

THE CASE FOR INTEGRATING COPYRIGHT LAW WITH THE CONSTITUTIONAL RIGHT TO EDUCATION IN NIGERIA AND DEVELOPING COUNTRIES

BY: SAMUEL W. UGWUMBA *

ABSTRACT

The commitment to ensure access to education, particularly in developing countries, is a developmental imperative. Lack of education is life-threatening and, if there was any doubt, this is clear from the numerous studies that show a positive correlation between education and other development components.

The sad reality, however, is that available data shows a growing crisis of access to education in developing countries exacerbated by socio-economic inequalities and legal obstacles. Particularly, the regime of copyright law, as a market institution, poses challenges to the achievement of education, a non-market good and a developmental imperative. Yet, there is very little analysis in many DCs on the interface between copyright and access to education, preferring instead to see the regime of copyright on a narrow legalistic normative lens that privileges wealth-maximization and undermines the value of access to education. Nigeria is a case study.

In this paper, the approach adopted to address this crisis of access to education in DCs, and particularly in Nigeria, is a novel one in as much as it seeks to integrate the

* LLB, PhD (University College Cork). Special thanks to Lilian and Dr. Darius Whelan for their encouragements during the writing of this piece. As always, I dedicate this article to the loving memory of my cousin, Ngozi Stephen. All errors and views expressed herein are solely those of the author.

The Case for Integrating Copyright Law with the Constitutional Right to Education in Nigeria and Developing Countries **101**

constitutional right to education with copyright. By interacting with external norms imbedded in the constitution--and given the supreme status of the constitution--copyright can yield to concerns of access to education. However, there are challenges to integrating copyright with the constitutional right to education and will be examined in this paper.

When people don't have free access to books, then communities are like radios without batteries.

____ Anne Lamott ____

Abstract.....	100
I. Introduction.....	102
II. Access to Education in Nigeria and Beyond: Issues and Promises to Keep.....	109
A. Nigeria at a Glance: History and Socio-Economic Realities.	109
B. The State of A2E in Nigeria.....	112
1. Why A2E: A Special Case for Developing Countries.....	112
2. Is there A Fundamental Right to Education Under Nigerian Law?.....	122
3. A2E in Nigeria: Beyond the Law	132
III. A2E in India and Beyond.....	145
A. The Right to Education: A Foundational Commitment.	146
1. India	146

2. The Right to Education in India: Connecting ESC and CP Rights.	148
B. Other Developing Countries with the Right to Education: South Africa & Brazil.....	153
IV. Copyright and A2E	157
A. “To Copy a Book is a Right”	159
B. Delhi University Photocopy Case: A Clash of Knowledge Seekers and Knowledge Dealers.	165
V. Commentary: Paving the Way for A2E	170
VI. Conclusion: Challenges on Integrating Copyright with the Constitutional Right to Education?	176

I. INTRODUCTION

Education is a development imperative. Its social, economic, and human development value can hardly be exaggerated. The sacrosanct importance of education is underscored by global, regional, and national initiatives as well as efforts aimed at achieving universal education: international human rights instruments, constitutional rights, and UN Sustainable Development Goals (SDGs) are laudable examples. Together these efforts serve to reaffirm, if ever there was any doubt, that education remains a powerful tool to foster development.

This goal of education, though universal, is particularly pressing for developing countries (DCs) for obvious reasons.¹ The literacy rate in some of these countries is discouraging and alarming. For example,

¹ The data presented below are for African DCs, but the same pattern is observable in many South Asian DCs. See *Literacy Rate, Adult (% Ages 15 and Older)*, UNDP: HUMAN DEVELOPMENT REPORTS, <http://hdr.undp.org/en/indicators/101406> [<https://perma.cc/TDE3-5NLF>].

*The Case for Integrating Copyright Law with the
Constitutional Right to Education in Nigeria and
Developing Countries* **103**

according to the UNESCO Institute for Statistics (UIS), the literacy rate of South Sudan's population for persons aged 15-24 years old was a mere 47.90% in 2018; Mali's was 50.13% in 2018; and Senegal's was 69.48% in 2017.² Even though, in general, there has been a steady increase of literacy rates in DCs over the years, the literacy proficiency level might still be an issue, i.e. whether a primary student from a DC has a comparable literacy proficiency level with a developed country's student of same standing. Given that the quality of education is a significant factor that affects literacy proficiency level, it is feared that, in many cases, the outlook negative since many DCs struggle with the material and financial resources to invest in quality education.³ In fact, the UIS may not even represent the accurate picture of literacy in DCs. Illiteracy is a problem but so is functional illiteracy.⁴ This is problematic because illiteracy has huge economic and social developmental costs.

This issue of (functional) illiteracy is a result lack of access to education (A2E). And even when there is A2E, the quality may be poor. Data from UIS shows the percentage

² The United Nations Educational Scientific and Cultural Organization Institute for Statistics [hereinafter UNESCO Institute for Statistics], *Education: Literacy Rate*, SUSTAINABLE DEVELOPMENT GOALS, <http://data.uis.unesco.org/index.aspx?queryid=166#%22%20http://data.uis.unesco.org/index.aspx?queryid=166> [<https://perma.cc/39KE-F4T2>].

³ Recently a Ghanaian teacher had to resort to drawing Microsoft Word on a blackboard to teach students who had to sit for a national examination that includes questions on ICT, as the school did not have a computer since 2011. See Gianluca Mezzofiore, *New Word Order: Ghanaian Teacher Uses Blackboard to Explain Software*, CNN (Mar. 1, 2018, 2:26 PM GMT), <https://edition.cnn.com/2018/03/01/africa/ghana-teacher-blackboard-intl/index.html> [<https://perma.cc/X7HG-A6CX>].

⁴ Even when someone is not illiterate, their writing and readings skills may not be adequate to enable the person carry out important daily tasks. This is functional illiteracy. See DR ANTHONY CREE ET AL., *THE ECONOMIC & SOCIAL COST OF ILLITERACY: A SNAPSHOT OF ILLITERACY IN A GLOBAL CONTEXT* 3 (2012).

of the population age twenty-five and older, that have at least completed their primary education in DCs is dwarfed by the same statistics from developed countries.⁵ In 2017, this rate was 95.87% for the same demographic Belgians, whereas Mali recorded 15.62% in 2018.⁶ Similar disparities between developed countries and DCs are replicated in other areas. For example, based on UIS data, the dropout rates in primary education for both sexes in Austria, Denmark, and Italy in 2014 were 0.57%, 0.23%, and 0.82% respectively; whereas in Cameroon, Burkina Faso, and Senegal, they were 61.97%, 31.15%, and 39.67% respectively in 2017.⁷ Similarly, wide gaps emerge between the mean years of schooling for developed countries and DCs, as shown by the UNDP human development report (HDR).⁸ Furthermore, in DCs there is a gender imbalance in A2E, wherein females have substantially less access than males.⁹ Clearly, A2E is a problem in DCs, and quality education even more so.

Of course, the statistics do not show, nor should they be interpreted to show, that African DCs place little value on education or fail to understand its developmental importance. On the contrary, the UNESCO statistics concerning government expenditures on education show that

⁵ UNESCO Institute for Statistics, *Educational Attainment Rate, Completed Primary Education or Higher, Population 25+ Years (Both Sexes)*, SUSTAINABLE DEVELOPMENT GOALS, <http://data.uis.unesco.org/index.aspx?queryid=121> [https://perma.cc/39KE-F4T2].

⁶ *Id.*

⁷ UNESCO Institute for Statistics, *Education: Drop-Out Rate in Primary Education*, SUSTAINABLE DEVELOPMENT GOALS, <http://data.uis.unesco.org/index.aspx?queryid=166#%22%20http://data.uis.unesco.org/index.aspx?queryid=166> [https://perma.cc/4CS8-3Q4C].

⁸ *Mean Years of Schooling (Years)*, UNDP: HUMAN DEVELOPMENT REPORTS, <http://www.hdr.undp.org/en/indicators/103006> [https://perma.cc/228J-8YFY].

⁹ *Mean Years of Schooling, Female (Years)*, UNDP: HUMAN DEVELOPMENT REPORTS, <http://hdr.undp.org/en/indicators/24106> [https://perma.cc/G4M8-9U5N]; *Mean Years of Schooling, Male (Years)*, UNDP: HUMAN DEVELOPMENT REPORTS.

The Case for Integrating Copyright Law with the Constitutional Right to Education in Nigeria and Developing Countries **105**

these countries place commendable value on education, although in some cases the education expenditure falls short of the UNESCO benchmark.¹⁰ There is ample reason for DCs to be enormously concerned about access to quality education. For instance, the UNDP HDR data shows a positive correlation between education and other components of development.¹¹

Given this developmental importance of access to quality education, one might expect an outpouring of literature on the relationship between copyright and A2E in DCs. After all, copyright is concerned with the governance of cultural works, of which learning materials are a significant part. Crucially, if the global South is to enhance A2E, thereby promoting development, all areas affecting A2E—legal, socio-economic, and cultural—should be critically addressed. Unfortunately, for Nigeria in particular, there is almost no analysis on the role of copyright in facilitating A2E. When such an issue is explored, it is mainly touched upon in passing within the broader framework of access to knowledge (A2K).¹² Several reasons

¹⁰ UNESCO Institute for Statistics, *Education: Expenditure on Education as a Percentage of Total Government Expenditure*, SUSTAINABLE DEVELOPMENT GOALS, <http://data.uis.unesco.org/index.aspx?queryid=166#%22%20http://data.uis.unesco.org/index.aspx?queryid=16> [<https://web.archive.org/web/20200920172954/http://data.uis.unesco.org/index.aspx?queryid=166>]; see also World Education Forum 2015, *Education 2030: Incheon Declaration and Framework for Action*, 9, ED-2016/WS/28 (May 21, 2015) (recommending that governments commit 15% to 20% of the national budget to education).

¹¹ For instance, there is a correlation between mean years of schooling and the Human Development Index (HDI) rank of countries. See *Mean Years of Schooling (Years)*, UNDP: HUMAN DEVELOPMENT REPORTS, <http://hdr.undp.org/en/indicators/103006> [<https://perma.cc/6PDG-T2XA>].

¹² *Contra* ANDREW RENS ET AL., PROPERTY, EDUCATION AND ACCESS TO KNOWLEDGE IN SOUTHERN AFRICA 28 (2006); see ACCESS TO KNOWLEDGE IN AFRICA: THE ROLE OF COPYRIGHT 1–17 (Chris Armstrong et al. eds., 2010); cf. SUSAN I. ŠTRBA, INTERNATIONAL

can be attributed to this lack of analysis, but four are particularly dangerous. First, in Nigeria, there is a legalistic normative approach to copyright law and policy which focuses on copyright enforcement, and how everyday practices fall short of norms in copyright law.¹³ Second, the prevailing understanding of copyright law in Nigerian scholarship and policy is mainly economic, and this is not surprising given the creative industries’ interests informing copyright policy and scholarship. Third, there is no reported judicial decision that discusses or interrogates the interface between copyright and human rights or development. Most copyright judicial decisions are concerned with either copyright infringement of musical works or book piracy.¹⁴ Fourth, A2E, if and when it is discussed, is often analyzed within the context of state funding, i.e. the problem of poor A2E is a matter for the government which can only be addressed by increasing the budgetary allocation of education. While increased government funding will ensure

COPYRIGHT AND ACCESS TO EDUCATION IN DEVELOPING COUNTRIES: EXPLORING MULTILATERAL LEGAL AND QUASI-LEGAL SOLUTIONS (2012) (focusing broadly on copyright and access to education, but not analyzing any specific DC).

¹³ Jeremy de Beer & Chidi Oguamanam, *Open Minds: Lessons from Nigeria on Intellectual Property, Innovation, and Development*, in OPEN DEVELOPMENT: NETWORKED INNOVATIONS IN INTERNATIONAL DEVELOPMENT 249, 259 (Mathew L. Smith & Katherine M.A. Reilly eds., 2013) (noting that “the tone and approach to IP that the [Nigerian Copyright Commission] champions in Nigeria issues from an unquestioned belief that a strict IP regime... is the panacea to economic and social development challenges in the polity”); Wahab Akanmu Aboyade et al., *Copyright Infringement and Photocopy Services Among University Students and Teachers in Nigeria*, 8(1) INT’L J. ARTS & SCIS. 463, 471 (2015) (focusing largely on the inadequacy of copyright enforcement in Nigerian higher institutions without paying attention to concerns of access to education).

¹⁴ *Copyright Cases in Nigeria*, NIGERIAN LAW INTELLECTUAL PROPERTY WATCH, <https://nlipw.com/copyright-cases-nigeria/> [<https://perma.cc/4JLF-93ZU>].

*The Case for Integrating Copyright Law with the
Constitutional Right to Education in Nigeria and
Developing Countries* **107**

improved A2E for many Nigerian youths, the COVID-19 pandemic and falling oil prices have shown the limits of relying solely on state funding to address concerns of A2E.¹⁵ Even before the COVID-19 pandemic, the budgetary allocation to education as a percentage of the national budget has continued to fall in succeeding years.¹⁶ Accordingly, even though state funding is an indispensable package, there is a need to look beyond this funding to solve the crisis of poor A2E in DCs.

This article, therefore, provides pathways to solving the crises of poor access to learning materials (ALM) and A2E generally by integrating copyright law with the constitutional right to education, an established economic, social, and cultural (ESC) right in various national constitutions. This is a novel approach. Existing approaches have focused on limitations and exceptions (L&Es) in copyright law informed by A2K theory, and international human rights.¹⁷ These are interesting and valuable

¹⁵ Mariano Cortes et al., *Nigeria in Times of Covid-19: Laying Foundations for a Strong Recovery*, NIGERIA DEV. UPDATE, June 2020, at 2 (estimating that Nigeria's economy would likely contract by 3.2% due to falling oil prices); Amos Hochstein, *The World Isn't Ready for Peak Oil*, THE ATLANTIC (June 28, 2020) (noting that Nigeria's oil exports account for more than half of government revenue and that "the price decline means that Nigerian oil is currently being traded at prices lower than it can be produced"), <https://www.theatlantic.com/ideas/archive/2020/06/were-not-ready-transition-away-oil/613621/> [<https://perma.cc/X758-EUKD>].

¹⁶ See BUDGIT, PUBLIC EDUCATION FINANCING: ISSUES AND RECOMMENDATIONS 7 (2018).

¹⁷ See Ruth L. Okediji, *Intellectual Property in the Image of Human Rights: A Critical Review*, in FRAMING INTELLECTUAL PROPERTY LAW IN THE 21ST CENTURY 234, (Rochelle C. Dreyfuss & E. Siew-Kuan Ng eds., 2018) (showing there are challenges with framing copyright in the language of human rights); Amy Kapczynski, *Access to Knowledge: A Conceptual Genealogy*, in ACCESS TO KNOWLEDGE IN THE AGE OF INTELLECTUAL PROPERTY (Gaëlle Krikorian and Amy Kapczynski eds., 2010) (attempting to place A2K on a theoretical footing); Jack M.

perspectives, but the constitutional approach can provide strong reinforcements given that the constitution is the supreme law of the land.

Section 2, therefore, inquires whether there is an enforceable right to education under the Nigerian Constitution. Furthermore, this section notes that the topic of ALM is part of a complex mix of institutional, economic, and legal issues. These issues and their resulting effect, poor ALM, are not peculiar to Nigeria. The patterns are similar and observable in many DCs, particularly in India and Brazil as discussed below. Aided by technology and black markets, students in these DCs have responded to the crisis of ALM by adopting expedient measures—photocopying, downloading, purchasing pirated copies, and shadow libraries—that trespass the boundaries of copyright law. Publishers on the other side have responded to these measures by aggressively seeking increased enforcement and punitive damages for copyright infringement. There are many ways to unpack this narrative, but the sad reality is that given reduced government spending budget for education and the weak purchasing power of students in Nigeria and other DCs, copyright law and policy has failed to prioritize A2E for students in these countries. Section 3 analyzes the interface between copyright law and A2E and points to pathways by which copyright can enhance A2E. Section 4 concludes.

Balkin, *What is Access to Knowledge*, BALKINIZATION (Apr. 21, 2006, 7:05 PM), <https://balkin.blogspot.com/2006/04/what-is-access-to-knowledge.html> [<https://perma.cc/JEE3-SSG9>]. *But see* Ruth L. Okediji, *IP Essentialism and Authority of the Firm*, 117 YALE L.J. POCKET PART 274 (2008) (discussing the limits of A2K theory in factoring concerns of development); Amy Kapczynski, *Linking Ideas to Outcomes: A Response*, 117 YALE L.J. POCKET PART 289, 291 (2008) (accepting that “A2K is oriented more towards the terms of IP law than to discourses of development”).

II. ACCESS TO EDUCATION IN NIGERIA AND BEYOND: ISSUES AND PROMISES TO KEEP.

A. *Nigeria at a Glance: History and Socio-Economic Realities.*¹⁸

The issue of A2E in Nigeria, as with any other country, needs to be examined in its proper socio-economic and historic contexts.

Nigeria is a country located in West Africa with the Gulf of Guinea in between its borders with Benin in the west and Cameroon in the east while also having borders with Niger and Chad in the north and east respectively. A federal republic, it gained independence on October 1, 1960 after almost a century under British colonial rule.¹⁹ English is the official language with Igbo, Hausa, and Yoruba being the three main ethnic languages, although there are more than 350 indigenous languages.²⁰ With a population of more than 190 million, it is easily the most populous country in Africa and seventh globally.²¹ Demographically, 43% of the population are under the age of fifteen; almost 20% of the population fall within the age bracket of 15-24 years, and 31% fall within the age bracket of 25-54 years.²² While the age structure and population growth of Nigeria might prove

¹⁸ See generally JOHN CAMPBELL & MATTHEW T. PAGE, *NIGERIA: WHAT EVERYONE NEEDS TO KNOW* (2018); RICHARD BOURNE, *NIGERIA: A NEW HISTORY OF A TURBULENT CENTURY* (2015); ARTHUR AGWUNCHA NWANKWO, *THE POWER DYNAMICS OF THE NIGERIAN SOCIETY: PEOPLE, POLITICS AND POWER* (1988).

¹⁹ *Nigeria Profile—Timeline*, BBC NEWS AFRICA (Feb. 18, 2019), <http://www.bbc.co.uk/news/world-africa-13951696> [<https://perma.cc/9HMC-4AY7>].

²⁰ See CAMPBELL & PAGE, *supra* note 18, at 9.

²¹ *Id.* at 5, 66.

²² *The World Factbook: Africa – Nigeria – People and Society*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/Library/publications/the-world-factbook/geos/ni.html> [<https://perma.cc/4SNC-VSRR>].

challenging when realizing the economic benefits of the demographic dividend, they clearly show the need for facilitating A2E.²³

Economically, Nigeria is Africa's largest oil-producer and is the sixth largest globally.²⁴ Although its economy is petroleum-based, there have been efforts in recent years to diversify.²⁵ When judged by the economic indicator of Gross Domestic Product (GDP), either in nominal terms or Purchasing Power Parity (PPP), Nigeria is Africa's largest economy.²⁶ The GDP (PPP) and GDP (nominal) for 2017 are 1.1 trillion USD and 376 billion USD respectively.²⁷ In comparison to the world, this places Nigeria 24th for GDP (PPP) and 187th for real GDP growth rate.²⁸ Given Nigeria's population, GDP (PPP) per capita is

²³ Johns Hopkins, *Country Highlights: Nigeria*, DEMOGRAPHIC DIVIDEND: INVESTING IN HUMAN CAPITAL, <http://www.demographicdividend.org/countryhighlights/nigeria/> [https://perma.cc/U47P-YNE7].

