degrees and kinds of wider and easier access to this literature. By "open access" to this literature, we mean its free availability on the public internet, permitting any users to read, download, copy, distribute, print, search, or link to the full texts of these articles, crawl them for indexing, pass them as data to software, or use them for any other lawful purpose, without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself. The only constraint on reproduction and distribution, and the only role for copyright in this domain, should be to give authors control over the integrity of their work and the right to be properly acknowledged and cited.”

This description is expressive of the thrust of this paper. It highlights two types of access. The first is what we term ‘primary access’ whereby a third party has access to a scholarly work through a digital medium. His ability to deal with the work and enable third parties to have access to the work even in print is the second type of access which we regard as ‘secondary access.’ By secondary access this paper refers to all subsequent free uses of the information obtained by the primary access. Without secondary access it is doubtful if primary access satisfies Open Access. Thus a scholarly work may be freely available but not Open Access. Africa’s digital divide makes secondary access even more important than primary access. For a continent where a significant number of persons have no digital access, public repositories of knowledge like libraries, museums and research centres must be able to copy and store open access works for the public. Teachers in African educational institutions must also be able to provide these materials for their students in course packs etc who cannot get them otherwise. If secondary access is not possible or is restricted, open access does not mean much for Africa.

While the present Open Access movement largely concentrates on peer reviewed research articles, nothing conceptually prevents other scholarly works such as books from being part of Open Access. It is often argued that Open Access as presently understood is inappropriate for book because authors expect financial reward for their enterprise. And that copyright protection is ideal for books. While that may be largely true, the question of the public interest in access to works does not discriminate between peer reviewed articles and books. They are both needed to reproduce knowledge critical for Africa’s survival.

Traditionally authors transfer their copyright to publishers. This transfer enables publishers to enforce the copyright blocking access in a number of ways. Accordingly when authors retain their copyright expressly or by conduct they create opportunities for Open Access. Retaining their copyright may enable authors to consent to the deposit of their article in institutional repositories which is the so called green route to Open Access. Alternatively authors may choose to publish in Open Access journals that ensure that the work becomes universally available. Furthermore an author may self-archive his work which also ensures universal access.

Being able to transfer copyright by an author assumes that the author is owner of the copyright. While this seems fair, it is neither natural nor inevitable. To discover who owns copyright we need to examine the text of copyright legislations especially when the academic author is a public servant. For example section 7 of the Ghana Copyright Act 2005 provides that
This is a matter which African higher educational institutions need to grapple with to ensure that copyright for academic work does not lie with the institution. It is often prudent that an educational institution develops an intellectual property or copyright policy that defines who owns the copyright. Copyright ownership policy varies from university to university. For example, some universities retain copyright in the works created by their staff such as the University of Pretoria. Other universities such as Columbia University permit their staff to own copyright in their work except where substantial university resources are used to produce the work.

Assuming the academic author owns the copyright, it is important to examine different copyright practices to determine which ones are more suitable for primary and secondary access. There are at least four scenarios of copyright practices towards Open Access. The first model is where the author claims only an enforcement of his moral rights and allows all manner of commercial and non-commercial reuses. Since the moral rights of an author is to ensure that his work is attributed to him and it is not mutilated or distorted, this model ensures primary and secondary access. In this regard an example of a suitable licence is the Creative Commons ‘Attribution’ licence. This type of licence is often associated with research articles where authors are more concerned with their reputation and hence dissemination than profit. The attribution licence permits the work to be subjected to all kinds of uses including commercial reuse such that a third party can claim copyright for the repackaged work. The second scenario is when an Open Access journal allows the author to retain the copyright; permits educational reuse but restricts commercial use only with the permission of the author. The third model is where the author is allowed to retain the copyright while he transfers the commercial exploitation rights to the publisher. These rights range from exclusive distribution rights, a restriction of commercial reuse to non-exclusive licences. The author is therefore free to do what he

