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Government Role in Realising A 'Right' to Research in Africa

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Government Role in Realising A ‘Right’ to Research in Africa

Chijioko I Okorie *

ABSTRACT

Development agendas and plans such as World Intellectual Property Organisation (WIPO) Development Agenda, African Union Agenda 2063, South Africa’s National Development Plan 2030 and Nigeria’s National Development Plan 2021 – 2025, etc. indicate the need for and benefits of research for development. Research as an activity is needed for countries to sharpen their innovative edge and contribute to global scientific and technological advancement. Recent scholarship has highlighted the positive impact on national development of copyright exceptions implementing a right to research in the form of either a complete defence to copyright infringement, or, as user rights. However, the realisation of a right to research has been limited by a copyright legislative framework that may be challenging to interpret especially given issues arising from technological advancements, new modalities of using copyright-protected subject matter and new sites and outcomes of research. There are also hinderances to realising a right to research, posed by limited access to courts for interpretation due to limited resources and also as a result of the inherent institutional limitations of courts to only the case pleaded by parties before them. In this environment, the role of the executive arm of government in driving the realisation of a right to research is crucial. Yet, there has not been executive action providing much-needed clarification to concretise and promote a right to research in order to actualise development goals. Focused on Nigeria and South Africa, this paper explores the duties imposed on executive government institutions and applies administrative law principles to indicate a policy toolkit within copyright statutes that may be deployed to realise a right to research and engender guidance for researchers, copyright owners, users and audience of research.

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INTRODUCTION

Development agendas and plans such as the World Intellectual Property Organisation (WIPO) Development Agenda, African Union Agenda 2063, South Africa's National Development Plan 2030 and Nigeria's National Development Plan 2021 – 2025, etc. indicate the need for research and the benefits of research for development understood in this paper as a right to research.¹ Research as an activity is needed for countries to sharpen their innovative edge and contribute to global scientific and technological advancement.² Recent scholarship has highlighted the positive impact on national development of copyright exceptions implementing a right to research in the form of either a complete defence to copyright infringement,³ or, as a copyright 'user right'.⁴

Within the field of copyright law, research is conceived in relation to copyright exceptions in many parts of the world. There are usually within a given copyright statute some provision that indicates that the unauthorised use of a copyright-protected work for research purposes is not infringing if such use was considered 'fair use' or 'fair dealing' with the work depending on the jurisdiction.⁵ However, research is such a nuanced concept and therefore characterized by subtle shades of meaning. For example, research could engage some reproduction of a copyright-protected work where the researcher was quoting portions of that work. Research could also involve communication of a given work, its adaptation and/or its distribution. It could also involve the use of informational aspects of a given work as opposed to or even in addition to unique, original elements of the work.⁶ Advancements in the field of

¹ See (2015) *National Development Plan 2030: Our Future-make it work*. National Planning Commission. Available at: https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf (Accessed: March 19, 2023) (hereinafter, 'NDP 2015'), (2007) *The 45 Adopted Recommendations under the WIPO Development Agenda*. WIPO. Available at: <https://www.wipo.int/ip-development/en/agenda/recommendations.html> (Accessed: March 19, 2023); (2021) *Nigeria National Development Plan 2021 - 2025*. Federal Ministry of Finance, Budget and National Planning. Available at: https://nationalplanning.gov.ng/wp-content/uploads/2021/12/NDP-2021-2025_AA_FINAL_PRINTING.pdf (Accessed: March 19, 2023).

² Ibid.

³ Okediji, R.L. ed., 2017. *Copyright law in an age of limitations and exceptions*. Cambridge University Press; Karapapa, S., 2020. *Defences to Copyright Infringement: Creativity, Innovation and Freedom on the Internet*. (Oxford University Press).

⁴ Elkin-Koren, N., 2016. The New Frontiers of User Rights. *Am. U. Int'l L. Rev.*, 32, p.1; Borghi, M., 2021. Exceptions as users' rights?. In *The Routledge Handbook of EU Copyright Law* (pp. 263-280). Routledge.