²⁴ CAMPBELL & PAGE, *supra* note 18, at 172.

²⁵ H.E. Yemi Osinbajo, *Reviving Nigeria's Economy Through Economic Diversification*, BROOKINGS (Jan. 25, 2019), <https://www.brookings.edu/blog/africa-in-focus/2019/01/25/reviving-nigerias-economy-through-economic-diversification/> [https://perma.cc/B62S-Q9WL].

²⁶ Kate Whiting, *5 Facts to Know About Africa's Powerhouse - Nigeria*, WORLD ECONOMIC FORUM (Aug. 9, 2019), <https://www.weforum.org/agenda/2019/08/nigeria-africa-economy/#:~:text=Last%20year%20C%20Nigeria's%20economy%20was,2%20million%20barrels%20each%20day> [https://perma.cc/WN74-U6T6].

²⁷ *World Economic Outlook Database April 2018*, INT'L MONETARY FUND, <http://www.imf.org/external/pubs/ft/weo/2018/01/weodata/index.aspx> [https://perma.cc/6CL2-VL46].

²⁸ *The World Factbook: Country Comparison - GDP (Purchasing Power Parity)*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/Library/publications/the-world-factbook/rankorder/2001rank.html#ni> [https://perma.cc/E2UD-3Q2S]; *The World Factbook: Country Comparison - GDP-REAL GROWTH RATE*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/Library/publications/the-world-factbook/fields/210.html#NI> [https://perma.cc/3WB5-8M2W].

*The Case for Integrating Copyright Law with the
Constitutional Right to Education in Nigeria and
Developing Countries* **111**

5900 USD placing 164th globally.²⁹ Although 5900 USD is not a huge amount, it will certainly provide for basic needs, given the cost of living in Nigeria. But of course, it would be a mistake to translate the GDP data literally without any context of a population's lived experiences since GDP does not tell us anything about the distribution of wealth.

This is exactly the case of Nigeria where the GDP data does not translate into economic prosperity for a majority of the population. The poverty rate is alarming and depressing. According to a World Bank report, the number of people living in extreme poverty in Nigeria, defined as those people living on less than 1.90 USD a day, has only increased.³⁰ In 1990, this population was 51 million, yet by 2013 it increased to 86 million.³¹ According to World Poverty Clock (WPC), which provides real-time poverty estimates, 102.4 million people in Nigeria currently live in extreme poverty, i.e., 50% of the total population.³² Indeed, the WPC confirms that poverty is rising in Nigeria which means that *vis-a-vis* the UN SDG Goal 1 (ending extreme poverty, in all forms everywhere, by 2030), Nigeria is regressing rather than making *any* progress.³³ Effectively,

²⁹ *The World Factbook: Country Comparison - GDP Per Capita (PPP)*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/Library/publications/the-world-factbook/rankorder/2004rank.html#ni> [<https://perma.cc/39RD-XYUN>].

³⁰ WORLD BANK, *ATLAS OF SUSTAINABLE DEVELOPMENT GOALS 2017: FROM WORLD DEVELOPMENT INDICATORS 16–17* (Elizabeth Purdie et al. eds., 2017).

³¹ *Id.* at 2–3.

³² *World Poverty Clock*, WORLD DATA LAB, <https://worldpoverty.io/map> [<https://perma.cc/MC8G-KPSR>] (originally accessed May 24, 2020, 4:07 PM).

³³ G.A. Res. A/70/1, *Transforming Our World: The 2030 Agenda for Sustainable Development*, ¶ 24 (Sept. 25, 2015). For the relationship between the SDGs and human development, see Pedro Conceição, *Human Development and the SDGs*, UNDP: HUMAN DEVELOPMENT REPORTS (June 24, 2019),

Nigeria is the world poverty capital.³⁴ Though heart-breaking, this is not surprising given the country's abysmal record on corruption, insecurity, and mismanagement. The effects of these are palpably clear: failed healthcare and poor access to quality education.³⁵ This creates a feedback loop in the system in which more poverty is created, which in turn exacerbates the failures in health care and lack of A2E.

B. The State of A2E in Nigeria

1. Why A2E: A Special Case for Developing Countries

What is the value of education?³⁶ The question is not whether education has value, but rather the question is an

<http://hdr.undp.org/en/content/human-development-and-sdgs>
[<https://perma.cc/B8LS-7489>].

³⁴ Yomi Kazeem, *Nigeria has Become the Poverty Capital of the World*, QUARTZ AFRICA (June 25, 2018), <https://qz.com/africa/1313380/nigerias-has-the-highest-rate-of-extreme-poverty-globally/> [<https://perma.cc/6PWE-ZDKR>]; Homi Kharas et al., *Future Development: The Start of a New Poverty Narrative*, BROOKINGS (June 19, 2018), <https://www.brookings.edu/blog/future-development/2018/06/19/the-start-of-a-new-poverty-narrative/> [<https://perma.cc/WQ7J-G9Z6>].

³⁵ *Why Nigeria's Educational System Is in Crisis—and How to Fix It*, BBC MINUTE, <https://www.bbc.co.uk/programmes/articles/3RbFXDdBw3g0HQG0fpyD0xF/why-nigerias-educational-system-is-in-crisis-and-how-to-fix-it> [<https://perma.cc/6BXU-4Y68>]; Oluwatosin Adeshokan, *Surgery by Candlelight: Hospitals in Nigeria Suffer Losing Power-And Staff*, THE GUARDIAN (Jan. 7, 2020), <https://www.theguardian.com/global-development/2020/jan/07/surgery-by-torchlight-hospitals-in-nigeria-suffer-losing-power-and-staff> [<https://perma.cc/ED3L-EBJM>] (narrating the huge challenges facing the health care system in Nigeria).

³⁶ Although the term education in this paper is generally employed in its formal and narrow sense i.e. the act of learning in schools carried out by certified teachers following a standardized curricula and assessment tests/exams, the completion of which determines the eligibility of the learner to progress to a higher level or graduate, the discussions in this

*The Case for Integrating Copyright Law with the
Constitutional Right to Education in Nigeria and
Developing Countries* **113**

invitation to enumerate its values. Few people, if any, would doubt the value of education, but given the appalling education statistics in many DCs, a reminder of the benefits of education is appropriate. Therefore, the purpose of this question is to serve as a reminder—rather than to convince—of the benefits of education.

a. Global Efforts on A2E

The commitment to provide universal basic education is of supreme importance on the international stage. These commitments and aspirations find their unequivocal expressions in various human rights treaties, declarations, programs of action, and conferences. In 1990, the global education movement was launched in Jomtien with the adoption of the World Declaration on Education for All (EFA).³⁷ The Jomtien conference was a significant moment for global education because it encouraged greater international cooperation by fostering the cooperative efforts of different sectors of society—governments, IGOs, civil society, education professionals, private sector—thereby emphasizing the goal of education as a shared responsibility.³⁸ Furthermore, education was understood to

and subsequent sections are equally applicable to informal education unless otherwise stated.

³⁷ UNESCO, WORLD DECLARATION ON EDUCATION FOR ALL AND FRAMEWORK FOR ACTION TO MEET BASIC LEARNING NEEDS (1990) [hereinafter UNESCO 1990].

³⁸ GEM Report, *The Jomtien Conference in 1990 was A Game Changer*, World Education Blog (Aug. 22, 2014), <https://gemreportunesco.wordpress.com/2014/08/22/the-jomtien-conference-in-1990-was-a-game-changer-for-education/> [<https://perma.cc/6PGB-BA9P>]; cf. Lene Buchert, *The Concept of Education for All: What Has Happened After Jomtien?* 41(6) INT'L REV. OF EDUC. 537, 537 (1995) (stating that the Jomtien conference “was attended by some 1,500 participants representing national and multinational donor organisations, national governments, inter-

be more than just access to primary education but also addressed the learning needs of youth and adults.³⁹ These commitments were reiterated in 2000 with the adoption of the Dakar Framework for Action in the World Education Forum (WEF), Dakar, laying out six EFA goals.⁴⁰ In the same year, the UN adopted the eight Millennium Development Goals (MDGs) with the second goal being to achieve universal primary education by 2015.⁴¹ This battle for global education is still ongoing. In 2015, the WEF adopted the Incheon Declaration for Education in Incheon, South Korea.⁴² The declaration continued the EFA movement and focused on “inclusive and equitable quality education and lifelong learning for all.”⁴³ In the same year, the UN adopted the 17 SDGs, with Goal 4 focusing specifically on quality education.⁴⁴

On the legal front, several international declarations and covenants have established the right to education as a fundamental human right: the UDHR,⁴⁵ the ICESCR,⁴⁶ the

governmental and non-governmental organisations, the educational research community as well as specialists in other sectors”).

³⁹ *Id.*; UNESCO 1990, *supra* note 37, at 6.

⁴⁰ UNESCO, THE DAKAR FRAMEWORK FOR ACTION: EDUCATION FOR ALL: MEETING OUR COLLECTIVE COMMITMENTS 8 (2000).

⁴¹ G.A. Res. 55/2, United Nations Millennium Declaration, ¶ 19 (Sept. 18, 2000).

⁴² UNESCO, INCHEON DECLARATION AND FRAMEWORK FOR ACTION FOR THE IMPLEMENTATION OF SUSTAINABLE DEVELOPMENT GOAL 4, at 20 (2015).

⁴³ *Id.* preamble ¶ 5.

⁴⁴ G.A. Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development, at 17 (Sept. 25, 2015).

⁴⁵ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 26, U.N. Doc. A/810 (Dec. 10, 1948).

⁴⁶ International Covenant on Economic, Social and Cultural Rights, art. 13, Dec. 16, 1966, 993 U.N.T.S. 3.

The Case for Integrating Copyright Law with the Constitutional Right to Education in Nigeria and Developing Countries **115**

CRC,⁴⁷ the CEDAW,⁴⁸ and the CRPD.⁴⁹ At the regional level, the ACHPR is prominent.⁵⁰ Article 13(1) of ICESCR, the longest provision of the covenant and on education in any international human rights instrument, recognizes the right of everyone to education.⁵¹

Clearly, education is of great importance in the global agenda. Not only is education firmly rooted within the international human rights regime but also the interaction between this regime and development-based approaches in combating the lack of A2E highlights its importance. Furthermore, in adopting a rights-based approach, the right to education is supplied with concrete normative content and is properly elevated to the realm of human dignity.

b. The Value of Education

The world faces pressing challenges that are clearly an issue of life and death: hunger, poverty, insecurity, and disease are among the most prominent. Lack of education, one might opine, is not life-threatening, therefore in a world of scarce resources, the commitment to addressing issues surrounding A2E may give way these “life-threatening” concerns. This stance is false. In many instances these life-threatening concerns are the effect of a lack of education. As Dr. David E. Bloom notes:

⁴⁷ G.A. Res. 44/25, Convention on the Rights of the Child, art. 28 (Nov. 20, 1989).

⁴⁸ G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination against Women, art. 10 (Dec. 18, 1979).

⁴⁹ G.A. Res. 61/106, Convention on Rights of Persons with Disabilities, art. 24 (Dec. 13, 2006).

⁵⁰ African Charter on Human and Peoples’ Rights, art. 17, June 27, 1981, 1520 U.N.T.S. 217.

⁵¹ International Covenant on Economic, Social and Cultural Rights, art. 13(1), Dec. 16, 1966, 993 U.N.T.S. 3.

[P]eople may not grasp the crises of poor education in developing nations because they may never turn on CNN and see someone dying from a lack of education. But make no mistake about it: when you look at the effect of education on family structure, health, infant mortality, and maternal mortality, there is no question that every day thousands of children die from a lack of education.⁵²

Lack of education is a life-threatening issue. This fact is not appreciated because most times education is primarily seen as an economic investment to improve the earnings of an individual. The calculus is mostly couched in a cost-benefit analysis (CBA),⁵³ i.e., weighing the costs of attending education (direct costs plus opportunity costs) minus the benefits measured in the form of improved income earnings over a lifetime. Of course, this is not to say that the economic value of education is not important. Clearly, it is of great importance. The point is that we undervalue the benefits of education if the focus is only on its economic value. And this is so, especially for DCs like Nigeria where the unemployment rate is exceedingly high.⁵⁴ In such cases a rational utility-maximizer might consider investment in a child's education to yield poor returns, given the gloomy prospects of employment.

However, the value of education extends beyond merely economic considerations. Education is a public good

⁵² David E. Bloom, *Education in the Developing World*, 60(4) BULL. AM. ACAD. ARTS & SCIS. 13, 19 (2007).

⁵³ Thomas E. Snider, *Education: An Economic Analysis*, 22(1) IMPROVING COLL. & U. TEACHING 69, 69 (1974); cf. Suhas L. Ketkar, *The Economics of Education in Sierra Leone*, 15(2) J. MOD. AFR. STUD. 301, 301 (1977) (providing a cost-benefit analysis of Sierra Leone's educational system).

⁵⁴ Yomi Kazeem, *Nigeria's Unemployment Rate Has More Than Tripled in the Last Five Years—and It Will Only Get Worse*, QUARTZ AFRICA (Apr. 14, 2020), <https://qz.com/africa/1892237/nigerias-unemployment-rate-tripled-in-five-years/> [<https://perma.cc/H3GP-DQ9S>].

*The Case for Integrating Copyright Law with the
Constitutional Right to Education in Nigeria and
Developing Countries* **117**

and it creates positive externalities, i.e., benefits external to the educated individual. Accordingly, the benefits of education will be examined in two dimensions. First is whether the benefits are private or social.⁵⁵ A benefit is private if it is captured by the individual or their family. On the other hand, the social benefits of education are not captured by the individual. There is a risk that there might be an under-investment in education as the social benefits are not captured by the individual although they are equally as important as the private benefits and contribute immensely to the welfare of society. Second is whether the benefits are either monetary or non-monetary.⁵⁶

The most recognized and associated benefit of education is economic.⁵⁷ This private economic benefit is well established in the literature.⁵⁸ In many societies, the welfare gap between the educated and non-educated is substantially due to their income earnings and this in turn is

⁵⁵ Luis E. Vila, *The Non-Monetary Benefits of Education*, 35(1) EUR. J. EDUC. 21, 22 (2000). See generally Barbara L. Wolfe & Robert H. Haveman, *Social and Non-Market Benefits of Education in an Advanced Economy*, 47 CONF. SER. FED. RSRV. BANK BOSTON 97, 98 (2002) (cataloguing the private and social benefits of education while emphasising that a full evaluation of the effects of education on welfare requires moving beyond its market-based effects); Edgar H. Bedenbaugh, *Education Is Still a Good Investment*, 59(3) CLEARING HOUSE 134, 135–6 (1985) (dividing the benefits of education broadly into private and social).

⁵⁶ I use monetary interchangeably with economic and *vice-versa* although the latter term is broader.

⁵⁷ Jere R. Behrman et.al, *Introduction*, in THE SOCIAL BENEFITS OF EDUCATION 1, 1 (Jere R. Behrman & Nevzer Stacey eds., 1997) (stating that “[f]or decades, the primary argument in justifying education has been based on its direct economic effects”).

⁵⁸ John Conlisk, *A Bit of Evidence on the Income-Education-Ability Interrelation*, 6(3) J. HUM. RES. 358, 360–61 (1971); Orley Ashenfelter & Alan Krueger, *Estimates of the Economic Return to Schooling from a New Sample of Twins*, 84(5) AM. ECON. REV. 1157, 1157 (1994) (finding that “an additional year of schooling increases wage by 12–16 percent”).

significantly affected by education.⁵⁹ There is abundant evidence that educational investment has a positive effect on market earnings.⁶⁰ It is partly based on this that education is considered an effective tool to lift people out of poverty. And this redeeming effect of education is even more salient in knowledge societies where labor is skills-based.

Given the private economic value of education, it is not difficult to imagine the effect of education investment (or lack thereof) on the social level. If education has a positive effect on market earnings, which is soundly established,⁶¹ then the cumulative effect on the social level would be higher GDP per capita and therefore increased economic growth. Conversely, the forgone income growth owing to underinvestment in education would have a negative impact on economic growth.⁶² This also explains the gap in economic growth between societies that encourage and invest in girl-child education and those that do not.⁶³ It is plain and simple: the opportunity cost of underinvestment in girl-child education is the foregone value in the form of earnings that would have been realized had the girl-child been schooled instead of attending to house chores. In fact, there is a positive correlation between girl-child education and GDP per capita if one examines the HDR statistics as represented in table 1.

⁵⁹ Ashenfelter & Krueger, *supra* note 58.

⁶⁰ Luis E. Villa, *The Outcomes of Investment in Education and People's Well-Being*, 40(1) EUR. J. OF EDUC. 3, 3 (2005); Ashenfelter & Krueger, *supra* note 58.

⁶¹ Villa, *supra* note 60.

⁶² Nancy Birdsall et al., *Underinvestment in Education: How Much Growth Has Pakistan Foregone?*, 32(4) PAK. DEV. REV. 453, 453 (1993).

⁶³ Kaushik Basu, *Why is Bangladesh Booming?*, PROJECT SYNDICATE (Apr. 23, 2018), <https://www.project-syndicate.org/commentary/bangladesh-sources-of-economic-growth-by-kaushik-basu-2018-04?barrier=accesspaylog> [<https://perma.cc/7PTK-8GVE>].

*The Case for Integrating Copyright Law with the
Constitutional Right to Education in Nigeria and
Developing Countries* **119**

Table 1: Positive correlation between female mean years of schooling and GNI.⁶⁴

Country	Mean years of schooling (Female)	Mean years of schooling (Male)	Gross National Income (GNI) per Capita
Afghanistan	1.9	6.0	1,746.00
Bangladesh	5.3	6.8	4,057.00
Iraq	6.0	8.6	15,365.00
Nigeria	5.3	7.6	5,086.00
Pakistan	3.8	6.5	5,190.00
Sri Lanka	10.5	11.6	11,611.00

But certainly, the benefits of education extend beyond the purely economic. And although it is difficult to quantify the non-economic benefits of education due to measurement problems, there are strong reasons to believe that they outweigh the economic benefits. These non-economic benefits are diverse and, as we shall see, contribute substantially to the value of the economic benefits.

On a private level, one of the key primary benefits of education is its role in guaranteeing effective freedom.⁶⁵ As

⁶⁴ The tabulated information is compiled based on a study of available data from HDR statistics for the year 2018. *Human Development Data (1990-2018)*, UNDP: HUMAN DEVELOPMENT REPORTS, <http://hdr.undp.org/en/data> [<https://perma.cc/LWW9-F3KA>].