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2 See Article 4.1.1 of the Intellectual property Policy of the University of the Witwatersrand which provides that the university owns all intellectual property originated and developed by its employees in the course of their employment other than private work which is carried out under university rules governing private work. Private work is defined as work for private gain. Available at www.web.wits.ac.za/Academic/ResearchPolicy/ip.htm (Last accessed 17th September 2008)

3 “By longstanding custom, faculty members hold copyright for books, monographs, articles, and similar works as delineated in the policy statement, whether distributed in print or electronically. This pattern will not change. This copyright policy retains and reasserts those rights- In keeping with longstanding academic custom, the University recognizes faculty ownership of copyright in traditional works of authorship created by faculty such as textbooks, other works of nonfiction and novels, articles, or other creative works, such as poems, musical compositions and visual works of art, whether such works are disseminated in print or electronically.” Available at www.columbia.edu/cu/provost/docs/copyright.html (last accessed 18th September 2006)

4 “The University asserts copyright ownership in any work of authorship that is: (i) created with substantial use of University resources, financial support or non-faculty University personnel beyond the level of common resources provided to faculty; (ii) created or commissioned for use by the University; or (iii) created under the terms of a sponsored project where the terms of the sponsored project require that copyright be in the name of the University.” As above.

5 This licence and other licences can be obtained from www.creativecommons.org. This site enables an arrangement of the content of a licence that reflects the wishes of a copyright owner.

6 A good example is copyright policy of the Electronic Journal of Comparative Law (EJCL) www.ejcl.org which appears on all publication: “Readers are reminded that this work is protected by copyright. While they are free to use the ideas expressed in it, they may not copy, distribute or publish the work or part of it, in any form, printed, electronic or otherwise, except for reasonable quoting, clearly indicating the source. Readers are permitted to make copies, electronically or printed, for personal and classroom use.” See also the journal Script-ed www.script-ed.org which uses a Creative Commons Attribution-Non-Commercial-No Derivative Works 2.5 UK Scotland Licence that allows authors to keep their copyright, allows third parties to distribute and perform the work; requires the attribution of the author; prohibits the commercial exploitation of the work and permits the alteration and transformation of the work only with the permission of the original holder.
or she likes with the work as long as it is not a commercial use. The fourth model is well expressed in a Creative Commons Licence with a ‘Share-Alike’ clause. This type of licence not only restricts commercial reuse but goes further to ensure that the alteration and transformation of an open access article can only distributed with a licence that requires the derivative work is also available via open access channels.

Where therefore an Open Access journal requires only ‘attribution’ or restricts reuse for ‘educational purposes’ with a ‘Share Alike’ clause this is suitable for African states. Where commercial reuse is restricted then there is need to revert to copyright law to enable us determine what is commercial and what is non commercial. Determining this fact is a function of copyright law. The first point to make is that broadly all free uses mandated by exceptions and limitations in a copyright regime are non-commercial uses and therefore in the public interest because they are free uses which can occur irrespective of the wishes of the copyright owner. This point is further explored in the next part of the article.

It is important to point to the fact that the content of Open Access journals is not affected by the fact that it is an Open Access journal. Since an Open Access journal on its own is not an exception to copyright its content that is copyright infringement is not cured by the fact that it appears in an open access journal. Because infringement follows the content third party uses may also be liable for copyright infringement. The scope of exceptions and limitations may however play a critical role here since a robust interpretation of exceptions and limitations will validate an otherwise infringing content. In fact within a human rights framework, it is plausible to argue that the Open Access model is well within fulfilling the many public interests of copyright. Because Open Access facilitates access to information, it may well be argued that an Open Access journal that is freely available requiring only an attribution is without more covered by the public interest since it is not designed for commercial purposes and is designed to serve a research purpose.

This paper shall now turn to a consideration of the public interest in copyright which without doubt the Open Access facilitates. The aim of the next section is to examine how the public interest and its human rights expression can facilitate access beyond what Open Access in all its ramifications can achieve.