⁵ Flynn, S., Schirru, L., Palmedo, M. and Izquierdo, A., 2022. Research exceptions in comparative copyright. <https://digitalcommons.wcl.american.edu/research/75/>

⁶ Marivate, V., Sefara, T., Chabalala, V., Makhaya, K., Mokgonyane, T., Mokoena, R. and Modupe, A., 2020. Investigating an approach for low resource language dataset creation, curation and classification: Setswana and Sepedi. *arXiv preprint arXiv:2003.04986*; Reichman, J.H. and Okediji, R.L., 2011. When copyright law and science collide: empowering digitally integrated research methods on a global scale. *Minn. L. Rev.*, 96, p.1362.

data science which includes activities such as text and data mining (TDM) have further compounded this issue. Questions here include whether TDM simpliciter is to be considered ‘research’ or whether the purpose of the TDM is relevant to describing the activity as research. In this regard, the EU’s TDM exception for purposes of scientific research including the definition of TDM has been criticised for being unduly broad and hinging the entirety of the data-driven AI field on a copyright exception.⁷

In essence, the realisation of a right to research within the field of copyright law has been limited by a copyright legislative framework that may be challenging to interpret especially given issues arising from technological advancements,⁸ new modalities of using copyright-protected subject matter and new sites and outcomes of research.⁹ There are also hinderances to realising a right to research, posed by limited access to courts for interpretation due to limited resources and also as a result of the inherent institutional limitations of courts to only the case pleaded by parties before them.¹⁰ Whatever be the focus – defences or rights – research exceptions like other copyright exceptions are matters of public policy.¹¹ As a matter of public policy and given constitutional provisions, research (exception) raises or implicates government action or involvement and in this environment, the role of the executive arm of government in driving the realisation of a right to research is crucial.¹² Yet, there has not been executive action providing much-needed clarification to promote a right to research in order to actualise development goals.

Legislation provides an avenue for the exploitation of rights to conduct and access the results of various kinds of research. For instance, s12 of the Copyright Act 1978 (South Africa) provides an exception to copyright protection for fair dealing with works for purposes of research. Provisions such as this could indicate some right or at least permission to lawfully conduct research using copyright-protected subject matter. But, given new sites, modes,

⁷ Margoni and Kretschmer “A deeper look”. Margoni, T. and Kretschmer, M., 2022. A Deeper Look into the EU Text and Data Mining Exceptions: Harmonisation, Data Ownership, and the Future of Technology. *GRUR International*, 71(8), pp.685-701.

⁸ Ibid.

⁹ NDP 2015 (n1), pp. 326-327.

¹⁰ Okorie, C.I., 2023. Fair use or fair dealing in Africa: The South African experience. In *Developments and Directions in Intellectual Property Law* (forthcoming). Oxford University Press.

¹¹ Karjiker, S., 2021. Should South Africa adopt fair use? Cutting through the rhetoric. *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg*, 2021(2), pp.240-255 (Karjiker 2021); Rosati, E., 2013. *Originality in EU copyright: full harmonization through case law*. Edward Elgar Publishing; Samuelson, P., 2015. Justifications for Copyright Limitations & Exceptions. *Copyright law in an age of limitations and exceptions*.

¹² See Part IA, below.

formats and platforms for research and of research outcomes,¹³ such a right to research would require interpretation and/or concretisation for practical enforcement.¹⁴

This paper advances two primary arguments: First, it argues that the executive has a primary constitutional duty to implement and/or ‘execute’ statutes and that in order to do so, it must engage in an interpretative exercise to, not only identify its duties but to also understand the purpose of the statute so as to implement same.¹⁵ Second, it argues that the executive should, barring reasons of national security and related factors, articulate and/or communicate its interpretation of statutory provision to the public and that it enjoys a wide discretion in selecting the medium or tool for communicating its interpretation.¹⁶ The rationale for these arguments (especially the second argument) is strengthened by the institutional nature of the executive, understood in this paper to comprise of the President, the cabinet, ministerial departments, executive agencies, public independent agencies, regulatory bodies, commissions and government parastatals, each sometimes ascribed specific roles and duties within specific statutes.¹⁷ These two arguments have wide-ranging implications for realising a right to research.