⁶⁵ Kiran Bhatty, *Educational Deprivation in India: A Survey of Field Investigations*, 33(28) *ECON. & POL. WKLY.* 1858, 1859 (1998) (explaining that “[t]he most fundamental benefit of education, not cited often enough, is its intrinsic value to the well-being or ‘effective freedom’ of a person”). On the difference between ‘effective freedom’

Nietzsche thoughtfully considers, “[n]o one can build you the bridge on which you, and only you, must cross the river of life.”⁶⁶ In order to accomplish this, one must have the capacity to make informed daily decisions and map out a life-plan. However, illiteracy is certainly an impediment in attaining this capacity. When one is illiterate, daily market and social transactions become practically impossible. At a basic level, simple but potentially life-changing tasks such as reading drug dosage instructions, safety manuals, nutrition information or hygiene instructions become difficult. The task of education is to prevent this sort of unfreedom and empower the individual to make informed choices.⁶⁷ Of equal importance is the intrinsic benefit of education. This intrinsic value of education is clearly captured in the General Comment on Article 13 by the Committee on Economic, Social and Cultural Rights (CESCR) when it notes that “the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.”⁶⁸

Apart from the enabling of substantive freedom, education is correlated with many positive outcomes. As Anderson and Portner state, “[p]eople who drop out of high

and ‘formal freedom’ see ADAM SWIFT, *POLITICAL PHILOSOPHY: A BEGINNERS’ GUIDE FOR STUDENTS AND POLITICIANS* 61 (2014) (stating that “[t]he difference between effective and formal freedom is the difference between having the power or capacity to act in a certain way and the mere absence of interference”). See also AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 17 (1999).

⁶⁶ FRIEDRICH W. NIETZSCHE, *SCHOPENHAUER AS EDUCATOR* 4 (E. Vivas ed., James W. Hillesheim & Malsolm R. Simpson trans., 1965).

⁶⁷ Kenneth J. Arrow, *The Benefits of Education and the Formation of Preferences*, in *THE SOCIAL BENEFITS OF EDUCATION* 11, 12 (Jere R. Behrman & Nevzer Stacey eds., 1997) (discussing the social benefit of education in preference formation).

⁶⁸ U.N. Comm. on Econ., Soc. and Cultural Rts., General Comment No. 13: The Right to Education, art. 13 ¶ 1, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999) [hereinafter UN CESCR].

*The Case for Integrating Copyright Law with the
Constitutional Right to Education in Nigeria and
Developing Countries* **121**

school do substantially worse compared to those who graduate. Dropouts earn less, report lower levels of happiness, commit more crimes, and suffer from poorer health.”⁶⁹ The authors also “find evidence supporting a positive relationship between dropping out of high school and the risk of contracting an STI for females.”⁷⁰ In a different study concerning the effects of literacy on health in Canada, Rootman and Ronson confirm that literacy has a direct effect on health.⁷¹ Other authors have even found a causal relationship between education and health.⁷² In their study that concerned the effects of a compulsory schooling law introduced in the Netherlands, Kippersluis et al. conclude that “education significantly reduces mortality in old age.”⁷³ It could therefore be said that education is positively correlated with life expectancy. Furthermore, education is correlated with crime reduction in society.⁷⁴ There is also evidence of a strong correlation between education and civic participation such as voting and

⁶⁹ D. Mark Anderson & Claus C. Pörtner, *High School Dropouts and Sexually Transmitted Infections*, 81(1) S. ECON. J. 113, 113 (2014) (internal citations omitted).

⁷⁰ *Id.*

⁷¹ Irving Rootman & Barbara Ronson, *Literacy and Health Research in Canada: Where Have We Been and Where Should We Go?*, 96(2) CAN. J. PUB. HEALTH S62, S68 (2005). Although education is not the sole determinant of literacy, it is certainly the most important.

⁷² Hans van Kippersluis et al., *Long-Runs Return to Education: Does Schooling Lead to an Extended Age?*, 46(4) J. HUM. RES. 695, 713 (2011).

⁷³ *Id.*; see also Simon Wigley & Arzu Akkoyunlu-Wigley, *Human Capabilities Versus Human Capital: Gauging the Value of Education in Developing Countries*, 78(2) SOC. INDICATORS RSCH. 287, 290 (2006). (evaluating education in terms of human capabilities, such as life expectancy).

⁷⁴ Lance Lochner & Enrico Moretti, *The Effect of Education on Crime: Evidence from Prison Inmates, Arrests and Self-Reports*, 94(1) AM. ECON. REV. 155, 183 (2004).

volunteerism.⁷⁵ This is not surprising since education enables effective freedom and the formation of preferences.⁷⁶ Education is also one of the most proven effective tools for ensuring gender equality, and nowhere is this more important than in DCs where boy-child education is prioritized over girl-child education.⁷⁷ Finally, education is essential to the smooth functioning of a democratic polity.⁷⁸

2. Is there A Fundamental Right to Education Under Nigerian Law?

Whether there is a fundamental right to education under Nigerian law is disputed, although it would seem to have been conclusively settled. Perhaps one of the reasons for this disputation lies in the status of the right to education as an (ESC) right in the human rights regime. Many African states guarantee lesser protection to ESC rights than civil and political (CP) rights.⁷⁹

⁷⁵ Horacio Larreguy & John Marshall, *The Effect of Education on Civil and Political Engagement in Nonconsolidated Democracies: Evidence from Nigeria*, 99(3) REV. ECON. & STAT. 387, 387 (2017); Thomas S. Dee, *Are There Civic Returns to Education*, 88 J. PUB. ECON. 1697, 1717 (2004).

⁷⁶ Arrow, *supra* note 67.

⁷⁷ Homi Kharas & Rebeca Winthrop, *Education for Fragile States*, PROJECT SYNDICATE (Sept. 18, 2018), <https://www.project-syndicate.org/commentary/strengthening-fragile-states-by-improving-education-by-homi-kharas-and-rebecca-winthrop-2018-09?barrier=accesspaylog> [<https://perma.cc/UA5E-5FX9>].

⁷⁸ Milton Friedman, *The Role of Government in Education*, in ECONOMICS AND THE PUBLIC INTEREST 123, 124 (Robert A. Solo ed., 1955).

⁷⁹ Manisuli Ssenyonjo, *The influence of the International Covenant on Economic, Social and Cultural Rights in Africa*, 64(1) NETH. INT'L L. REV. 259, 270–1, 286–7 (2017) (noting the limited constitutional protection of ESC rights in Africa). For the different constitutional approaches to the protection of ESC rights in Africa, see THE PROTECTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN AFRICA:

The Case for Integrating Copyright Law with the Constitutional Right to Education in Nigeria and Developing Countries **123**

a. *Justiciability of ESC Rights and the Right to Education Under the Nigerian Constitution.*

Chapter IV of the Constitution of the Federal Republic of Nigeria 1999, which guarantees fundamental rights, does not include the right to education.⁸⁰ The rights guaranteed are mainly CP rights which are contained in §§33–43 of the constitution.

Some have asserted that the right to education, even though not mentioned under chapter IV of the Constitution, “found indirect rendition under section 39 of the same Constitution” which guarantees the freedom of expression and the press.⁸¹ Put differently, the right to education follows from the understanding that “[e]ducation is the key to the realization of the right to freedom of expression and the press.”⁸²

Although a clever argument, it may not be persuasive or convincing enough as a free-standing argument to ground the existence of the right to education under Nigerian law.⁸³

INTERNATIONAL, REGIONAL, AND NATIONAL PERSPECTIVES (Danwood M. Chirwa & Lilian Chenwi eds., 2016).

⁸⁰ References to the “constitution” are to the Constitution of the Federal Republic of Nigeria 1999 (Fourth Republic). See CONSTITUTION OF NIGERIA (1999). Prior to this, Nigeria had several constitutions: constitution 1960 (Independence); constitution 1963 (First Republic); constitution 1979 (Second Republic); and constitution 1993 (Third Republic). See generally CONSTITUTION OF NIGERIA (1993); CONSTITUTION OF NIGERIA (1979); CONSTITUTION OF NIGERIA (1963); CONSTITUTION OF NIGERIA (1960).

⁸¹ Eteete M. Adam, *Advancing the Anti-Poverty Crusade Through the Enforcement of the Fundamental Right to Education Under Nigerian Law*, in EDUCATION, CREATIVITY, AND ECONOMIC EMPOWERMENT IN AFRICA 15, 20 (Toyin Falola & Jamaine Abidogun eds., 2014).

⁸² *Id.*

⁸³ A distinction has to be made between inferring the existence of an ESC right, not expressly recognized, on the basis of the express guarantee of

First, the right to free speech is well established as a civil right under the international human rights regime;⁸⁴ and it is different, though not disconnected, from the right to education, an ESC right.⁸⁵ The protection of free speech in constitutional provisions does not diminish the importance of explicitly recognizing the right to education or making such a recognition a superfluous exercise. Second, although it is true that education enables the realisation of the right to freedom of expression it certainly does not follow that by implication there exists the right to education. But it is not only the right to free speech that education enables or makes more meaningful. As the UN CESCR notes in its General Comment, “[e]ducation is both a human right in itself and an indispensable means of realizing other human rights.”⁸⁶ Nor is the right to education the only ESC right that enables the meaningful enjoyment of other rights. The indispensability of ESC rights—right to education in this instance—to the enjoyment and meaningful realization of CP rights is

CP right; and enabling the enjoyment or realization of a CP right via the protection of an ESC right that is expressly guaranteed. I am here concerned with the former. There is authority for the latter in international, national and regional human rights law. See generally Martin Scheinin, *Indirect Protection of Economic, Social, and Cultural Rights in International Law*, in *THE PROTECTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN AFRICA: INTERNATIONAL, REGIONAL, AND NATIONAL PERSPECTIVES* 72 (Danwood M. Chirwa & Lilian Chenwi eds., 2016). At the national level, see Enyinna S. Nwauche, *Indirect Constitutional Protection of Economic, Social and Cultural Rights in Nigeria*, in *THE PROTECTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN AFRICA: INTERNATIONAL, REGIONAL, AND NATIONAL PERSPECTIVES* 501 (Danwood M. Chirwa & Lillian Chenwi eds., 2016).

⁸⁴ See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 19, U.N. Doc. A/810 (Dec. 10, 1948); G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art.19 (Dec. 16, 1966).

⁸⁵ It is worth emphasizing that the difference reiterated between ESC and CP rights is not a judgment regarding the justiciability of the former. Nor is it a statement to diminish the interconnectedness of ESC and CP rights.

⁸⁶ UN CESCR, *supra* note 68 (emphasis added).

*The Case for Integrating Copyright Law with the
Constitutional Right to Education in Nigeria and
Developing Countries* **125**

unchallenged.⁸⁷ This recognition, however, is not and cannot be a basis for asserting the existence of the right to education that has not been explicitly protected as a fundamental right. If it were, we might also insist that the constitutional protection of other rights is a clear indication of the existence of the right to education, even if not explicitly protected, given that education is an enabler of other human rights. For example, on this logic there is nothing that precludes an inference of the existence of the right to education on the basis of the explicit recognition of the right to vote since education enables a citizen to have informed choices on whom or what to vote for. The purpose of the recognition rather is to emphasize the interconnectedness of ESC and CP rights and thereby ensure that ESC rights are treated with equal importance. To be clear, the argument is not that the existence of the fundamental right to free speech under Nigerian law may not be used to support the existence of the right to education. But, as a free-standing argument, it does not gain traction. And neither is there any Nigerian judicial decision on this.⁸⁸

⁸⁷ See *infra* Section C(I)(b).

⁸⁸ The only case law I have come across that dealt with the interplay of the fundamental right to freedom of expression and education is *Archbishop Anthony Olubunmi Okogie & Ors v. Attorney General of Lagos State* [1981] 2 NCLR 337 (Nigeria). In this case, the Court of Appeal had to determine the constitutionality of a circular by the Lagos State Government purporting to abolish all private primary schools, the purpose of which was to facilitate adequate and equal educational opportunities. The Court of Appeal held in favor of the plaintiffs on the basis that preventing them from establishing private primary educational institutions impinged on their constitutionally protected right to freedom of expression as guaranteed under Section 36 of the Constitution of Nigeria 1979. The case, however, does not go beyond establishing that educational institutions are avenues for the exercise of the right to freedom of expression. See also *Adebowale v. Jakande* [1981] 1 NCLR 262 (Nigeria).

The only place education is dealt with in the Constitution is under Chapter II, Section 18, titled “Fundamental Objectives and Directive Principles of State Policy” (FODPSP).⁸⁹ Section 18 provides:

1. Government shall direct its policy towards ensuring that there are equal and adequate educational opportunities at all levels.
2. Government shall promote science and technology
3. Government shall strive to eradicate illiteracy; and to this end Government shall as and when practicable provide
 - a. free, compulsory and universal primary education;
 - b. free secondary education;
 - c. free university education; and
 - d. free adult literacy programme.⁹⁰

Although Section 13 of Chapter II imposes a duty on all arms of government to “observe and apply the provisions of this Chapter of this Constitution,”⁹¹ Section 6(6)(c) of the Constitution provides:

The judicial powers vested in accordance with the foregoing provisions shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the

⁸⁹ CONSTITUTION OF NIGERIA (1999), § 18.

⁹⁰ *Id.*

⁹¹ *Id.* § 13.

*The Case for Integrating Copyright Law with the
Constitutional Right to Education in Nigeria and
Developing Countries* **127**

Fundamental Objectives and Directive Principles of
State Policy set out in Chapter II of this Constitution.⁹²

Accordingly, Section 18 is not justiciable and does not confer any legal entitlement.⁹³ Put differently, the effect of Section 6(6)(c) is that an aggrieved party who complains of a violation of Section 18, or Chapter II in general, will not obtain judgment before a court of law as Section 6(6)(c) removes the jurisdiction of the court to try any issue or matter under Chapter II of the Constitution. Putting Section 6(6)(c) aside, the language of Section 18—including words such as “shall strive” and “when practicable”—can hardly be seen as conferring any justiciable legal entitlement. These words are more declaratory than right-conferring.

Although the non-justiciability of the FODPSP of the Constitution is well established in judicial decisions⁹⁴ and academic commentary,⁹⁵ the settled law is that there are exceptions in which Chapter II or its provisions may be made justiciable. In *Attorney General of Ondo State v. Attorney*

⁹² *Id.* § 6(6)(c).

⁹³ Justiciability is the “quality or state of being appropriate or suitable for adjudication by a court.” Justiciability, BLACK’S LAW DICTIONARY (11th ed. 2019).

⁹⁴ Archbishop Anthony Olubunmi Okogie & Ors v. Att’y Gen. of Lagos State [1981] 2 NCLR 337 (Nigeria); Ahmed v. Sokoto State House of Assembly [2002] 15 NWLR 539 (Nigeria).

⁹⁵ See generally Femi Falana, *Chapter II and Socio-Economic Rights*, THIS DAY (May 3, 2016, 1:52 AM), <https://www.thisdaylive.com/index.php/2016/05/03/chapter-ii-and-socio-economic-rights/> [https://perma.cc/C2UU-SV9B]; Halima D. Kutigi, *Towards Justiciability of Economic, Social and Cultural Rights in Nigeria: A Role for Canadian-Nigerian Cooperation?*, 4 TRANSNAT’L HUM. RTS. REV. 126 (2017); Taiwo Olaiya, *Interrogating the Non Justiciability of Constitutional Directive Principles and Public Failure in Nigeria*, 8(3) J. Pol. L. 23 (2015); Ogugua V.C. Ikpeze, *Non-Justiciability of Chapter II of the Nigerian Constitution as an Impediment to Economic Rights and Development*, 5(18) DEVELOPING COUNTRY STUD. 48, 48 (2015); Nwauche, *supra* note 83.

General of the Federation, the Supreme Court (SC) was called upon by the Ondo State Government to adjudicate on the constitutionality of the Corrupt Practices and Other Related Offences Act, an enactment of the National Assembly (NASS) which sought to establish the Independent Corrupt Practices and Other Related Offences Commission.⁹⁶ The Ondo State Government argued that the enactment was unconstitutional because NASS did not have the legal mandate under the Constitution to make such enactment and that such power lay with state legislatures.⁹⁷ The NASS argued that Section 15(5) in conjunction with other provisions of the Constitution empowered it to make such enactment.⁹⁸ In response, Ondo State Government argued in part that Section 15(5) is non-justiciable. The SC held that the enactment was constitutional and in delivering the leading judgment, Uwaifo JSC stated that:

As to the non-justiciability of the Fundamental Objectives and Directive Principles of State Policy in Chapter II of our Constitution, section (6)(6)(c) says so. While they remain mere declarations, they cannot be enforced by legal process but would be seen as a failure of duty and responsibility of State organs if they acted in clear disregard of them, the nature of the consequences of which having to depend on the aspect of the infringement and in some cases the political will of those in power to redress the situation. But the Directive Principles (or some of them) can be made justiciable by legislation.⁹⁹

⁹⁶ Att’y Gen. of Ondo State v. Att’y Gen. of the Fed’n [2002] 9 NWLR (Pt. 772) 222 (Nigeria).

⁹⁷ *Id.*

⁹⁸ Section 15(5), which is part of the FODPSP, provides that “[t]he State shall abolish all corrupt practices and abuse of power.” CONSTITUTION OF NIGERIA (1999), § 15(5).

⁹⁹ Att’y Gen. of Ondo State v. Att’y Gen. of the Fed’n [2002] 9 NWLR (Pt. 772) 222, ¶ 4.12 (Nigeria). Ogwuegbu, JSC. also concurred with the statement that the FODPSP is made justiciable by an Act of the NASS.

*The Case for Integrating Copyright Law with the
Constitutional Right to Education in Nigeria and
Developing Countries* 129

Accordingly, the law as it stands is that although Chapter II is non-justiciable, it may be made justiciable in some cases if the NASS enacts legislation which it is empowered to for the enforcement of the provisions of Chapter II.¹⁰⁰

Parts of section 18(3) of the Constitution have been enacted into law with the passage of the Compulsory, Free, Universal Basic Education Act, 2004 (UBE Act 2004).¹⁰¹ This law provides for free, compulsory primary and junior secondary education.¹⁰² In *LEDAP GTE & Ltd. v. Federal Ministry of Education & Ors*, the issue was whether section 18(3)(a) of the Constitution granted an enforceable right by virtue of the UBE Act 2004.¹⁰³ Justice J.T. Tosho, sitting at the Abuja division of the Federal High Court, held that even though Chapter II of the Constitution is non-justiciable, the legislature having enacted the UBE Act 2004 meant that section 18(3)(a) granted an enforceable constitutional right.¹⁰⁴ Therefore, Nigerians have an enforceable constitutional right to free, compulsory primary and junior secondary education.

*b. Other Mechanisms for Enforcing the
Right to Education in Nigeria.*

Apart from the foregoing, the right to education is guaranteed under several human rights treaties ratified by Nigeria. Of pertinence is Art 17(1) of the ACHPR which

¹⁰⁰ Some have argued that making Chapter II of the Constitution justiciable in this way is a contradiction. See G.N. Okeke & Chika Okeke, *The Justiciability of the Non-Justiciable Constitutional Policy of Governance in Nigeria*, 7(6) IOSR J. HUMANITIES & SOC. SCI. 9, 11–12 (2013).