III. The Public Interest in Copyright

As stated above Open Access is a reaction to the access restrictions which are facilitated by copyright. It may also be imagined as a means of fulfilling the human rights of the public to have access to copyrighted works. Copyright which can simply be defined as the ability of a copyright owner to control how the public has access to his work is made up of the private and public interest. A copyright owner has exclusive rights representing his private interest which enable him to determine how third parties have access to the work. These exclusive rights include the right of reproduction, translation, public performance, distribution. The public interest represents the mechanisms by which the general public is allowed to have access to copyrighted works. The public interest is different from the public domain which includes the public interest and works which are not subject to copyright. The principal mechanisms for the public interest in a copyright regime are exceptions and limitations. The dichotomy between ideas and expression is also advanced as facilitative to the public interest. This is true since the fact that copyright protects only expressions and not ideas ensures that the public have access to the ideas that can sustain different

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7 The Nigerian Copyright Act, Chapter C 38 Laws of the Federation of Nigeria 2004 in section 1(1) lists the works eligible for copyright as: Literary works; musical works; artistic works; cinematograph works; sound recordings and broadcasts. Literary work is defined as including computer software.

8 See Gillian Davies Copyright and the Public Interest (Thomson Sweet and Maxwell London 2002) p. 7: “Copyright systems are recognized as having two-fold purpose: to accord exploitation rights to those engaged in literary and artistic production and to answer to the general public interest in the widest possible availability of copyright material.”
expressions. However it must be noted that without access to the work, a third party may never learn of the idea.

Why is public interest important? Broadly put, the public interest enhances the ability of society to engage in innovation and creativity. Without the information the building blocks of knowledge is lost and creativity is threatened.9

However it is often thought that copyright is only about the private interest. This is not true because copyright is as much about the private interest as it is about the public interest. This fact is however not reflected in national legislation and international treaties which govern copyright systems. In these regulatory systems, it is a fact that while author’s rights are declared to be exclusive, the public interest is non-exclusive and is found in exceptions and limitations which are couched and interpreted as privileges. A good source of these exceptions and limitations in the international intellectual property system is found in the Berne Convention for the Protection of Literary and Artistic Works. Other international treaties such as the Agreement on the Trade Related Aspects of Intellectual Property Rights (TRIPS) follow this pattern. A survey of African copyright legislations also shows this pattern. For example the Ghana Copyright Act 2005 recognises the exclusive rights of copyright owners in section 5 as follows:

“The author of any protected copyright work has the exclusive economic right in respect of the work to do or authorise the doing of any of the following: (a) the reproduction of the work in any manner or form, (b) the translation, adaptation, arrangement or any other transformation of the work, (c) the public performance, broadcasting and communication of the work to the public, (d) the distribution to the public of originals or copies of the work by way of first sales or other first transfer of ownership, and (e) the commercial rental to the public of originals or copies of the work.”

Section 19 of the Ghana Copyright Act declares a number of uses as free and not needing the consent of the copyright owner. These uses which represent the public interest are not declared as exclusive like the economic rights of the author. Mozambique follows this pattern.10 In chapter II the economic rights of a copyright owner is set out while in chapter III the permitted uses are also listed out. Nigeria also follows this pattern listing the private interests of the copyright owner in section 5 while the second schedule to the Copyright Act lists exceptions from copyright control.

This paper uses the copyright legislations of Ghana Nigeria and Mozambique to elaborate on the content of the exceptions and limitations in African copyright legislations. The three legislations differ in remarkable terms. One key difference is that while the Nigerian legislation begins with a general fair dealing provision and proceeds to list other permitted uses, the other legislations make no mention of the general fair use/dealing exception but defines the exceptions and limitations in great detail. The legislative style of Ghana and Mozambique ensures that the judiciary has little room for maneuver in determining permitted uses. Fair dealing has not been judicially explained or determined in Nigeria. One of the disadvantages of such a general rule is that it is discretionary and at the mercy of the judiciary. However It is generally regarded as permitted use that does not unduly impact on the economic potentials of a copyright owner. For example poking fun at a copyright owner by way of a parody may qualify as fair dealing just as