A preliminary conclusion that may be drawn from this investigation is the striking under-utilised resource that executive articulation of statutory interpretation has been in the field of copyright in Africa. Institutionally better positioned than courts when it comes statutory interpretation¹⁸ – not being restricted to the case pleaded by parties and being an integral part of the law-making process – the executive has better opportunity to provide statutory interpretation that aligns with statutory text, legislative history, industry/sectoral understandings, etc. This ‘advantage’ is one which can be applied towards realising a right to research in Africa.

¹³ Research outcomes and outputs are increasingly now presented in various formats (including as products and services) and across platforms. Research increasingly also takes place in industrial laboratories, government departments, corporate research units, parastatals, statutory research councils, and NGOs, working in silos or in collaboration with each other. See NDP 2015 (n1), pp. 326-327.

¹⁴ Du Plessis, A., 2018. The promise of ‘well-being’ in Section 24 of the Constitution of South Africa. *South African Journal on Human Rights*, 34(2), pp.191-208 (arguing that the constitutional right to well-being imposes a duty on the executive to give force to those rights) (Du Plessis 2018).

¹⁵ Part I, below.

¹⁶ Part II, below.

¹⁷ Other scholars adopt a similar definition. See Fuo, O.N., 2013. Constitutional basis for the enforcement of "executive" policies that give effect to socio-economic rights in South Africa. *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*, 16(4), p.7 (henceforth, Fuo 2013); Stack, K.M., 2014. Purposivism in the Executive Branch: How Agencies Interpret Statutes. *Nw. UL Rev.*, 109, pp.879-880 (henceforth, Stack 2014). This broad understanding of the executive aligns with constitutional delineation.

¹⁸ Mashaw, J.L., 2007. Agency-Centered or Court-Centered Administrative Law-A Dialogue with Richard Pierce on Agency Statutory Interpretation. *Admin. L. Rev.*, 59, p.896 (henceforth, Mashaw 2007).

This paper explores the critical role that government's use of various communication tools – so-called 'tools of articulation' – can/should play in realising a right to research in Africa (focusing on Nigeria and South Africa), including by determining interpretations of the 'research' exception in copyright law in a way that allows the exception to be a force for development.¹⁹ In this paper, the executive's role in realising a right to research is highlighted through the consideration of both the ascribed statutory functions of the executive body and the interpretative context inherent in the executive's unique institutional position. The executive occupies a role that is respected, constitutionally recognised and can accord legal certainty.²⁰ In this regard, the approach taken parallels those of administrative law scholars in their study of statutory interpretation by executive agencies, the practice of executive agencies and the status and enforceability of executive interpretation as distinct lines of enquiry.²¹

In order to achieve its stated objectives, this paper is structured in three main parts. The first part draws from the work of some administrative law scholars on the executive's statutory interpretation, implementation (instruments) and concretisation of legislative provisions to provide constitutional, statutory and institutional basis for government's role in realising a right to research. It illustrates that when the executive seeks to give effect to legislative provisions, it engages in an interpretative exercise which could provide much-needed certainty regarding those legislative provisions. The second part provides an overview and explanation of a selection of tools that are available to the executive in the field of governance generally (referred to in this paper as 'tools of articulation') and then demonstrates their relevance to the field of copyright. With respect to the latter, the second part presents two case studies from Nigeria and South Africa to demonstrate that such tools of articulation could realise a right to research in Africa and that many of such tools have the force of law and will engender guidance for researchers, audience/users of research and also,

¹⁹ See Fuo 2013 (n17), p. 34 (arguing that the executive has wide discretion on how it exercises its delegated powers and could use regulation, policy, code or strategy).

²⁰ Ibid at pp. 488- 489 (arguing that executive's exercise of delegated powers should have the force of law); Ingber, R., 2013. Interpretation catalysts and executive branch legal decision-making. *Yale J. Int'l L.*, 38, p.361 (Ingber 2013) (arguing that 'the executive's interpretation of its national security authority is therefore extremely significant and can often serve not only as one step in an inter-branch interpretive dance, but as lawmaking itself').