¹⁰¹ Compulsory, Free Universal Basic Education Act (2004), (Nigeria).

¹⁰² *Id.* § 2.

¹⁰³ *LEDAP GTE & Ltd. v. Fed. Ministry of Educ. & Ors* [2017] 3 CLRN 116, 119 (Nigeria).

¹⁰⁴ *Id.* at 129.

states that “[e]very individual shall have the right to education.”¹⁰⁵ Nigeria, a signatory to the treaty, has domesticated the ACHPR by an Act of the NASS.¹⁰⁶ In *Abacha v. Fawehinmi* it was held by the SC that the domesticating Act of the ACHPR being “a statute with international flavour” is superior to domestic legislation although subordinate to the Constitution.¹⁰⁷ Given that ESC rights are non-justiciable under the Constitution, it is not difficult to imagine a conflict between the ACHPR Act and the Constitution. And since the Constitution is the supreme law of the land, any domestic court called upon to adjudicate on any issues involving the conflict will have to give effect to the Constitution. The case however is different where a party who alleges an infringement of an ESC right calls upon a regional or international human right court to adjudicate on the issue.

In *SERAP v Nigeria and Universal Basic Education Commission* the plaintiff a human rights NGO brought a case to the ECOWAS court of justice alleging *inter alia* a violation of the right to quality education as guaranteed by Art 17(1) of ACHPR.¹⁰⁸ The defendants argued that the ECOWAS court lacked the jurisdiction to hear the case because, amongst others, “the educational objective of the Federal Republic of Nigeria is provided for under Section 18(1), (2) and (3) of Chapter II of the 1999 Constitution and is non-justiciable or enforceable and cannot be determined by the Court.”¹⁰⁹ In dismissing the argument and holding

¹⁰⁵ African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act, Chapter A9, Laws of the Federation of Nigeria 2004 [hereinafter ACHPR], art. 17(1).

¹⁰⁶ See *id.* Nigeria applies a dualist approach to international law as international treaties are required to be domesticated before they have the force of law. See CONSTITUTION OF NIGERIA (1999), § 12(1).

¹⁰⁷ *Abacha v. Fawehinmi* [2000] 6 NWLR (Pt. 660) 228, 289 (Nigeria).

¹⁰⁸ *SERAP v. Nigeria* [2009]; ACHPR, art. 17(1), June 27, 1981, 21 I.L.M. 58.

¹⁰⁹ *SERAP v. Nigeria* [2009] ECW/CCJ/APP/08/08, ¶ 3.

*The Case for Integrating Copyright Law with the
Constitutional Right to Education in Nigeria and
Developing Countries* **131**

that the right to education was justiciable before the ECOWAS court, the court stated that “[t]he right to education guaranteed under Article 17 of the African Charter is independent of the right of education captured under the directive principles of state policy of the 1999 Federal Constitution of Nigeria.”¹¹⁰ And since the issue was whether a violation of Article 17(1) of ACHPR occurred, it was irrelevant whether the Constitution made the right to education justiciable.¹¹¹

Also of relevance are the ICESCR and the CRC. As noted, Article 13 of the ICESCR provides for the right to education.¹¹² Nigeria, although having acceded to the ICESCR, is yet to domesticate it.¹¹³ Given that Nigeria adopts a dualist approach to international law,¹¹⁴ the effect of the ICESCR at domestic courts would only be persuasive rather than binding.¹¹⁵ On the other hand, Nigeria has

¹¹⁰ *Id.* ¶ 18.

¹¹¹ *Id.* ¶ 20.

¹¹² International Covenant on Economic, Social and Cultural Rights, *supra* note 51.

¹¹³ *Ratification Status for Nigeria*, UN TREATY BODY DATABASE, https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx [<https://perma.cc/745C-KP38>]; Manisuli Ssenyonjo, *The Influence of the International Covenant on Economic, Social and Cultural Rights in Africa*, 64 NETH. INT’L L. REV. 259, 274–75 (2017).

¹¹⁴ *See* CONSTITUTION OF NIGERIA (1999), § 12(1).

¹¹⁵ *But see* Preamble 3(b) of the Fundamental Rights (Enforcement Procedure) Rules 2009 (Nigeria) (stating that “the Court shall respect municipal, regional and international bills of rights cited to it or brought to its attention or of which the Court is aware...”), <http://www.refworld.org/pdfid/54f97e064.pdf> [<https://perma.cc/YQL8-JS33>]. Some have rightly pointed out that the effect of Preamble 3(b) on Nigerian courts vis-à-vis the application of human rights treaties Nigeria has acceded to, though yet to domesticate, is not to confer binding legal status on them but rather to “encourage Nigerian courts to accord a greater role to international instruments in the enforcement of human rights.” *See* Enyinna S. Nwauche, *The Nigerian Fundamental Rights (Enforcement) Procedure Rules 2009: A Fitting Response to Problems*

domesticated the CRC with the Child’s Right Act, 2003 (CRA).¹¹⁶ Section 15 of the CRA guarantees the right of a child to free, compulsory and universal primary education,¹¹⁷ while s.277 defines a child to be a person under the age of eighteen years.¹¹⁸ By virtue of section 12(1) of the Constitution, the CRC has the full effect of law in Nigeria, and in conjunction with the Fundamental Rights (Enforcement Procedure) Rules 2009 the courts are bound to apply it.¹¹⁹ Furthermore, following *AG of Ondo State*, CRA has made section 18(3)(a) an enforceable right.¹²⁰

3. A2E in Nigeria: Beyond the Law

Nigerians having an enforceable right to education says nothing about whether Nigerians actually enjoy A2E. The former is a question of law whereas the latter is a question of fact. Although essential to the guarantee of fundamental freedoms, rights do not mirror reality, nor do they necessarily translate into improved socio-economic conditions. As such, it is necessary to move beyond the discussion of rights to inquire about the real conditions vis-à-vis the state of A2E in Nigeria.

a. Content of the Right to Education

The CESCR has outlined the essential features of the right to education.¹²¹ These features constitute the analytical framework for assessing whether there is a fulfilment of the

in the Enforcement of Human Rights in Nigeria?, 10(2) AFR. HUM. RTS. L.J. 502, 513 (2010).

¹¹⁶ Act No. 26 of 2003, Child’s Rights Act (2003), § 261 (Nigeria).

¹¹⁷ *Id.* § 15.

¹¹⁸ *Id.* § 277.

¹¹⁹ See Preamble 3(b) of the Fundamental Rights (Enforcement Procedure) Rules 2009 (Nigeria), <http://www.refworld.org/pdfid/54f97e064.pdf> [<https://perma.cc/YQL8-JS33>]

¹²⁰ *Supra* notes 94–100 and accompanying text.

¹²¹ UN CESCR, *supra* note 68, ¶ 6.

*The Case for Integrating Copyright Law with the
Constitutional Right to Education in Nigeria and
Developing Countries* **133**

right to education. In its general comment, the CESCR states that the right to education, irrespective of the condition obtainable in member States, shall have four essential attributes: availability, accessibility, acceptability, and adaptability.¹²²

According to the CESCR, the criterion of availability requires functioning educational institutions in sufficient quantity.¹²³ In elaborating further on the requirement of functioning educational institutions, the CESCR states:

What they require to function depends upon numerous factors, including the developmental context within which they operate; for example, all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, *teaching materials*, and so on; while some will also require facilities such as a library, computer facilities and information technology.¹²⁴

On the other hand, the criterion of accessibility requires the removal of hurdles in accessing educational institutions and programmes. This requires the removal of constraints in three dimensions: non-discrimination, physical accessibility and economic accessibility.

With regard to acceptability, the issue is whether the form and substance of education is acceptable to students and parents.

Finally, the adaptability feature requires that “education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* (emphasis added).

needs of students within their diverse social and cultural settings.”¹²⁵

b. The Nigeria Education System: A Snapshot

The federal, state and local governments are responsible for the administration of education in Nigeria as it falls under the concurrent legislative list.¹²⁶ The Federal Ministry of Education (FME) is the body responsible for the formulation of national policy on education.¹²⁷ In practice, the FME is primarily responsible for tertiary education while state and local governments are responsible for primary and secondary schools.¹²⁸ Aside from state schools (public schools), there are many private schools in Nigeria at all levels of education. However, private schools are expensive and not affordable to many.

Nigeria has a 6-3-3-4 education system as provided for by the National Policy on Education (NPE).¹²⁹ This structure translates into six years of primary school, three years junior secondary school (JSS), three years of senior secondary school (SSS), and four years of tertiary education.¹³⁰ The first nine years (primary and JSS) form the free and compulsory basic education as provided for by the UBE programme and legalized by the UBE Act 2004, although an additional one year has been added to the

¹²⁵ *Id.*

¹²⁶ See CONSTITUTION OF NIGERIA (1999), Part II (2nd Schedule), §§ 27, 29, 30.

¹²⁷ *About: Our Mandate*, FEDERAL MINISTRY OF EDUCATION, <https://education.gov.ng/our-mandate/#> [<https://perma.cc/S55A-RK7B>].

¹²⁸ See FEDERAL MINISTRY OF EDUCATION, EDUCATION FOR ALL 2015 NATIONAL REVIEW REPORT: NIGERIA 3 (2015) [hereinafter FME 2015 Report].

¹²⁹ *Id.*; FEDERAL REPUBLIC OF NIGERIA, NATIONAL POLICY ON EDUCATION (4th ed. 2004).

¹³⁰ FME 2015 Report, *supra* note 128, at 2.

*The Case for Integrating Copyright Law with the
Constitutional Right to Education in Nigeria and
Developing Countries* **135**

education structure after a 2013 review to make room for the formal inclusion of pre-primary education.¹³¹ The first ten years of education (pre-primary, primary, JSS), apart from being compulsory and free, is continuous and does not require any examination to progress to the next stage although continuous assessments are required.¹³² At the end of primary school a student is awarded the Primary Leaving School certificate and progression to JSS is automatic.¹³³ On completion of JSS, the student is awarded a Basic Education Certificate (BEC), formerly known as Junior School Certificate, in a final examination administered by the state government if it is a state secondary school.¹³⁴ Otherwise it is administered by the National Examinations Council (NECO) if it is a Federal Unity College.¹³⁵ Basic education terminates at this level and successful completion of the BEC Examination is required to gain entrance to the SSS. A student who elects to proceed further to the SSS will spend 3 years at the SSS and on completion will be awarded a Senior School Certificate after completing an examination administered either by NECO or WAEC.¹³⁶ This certificate, with the minimum required passes, is required in addition to

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ NUFFIC, THE EDUCATION SYSTEM OF NIGERIA DESCRIBED AND COMPARED WITH THE DUTCH SYSTEM 7 (2017).

¹³⁵ *Federal Unity Colleges*, FEDERAL MINISTRY OF EDUCATION, <https://education.gov.ng/federal-unity-colleges/> [<https://perma.cc/H54U-WK73>] (showing a list of Federal Unity Colleges); *National Common Entrance Examination (NCEE)*, NATIONAL EXAMINATIONS COUNCIL, <https://www.neco.gov.ng/our-exams/ncee/> [<https://perma.cc/HUX7-Q5K9>] (showing an exam is required to gain entrance to a Federal Unity College).

¹³⁶ Aside from proceeding to SSS, students can also opt for three years of secondary vocational education at a technical college and be awarded the National Technical Certificate or the National Business Certificate. *See* NUFFIC, *supra* note 134, at 8.

the Unified Tertiary Matriculation Examination administered (UTME) by JAMB to gain entry into university.¹³⁷ Apart from universities, Nigeria's tertiary institutions consist of polytechnics, monotechnics, and colleges of education.¹³⁸ Generally, a UTME is not required to gain entrance into these tertiary institutions. These institutions also provide alternative pathways to gain entrance to the university normally after a student has gained a National Diploma in the case of polytechnics.

There are forty-three federal universities,¹³⁹ forty-eight state universities,¹⁴⁰ and forty-nine private universities¹⁴¹ in Nigeria.

c. Challenges of A2E in Nigeria: The Cost of Reading a Book.

The importance of education in national and individual development is well understood by the Nigerian government as clearly articulated in the NPE.¹⁴² In fact, there are several intervention programs backed by law in Nigeria to deal with the issue of A2E at the basic and tertiary

¹³⁷ See Joint Admissions and Matriculation Board Act (1989), § 5 (Nigeria).

¹³⁸ *List of Approved Federal Polytechnics in Nigeria*, FEDERAL MINISTRY OF EDUCATION, <https://education.gov.ng/government-polytechnics/#> [<https://perma.cc/VB7H-NYMK>].

¹³⁹ *Nigerian Universities: Federal Universities*, NATIONAL UNIVERSITIES COMMISSION, <http://nuc.edu.ng/nigerian-universities/federal-universities/> [<https://perma.cc/92RQ-V4DG>].

¹⁴⁰ *Nigerian Universities: State Universities*, NATIONAL UNIVERSITIES COMMISSION, <http://nuc.edu.ng/nigerian-universities/state-university/> [<https://perma.cc/8XB3-ZPFQ>].

¹⁴¹ *Nigerian Universities: Private Universities*, NATIONAL UNIVERSITIES COMMISSION, <http://nuc.edu.ng/nigerian-universities/private-universities/> [<https://perma.cc/C9UL-JCUH>].

¹⁴² FEDERAL REPUBLIC OF NIGERIA, *supra* note 129, at 4.

*The Case for Integrating Copyright Law with the
Constitutional Right to Education in Nigeria and
Developing Countries* **137**

levels.¹⁴³ Aside from these efforts, Nigeria is committed to the SDG goals 2030 by virtue of its UN membership.¹⁴⁴ Despite these well-intentioned efforts, there is broad consensus that the Nigerian experience has been alarmingly appalling.¹⁴⁵ In other words, the right to education has not

¹⁴³ Two programmes are prominent. The UBE programme, introduced by President Olusegun Obasanjo on 30 September 1999, and the Tertiary Education Trust Fund (TETFund). The central goal of the UBE programme is to provide free, compulsory, and universal basic education for children enrolling in primary and junior secondary school and is legally backed by the UBE Act 2004. For some of the challenges in implementing the UBE programme see Kayode Ajayi et al., *Universal Basic Education (UBE) Policy Implementation in Facilities Provision: Ogun State as a Case Study*, 2(2) INT'L J. ON NEW TRENDS EDUC. 34, 42–3 (2011). See generally ADUNOLA ADEPOJU & ANNE FABIYI, UNIVERSAL BASIC EDUCATION IN NIGERIA: CHALLENGES AND PROSPECTS, <http://uaps2007.princeton.edu/papers/70830> [<https://perma.cc/MPR8-4KRF>]. Unlike UBE, TETFund applies to tertiary institutions and is backed by the TETFund (Establishment, Etc.) Act, 2011. For an explanation of the history of TETFund, see Georgina O. Ugwuanyi, *Taxation and Tertiary Education Enhancement in Nigeria: An Evaluation of the Education Tax Fund (ETF) Between 1999-2010*, 5(6) J. ECON. & SUSTAINABLE DEV. 131, 132–33 (2014). Furthermore, TETFund *does not* guarantee a statutory right to free higher education in Nigeria. All it does is to provide support to public tertiary institutions, and it does not ensure provision of free ALM like the UBE Programme. And it is saddled with inefficiency and corruption. Larry E. Udu and Joseph O. Nkwede, *Tertiary Education Trust Fund Interventions and Sustainable Development in Nigerian Universities: Evidence from Ebonyi State University, Abakiliki*, 7 J. SUSTAINABLE DEV. 191, 203–4 (2014).

¹⁴⁴ *Member States*, UNITED NATIONS, <https://www.un.org/en/member-states/#gotoN> [<https://perma.cc/T664-4XYT>].

¹⁴⁵ For a sample of literature lamenting on the problems of A2E in Nigeria, see generally S.N. Aja et al., *Overview of the Progress and Challenges of Education for All in Nigeria*, 5(7) EDUC. RES. 257 (2014); Elizabeth O. Kingdom & Job Maekae, *The Role of Education in National Development: Nigerian Experience*, 9(28) EUR. SCI. J. 312 (2013); Uche S. Anaduaka & Chinyere F. Okafor, *The Universal Basic Education (UBE) Programme: Problems and Prospects*, 2(3) BASIC RES. J. EDUC. RSCH. & REV. 48 (2013).

translated into quality A2E for Nigerians. Coupled with Nigeria’s exponential growth in population, the prospects of achieving SDG goal 4 by 2030 is very far-fetched. The effects of these are evident at the national and individual levels although data is hardly available.¹⁴⁶

Nigeria’s Human Development Index (HDI) rank currently is 158 out of 189 countries.¹⁴⁷ This is not surprising given that, as shown above, lack of education is correlated with many negative outcomes. According to UNESCO statistics, the literacy rate among the population aged fifteen years and older is 62.02% for both sexes in 2018.¹⁴⁸ This is a substantial improvement from previous decades based on available data. In 1991, it was 55.45% and 54.77% in 2003.¹⁴⁹ Despite this improvement, however, Nigeria is still lagging behind. For example, South Africa’s literacy rate among the population aged fifteen years and older was 87.05% in 2017,¹⁵⁰ Ghana’s rate was 79.04% in

¹⁴⁶ See FME 2015 Report (stating that “[o]ne of the very serious challenges in the way of documenting the progress achieved towards the EFA Goal(s) within the Nigerian context is the paucity, and in some cases, the complete absence of data required for such an exercise”).

¹⁴⁷ *Nigeria: Human Development Indicators*, UNDP: HUMAN DEVELOPMENT REPORTS, <http://hdr.undp.org/en/countries/profiles/NGA> [<https://perma.cc/4AEA-DNYP>].

¹⁴⁸ UNESCO Institute for Statistics, *Nigeria: Education and Literacy*, SUSTAINABLE DEVELOPMENT GOALS, <http://uis.unesco.org/en/country/ng?theme=education-and-literacy> [<https://perma.cc/5B4E-GCXR>] (last visited Sept. 20, 2020).

¹⁴⁹ *Id.*

¹⁵⁰ UNESCO Institute for Statistics, *South Africa: Education and Literacy*, SUSTAINABLE DEVELOPMENT GOALS, <http://uis.unesco.org/en/country/za> [<https://perma.cc/RS9H-8X5B>] (last visited Sept. 20, 2020).

The Case for Integrating Copyright Law with the Constitutional Right to Education in Nigeria and Developing Countries **139**

2018,¹⁵¹ and Kenya's rate was 81.53% in 2018.¹⁵² What is more troubling is when the available literacy statistics are juxtaposed with data on the mean years and expected years of schooling. According to the UNDP HDR on Nigeria, mean years of schooling for people aged twenty-five years and above was 6.0 for 2015, while the expected years of schooling was 10.0.¹⁵³ Putting this in context, mean years of schooling for Ghana and Kenya in 2015 were 6.9 and 6.3 respectively.¹⁵⁴ For developed countries like Ireland and Germany, it is 12.3 and 13.2 respectively.¹⁵⁵ Fortunately, there has been a continuous increase in both mean and expected years of schooling over the years in Nigeria.¹⁵⁶ Though, this increase has not translated into improved literacy rates, as the data shows. Although surprising, the explanation for this is mainly due to lack of access to teaching materials and inadequate infrastructure.¹⁵⁷ Furthermore, the Nigerian government has admitted that the country has the highest number of out-of-school children in the world.¹⁵⁸

¹⁵¹ UNESCO Institute for Statistics, *Ghana: Education and Literacy*, SUSTAINABLE DEVELOPMENT GOALS, <http://uis.unesco.org/en/country/gh> [<https://perma.cc/Y7VA-NWGB>] (last visited Sept. 20, 2020).