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10 See Law No. 4/2001 of February 27, 2001, Approving Copyright and Repealing the Code of Copyright Approved by Decree-Law No. 46,980 of April 27, 1966.
transforming a book to send a message may also qualify. Quoting a reasonable portion of a book or an article may also qualify as fair dealing. Copying a whole book or a whole article may not qualify since it may be regarded as depriving the copyright owner of just material reward. Because of the uncertainty of determining whether a use is fair and a potentially costly legal fight, copyright owners scare members of the public by declaring their use as unfair. This consequently introduces a form of litigation chill which serves to further strengthen the private interests of copyright owners. Another key difference is that the Mozambiquan legislation in Article III incorporates the three step test. This test found in international intellectual property treaties such as the Berne Convention for the Protection of Literary Works; the Trade Related Aspects of Intellectual Property Rights (TRIPS) of the WTO; to mention a few requires that limitations of or exceptions to rights granted to copyright owners must be in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author. The cumulative nature of this test ensures that exceptions and limitations and therefore the public interest are severely threatened. It is difficult to imagine which exception and limitation that does not for example impact on the income of an author. If the three step test is pursued to its logical conclusion, copyright will become an exclusive protection for authors. Even if it is not mentioned in their legislation, Nigeria and Ghana as well as other countries who are WTO members are bound by TRIPS such that the three step test applies to exceptions and limitations in their copyright regimes.

Specific exceptions and limitations in the three legislations under consideration include reproduction for private use; reasonable quotation from a work; news reporting; use of copyright work for judicial and administrative purposes and the reproduction and adaptation of computer programs. All three legislations make provision for the free use of copyright works for educational purposes. The Mozambiquan legislation allows a lawfully published work by way of illustration in publications broadcasts intended for educational purposes. Furthermore the copying of isolated articles lawfully published in a newspaper or magazine or short extracts from a book is allowed if it is done in accordance with custom and practice. Libraries and archival institutions may make a copy of a work that is lost destroyed or rendered unusable provided a copy cannot be found on reasonable terms and this is an isolated act. The library is also allowed to make a copy of the published article, short work or short extract of a work if in addition there is no possibility of a collective licence to pay for the work. The Ghanaian Copyright Act makes a similar provision. The Nigerian educational exceptions and limitations are more robust. For example public libraries can reproduce three copies of a book for the use of library if such a book is not available for sale in Nigeria.

In the digital environment the small window which exceptions and limitations present to the public is even more threatened. In a digital environment the reaction to widespread copying enabled by that environment lead to the development of technological tools that deny access to copyright works held in that medium. In addition all those who use technological devices to circumvent these access restricting technologies are liable to be convicted for criminal offences. Consequently if a technical distinction is not made these technological measures are enough in a digital environment to restrict the access granted by exceptions and limitations. This is possible because the technology is neutral unless configured to recognize legitimate access. In this regard, African countries are increasingly becoming state parties to the WIPO digital treaties and we must caution that must ensure that their copyright legislations require technological distinctions that recognize and enable exceptions and limitations.

11 See the WIPO Copyright Treaty (WCT) and the WIPO Phonograms Performances Treaty.
IV. The Public Interest in Copyright as a Human Right

One of the relatively unexplored issues about the public interest in copyright is the fact that copyright and other intellectual property rights are human rights. Article 15 (1) of the International Covenant for Social Economic and Cultural Rights provides that “

(1). The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”

In addition Article 27(1) of the Universal Declaration of Human Rights provides that

‘ (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”