²¹ Fuo 2013 (n17), pp.487-488; Mashaw 2007 (n18), p.893; Du Plessis, L., 2005. The (re)systematization of the canons of and aids to statutory interpretation. *South African Law Journal*, 122(3), pp.591-613 (henceforth, Du Plessis 2005); Van Staden, M., 2020. The theoretical (and constitutional) underpinnings of statutory interpretation. *Select Essays on Governance and Accountability Issues in Public Law*, pp.1-32 (henceforth, Van Staden 2020); Singh, A., 2016. *The impact of the constitution on transforming the process of statutory interpretation in South Africa* (Doctoral dissertation) (henceforth, Singh 2016); etc.

institutions. The third part of the paper explores the implications of the availability and use of these tools of articulation for realising a right to research, by proposing some guiding principles and developing some interpretative paths that may be articulated to realise a right to research. The conclusion suggests that the executive's use of tools of articulation as proposed in this paper could be useful for realising a right to research in Africa.

I. The executive's mandate in realising a right to research

The discussion in this part involves a consideration of the constitutional, statutory (copyright statute) and institutional basis for the role of the executive in realising a right to research. It begins with a consideration of the nature of the general mandate of the executive under the Constitution to implement and/or 'execute' the law. This is followed by a discussion of the duty imposed on the executive under the copyright statute in Nigeria and South Africa. In this regard, both general duties and specific duties regarding the research exception are highlighted. The last section of this Part highlights the institutional basis for the executive's role in realising a right to research.

A. Constitutional basis

Section 5(1) of the Constitution of the Federal Republic of Nigeria extends the executive powers of the Federation, which vests in the President (and Ministers of the Government of the Federation or officers in the public service of the Federation, on the President's behalf) to the *execution and maintenance* of the Constitution, all laws made by the National Assembly and to all matters with respect to which the National Assembly has power to make laws. Such matters include copyright by virtue of Part 1, Second Schedule to the Constitution.

Section 7(2) of the Constitution of the Republic of South Africa requires the state to respect, protect, promote and fulfil the rights in the Bill of Rights and by s8(1), the Bill of Rights "applies to all law, and binds the legislature, the executive, the judiciary and all organs of state". Section 84(2) stipulates that the President is responsible for inter alia assenting to and signing Bills, referring a Bill back to the National Assembly for reconsideration of the Bill's constitutionality; and/or referring a Bill to the Constitutional Court for a decision on the Bill's constitutionality. The President exercises the executive authority together with other members of the Cabinet by inter alia, *implementing national legislation*; developing and

implementing national policy; co-ordinating the functions of state departments and administrations; and preparing and initiating legislation.²²

In order to implement laws enacted by the legislature, the executive branch of government must engage in statutory interpretation.²³ The executive branch must of necessity accord some (interpretative) meaning to a statute in order to ‘execute’ and/or ‘implement’ it. This is also the case with the entirety of copyright statute including provisions relating to the research exception.²⁴ Mashaw explains what counts as interpretation thus:

From an agency’s perspective, the first step in any process of policy implementation is to ask a basic interpretive question: What is it that we are meant to do? Further questions will follow in rapid succession, such as, what legal techniques are available to us for implementation, through what processes are we required to make our decisions, and so on. Only interpreting the statute’s language within the context of the agency’s understanding of the general purposes of the statute and the current state of the world can answer these questions. For an agency to adopt a policy that it believes carries out the purposes of its statute—given its statutory powers, required statutory processes, available regulatory techniques, and understanding of the facts of the matter—is precisely to give concrete meaning to the abstract commands of the statute. And any explanation of how its action implements the statutory purposes for which it has responsibility will necessarily provide, or perhaps assume, an interpretation of the statute...[t]he notion that policy choice is not interpretive simply ignores many of the necessary mental operations involved in administrative implementation.²⁵

In essence, implementing a statute involves interpreting it. The executive must of necessity offer (even if to itself or internally) some interpretation or understanding of the purpose of that statute, the scope of its powers, the principles that could inform its actions, the scope of options available to it in performing its duties amongst other factors.²⁶ Whether one terms these activities as ‘statutory interpretation’ or as ‘policymaking’, the executive must have an understanding of a statute in order to adopt a policy position and practically implement that statute. As such, even if there is some objection with the term used,²⁷ there is implicit consensus that policy choices are to be understood as interpretative.²⁸ The point is that there is constitutional support (in Nigeria, South Africa and other jurisdictions) for the executive’s

²² See section 85(2).