¹⁵² UNESCO Institute for Statistics, *Kenya: Education and Literacy*, SUSTAINABLE DEVELOPMENT GOALS, <http://uis.unesco.org/en/country/ke> [<https://perma.cc/CDS9-LBSW>] (last visited Sept. 20, 2020).

¹⁵³ UNDP, HUMAN DEVELOPMENT REPORT 2016: HUMAN DEVELOPMENT FOR EVERYONE 198 (2016).

¹⁵⁴ *Mean Years of Schooling (Years)*, UNDP: HUMAN DEVELOPMENT REPORTS, <http://hdr.undp.org/en/indicators/103006> [<https://perma.cc/6CBS-W8BF>].

¹⁵⁵ *Id.*

¹⁵⁶ UNDP, HUMAN DEVELOPMENT REPORT 2019: INEQUALITIES IN HUMAN DEVELOPMENT IN THE 21ST CENTURY: NIGERIA 3 (2019).

¹⁵⁷ FME 2015 Report, *supra* note 128, at 66, 73.

¹⁵⁸ *Nigeria Has 'Largest Number of Children Out-of-School' in the World*, BBC NEWS AFRICA (July 25, 2017),

To be clear, the causes of the failure of the education system in Nigeria are multi-faceted and multi-layered: corruption, incompetent teachers, non-existing or dilapidated infrastructure, weak policy implementation, among others. Accordingly, the assertion is not that copyright law reform is the panacea to Nigeria’s education woes. Many of the issues are governance related while others are better handled through re-thinking the policy landscape of copyright law. Perhaps, it will be useful to elaborate on some of the issues responsible for poor literacy rates in Nigeria and which if addressed would translate the right to education into effective opportunities for Nigerians. A proper understanding of these issues dispels the view that the appalling literacy rate in Nigeria is due to a lack of reading culture.

1. ALM and textbooks: students in Nigeria still depend on bulk access to printed materials for learning.¹⁵⁹ There is very little to no access to electronic materials which creates difficulties for reaping the digital dividend. Although information is non-rivalrous, the hardcopy material embodying the information is rivalrous. This rivalrous nature of hard copy materials creates problems of

<https://www.bbc.co.uk/news/world-africa-40715305>

[<https://perma.cc/M8FM-329W>].

¹⁵⁹ See Rufai Danmusa Gambo & Sani Masanwa Aliyu, *Use of Open Educational Resources and Print Educational Materials by Federal College of Education Katsina, Nigeria: A Study* 37(6) J. LIBR. & INFO. TECH. 437, 438 (2017) (noting that “[p]rint materials remain the bank of Nigeria’s literature through which her historical heritage, norms and values and the entire culture can be transmitted to her younger generations” and that “[m]ost of the scholarly works: books, journals, experts and reports from research institutes are in print forms”); Dr. A.U. Nwabueze & Lucky Oghenetega Urhiewhu, *Availability and Use of Digital Information Resources by Undergraduates of Universities in Delta and Edo States*, 5(2) INT’L J. DIGIT. LIBR. SERVICES, Apr. – June 2015, at 1 (finding that network problems and unavailability of a digital library prevent university students in the examined region from accessing Digital Information Resources).

*The Case for Integrating Copyright Law with the
Constitutional Right to Education in Nigeria and
Developing Countries* **141**

access to knowledge for DCs like Nigeria where there is an insufficient supply of and limited access to printed materials. This is especially the case in Nigeria for several economic and legal reasons.

School libraries in Nigeria are notoriously under-resourced.¹⁶⁰ This is not surprising given Nigeria's poor funding of education and spending per student in both secondary and higher institutions as shown on tables 3A and 3B below. In fact, the so-called libraries in many public primary and secondary schools in Nigeria are completely empty, such that it is a misnomer to refer to them as libraries.¹⁶¹ For students in these schools, the two options available for gaining ALM are either to acquire them from vendors or do without them. Sadly, out of economic necessity, a great number of households would opt for the latter. In reality, many families cannot even afford school uniforms for their dependants, let alone textbooks. Higher institutions on the other hand do have libraries, but they are badly equipped unless you are part of the privileged few whose parents can afford a private college.¹⁶² For the

¹⁶⁰ See Babangida Umar Babayi et al., *Poor Funding of Public Libraries in Nigeria: Adamawa State Scenario*, 7(3) J. SCI. TECH. & EDUC., Sept. 2019, at 7; Fredrick Olatunji Ajegbomogun & Mulikat O. Salam, *The State of School Libraries in Nigeria*, 75(3) PAC. NW. LIBR. ASS'N Q., Spring 2011, at 112; Rose B. Okiy, *Funding Nigerian Universities in the 21st Century: Will funding from alternative sources suffice?*, 18(2) THE BOTTOM LINE 71 (2005); I.E. Aguolu, *Nigerian University Libraries: What Future?* 28(3) INT'L INFO. & LIBR. REV. 261 (1996).

¹⁶¹ Ajegbomogun & Salam, *supra* note 160, at 114.

¹⁶² See Aguolu, *supra* note 160; Okiy, *supra* note 160; James Daniel, *Lack of Funds Hampers Library Development in Nigeria*, PREMIUM TIMES (Feb. 18, 2013), <https://www.premiumtimesng.com/news/top-news/120838-lack-of-funds-hampers-library-development-in-nigeria-chief-librarian.html> [<https://perma.cc/6BDD-54NT>]; Goodluck Ifijeh & Felicia Yusuf, *Covid-19 Pandemic and the Future of Nigeria's University System: The Quest for Libraries Relevance*, 46(6) J. ACAD. LIBRARIANSHIP 1, 5 (2020) (pointing out the various challenges facing

unfortunate students that cannot afford textbooks, there are various ways to gain ALM with different copyright implications. First is by photocopying the original texts. This option is only feasible if on the one hand the learning material is available and within reach; and on the other hand the student can bear the economic and legal costs of photocopying the copyrighted material. Second is through course packs. Course packs are a compilation of photocopied materials (usually extracts from copyrighted materials) made for a particular course of study. They are useful especially where the collected materials are not available in sufficient quantity or not affordable as is the case in Nigeria. They are also flexible since they allow the teacher to tailor the content of the course packs to the curriculum. However, they involve copyrighted materials, and this may require copyright clearances for their preparation. Third is through the outright purchase of learning materials. This is not a viable option for a great number of students in Nigeria due to weak purchasing power. For many students, the only way to own a copy is to purchase pirated copies at a significantly cheaper rate.

2. Access to electronic materials: the problems associated with access to printed materials discussed above would be reduced if there was broad access to ICT, particularly computers and the internet, as ICT provides the technological capacity to utilize the non-rivalrous character of information.¹⁶³ But access to electronic materials via the

university libraries in Nigeria, especially in establishing electronic databases).

¹⁶³ Information, *not the material embodiment*, is non-rivalrous because my use of it does not subtract from another person's use. Although information is characteristically non-rivalrous, technology impacts on the extent to which this public good characteristic of information is exploited by removing spatial and temporal limitations, which are excludability issues. On the implications of the non-rivalrous and non-excludable characteristics of informational works, the subject matters of copyright law, for copyright theory and policy, see Glynn S. Lunney, Jr.,

*The Case for Integrating Copyright Law with the
Constitutional Right to Education in Nigeria and
Developing Countries* **143**

Internet is a luxury only reserved for the affluent household. This is not surprising. In a country where more than 40% of the population live in extreme poverty, it is a Sisyphean task to expect households to afford a computer with or without internet connection. For a majority of those who even have access to the internet, it is through mobile phones.¹⁶⁴ Even then, it is estimated that 111 million people are offline in Nigeria.¹⁶⁵ The impact of this poor access to ICT on A2E cannot be exaggerated. The internet provides quick and easily accessible way to find information. For those in developed countries, access to Wikipedia may be taken for granted, given that it is easily accessible at any time. But imagine being without access to Wikipedia or other websites. Yet this is the experience of many students in DCs. Furthermore, many works that are either unavailable in hard copy or out of print are now digitized. Given that ICT have greatly reduced the production costs of

Re-examining Copyright's Incentives-Access Paradigm, 49 VAND. L. REV. 483, 492–99 (1996); Oren Bracha & Talha Syed, *Beyond Efficiency: Consequence Sensitive Theories of Copyright*, 29 BERKELEY TECH. L.J. 229, 237–41 (2014). For works examining the subject matters of copyright as public goods, see William M. Landes and Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326–27. *But see* Christopher S. Yoo, *Copyright and Public Good Economics: A Misunderstood Relation*, 155 U. PA. L. REV. 635 (2007) (objecting to the analysis of copyrightable works as pure public goods). On public goods and their characteristics, see generally RICHARD CORNES & TODD SANDLER, *THE THEORY OF EXTERNALITIES, PUBLIC GOODS AND CLUB GOODS* 3–10 (1996); J.G. Head, *Public Goods and Public Policy*, 17 PUB. FIN. 197 (1962).

¹⁶⁴ This is an observed reality. In addition, see WORLD BANK GROUP, *WORLD DEVELOPMENT REPORT 2016: DIGITAL DIVIDENDS* 6 (2016) (“The lives of the majority of the world’s people remain largely untouched by the digital revolution. Only around 15% can afford access to broadband internet. Mobile phones, reaching almost four-fifths of the world’s people, provide the main form of internet access to developing countries.”).

¹⁶⁵ *Id.* at 8.

informational works, many academic journals are now published online. On one hand, these problems of ICT access clearly mean that Nigerian students are not reaping the benefits of digital resources. On the other hand, this issue of poor access to ICT in Nigeria, an observable fact in many DCs, brings in to sharp focus whether the issues and concerns of the A2K movement accommodate the concerns of DCs.

Table 2A: Federal Government of Nigeria Budgetary Allocation to Education: 2009-2018

Year	Allocation to Education as % of Total Budget
2009	7.25
2010	4.83
2011	6.16
2012	8.20
2013	8.55
2014	9.94
2015	7.74
2016	6.10
2017	7.38
2018	7.03

Source: VANGUARD Nigeria.¹⁶⁶

¹⁶⁶ Clifford Ndujihe, *Education Sector Gets Paltry N3.9 Trillion Out of N55.19 Trillion in 10 Years*, VANGUARD NIGERIA (Apr. 8, 2018, 5:52 AM), <https://www.vanguardngr.com/2018/04/education-free-fall/> [<https://perma.cc/9KWD-G8NW>]; cf. BUDGIT, EDUCATION FINANCING: ANALYSIS AND RECOMMENDATIONS 8 (2018) (showing data that differs from Vanguard's but comparable for some of the years).

Table 2B: Public Recurrent Spending per Year in Sub-Saharan African Countries by Education Level 2003.

Country	Primary Education (% of GDP per capita)	Higher Education (% of GDP per capita)
Ghana	17.6	372.0
Kenya	9.0	266.1
Malawi	11.0	1760.0
Nigeria	14.4	111.0
Senegal	13.9	257.0
Zimbabwe	16.2	201.3

Source: World Bank Study¹⁶⁷

III. A2E IN INDIA AND BEYOND

The crisis of ALM and the strategies employed by students to overcome this crisis are not peculiar to Nigeria nor even to DCs though there are cogent reasons for emphasizing the access conditions of developing over developed countries: (1) the salience of education for DCs' developmental progress given their developmental level, (2) the weaker purchasing power of DCs' students, (3) limited access to ICT, and (4) developed countries are the main producers of knowledge goods.

It is therefore interesting to examine how some DCs grapple with this crisis. This and subsequent sections will focus on India for three reasons. India is a DC; it is a prominent voice in the copyright and development

¹⁶⁷ KIRSTEN MAJGAARD & ALAIN MINGAT, EDUCATION IN SUB-SAHARAN AFRICA: A COMPARATIVE ANALYSIS 97 (2012).

discourse;¹⁶⁸ and apart from similar socio-economic conditions with Nigeria, its constitutional guarantee of the right to education tracks that of Nigeria in interesting ways.

A. *The Right to Education: A Foundational Commitment.*

1. India

Although located in South Asia, India's political history and socio-economic conditions are similar to Nigeria's.¹⁶⁹ Like Nigeria, India gained independence from Britain, earning that independence on August 15, 1947.¹⁷⁰ With a population of 1.3 billion, India is the most populous democracy in the world.¹⁷¹ It boasts a rich diversity of ethnicities, languages, and religions.¹⁷² English is the most important language for national, political and commercial communication, although Hindi enjoys the status of India's primary official language, with English being the second official language.¹⁷³

Similarly, the current development indicators and economic realities track those of Nigeria. Despite increased economic growth, India continues to be plagued by massive

¹⁶⁸ See PRASHANT REDDY & SUMATHI CHANDRSHEKARAN, CREATE, COPY, DISRUPT: INDIA'S INTELLECTUAL PROPERTY DILEMMAS 115–53 (2017).

¹⁶⁹ See *The World Factbook: South Asia-India*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/in.html> [<https://perma.cc/DMG4-J6P8>].

¹⁷⁰ *Id.*

¹⁷¹ *The World Factbook: Population: Country Comparison Ranking*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/fields/335.html> [<https://perma.cc/4LYW-MSZJ>].

¹⁷² CENTRAL INTELLIGENCE AGENCY, *supra* note 169.

¹⁷³ *Id.*

*The Case for Integrating Copyright Law with the
Constitutional Right to Education in Nigeria and
Developing Countries* **147**

inequality, discrimination against women, and poverty.¹⁷⁴ With a GDP per capita (PPP) of 7,200 USD, per capita income still remains below world average.¹⁷⁵ India, however, is on track for SDG 2030 Goal 1 of no poverty as the percentage of people living in extreme poverty is only 4%.¹⁷⁶ But its HDI rank is low, ranking 129 out of 189 among world countries.¹⁷⁷

On the education front, India has made substantial progress. The adult literacy rate, as a percentage of the population aged fifteen and above, is 69.3%.¹⁷⁸ But there are still significant problems, especially with access to higher education. While the percentage of secondary school-age population enrolled in secondary school is 69%, as of 2013 that of tertiary school is a meagre 24%.¹⁷⁹ The government expenditure on education as a percentage of GDP is neither significant nor has it increased much over the years. It was 3.4%, 3.8%, and 3.9% for each year from 2010-2012 respectively.¹⁸⁰ Furthermore, even though the adult literacy rate is 72.1%, there are wide gaps in the literacy level

¹⁷⁴ Nisha Agrawal, *Inequality in India: What's the Real Story?*, WORLD ECONOMIC FORUM (Oct. 4, 2016), <https://www.weforum.org/agenda/2016/10/inequality-in-india-oxfam-explainer/> [<https://perma.cc/T53M-YLXV>].

¹⁷⁵ *The World Factbook: India - GDP Per Capita (PPP)*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/in.html> [<https://perma.cc/8XDM-R7TA>].

¹⁷⁶ *World Poverty Clock*, WORLD DATA LAB, <http://worldpoverty.io/> [<https://perma.cc/LP5R-BLLF>].

¹⁷⁷ *2019 Human Development Index Ranking*, UNDP: HUMAN DEVELOPMENT REPORTS, <http://hdr.undp.org/en/content/2019-human-development-index-ranking> [<https://perma.cc/8SU8-QMAK>].

¹⁷⁸ *India: Human Development Indicators*, UNDP: HUMAN DEVELOPMENT REPORTS, <http://hdr.undp.org/en/countries/profiles/IND> [<https://perma.cc/HJP2-655N>].

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

between different regions of the country.¹⁸¹ More importantly is the effect of poor economic conditions on A2E opportunities for children.¹⁸²

2. The Right to Education in India: Connecting ESC and CP Rights.

India, a federal republic though with certain unitary features, is governed by its supreme law, the Constitution of India.¹⁸³ It was adopted on 26th November 1949 and came into force on 26th January 1950.¹⁸⁴

The Constitution of India recognises the rights guaranteed in the ICCPR and ICESCR.¹⁸⁵ Indeed India is a signatory to both conventions having acceded to both on 10th April 1979.¹⁸⁶ Like Nigeria, the Indian Constitution distinguishes between CP rights contained in Part III as fundamental rights and ESC rights contained in Part IV as Directive Principles of State Policy (DPSP). Regarding Part IV, Art. 37 of the India Constitution states that “[t]he provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”¹⁸⁷ Clearly, the import of Art. 37 is to demarcate the regime of fundamental rights from DPSP vis-à-vis justiciability. The implication therefore is that the

¹⁸¹ Vachaspati Shukla & Udaya S. Mishra, *Literacy Achievement in India: Across the States and Over the Age Cohort*, 54(48) ECON & POL. WKLY. (Dec. 7, 2019).

¹⁸² See generally Saroj Pandey, *Education as a Fundamental Right in India: Promises and Challenges*, 1 INT’L J. EDUC. L. & POL’Y 13 (2005).

¹⁸³ India Const.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* Parts III & IV.

¹⁸⁶ Like Nigeria, India has a dualist approach to international law. See *id.* art. 253.

¹⁸⁷ *Id.* art. 37.

*The Case for Integrating Copyright Law with the
Constitutional Right to Education in Nigeria and
Developing Countries* **149**

rights contained in the DPSP are to be implemented only by the State and not enforceable by the judiciary.

Education, as an ESC right, is dealt under the DPSP in India's Constitution. Three provisions—Arts. 41, 45, and 46—deal with education, but two are particularly important for present purposes. Art. 41 states that “[t]he State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement and in other cases of undeserved want.”¹⁸⁸ And Art. 45, originally stated that “[t]he State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.”¹⁸⁹

The issue of whether education, under the Indian Constitution, is a fundamental right is contingent on the relationship between Part III and IV as understood and interpreted by the Indian judiciary. Although the DPSP seems to be accorded a lesser status vis-à-vis Part III by virtue of Art. 37, the Indian SC has been innovative in construing the status of the DPSP in the constitutional scheme.

This relationship was first examined in *State of Madras v. Champakam Dorairajan* where it was held that fundamental rights were superior to the DPSP. Specifically, the SC of India held that “[t]he directive principles have to conform to and run subsidiary to the Chapter on Fundamental Rights.”¹⁹⁰ The SC of India has since shunned this view, preferring a harmonious approach in which the relationship between Part III and IV is considered supplementary and complementary. In *Minerva Mills v.*

¹⁸⁸ *Id.* art. 41.

¹⁸⁹ *Id.* art. 45.

¹⁹⁰ *State of Madras v. Srimathi Champakam*, AIR 1951 SC 226 (India).