When these two provisions are textually analysed, it may be asserted that the right to intellectual property requires an equal priority of the public and private interests. None is more important than the other. Therefore a copyright owner centred copyright is unfaithful to the equal priority dictated by the right to intellectual property. Thus the African copyright legislations examined above that privilege the private interests of a copyright owner do not fully conform to the right to intellectual property. The public interest in copyright must therefore be nurtured so that the obligation imposed by the right to intellectual property can be realized. One way of doing this is to recognize that the exceptions and limitations are of equal priority with the private interests of copyright owners. This can be done by treating the free uses as rights rather than as exceptions and limitations. The Canadian Supreme Court has blazed the trail in this regard in CCH v Law Society of Upper Canada. In this case the appellant Law Society maintained and operated the Great Library at Osgoode Hall in Toronto, a reference and research library with one of the largest collections of legal materials in Canada. The Great Library provides a request-based photocopy service for Law Society members, the judiciary and other authorized researchers. Under this ‘custom photocopy service’, legal materials are reproduced by Great Library staff and delivered in person, by mail or by facsimile transmission to requesters. The Law Society also maintains self-service photocopiers in Great Library for use by its patrons. In 1993, the respondent publishers commenced copyright infringement actions against the Law Society, seeking a declaration of subsistence and ownership of copyright in specific works and a declaration that the Law Society had infringed copyright when the Great Library reproduced a copy of each of the works. The publishers also sought a permanent injunction prohibiting the Law Society from reproducing these works as well as any other works that they published. The Law Society denied liability and counterclaimed that copyright is not infringed when a single copy of a reported decision, case summary, statute, regulation or a limited selection of text from a treatise is made by the Great Library staff, or one of its patrons on a self-service copier, for the purpose of research. The Supreme Court held inter alia that under s. 29 of the Canadian Copyright Act fair dealing for the purpose of research or private study does not infringe copyright. As stated above CCH court confirmed what in their opinion the fundamental attribute of copyright is. The Court approved its opinion in Théberge v Galerie d’Art du Petit Champlain Inc where this attribute is set out thus:

“The Copyright Act is usually presented as a balance between promoting the public interests in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator...The proper balance among these and other public policy objectives lies not only in recognizing the creator’s rights but in giving due weight to their limited nature...Excessive control be holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization.”

The CCH court formulated the concept that exceptions and limitations are user rights. According to the Court:

“Before reviewing the scope of the fair dealing exception under the Copyright Act, it is important to clarify some general considerations about exceptions to copyright infringement. Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however the fair dealing exception is perhaps more properly understood as an integral part of the Copyright Act than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception like other exceptions in the Copyright Act, is a user’s right. In order to maintain the proper balance between the rights of a copyright owner and user’s interests it must not be interpreted restrictively.”

Another way that the priority of public interest can be achieved is by conceptualizing the public interest in other human rights. For example the freedom of expression adequately reflects the public interest in copyright and can be applied in pursuit of access to copyright works. This is because freedom of expression is not just about being able to communicate as it is also about receiving ideas. As the Constitutional Court put in South African Broadcasting Corporation v The National Director of Public Prosecutions:

“Access to information and the facilitation of learning and understanding are essential for meaningful involvement of ordinary citizens in public life. This corresponds to the vision in the Preamble to the Constitution of laying the foundations for a democratic and open society in which government is based on the will of the people. It also reflects the foundational principle of democratic government which ensures accountability, responsiveness and openness.”

The South African Constitutional Court has demonstrated in Laugh It off Promotions v South African Breweries that using the freedom of expression can be a good way to constrain excessive private interest

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17 2007 (1) SA 523(CC). (Hereafter SABC).

18 Ibid, para 28.

19 2006 (1) SA 144 (CC).
centred intellectual property rights which in this case was the reach of the anti-dilution provisions of the South African Trade Marks Act. In this case a multinational company sought to restrain a small company that poked fun at the company by means of parody achieved through selling T-shirts that reproduce the logo of the company with a modified text of the trade mark that represents the company of exploiting black labour. The multinational company argued that the changed logo diluted its trade mark. The South African Constitutional Court rejected this contention and held that the parody was covered by the freedom of expression protected by s.16 of the Final Constitution. In effect the Court recognized that the freedom of expression can assist in an expansive interpretation of the right to intellectual property expressed in a trade mark. With respect to copyright, it is plausible that an understanding of copyright as including the receipt of ideas could justify a court mandating unrestricted access to copyright works. It is important to point out that universal access to copyright works will certainly be a breach of the right to intellectual property and the private interest of the copyright owner. The public interest demands that the uses for which it ought to be put are truly public purposes. In this regard it is not difficult to conceive of a court declaring that the teachers and knowledge repositories of educational institutions should have access to copyrighted works to ensure the education of its pupils. Teachers should be able to provide full text of articles and fundamental books in their course packs. Libraries and other archival institutions should also be able to reproduce copies of fundamental books for use by its patrons on the condition that they do not use them for commercial purposes.