²³ Fuo 2013 (n17) p.16; Du Plessis, 2005 (n21); Morrison, T.W., 2006. Constitutional Avoidance in the Executive branch. *Colum. L. Rev.*, 106, p.1211 (henceforth, Morrison 2006).

²⁴ Morrison 2006 (n23) pp.1190-1191 arguing that the executive has constitutional authority to interpret the laws it is charged with executing.

²⁵ Mashaw 2007 (n18) pp.897-898.

²⁶ Ibid.

²⁷ For example, Pierce Jr, R.J., 2007. How Agencies Should Give Meaning to the Statutes They Administer: A Response to Mashaw and Strauss. *Admin. L. Rev.*, 59, pp.204-205 (arguing that the construction of and reference to statutes by agencies is mere policymaking); Fuo 2013 (n17) p.4 (making reference to ‘executive policies’ with reference to what the executive does to give effect to legislative provisions); Karjiker 2021 (n11) (generally referring to ‘policy preferences’).

²⁸ Ibid. Also, Du Plessis 2018 (n14).

interpretation and implementation of its statutory duties through instruments of its choice.²⁹ These constitutional provisions on the powers of the executive show that statutory interpretation is not the exclusive preserve of the judiciary.

B. Statutory basis

Having explored constitutional basis for the executive's role in realising a right to research, the next possible basis is statutes, in this case, the relevant copyright statute. This section critically reflects on the basis in copyright law for the interpretation and articulation of provisions that give effect to a right to research in Nigeria and South Africa. It begins by identifying in general terms, the executive powers entrenched in the copyright statute. A key feature of statutes (including copyright statutes) is the vesting of authority on specific executive bodies or institutions to take actions that have binding force.³⁰ The copyright statutes are no different. They, as discussed in below respectively confer powers on various executive bodies to make regulations, license, advise, investigate, recommend, coordinate resource management, etc. Apart from vesting powers on the Minister, the Commission, etc. to make rules, adjudicate, license, permit, advise, investigate, etc., another key feature of statutes including the copyright statutes is that they also impose an inherent duty to exercise the powers granted.³¹ This is equally discussed below.

1. Copyright-based executive powers in Nigeria

For Nigeria, the executive bodies directly involved with matters of copyright law including research as a copyright-facing activity are the Minister of Justice (i.e., the Attorney-General of the Federation);³² and the Nigerian Copyright Commission established by virtue of s34 of the Nigerian Copyright Act.

²⁹ Fuo 2013 (n17) pp.19-20; Osadola, O.O. and Ojo, P.O., 2020. Use of Executive Orders in Nigeria by the Executive Branch of Government in Time of Emergency. *Britain International of Humanities and Social Sciences (BloHS) Journal*, 2(3), pp.669-678; Okebukola, E.O. and Kana, A.A., 2012. Executive orders in Nigeria as valid legislative instruments and administrative tools. *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, 3, pp.59-68; Mashaw 2007 (n18) p.895; Stack 2014 (n17) p.879.

³⁰ Ibid.

³¹ Stack 2014 (n17) pp.890-891 (arguing that 'many statutes build the expression of a duty [to implement the powers granted] into the vesting of power').

³² Per the decision of Nigeria's Federal High Court in *Copyright Society of Nigeria v Music Copyright Society of Nigeria and Ors*, unreported Suit No.: FHC/L/CS/1259/2017 (13 February 2018), the Minister of Justice/Attorney General of the Federation (MoJ/AGF) is now the Minister envisaged under s51 of the Nigerian Copyright Act having been designated by the President to oversee copyright regulation in Nigeria.