Union of India Chandrachud CJ delivering the leading judgment in the Indian SC stated:

Granville Austin's observation brings out the true position that Parts III and IV are like two wheels of a chariot, one no less important than the other. You snap one and the other will lose its efficacy. They are like a twin formula for achieving the social revolution, which is the ideal which the visionary founders of the Constitution set before themselves. In other words, the Indian Constitution is founded on the bed-rock of the balance between Parts III and IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution.¹⁹¹

If neither Part III nor Part IV is superior, but they are of equal importance, then it follows that both Parts should be equally protected. In *Keshavanda v. State of Kerala* Mathew J. put it this way:

Many of the articles, whether in Part III or Part IV, represent moral rights which they have recognised as inherent in every human being in his country. The task of protecting and realising these rights is imposed upon all the organs of the State, namely, legislative, executive and judicial. What then is the importance to be attached to the fact that the provisions of Part III are enforceable in a Court and the provisions in Part IV are not? Is it that the rights reflected in the provisions of Part III are somehow superior to the moral claims and aspirations reflected in the provisions of Part IV? I think not.¹⁹²

¹⁹¹ *Minerva Mills Ltd. v. Union of India*, (1980) SCR (1) 206, 53 (India).

¹⁹² *Keshavanda Bharati v. State of Kerala*, (1973) 4 SCC 225, ¶ 1762 (India). This remark was quoted with approval by the SC of India in *Unni Krishnan v. State of Andhra Pradesh*, AIR 1993 SC 2178 (India).

*The Case for Integrating Copyright Law with the
Constitutional Right to Education in Nigeria and
Developing Countries* **151**

By adopting this approach, the SC of India is able to connect Part III and IV as supplementary and complementary to each other thereby enabling it to give effect to the provisions under the DPSP.

The issue of whether there is a fundamental right to education enforceable by the Court was first answered affirmatively in *Mohini Jain v. State of Karnataka*.¹⁹³ In this case, which concerned the charging of “capitation fees” in consideration of admission, the SC held that every citizen has a right to education under the Constitution and that the State was under an obligation to establish educational institutions to enable the citizens to enjoy the said right. This obligation may be discharged either through State owned or State-recognized educational institutions.

In *Unni Krishnan v. State of Andhra Pradesh*, the Indian SC with a larger bench of five judges had the opportunity to examine the validity of the *Mohini Jain* decision.¹⁹⁴ Like *Mohini Jain*, *Unni Krishnan* challenged the ability of private medical and engineering colleges in Andhra Pradesh to charge capitation fees to students seeking admission. The primary issue for the Court was whether the social right to education is a fundamental right under the Indian constitution.¹⁹⁵ What is interesting in both *Mohini Jain* and *Unni Krishnan* is not just the outcome but the manner in which the Indian SC arrived at the decision. In *Mohini Jain*, the SC held that there is a fundamental right to education under the Indian Constitution and that this right “flows directly from right to life.”¹⁹⁶ The SC in *Unni Krishnan* affirmed this part of *Mohini Jain*’s judgment and held that the “right to education is implicit and flows from

¹⁹³ *Mohini Jain v. State of Karnataka*, 1992 SCR (3) 658, 660 (India).

¹⁹⁴ *See Unni Krishnan v. State of Andhra Pradesh*, 1993 SCR (1) 594, 594 (India).

¹⁹⁵ *Id.* at 597.

¹⁹⁶ *Mohini Jain v. State of Karnataka*, 1992 SCR (3) 658, 661 (India).

the right to life guaranteed by Article 21.” In other words, the right to education is a component of the right to life. As such, the right to education is a fundamental right and should be enforced as a fundamental right. According to the SC, the fact that the right to life as guaranteed by Art. 21 of the Indian Constitution is negative in character—i.e. requires non-interference rather than any positive obligation by the State—has no relevance to whether the right to education is constitutive of the right to life.¹⁹⁷ The Court, however, departed from *Mohini Jain* in determining the content of the right to education. According to the Court, “[t]he right to education which is implicit in the right to life and personal liberty guaranteed by Article 21 must be construed in the light of the directive principles in Part IV of the Constitution.”¹⁹⁸ After analyzing the various articles in Part IV—Arts. 41, 45, and 46—the Court held that the “[r]ight to education understood in the context of Articles 45 and 41 means, (a) every child/citizen of this country has a right to free education until he completes the age of fourteen years and (b) after a child/citizen completes 14 years, his right to education is circumscribed by the limits of the economic capacity of the State and its development.”¹⁹⁹ Thus, by virtue of Article 21, the Indian Constitution guarantees the right to basic education which ends when a normal child completes the age of fourteen in India.

The SC was wary their reasoning in arriving at the fundamental right to education may open up the flood gates to other claims relying on Art. 21, so it stated:

We must hasten to add that just because we have relied upon some of the directive principles to locate the parameters of the right to education implicit in

¹⁹⁷ *Unni Krishnan v. State of Andhra Pradesh*, AIR 1993 SC 2178, ¶ 44 (India).

¹⁹⁸ *Id.* ¶ 45.

¹⁹⁹ *Id.*

The Case for Integrating Copyright Law with the Constitutional Right to Education in Nigeria and Developing Countries **153**

Article 21, it does not follow automatically that each and every obligation referred to in Part IV gets automatically included within the purview of Article 21. We have held the right to education to be implicit in the right to life because of its inherent fundamental importance. As a matter of fact, we have referred to Articles 41, 45 and 46 merely to determine the parameters of the said right.²⁰⁰

Following this judgment, the Constitution (Eighty-sixth Amendment) Act, 2002, inserted Art. 21A into the Indian Constitution which explicitly guarantees the right to basic education to all children of the age of six to fourteen years.²⁰¹ The Right of Children to Free and Compulsory Education Act, 2009, is the enabling legislation that implements the fundamental right to education, and both the constitutional amendment and the Act came into force on April 1, 2010.²⁰²

B. *Other Developing Countries with the Right to Education: South Africa & Brazil*

The Indian judgment on the right to education is representative of the importance education has on individual development in as much as it connects the right to education with the right to life. Therefore, it is not surprising that many countries, DCs, and developed nations, have constitutional provisions protecting this important right.²⁰³ Unlike Nigeria, the right to education is a fundamental right in the South

²⁰⁰ *Id.* ¶ 50.

²⁰¹ India Const., amended by The Constitution (Eighty-Six Amendment) Act, 2002.

²⁰² The Right of Children to Free and Compulsory Education Act, 2009, § 3 (India); *Right to Education*, MINISTRY OF EDUCATION, <https://education.gov.in/rte> [<https://perma.cc/E4JY-LAW9>].

²⁰³ See THE LAW LIBRARY OF CONGRESS, CONSTITUTIONAL RIGHT TO AN EDUCATION IN SELECTED COUNTRIES (2016).

African (SA) and Brazilian constitutions and is therefore justiciable.

The SA Constitution in the Bill of Rights chapter explicitly guarantees the right to education.²⁰⁴ Section 29(1) of the South African Constitution contained in the Bill of Rights chapter states that “Everyone has the right (a) to a basic education, including adult basic education; and (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.”²⁰⁵ The SA Constitutional Court has not considered the content or meaning of “basic education”. However, section 3(1) of the South African Schools Act, 1996, makes education compulsory for children from the ages of seven years until the age of fifteen years, or ninth grade, whichever comes first.²⁰⁶

The right to basic education in the Bill of Rights is absolute, thereby impressing the importance of education for national and individual development. As some commentators note, “[t]he way in which the courts adjudicate the right to a basic education differs from the way in which other socio-economic rights are adjudicated.”²⁰⁷ In *Governing Body of the Juma Musjid Primary School v Essay*, the Constitutional Court stated:

[i]t is important... to understand the nature of the right to ‘a basic education’ under section 29(1)(a). Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be ‘progressively realised’

²⁰⁴ S. AFR. CONST., 1996, Ch.2: Bill of Rights, § 29.

²⁰⁵ *Id.* § 29(1).

²⁰⁶ South African Schools Act 84 of 1996 § 3(1).

²⁰⁷ Chrizzell Chürr, *Realisation of a Child’s Right to a Basic Education in the South African School System: Some Lessons from Germany*, 18(7) POTCHEFSTROOM ELEC. L.J. 2405, 2415 (2015).

*The Case for Integrating Copyright Law with the
Constitutional Right to Education in Nigeria and
Developing Countries* **155**

within ‘available resources’ subject to ‘reasonable
legislative measures’.²⁰⁸

Given the indispensability of ALM to education, SA courts have held the right to basic education can only be meaningfully operationalized if there is ALM. In *Section 27 and Others v. Minister of Education and Another*, the North Gauteng High Court held:

the provision of learner support material in the form of text books, as may be prescribed is an essential component of the right to basic education and its provision is inextricably linked to the fulfilment of the right. In fact, it is difficult to conceive, even with the best of intentions, how the right to basic education can be given effect to in the absence of text books. . .²⁰⁹

In yet another decision, the Eastern Cape Local Division of the SA High Court in *Madzodzo and Others v. Minister of Basic Education and Others* stated that the state’s obligation to provide basic education under the Constitution “requires the provision of a range of educational resources:- schools, teachers, teaching materials and appropriate facilities for learners.”²¹⁰

The Constitution of the Federative Republic of Brazil, promulgated on October 5, 1988, provides for the right to education.²¹¹ There are nine titles in the Brazilian Constitution which are sub-divided into chapters and

²⁰⁸ *Governing Body of the Juma Masjid Primary Sch. & Others v. Essay N.O. and Others*, 2011 (13) SA (CC) at 19–20 para. 37 (S. Afr.).

²⁰⁹ *Section 27 and others v. Minister of Educ. and another*, 2012 (2) SA (GNP) at 13–14 para. 25 (S. Afr.).

²¹⁰ *Madzodzo and Others v. Minister of Basic Educ.* 2014 ZAECMHC 5 at para. 20 (S. Afr.).

²¹¹ Constituição Federal [C.F] [CONSTITUTION] art. 205 (Braz.), translated in CONSTITUTE PROJECT, https://www.constituteproject.org/constitution/Brazil_2017.pdf?lang=en [https://perma.cc/4SKM-7BEY].

articles.²¹² Title 2 is captioned “Fundamental Rights and Guarantees.”²¹³ Under this title, chapter 2 comprises Arts 6-11 and provides for social rights. Art. 6 states that “[e]ducation, health, food, work, housing, leisure, security, social security, protection of motherhood and childhood, and assistance to the destitute are social rights, as set forth by this Constitution.”²¹⁴ Art. 205 states that “[e]ducation, which is the right of all and duty of the State and of the family, shall be promoted and fostered with the cooperation of society, with a view to the full development of the person, his preparation for the exercise of citizenship and his qualification for work.”²¹⁵ Art. 208 elaborates on the nature of this right by providing that the duty of the State towards education shall be fulfilled by ensuring, amongst others, free, mandatory basic education for every individual from the age of four through the age of seventeen, and access to higher levels of education according to individual capacity.²¹⁶ According to Art. 208(1), access to compulsory and free education is a subjective public right i.e. a person may petition the court to enforce his/her claim against the state.²¹⁷ In other words, it is justiciable. So the constitutionally guaranteed right is the right to basic education, as in other countries examined above. Although access to higher levels of education and research is guaranteed, it is not a subjective public right. An important principle in the fulfilment of the state’s obligation to provide education as stated in Art. 206(II) is “freedom to learn, teach, research and express thought, art and knowledge.”²¹⁸

²¹² See generally *Constituição Federal* [C.F] [Constitution] (Braz.), translated in CONSTITUTE PROJECT, https://www.constituteproject.org/constitution/Brazil_2017.pdf?lang=en [<https://perma.cc/HD2T-WT8C>].

²¹³ *Id.* Title II.

²¹⁴ *Id.* art. 6.

²¹⁵ *Id.* art. 205.

²¹⁶ *Id.* art. 208.

²¹⁷ *Id.* art. 208(1).

²¹⁸ *Id.* art. 206(II).

IV. COPYRIGHT AND A2E

On one hand, the right to education as guaranteed in various DCs' Constitutions provides an opportunity to launch into a much broader and complex issue concerning the legal, institutional, and stakeholder dynamics conditioning ALM. On the other hand, the challenges of integrating the right to education, as recognized in various constitutions, with copyright in order to enhance access.

The terms and conditions of ALM in higher institutions are determined by a complex trajectory of law, institution and the state. Reminiscent of the legendary "Battle of the Book" case, different parties with different interests are camped against each other, each armed with different banners and labels in a seemingly never-ending 'knowledge war'.²¹⁹ At the center of this conflict are copyright law and policy with different parties informed by different interests, each vying for the right to re-draw the balance of this important law shaping the cultural ecosystem. In this protracted battle for knowledge production and use, concerns of ALM are juxtaposed against the goal of rewarding creators. The narrative is often that the realization of one concern impedes the other, but nothing is so further away from the truth. In this battle for knowledge-production and use, students and publishers are the prominent parties—the former labelling the latter "capitalists" and the latter casting the former as "pirates." This altercation is even more exacerbated in DCs where the legal market for books does not meet the needs of students.

One major task facing higher institutions is in how they facilitate and negotiate access for students. It is not difficult to imagine that many students in DCs resort to

²¹⁹ See RAY CORRIGAN, COLMCILLE AND THE BATTLE OF THE BOOK: TECHNOLOGY, LAW AND ACCESS TO KNOWLEDGE IN 6TH CENTURY IRELAND (2007) (discussing the "Battle of the Book" case).

infringement as a means of access. Consequently, publishers and rights organizations ramp up measures to enforce their copyrights. In Nigeria, the Reproduction Rights Society of Nigeria (REPRONIG) is the sole collecting society for the rights of authors and rightsholders in the literary field.²²⁰ Given that most copyright infringements happen in university campuses, particularly in copy shops located inside the campus, the stance of these universities becomes critical.²²¹ In other words, would they prefer turning a blind eye to infringements, or would they rather aid rightsholders in curtailing these infringements? DCs' universities faced with this reality have a difficult decision to make. Universities have a duty to provide quality education to their students, but such a mandate is impossible to fulfil without proper ALM. This task becomes even tougher as enrollment figures continue to increase.

In Nigeria, overcrowded public higher institutions place further pressure on the available but already-limited resources. However, universities are also obliged to ensure that materials are both legally accessed and used. How each institution manages this task is crucial to the sustainability of the cultural ecosystem. One way to unpack this situation is to see the universities as playing a mediating role between students and publishers. The better approach is to understand the role of universities as facilitatory in ensuring that the public interests and objectives of equitable ALM and fair remuneration for authors are met. No matter the strategies adopted by the universities to ensure the fulfilment

²²⁰ *Mandate*, REPRODUCTION RIGHTS SOCIETY OF NIGERIA, <http://repronig.ng/mandate/> [<https://perma.cc/2Q2D-MMHT>].

²²¹ REPRONIG, PHOTOCOPYING IN NIGERIA'S TERTIARY INSTITUTIONS (2004) (This report is on file with author and provided upon request by John Asein, the Director General of the Nigerian Copyright Commission.). However, it is important to note that the report may not be completely objective as the survey was carried out by an authors' rights organization.

*The Case for Integrating Copyright Law with the
Constitutional Right to Education in Nigeria and
Developing Countries* **159**

of this objective, the country's prevailing socio-economic conditions should be a key consideration.

This complex interaction amongst universities, libraries, students, publishers, copy shops and the State in determining the conditions of access has played out in many DCs. Brazil and India are notable examples.

A. "To Copy a Book is a Right"

The conflict between publishers and students vis-à-vis the legality of copying carried out by the latter in university copy shops has played out heavily in Brazil.

In 2005, twenty civil actions and 150 raids by Brazilian police were carried out at Brazilian higher institutions at the request of Associação Brasileira de Direitos Reprográficos (ABDR), the Brazilian reprographic rights association representing publishers.²²² In March 2005, seventy-four books and 141 teachers' folders were seized.²²³ ABDR claimed that rampant photocopying of academic books in universities by students, cost publishers R\$ 400 million (~ 180 million USD in 2005).²²⁴ One of the affected universities, Pontifical Catholic University of Sao Paulo (PUC-SP) tried to reach an agreement with ABDR.²²⁵ PUC-SP offered to create an intranet system that would control copying while enabling the compensation of

²²² Marcelo Gutierrez & Simone Harnik, *Editoras Dão Descontos para Coibir Xerox*, FOLHA DE SÃO PAULO (Oct. 27, 2005, 11:00 AM), <https://www1.folha.uol.com.br/folha/educacao/ult305u17969.shtml> [<https://perma.cc/2RUV-RJVE>].

²²³ Fabio Takahashi, *Alunos e Editoras Duelam por Xerox de Obra*, FOLHA DE SÃO PAULO (May 30, 2005), <https://www1.folha.uol.com.br/fsp/cotidian/ff3005200520.htm> [<https://perma.cc/4GGM-7MLM>].

²²⁴ *Id.*

²²⁵ *Universidade Propõe Sistema Para Evitar Xerox*, FOLHA DE SÃO PAULO (May 1, 2005), <https://www1.folha.uol.com.br/fsp/cotidian/ff0105200528.htm> [<https://perma.cc/B34G-ZXCX>].

publishers through reproduction costs.²²⁶ ABDR rejected this proposal and instead offered a 40% discount, and the possibility of freight paid by publishers, on the price of all college books purchased for college libraries on the condition that universities prevent copying by students.²²⁷ Universities rejected this offer as practically unfeasible arguing copies are necessary to fulfil the learning needs of students.²²⁸ Even with a 40% discount, they argued, it is not possible for libraries to stock all the books and copies required by the growing number of students.²²⁹ It is an economic “death sentence” to require students to purchase all the books required for an academic degree because according to a survey by Fundação Getulio Vargas (FGV), first semester students would have to spend R\$ 2000 (~ 920 USD in 2005) to acquire all the books required by teachers.²³⁰

This conflict around the copying of educational books amongst publishers, students and universities revolves around Brazilian copyright law.²³¹ Art 46(II) of the Brazilian copyright law states that “the reproduction in one copy of short extracts from a work for the private use of the copier, provided that it is done by him and without gainful

²²⁶ *Id.*

²²⁷ Gutierrez & Harnik, *supra.* note 222; *Editoras Oferecem Descontos a Universidades Para Coibir Xerox*, UOL NEWS (Nov. 11, 2005), <https://noticias.uol.com.br/uolnews/brasil/reportagens/2005/11/11/ult2616u194.jhtm> [<https://perma.cc/K9Y7-VGHP>].

²²⁸ Gutierrez & Harnik, *supra.* note 222.

²²⁹ *Id.*

²³⁰ Fabio Takahashi, *Universitários Lançam Frente Pró-Xerox*, FOLHA DE SÃO PAULO (Feb. 22, 2006), <https://www1.folha.uol.com.br/fsp/cotidian/ff2202200618.htm> [<https://perma.cc/7GWU-H4KG>].

²³¹ Lei No. 9.610 de 19 de Fevereiro de 1998, Altera, atualiza e consolida a legislação sobre direitos autorais e dá outras providências (Braz.), *translated by the International Bureau of WIPO*, <https://www.wipo.int/edocs/lexdocs/laws/en/br/br002en.pdf> [<https://perma.cc/5RLL5-4BSB>].