In many African countries the combination of the dominance of foreign copyright works and a relatively unexplored regime of exceptions and limitations point to the need for a more nuanced interpretation of the public interest in copyright. Since Africa contends simultaneously with ensuring access and developing a local creative base there is need for a number of measures that balances the public and private interest in such a way that is beneficial for African countries. While it may argued that open access will ultimately encourage more scholarship and lead to the creation of an indigenous group of authors, it is worth remembering three salient facts. First as stated above copyright owners also have the human right to receive benefits from their work and the incentivizing function this plays. Secondly academic authors who are paid public servants are not the only authors who are participants in open access. Thirdly certain institutional arrangements such as collecting societies in Africa may channel some of resources obtained through copyright protection into national social and cultural renewal. Introducing collective management of copyright and mandating a blanket licensing is therefore one way that the private and public interests can be balanced. I shall explore this option in more detail in the next section.

Given our examination of the public interest in copyright there is no doubt that it can be of considerable assistance to Open Access. First it may be possible to regard Open Access journals as facilitating the public interest such that its content may be regarded as fair use/dealing in the even of alleged copyright infringement. Furthermore In cases where there is no secondary access, the public interest can ensure that access is guaranteed. Thus for educational institutions the public interest will guarantee access in line with our discussions above.

V. Open Access the Public Interest and Collective Management Societies in Africa

In many African countries collecting societies exist to act for copyright owners in licensing their content and enforcing their copyright. Collecting societies which are state mandated or recognized monopolies that represent copyright owners interests are of three types in Africa. The first type is private institutions
licensed by the state to act for authors. Examples of this type include the collecting societies in South Africa: SAMRO, DALRO and SARRAL. The second type can be described as semi-public in the sense that they are private organisations that are managed with the compulsory and active involvement of the State. This is usually achieved by a requirement of a single institution for each copyright genre, a compulsory membership of the collecting society for all qualifying authors and the membership of the governing body of the collecting society by a government representative. Examples of this type of collecting society can be found in Nigeria and Ghana. The third type of collecting society is a mandatory society which also acts as the national copyright office. Examples include the BSDA which is the Senegalese Copyright society, BUTEDRA which is the Togolese Copyright Office and other copyright offices of civil law countries. Membership of the copyright society is mandatory for all authors who transfer their rights to the Copyright Office and therefore lose the right to negotiate licences and grant rights to third parties. In such a circumstance the effects of placing a work in an open licence has not received extensive consideration. Assuming an author who is a member of a collecting society publishes in an Open Access journal that uses a Creative Commons “Attribution” Licence, does it preclude the collecting society from placing the work in their repertoire? The answer would seem to be in the positive since the intention of the author is only to assert a moral right. The same consideration will also apply in a situation where a share alike clause is in the license and it is difficult to see what the collecting society will be licensing. Perhaps it is only when commercial use is restricted for the author or the publisher that collecting societies can become involved. The collecting society will then license the work to third parties.

VI. Concluding Remarks

This paper has demonstrated that the Open Access is a manifestation of the public interest in copyright. To strengthen Open Access in Africa it is important that a number of measures are introduced or reinforced. First African higher educational institutions should encourage faculty to conceive and maintain Open Access journals. In this way research relevant to Africa will also be available to the continent. Secondly if Open Access should guarantee secondary access as a response to Africa’s digital divide, Open Access participants should grapple and understand copyright practices that ensure this. Thirdly universities and other higher educational institutions must design or renegotiate copyright policies that allow original authors to own copyright while publishers should increasingly also authors to keep their copyright. Fourthly Open Access activists should not feel complacent because they have put the material out there. Care should be taken to ensure that their content does not infringe copyright just as it is important to note that they must engage in the battle for the public interest being fought in legislatures and court rooms. An increase the content of the public interest in copyright is supportive of an expansive Open Access.