Nigerian Copyright Commission (NCC)

The NCC has a Governing Board consisting of a Chairman who shall be a person *knowledgeable in copyright matters*; the Director-General of the NCC, one representative from the ministries of justice and education, one representative each from the police force and the customs service and six other person representing authors of each category of protectable subject matter viz literary works; artistic works; musical works; cinematograph films; sound recordings; and broadcasts.³³

The range of powers (and role) of the NCC is quite broad and extensive. Section 34(3) of the Copyright Act provides that, the NCC shall:

- (a) be responsible for all matters affecting copyright in Nigeria as provided for in this Act;
- (b) monitor and supervise Nigeria's position in relation to international conventions and advise Government thereon;
- (c) advise and regulate conditions for the conclusion of bilateral and multilateral agreements between Nigeria and any other country;
- (d) enlighten and inform the public on matters relating to copyright;
- (e) maintain an effective data bank on authors and their works;
- (f) be responsible for such other matters as relate to copyright in Nigeria as the Minister may, from time to time, direct.

The NCC is empowered under the Act to issue a certificate confirming whether a country is a party to a copyright treaty that Nigeria is also a party to.³⁴ The NCC also enjoys quasi-legislative powers to prescribe conditions for the authors of graphic works, three-dimensional works and manuscripts to exercise their right to the proceeds of sale of their works by public auction;³⁵ to (with the consent of the Attorney-General of the Federation) make regulations specifying the conditions necessary to give effect to the purpose of s21 which deals with the production and use of anti-piracy device,³⁶ and to make regulations regarding the procedure for a copyright licensing panel under s37(5). Deciphering the purpose of s21 involves an interpretative exercise. Similarly, the powers of the NCC to approve collecting societies requires it to be satisfied *inter alia* that the society complies with its regulations for collecting societies.³⁷ If the NCC is satisfied that an existing approved society adequately protects the interest of a class of copyright owners, it shall not approve another society.³⁸ The NCC also has power to make regulations indicating the conditions that are necessary to give effect to

³³ Section 35. Emphasis added.

³⁴ Section 5(2).

³⁵ Section 13(3).

³⁶ Section 21(5).

³⁷ Section 39(2).

³⁸ Section 39(3).

the *purpose* of establishing and governing collecting societies.³⁹ Also, where the NCC finds it expedient, it may assist in establishing a collecting society.⁴⁰ Regulations are also to be made by the NCC regarding the disbursement to approved collecting societies, of funds received as levies for materials used or capable of being used to infringe copyright.⁴¹ All these engage interpretation by the NCC.

Indeed, in setting out the CMO Regulations, the NCC articulated its interpretation of the purpose of section 39 of the Copyright Act to be the efficient, transparent and accountable administration of copyright for the benefit of authors and copyright owners who are the members of CMOs. In setting out regulation such as Copyright (Collective Management Organisation) Regulations 2007 (CMO Regulations), the NCC revealed that the corporate governance and smooth running of collecting societies are the purposes of s 39 of the Copyright Act.⁴²

With the consent of the Attorney-General of the Federation (AGF), the NCC also has powers to make regulations indicating the conditions for operating a business involving production, exhibition, hiring or rental of copyright works.⁴³ The NCC is empowered to issue operating licensing or certificate of exemption to collecting societies without which such societies cannot validly operate and/or institute action for copyright infringement.⁴⁴ It also has powers to, with the consent of the AGF, prescribe anti-piracy devices to be used in respect of copyright-protected works⁴⁵ or to authorise anyone to produce such devices.⁴⁶

The NCC has the right to authorise reproduction, communication to the public and adaptations of expressions of folklore for commercial purposes or uses outside their traditional or customary context.⁴⁷ It appoints other members of staff apart from its Director-General who is appointed by the President on the recommendation of the AGF.⁴⁸ The NCC also has the power to grant compulsory licences and to also constitute a Copyright Licensing Panel in that regard.⁴⁹ Copyright inspectors may be appointed by the NCC to investigate

³⁹ Section 39(7).

⁴⁰ Section 39(9).

⁴¹ Section 40(3).

⁴² Okorie, C.I., 2018. Corporate governance of collecting societies in Nigeria: powers of the copyright sector regulator. *South African Intellectual Property Law Journal*, 6(1), pp.24-46 (Okorie 2018).

⁴³ Section 45(4).

⁴⁴ Section 17.

⁴⁵ Section 21(1).

⁴⁶ Section 21(4).