*The Case for Integrating Copyright Law with the
Constitutional Right to Education in Nigeria and
Developing Countries* **161**

intent” shall not constitute a violation of copyright.²³² Unfortunately, this provision is not clear on the extent of permissible legal copying that will not constitute a violation but for the stipulation of “short extracts.” Is a “short extract” 5%, 10% or 20% of a book? Both parties latched onto this legal loophole to provide support for their activities. For students, short extracts could be a chapter of a book, thus justifying their copying activities. ABDR and publishers, on the other hand, considered this to be an unwarranted liberal interpretation of Art 46(II), and they accordingly intensified their crack down.²³³ To ABDR, even the act of photocopying two pages of a book could amount to unlawful copying.²³⁴ It is therefore not a stretch to say that the position of ABDR is that any reproduction requires permission, the implication being that universities must pay for every access. As the president of ABDR put it,

“the university community, now protected by a large number of teachers and school owners, thinks that the villain of history is the author and the publisher. I say: the villain of history is the one who offers, who proposes to offer a package called education and it does not do it completely. That is, those who offer education in the market have to offer buildings, facilities, laboratories, internet, other supports for information and knowledge and books and libraries.”²³⁵

Following the raids and the lack of clarity in Art 46(II) of Brazilian copyright law, several Brazilian universities passed internal resolutions establishing the

²³² *Id.* art. 46(II).

²³³ *Afinal, Copiar Trechos de Livros é Certo ou Errado?*, PORTAL UNIVERSIA (Sept. 12, 2005, 6:31 PM), <https://www.jornaljurid.com.br/noticias/afinal-copiar-trechos-de-livros-e-certo-ou-errado> [<https://perma.cc/RS6M-PZ3B>].

²³⁴ *Id.*

²³⁵ *Id.*

permissible extent of legal copying.²³⁶ The involved universities were PUC-SP, University of São Paulo (USP), FGV and later in 2010 Federal University of Rio de Janeiro and according to Mizukami and Reia:

The resolutions are very similar but diverge somewhat in the range of rights defined and justifications offered. All authorize the reproduction of chapters, articles, and other substantial portions of works for personal use—as well as copies of full works that have been out of print for at least a decade. All authorize the “professor’s folder” as means of distributing materials via the copy shops. All require the library to tag work that can be fully copied. Most authorized the copying of foreign works not available in the domestic market.²³⁷

The intensification of ABDR efforts to prevent photocopying in universities led to the birth of an organised movement “Copiar Livro É Direito” (To Copy a Book is a Right) by students from USP, PUC-SP, FGV of São Paulo and Rio, Mackenzie, Ibmecc Rio de Janeiro, and São Judas University.²³⁸ Anchoring their arguments on human rights law and the Brazilian constitution, the movement challenged the threats of ABDR and publishers that sought to undermine A2E.²³⁹ They correctly pointed out that human rights and constitutional law provide for “the access of all citizens to culture, information and knowledge, independent of prior consultation with right holders (especially book publisher associations).”²⁴⁰ For these students, they were simply

²³⁶ Pedro Mizukami & Jhessica Reia, *Brazil: The Copy Shop and the Cloud*, in *SHADOW LIBRARIES: ACCESS TO KNOWLEDGE IN GLOBAL HIGHER EDUCATION* 223, 228 (Joe Karaganis ed., 2018).

²³⁷ *Id.*

²³⁸ Takahashi, *supra* note 230.

²³⁹ *Copiar Livro é Direito*, UNIFIMES: CENTRO UNIVERSITARIO DE MINEIROS, <http://unifimes.edu.br/2007/01/10/copiar-livro-direito/> [<https://perma.cc/52YV-2QDL>].

²⁴⁰ *Id.*

The Case for Integrating Copyright Law with the Constitutional Right to Education in Nigeria and Developing Countries **163**

“fighting for what is already legal, that is, the right to access to information.”²⁴¹

This conflict amongst publishers, students and universities over the conditions of ALM in Brazil is sharply representative of the complex interactions between law and institutions in determining the conditions of ALM and *a fortiori* A2E. At the centre of these interactions and conflict is copyright law. Although State funding can impact A2E, it is also palpably clear, as the Brazilian case shows that copyright law substantially shapes A2E. Whether it is conducive to or restrictive of access depends on the nature of the L&Es contained therein. This in turn depends on how copyright is understood: whether as a distinct and separate sphere of law or an overlapping sphere that must connect with other areas of law. DCs need to adopt the latter view and thereby integrate copyright with the constitutional right to education. As Branco states:

In a country like Brazil where 6 million children live in absolute poverty we cannot ignore the benefits of technology, nor regard copyright as an absolute rule to be followed to the letter. Copyright is part of a far wider context, involving constitutional and international rules that need to be respected. As the Brazilian Constitution requires the observance of the social function of all forms of property... it is of vital importance that the LDA is read in the light of the Constitution and not the other way around.²⁴²

Interestingly, on July 12, 2018, Brazil enacted Law No. 13,696 which institutes the National Policy of Reading

²⁴¹ Takahashi, *supra* note 230.

²⁴² Sergio Branco, *Brazilian Copyright and How It Restricts the Efficiency of the Human Right to Education*, 4 INT'L. J. ON HUM. RTS. 115, 132 (2007).

and Writing (NPRW).²⁴³ Art. 2 of this law is important. It states:

The following are guidelines of the National Policy of Reading and Writing:

I - Universalisation of the right to access to books, reading, writing, literature and libraries;

II - The recognition of reading and writing as a right in order to enable everyone, including through policies to stimulate reading, the conditions to fully exercise citizenship, to live a dignified life and to contribute to the construction of a more just society;

Art 2(V), on the other hand, affirms the “recognition of the creative, productive, distributive and mediating chains of books, reading, writing, literature and libraries as fundamental and stipulating components of the creative economy” thereby pointing out the important roles of authors and publishers.²⁴⁴ According to Art. 3(I), one of the objectives of the NPRW is to “democratise access to the book and the various supports for reading through public libraries, among other places to encourage reading, in order to expand the physical and digital collection and accessibility conditions.”²⁴⁵

The Brazilian NPRW is a development strategy. It is an interesting and concise articulation of the benefits of reading and writing. The strategy recognizes reading as a right and necessary to live a dignified life. As a development strategy, the NPRW is part of a package of other development policies and laws aiming to transform the lives of individuals. Its successful implementation requires that

²⁴³ Lei No. 13.696 de 12 de Julho de 2018, Institui a Política Nacional de Leitura e Escrita (Braz.).

²⁴⁴ *Id.* art. 2(V).

²⁴⁵ *Id.* art. 3(I).

The Case for Integrating Copyright Law with the Constitutional Right to Education in Nigeria and Developing Countries **165**

these other development areas be harmoniously interpreted with the NPRW.

Copyright law and policy is part of this set of development tools. They each are a key part in realizing the noble goals of the Brazilian NPRW. State funding and library acquisition can only go so far due to finite resources. Even if libraries were able to stock enough books for each student, the L&Es of copyright law, regarding the making of copies, would still be necessary for A2E.

B. Delhi University Photocopy Case: A Clash of Knowledge Seekers and Knowledge Dealers.

A conflict similar to the one examined above recently played out in India .

In August 2012, five prominent publishers— Oxford University Press; Cambridge University Press (United Kingdom); Cambridge University Press India Pvt. Ltd.; Taylor & Francis Group (United Kingdom); and Taylor & Francis Books India Pvt. Ltd.— brought a copyright infringement suit before the Delhi High Court (DHC) against Rameshwari Photocopy Service (RAPS) and Delhi University (DU).²⁴⁶ The publishers sought relief in the form of a permanent injunction for the photocopying and distribution of their publications in the form of course packs to students.²⁴⁷ Specifically, the plaintiff publishers alleged that the first defendant, RAPS, infringed their copyright by reproducing chapters of the publishers' works, compiling the chapters as course packs, and distributing the course packs

²⁴⁶ The Chancellor, Masters & Scholars of the University v. Rameshwari Photocopy Services, CS(OS) 2439/2012 (India).

²⁴⁷ *Id.*

for sale to students.²⁴⁸ Furthermore, the publishers argued that DU institutionalized copyright infringement by permitting the photocopying and the sale of their chapters as course packs.²⁴⁹ The publishers alleged that these course packs competed with their publications, so they thereby sought a permanent injunction against the defendants, restraining them from making the course packs.²⁵⁰ Relatedly, these publishers maintained that failure to protect their copyrights would sound a death knell for the publishing business.

The facts of the case are that RAPS obtained a license from DU to operate a photocopying facility at the Delhi School of Economics (DSE).²⁵¹ Although initially denied by DU, teachers at DSE had authorized the creation of course packs and assigned this task to RAPS.²⁵² RAPS photocopied pages and chapters from the plaintiff-publishers' publications, compiled them, and supplied them to students pursuant to the license agreement at 50 paisa per page.²⁵³ The excerpted chapters were part of the syllabus prescribed by DU.

The infringement suit first came up before the DHC on August 14, 2012.²⁵⁴ The court appointed a Commissioner to visit the premises of RAPS without prior notice and to make an inventory of all the infringing and pirated copies plaintiffs' publication found and to seize and seal the

²⁴⁸ *Id.* ¶ 8, <https://spicyip.com/wp-content/uploads/2016/10/Plaint.pdf> [<https://perma.cc/7VRK-TXYE>].

²⁴⁹ *Id.* ¶ 11.

²⁵⁰ *Id.* ¶ 21.

²⁵¹ *The Chancellor, Masters & Scholars of the University v. Rameshwari Photocopy Services*, RFA(OS) No. 81/2016, ¶ 1 (India).

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *The Chancellor, Masters & Scholars of the University v. Rameshwari Photocopy Services*, CS(OS) 2439/2012 (India), http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=159532&yr=2012 [<https://perma.cc/P5DA-33ZL>].

The Case for Integrating Copyright Law with the Constitutional Right to Education in Nigeria and Developing Countries **167**

same.²⁵⁵ On October 17, 2012, Justice Kailash Gambhir sitting at the DHC granted an interim injunction against RAPS restraining them from making or selling course packs.²⁵⁶

Following these events, a mobilisation of students, academics and civil society converged to challenge the publishers' suit.²⁵⁷ Students organized protest rallies.²⁵⁸ In 2013, the Association of Students for Equitable Access to Knowledge (ASEAK), an association organized by students of DU, filed an application to be impleaded as a necessary party.²⁵⁹ On March 1, 2013, ASEAK was impleaded as defendant No. 3.²⁶⁰ Then, on April 12, 2013, the Society for Promoting Educational Access and Knowledge (SPEAK), a society of academics from reputed academic institutions in India, filed an impleadment application and was so impleaded as defendant No. 4.²⁶¹ Furthermore, a change.org online petition was started by academics with over 1300 supporters.²⁶²

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ Radhika Oberoi, *DU Photocopy Case: What Happened and Why It's Important*, THE WIRE (Oct. 26, 2016), <https://thewire.in/education/du-photocopy-case> [<https://perma.cc/XQ52-4KB2>].

²⁵⁸ *Id.*

²⁵⁹ The Chancellor, Masters & Scholars of the University v. Rameshwari Photocopy Services, CS(OS) 2439/2012 (of the Association of Students for Equitable Access to Knowledge, for impleadment in the present suit) (India), http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=45772&yr=2013 [<https://perma.cc/KYD3-D3QX>].

²⁶⁰ *Id.*

²⁶¹ The Chancellor, Master & Scholars of the University v. Rameshwari Photocopy Services, CS(OS) 2439/2012 (SPEAK Impleadment suit) (India), <https://spicyip.com/wp-content/uploads/2016/10/IA-5960-of-2013-O1R10-filed-by-SPEAK.pdf> [<https://perma.cc/SNH7-P6Z6>].

²⁶² *Appeal to Publishers to Withdraw Suit Filed Against Delhi University*, CHANGE.ORG, <https://www.change.org/p/academics-appeal->

On September 16, 2016 Justice Rajiv Sahai Endlaw, sitting as a single judge before the DHC, delivered the judgment of the court.²⁶³ According to Justice Endlaw, the issue before the court was one of law that required an adjudication on “whether the making of course packs as the defendant No. 2 university is making amounts to infringement of copyright.”²⁶⁴ The factual issue as argued by both defendants and plaintiffs – whether the percentage of photocopied copyright content constituting the course packs fell substantially outside of fair use protection – was considered relevant to the adjudication of the suit.²⁶⁵ The DHC held that the actions of the defendants did not amount to copyright infringement by virtue of s.52(1)(i) of the Indian Copyright Act, which provides that the reproduction of any work by a teacher or a pupil in the course of instruction does not constitute copyright infringement.²⁶⁶ In a big win for students and civil society, the court denied the injunction sought by the plaintiffs.²⁶⁷ The plaintiffs appealed this decision before the Division Bench (composed of two judges) of DHC and on December 9, 2016, Justice Pradeep Nandrajog delivered the judgment of the court.²⁶⁸ Prior to the judgment, intervention applications by the Association of Publishers in India, the Federation of Indian Publishers, and the Indian Reprographic Rights Organisation (IRRO)

to-publishers-to-withdraw-suit-filed-against-delhi-university
[<https://perma.cc/DP7M-NHNT>].

²⁶³ The Chancellor, Master & Scholars of the University v. Rameshwari Photocopy Services, CS(OS) 2439/2012 (India), <http://164.100.69.66/jupload/dhc/RSE/judgement/16-09-2016/RSE16092016S24392012.pdf> [<https://perma.cc/FH97-KQ7K>].

²⁶⁴ *Id.* ¶ 22.

²⁶⁵ *Id.*

²⁶⁶ The Copyright Act, 1957, § 52(1)(i)(i) (India).

²⁶⁷ The Chancellor, Master & Scholars of the University v. Rameshwari Photocopy Services, CS(OS) 2439/2012, ¶ 101 (India).

²⁶⁸ The Chancellor, Master & Scholars of the University v. Rameshwari Photocopy Services, RFA(OS) No. 81/2016 (India).

*The Case for Integrating Copyright Law with the
Constitutional Right to Education in Nigeria and
Developing Countries* **169**

were filed supporting the appellants before the DHC and on November 8, 2016, the application was allowed.²⁶⁹

In a blow to the appellants and interveners, the Division Bench of the DHC denied the grant of interim injunction against the respondents, holding that the impugned action of the respondents—the making and distribution of course packs to students—did not constitute copyright infringement, provided the inclusion of the copyrighted work in the course pack was justified for the purpose of educational instruction.²⁷⁰ It did not matter the quantity photocopied as long as the course pack was justified for the purpose of educational instruction.²⁷¹ In reaching this conclusion, the court’s opinion, penned by Justice Nandrajog, affirmed the determination of the Single Judge that the adjudication of the suit was contingent on the interpretation of s.52(1)(i) and further elaborated that the issue for determination is “whether the right of reproduction of any work by a teacher or a pupil in the course of instruction is absolute and not hedged with the condition of it being a fair use.”²⁷² The bone of contention was whether a general principle of fair use or the specific four fair use factors, as applied in the US, should circumscribe the limits of s.52(1)(i).²⁷³ Appellants argued that a fair use principle as applied in the US and other jurisdictions was applicable to the interpretation of s.52(1)(i), but the court disagreed, stating that “the general principle of fair use would be

²⁶⁹ *The Chancellor, Masters & Scholars of the University v. Rameshwari Photocopy Services*, RFA(OS) No. 81/2016 (Indian Reprographic Rights Organisation Application) (India), <https://spicyip.com/wp-content/uploads/2016/11/Intervention-Application-IRRO.pdf> [<https://perma.cc/4X4W-SSDV>].

²⁷⁰ *The Chancellor, Masters & Scholars of the University v. Rameshwari Photocopy Services*, RFA(OS) No. 81/2016, ¶ 56 (India).

²⁷¹ *Id.* ¶ 33.

²⁷² *Id.* ¶ 17.

²⁷³ *Id.*

required to be read into the clause and not the four principles on which fair use is determined in jurisdictions abroad and especially in the United States of America.”²⁷⁴ This general principle of fair use read into s.52(1)(i) of the Indian Copyright Act would be “determined on the touchstone of ‘extent justified by the purpose.’”²⁷⁵ Put differently, “the utilization of copyrighted work would be a fair use to the extent justified for purpose of education. It would have no concern with the extent of the material used, both qualitative and quantitative.”²⁷⁶

As a matter of law, the court therefore denied the grant of interim injunction on the grounds stated above but remanded the suit to the Single Judge to determine the factual issue of whether the inclusion of copyrighted works in the course pack was justified for the purpose of instructional use by the teacher to the class.²⁷⁷

On March 10, 2017, the publishers issued a joint statement to withdraw as plaintiffs and not to appeal the judgment of the DHC Division Bench to the SC of India.²⁷⁸

V. COMMENTARY: PAVING THE WAY FOR A2E

Whichever way one unpacks or characterise the Brazilian and Indian cases, it is impossible to deny that A2K and A2E concerns are central to each case. They show how copyright law is central to these concerns. In both cases, the contestation revolved around the permissible extent of copying allowed under each country’s copyright law. For

²⁷⁴ *Id.* ¶ 31.

²⁷⁵ *Id.* ¶ 33.

²⁷⁶ *Id.*

²⁷⁷ *Id.* ¶ 80.

²⁷⁸ *The Chancellor, Masters & Scholars of the University v. Rameshwari Photocopy Services*, CS(OS) 2439/2012 (Suit Withdrawal), http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=50568&yr=2017 [https://perma.cc/T9JL-9H4C].

*The Case for Integrating Copyright Law with the
Constitutional Right to Education in Nigeria and
Developing Countries* **171**

Brazil, it was Art 46(II) of the Brazilian Copyright law; and in India, s.52 of the Indian Copyright Act.

Although there are significant parallels between these two cases, the India case in particular represents a watershed moment in the struggle for the governance of knowledge use in higher institutions, because it pits globally recognised publishers against DC students and also brings the case up for determination before the court. The outcome of the India case is partly the result of a clear effort to integrate the right to education with copyright law. Although there were echoes of A2E concerns in the Copy Book is Right movement in Brazil, the India case differed in the sense that the court served as a platform to articulate these concerns coherently and integrate them with copyright law.

Before Justice Endlaw at the Single Bench, counsels for the defendants incorporated the issue of education in their arguments and specifically the right to education under the Indian Constitution.²⁷⁹ Broadly, they drew attention to the socio-economic inequalities in Indian society and its impact on A2E.²⁸⁰ Particularly, they showed that the purchasing power of Indian students is weak given the existing socio-economic conditions and, consequently, the difficulty of placing unrealistic expectations on students to purchase copies of textbooks that are beyond their means.²⁸¹ Counsel for defendant No.1 “drew attention to Articles 39(f) and 41 of the Constitution of India constituting giving of opportunities and facilities to children to develop in a healthy manner, protected from exploitation and right to education as Directive Principles of State Policy...”²⁸²

²⁷⁹ The Chancellor, Masters & Scholars of the University v. Rameshwari Photocopy Services, CS(OS) 2439/2012, ¶16–18 (India).

²⁸⁰ *Id.* ¶ 15.

²⁸¹ *Id.*

²⁸² *Id.* ¶ 16.

Counsel for defendant No. 2 relatedly argued that “the question, though relating to copyright law, has to be judged in the light of the right to access to knowledge”, that “the right to education finds mention in the Constitution not only as a Fundamental Right but also as a Directive Principle of State Policy” and that “A2E is a cherished constitutional value and includes within it access for students to book library and right to research and to use all materials available.”²⁸³ These arguments—clear attempts to integrate copyright law with the right to education—clearly informed the court’s judgment. Justice Nandrajog, writing the decision of the DHC Division Bench, articulated:

The importance of education lies in the fact that education alone is the foundation on which a progressive and prosperous society can be built... So fundamental is education to a society – it warrants the promotion of equitable access to knowledge to all segments of the society, irrespective of their caste, creed and financial position. *Of course, the more indigent the learner, the greater the responsibility to ensure equitable access.*²⁸⁴

One aspect of the court’s judgment—which dovetails with the responsibility to ensure A2E—is its understanding of the relationship between s.52 and s.51. The latter section under Indian Copyright Act confers exclusive rights on copyright owners and the former section is what is normally referred to under a copyright regime as “exceptions” because it permits the doing of an act that but for the section would constitute a copyright infringement.²⁸⁵ The plaintiffs argued

²⁸³ *Id.* ¶ 18.

²⁸⁴ The Chancellor, Masters & Scholars of the University v. Rameshwari Photocopy Services, RFA(OS) No. 81/2016, ¶ 40 (India) (emphasis added).

²⁸⁵ On the difference between “exceptions” and “limitations” in copyright law, see JANE C. GINSBURG, *Copyright, in* OXFORD HANDBOOK OF INTELLECTUAL (Rochelle C. Dreyfuss and Justine Pila

*The Case for Integrating Copyright Law with the
Constitutional Right to Education in Nigeria and
Developing Countries* **173**

that s.52 is an exception to the rights conferred by s.51 and should be interpreted narrowly. The court, per Judge Endlaw, disagreed stating, “I thus agree with the contention of the senior counsel for the defendant no.2 University that the rights of persons mentioned in Section 52 are to be interpreted following the same rules as the rights of a copyright owner and are not to be read narrowly or strictly or so as not to reduce the ambit of Section 51...”²⁸⁶

The Division Bench agreed with the Single judge. S.52 should be understood as rights and interpreted accordingly, and not just as exceptions to the exclusive rights of copyright owners.²⁸⁷ The implication of this is clear: exclusive rights of copyright owners and rights of users are equally important, and as such neither should be given any preference. The practice of treating rights of users as concessions or simply exceptions does not fit in with the objective of copyright which Justice Endlaw noted “seeks to maintain a balance between the interest of the owner of copyright in protecting his works on the one hand and interest of the public to have access to the works, on the other.”²⁸⁸

eds., 2018). See also Sam Ricketson, *The Boundaries of Copyright: Its Proper Limitations and Exceptions - International Conventions and Treaties*, INTELL. PROP. Q. 56, 59 (1999).

²⁸⁶ The Chancellor, Masters & Scholars of the University, CS(OS) 2439/2012, ¶ 41 (India).

²⁸⁷ The Chancellor, Masters & Scholars of the University v. Rameshwari Photocopy Services, RFA(OS) No. 81/2016, ¶ 25 (India).

²⁸⁸ *Id.* The view that L&Es are simply limits to the rights of authors is being shunned for a users’ rights approach to L&Es which finds justification on human rights and even utilitarian grounds. See CCH Canadian Ltd v. Law Society of Upper Canada [2004] 1 SCR 339 (Can.); see generally Michael Geist, *The Canadian Copyright Story: How Canada Improbably Became the World Leader on Users’ Rights in Copyright Law*, in COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS (Ruth L. Okediji ed., 2017); Saleh Al-Sharieh, *Securing the*

As mentioned above, there are similarities between the Indian and Brazilian case. Notably are the publishers' hackneyed tactics of exaggerating economic losses due to supposed copyright infringement. In Brazil, the ABDR had estimated a 400 million USD economic loss due to the rampant photocopying by students. The same argument was utilized by the publishers in India.²⁸⁹ They asserted that the course packs constituted lost sales and therefore huge economic losses to the publishing industry.²⁹⁰ The Division Bench rejected this argument even suggesting that improved education could in the long run expand the market for copyright works:

In the context of the argument of an adverse impact or the likelihood of the same on the market of the copyrighted work in question, taking the example of a literacy programme, assuming the whole of the copyrighted material is used to spread literacy, one cannot think of any adverse impact on the market of the copyrighted work for the simple reason the recipient of the literacy programme is not a potential customer. Similar would be the situation of a student/pupil, who would not be a potential customer to buy thirty or forty reference books relevant to the subject at hand. For purposes of reference she would visit the library. It could well be argued that by producing more citizens with greater literacy skills and earning potential, in the long run, improved education expands the market for copyrighted materials.²⁹¹

Future of Copyright Users' Rights in Canada, 35 WINDSOR Y.B. ACCESS JUST. 11 (2018).

²⁸⁹ Takahashi, *supra* note 223.

²⁹⁰ The Chancellor, Masters & Scholars of the University v. Rameshwari Photocopy Services, CS(OS) 2439/2012, ¶ 14 (India).

²⁹¹ The Chancellor, Masters & Scholars of the University v. Rameshwari Photocopy Services, RFA(OS) No. 81/2016, ¶ 36 (India).

The Case for Integrating Copyright Law with the Constitutional Right to Education in Nigeria and Developing Countries 175

The plaintiff publishers stated before the Single and Division Benches of the court that the objective was not to compel students into buying copies of their copyrighted works but rather to direct DU to obtain licenses from the IRRO in order to reproduce extracts of their copyrighted works.²⁹² In Brazil however, the ABDR insisted that students purchase the textbooks at a 40% discount.²⁹³ The publishers in the Indian case strategically opted require the negotiation of licenses with the IRRO—instead of insisting on the purchase of textbooks even at a discounted price—to paint a picture of an empathetic publisher who understands the economic realities of Indian society. It is also likely that the publishers opted for this approach because it would fit well with the neo-classical L&E theory of copyright. This theory privileges the market as an efficient mechanism for determining the production and consumption of creative works, and it also puts forth the understanding of copyright as a property right.²⁹⁴ Under this theory, the use of a copyrighted work without the permission of the copyright owner should only be considered fair use if there is market failure.²⁹⁵ This market failure could manifest in the form of

²⁹² The Chancellor, Masters & Scholars of the University v. Rameshwari Photocopy Services, CS(OS) 2439/2012, ¶ 20 (India); The Chancellor, Masters & Scholars of the University v. Rameshwari Photocopy Services, RFA(OS) No. 81/2016, ¶ 3 (India).

²⁹³ Gutierrez & Harnik, *supra* note 222.

²⁹⁴ See generally Stan Liebowitz, *The Case for Copyright*, 24(4) GEO. MASON L. REV. 907 (2017); Jeremy de Beer, *Making Copyright Market Work for Creators, Consumers and the Public Interest*, in WHAT IF WE COULD REIMAGINE COPYRIGHT? (Rebeca Giblin & Kimberlee Weatherall eds., 2017).

²⁹⁵ Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1614–22 (1982); Sam Ricketson, *supra* note 285, at 60 (stating that “free use provisions should only arise where the benefit of allowing the use in question outweighs the losses to the right owner and where transaction costs would otherwise prevent a negotiated

transaction costs in negotiating licenses or where collecting societies such as IRRO do not exist. In the absence of market failure, licenses for the use of copyrighted works should be negotiated, even if the impugned act constitutes a fair use. Given that a collecting society, e.g. IRRO, did exist, the plaintiff publishers were likely hoping that the court would opt for a licensing regime. This is evident from their arguments before the Single judge, submitting “(y) that the defendants on the one hand are infringing copyright of the plaintiffs and on the other hand also depriving the plaintiffs of the IRRO licence fee; (z) that once an efficient mechanism is in place to deal with the situation as has arisen, the same should be adopted.”²⁹⁶ Justice Endlaw nipped these arguments in the bud. According to the learned judge, the question of directing DU to approach IRRO for a reproduction license “would arise only upon finding that what the defendant No.2 University is doing is not covered by Section 52 of the Act and which would make it an infringement of the copyright and to avoid which it can go before IRRO.”²⁹⁷

VI. CONCLUSION: CHALLENGES ON INTEGRATING COPYRIGHT WITH THE CONSTITUTIONAL RIGHT TO EDUCATION?

Many DCs provide for A2E either as a fundamental right or part of DPSP in their Constitutions. This importance accorded to education in national constitutions is a firm recognition of its indispensable value for national and human development. It attests to the fact that education is correlated

license.”) To be fair to Ricketson, he admits that economic considerations should not be the sole concern in determining exceptions to copyright but considers it to be a “starting point of analysis.”

²⁹⁶ *The Chancellor, Masters & Scholars of the University v. Rameshwari Photocopy Services*, CS(OS) 2439/2012, ¶ 14 (India).

²⁹⁷ *Id.* ¶ 23.

The Case for Integrating Copyright Law with the Constitutional Right to Education in Nigeria and Developing Countries 177

with many positive outcomes. The constitutionalization of the right to education also reinforces, and in turn is reinforced by international human rights and global development efforts by promoting the agenda for universal education. This awareness for education, as expressed, is particularly pressing for DCs as they face numerous challenges concerning access to quality education.

One of these numerous challenges is ALM. There are two dimensions to this problem. One is resource-based and the second is legal. The first dimension has to do with the resource limitations of libraries and the weak purchasing power of university students in DCs when acquiring learning materials. The Nigerian situation, which is not too different from many DCs, shows that libraries are significantly under-resourced, and the fee-based available titles in these libraries are not sufficient for the research and learning needs of students. These students cannot afford to purchase textbooks.

Second is the legal dimension of this issue. These concerns center on the conditions of the access to and the use of existing learning materials. Both the DU case in India and the Brazilian case capture and map out these institutional and legal determinants of ALM in higher institutions. As we have seen, at the center of these cases is copyright law. The exclusive rights guaranteed by this regime, the proprietary and market justifications predominantly underpinning the regime, and the litany of misleading arguments and tropes by publishers and copyright-holders legitimizing the intensification of enforcement all ensure that existing L&Es, which are already narrow, are interpreted even more narrowly to suit private interests. Increasingly, copyright law continues to pander to these private interests and undermine development goals, including A2E.

But there is good news.

The importance of the Brazilian and the Indian photocopy cases discussed above is less about the outcome

of the cases, and more about the strategy employed by knowledge seekers to counter the claims of knowledge dealers. The parties affected by copyright restrictions on photocopying in these cases understood that their petition for a liberal interpretation and understanding of users rights will hardly be answered if copyright is not understood in a wider context. Accordingly, the debates and issues at stake were pushed beyond the boundaries of copyright law. By removing the contested issues solely from the turf of copyright law and framing it as A2K and A2E, copyright law is forced to interact and integrate with other areas of law. The implication is that the issues at stake are removed from the narrow confines of copyright law and thereby interrogated in their broader context. Integrating the constitutional right to education with copyright law accomplishes this task and more importantly aligns copyright law with its public interest objectives. But there are challenges in integrating copyright law with the constitutional right to education which I will outline briefly.

The first set of challenges is concerns the nature and content of the right to education expressed in the Constitutions of many DCs. As discussed above, there is a noticeable pattern in these Constitutions concerning the relegation of the right to education to the DPSP which is not justiciable mainly because they require resources and are classified as ESC rights. The constitutional right to education needs to be justiciable to be meaningfully integrated with copyright law. This non-justiciability effect poses problems for a claimant who calls upon the court to determine if a law affects her enjoyment of the constitutional right to education. If a court has no jurisdiction to determine whether the right to education has been infringed, then it will be prevented in adjudicating issues affecting this right. This challenge does not exist for the countries examined (India, South Africa, and Brazil), and seemingly so for Nigeria, as the right to education now enjoys the status of a fundamental

*The Case for Integrating Copyright Law with the
Constitutional Right to Education in Nigeria and
Developing Countries* 179

right. Unfortunately, ESC rights are somehow perceived as inferior to CP rights and thereby non-justiciable.²⁹⁸ As the Indian SC jurisprudence shows, however, both rights are supplementary and complementary, and should be equally protected. In fact, lack of education is life-threatening.

Another challenge concerns the scope of the right to education. In all the countries examined above, the constitutionally guaranteed right is the right to basic education. The State is under obligation to provide access to quality education at this level and an aggrieved party may compel the State before the courts to carry out its obligation. Beyond the basic level, the courts will defer to the State. But, as discussed above concerning Brazil, India, and Nigeria, access to text books is of greater concern in higher institutions than at the basic level, and there is no reason to suggest it is any different for other DCs. If the constitutionally guaranteed right to education extends no further than the basic level, and the concerns which implicate copyright are more prevalent at higher institutions, the challenge is whether this limitation prevents the effects the integration would have at the higher level of education. This is unlikely to be so. The purpose of the integration is to enable copyright to respond to the developmental goals of A2E, rather than for the state to commit resources in the provisioning of higher education. In fact, if the constitutional right to education is limited to the basic level as a result of limited resources, then the integration should have maximum impact at the higher institution level because it does not require the commitment of resources for copyright to respond to concerns of A2E. Indeed, this supposed limitation did not prevent counsels for the

²⁹⁸ Ssenyonjo, *supra* note 79; THE PROTECTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN AFRICA: INTERNATIONAL, REGIONAL, AND NATIONAL PERSPECTIVES, *supra* note 79.

respondents in the India photocopying case from utilizing the constitutional right to education, even though as was discussed with India, the right to basic education is guaranteed. Nor did it change the court's view on the importance of education and the need to ensure equitable access.

The final issue is *whether* the constitutional right to education can be integrated with copyright law. This concerns the nature of the obligation conferred by the constitutional right to education and how it may interact—or the nature of the relationship—with rights and obligations conferred by copyright law. Both areas of law are different. Copyright is a private law with obligations and rights created between individuals, whereas constitutional law is public law which deals with the relations between private individuals and the State. The constitutional right to education imposes an obligation on States with private individuals as right-bearers. The question then is whether it is possible to integrate the two, as the constitutional right to education and copyright law impose obligations on states and individuals, respectively. The issue might be stated differently in the form of an argument: the constitutional right to education imposes an obligation upon States which may be fulfilled by increased state funding and the provision of textbooks. Copyright law has no role in this constitutional assignment as mandating its assistance in this assignment would equate to the State passing the buck or shying away from its responsibility. This would be an encroachment on the property rights of private individuals to achieve the societal objective of basic education.

There are several problems with this understanding. First, there are other ways the State can ensure its constitutional obligation on the right to education is fulfilled other than funding. States may enact or amend existing laws to align with or facilitate the constitutional right to education. For example, the recently enacted Brazilian law

*The Case for Integrating Copyright Law with the
Constitutional Right to Education in Nigeria and
Developing Countries* **181**

No. 13,696, instituting the NPRW, facilitates the constitutional right to education by promoting access to reading materials. Copyright law can be amended to facilitate these goals. Second, obligating the State to fulfill the enjoyment of the constitutional right to education does not prevent it from enjoining private citizens in carrying out acts or exercising rights that may impinge on the enjoyment of the right to education. Put differently, if the State is under obligation to ensure the enjoyment of the constitutional right to education, which involves ALM, it may carry out this obligation by preventing the exercise or conferral of rights on private citizens, through its organs, that hinder ALM and thereby A2E. Copyright is one such law and there is no reason why it cannot be integrated with the constitutional right to education. Third, this understanding of copyright law's limited role is premised on the public/private distinction. The demarcation between public law and private law follows from the public/private divide in liberal thought. In classical legal thought, the public/private distinction serves as labels to demarcate spheres of activities that may legitimately be subject to government regulation or intervention from those that are presumptively outside the bounds of such intervention.²⁹⁹ Market and family are the two main examples of the latter, the private sphere. This demarcation of the private sphere from the public arose out of the idea that governments' encroachment on the rights of the individual should be restrained.³⁰⁰ On the basis of this

²⁹⁹ See Robert H. Mnookin, *The Public/Private Dichotomy: Political Disagreement and Academic Repudiation*, 130(6) U. PA. L. REV. 1429, 1429–30 (1982); Hila Shamir, *The Public/Private Distinction Now: The Challenges of Privatization and of the Regulatory State*, 15 THEOR. INQ. L. 1, 4–7 (2014) (summarizing the public/private distinction). For the history of the public/private distinction, see generally Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982).

³⁰⁰ Horwitz, *supra* note 299, at 1423.

distinction, “a clear separation between constitutional, criminal and regulatory law—public law—and the law of private transactions—torts, contracts, property, and commercial law” was created.³⁰¹ Horwitz states that this separation between public law and private law, this public/private distinction, was brought about by “[t]he emergence of the market as a central legitimating institution.”³⁰² Private law is seen as merely facilitating the voluntary transactions of individuals to achieve the efficiency goals of the market. The role of the state is to facilitate and not to regulate private transactions.

The implication of the public/private distinction on the integration of the constitutional right to education with copyright law is clear: copyright law is a genus of private law which confers exclusive rights in the form of property rights to rightsholders to facilitate voluntary transactions in the market place for creative works. The role of the state is to facilitate these transactions through the guarantee and strengthening of these property rights.

The public/private distinction has come under increasing attack.³⁰³ Many have pointed that it is incoherent and useless as an analytical tool, and that “[t]he distinction is dead, but it rules us from the grave,”³⁰⁴ While some have even stated that “[t]here is no public/private distinction.”³⁰⁵ The general conclusion is that the public/private distinction

³⁰¹ *Id.* at 1424.

³⁰² *Id.*

³⁰³ Symposium, *The Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982); Symposium, *The Boundaries of Public Law*, 11 INT’L J. CONST. L. 125 (2013); Symposium, *Public/Private Beyond Distinctions?*, 15 THEOR. INQ. L. 1 (2013); Paul M. Schoenhard, *A Three-Dimensional Approach to the Public-Private Distinction*, UTAH L. REV. 635, 637–43 (2008).

³⁰⁴ Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1353 (1982).

³⁰⁵ Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1361 (1982) (emphasis in original).

The Case for Integrating Copyright Law with the Constitutional Right to Education in Nigeria and Developing Countries **183**

has lost its ability to be distinguished.³⁰⁶ Even if we insist that the public/private distinction exists, the key question still remains: is copyright a private law? This is by no means definite even though I have suggested above, for the sake of argument, that it is private law. Patterson and Judge Birch, as he then was, have argued that copyright law is public law.³⁰⁷ According to them, the impact rather than source of a law should determine whether it is public or private.³⁰⁸

Accordingly, they argue that “copyright law, both in the form of statutory law and private pronouncements, should be treated as public law because of its impacts on the lives of all citizens.”³⁰⁹ To label it as private law is to deny that it has distributive consequences and, most importantly, that it impacts on the lives of countless indigent people to gain A2E.

³⁰⁶ Schoenhard, *supra* note 303, at 636.

³⁰⁷ L. Ray Patterson & Judge Stanley F. Birch Jr., *Copyright and Free Speech Rights*, 4 J. INTELL. PROP. L. 1, 6 (1996).

³⁰⁸ *Id.* at 19.

³⁰⁹ *Id.*; see also Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN L. REV. 1293, 1311–33 (1996) (suggesting that copyright law is public law based on his assessment of the relationship between “property” and “sovereignty” in American IP law).