⁴⁷ Section 31(4). See also Oriakhogba, D.O., 2022. Repatriation of ancient Benin bronzes to Nigeria: reflection on copyright and related issues. *Journal of Intellectual Property Law & Practice*, 17(10), pp.823-833.

⁴⁸ Section 36(1) and 36(3)(a).

⁴⁹ Section 37.

infringing activities and to make inquiries to ascertain compliance with the provisions of the copyright statute.⁵⁰ Other powers of the NCC relate to the disbursement of levies received for materials used or capable of being used to infringe copyright in a work.⁵¹

The NCC has powers to hold a public inquiry on the subject of royalty rates where it appears to it that the prescribed rate is no longer equitable and where it is satisfied as to need to do so, may make an order changing the prescribed rate.⁵² The NCC is empowered to receive and to grant licence applications regarding the production and publishing of a translation of a literary or dramatic work for the purposes of teaching, scholarship or research where a licence was requested for and denied by the copyright owner or where diligent searches has been for the copyright owner to no avail.⁵³ Such licences are issued on the condition inter alia of payment of royalties in respect of copies of the translation of the work sold to the public.⁵⁴ The NCC also has powers to grant licences to Nigerian broadcasting organisations to produce and publish translations of inter alia, translations of literary or dramatic works for the purpose of disseminating results of “specialised, technical or scientific research to the experts in any particular field”.⁵⁵

The Attorney-General of the Federation (AGF)

On its part, the AGF recommends the person to be appointed as Chairman of the Governing Board of the NCC and the person to be appointed as the Director-General of the NCC, appoints the representatives of authors who shall be members of the Governing Board,⁵⁶ authorises the NCC to make regulations regarding rental and exhibition, etc. of copyright works,⁵⁷ etc. The AG determines the levy payable on any material used or capable of being used to infringe copyright and may exempt any class of materials from the payment of such levy.⁵⁸ Like its South African counterpart, the AG has powers to extend national treatment to countries who are parties to the same copyright treaties as Nigeria.⁵⁹ The AG also has powers to make regulations where no other provision is made with respect to such matter.⁶⁰

⁵⁰ Section 38.

⁵¹ Section 40(3).

⁵² Paragraph 3, Third Schedule.

⁵³ Paragraph 2(4), Fourth Schedule.

⁵⁴ Ibid.

⁵⁵ Paragraph 4, Fourth Schedule.

⁵⁶ Section 35(1)(a).

⁵⁷ Section 45(4).

⁵⁸ Section 40(2) and (4).

⁵⁹ Section 41.

⁶⁰ Section 45(1).

The AGF is also required to consent to the NCC's making of regulations specifying the conditions necessary to give effect to the purpose of s21 which deals with the production and use of anti-piracy device for such regulation to be valid. It may be presumed that the AGF's consent would involve some consideration of a draft regulation including whether the regulation gives effect to the purpose of s21.⁶¹ Similar considerations apply to the provisions of s45(4) which requires the AGF's consent to the NCC's making of regulations indicating the conditions for operating a business involving production, exhibition, hiring or rental of copyright works and the NCC's prescription of anti-piracy devices to be used in respect of copyright-protected works.⁶² The AGF also recommends the person to be appointed Director-General of the NCC.⁶³

More significantly, the AGF is empowered under s50 of the Act to give directives to the NCC regarding any of the functions of the NCC under the Act and the NCC has a duty to comply with such directives. In 2019, the AGF utilised this power to wade into and resolve the longstanding issue regarding the approval of a collecting society – Music Copyright Society of Nigeria (MCSN).⁶⁴ The AGF directed the NCC to issue MCSN with an operating licence.⁶⁵

Minister of Internal Affairs

The Minister of Internal Affairs is authorised to by virtue of s 44(5) to make regulations regarding notices to be provided by copyright owners regarding importation of copyright materials.

2. Copyright-based executive powers in South Africa

Under South Africa's Copyright Act, the executive bodies directly involved with matters of copyright law including research as a copyright-facing activity and as such doing the interpreting are the Minister of Trade, Industry and Competition;⁶⁶ and its appointee, the Standing Advisory Committee on Intellectual Property. The range of powers (and role) of the Minister is quite broad.

⁶¹ Section 21(5).

⁶² Section 21(1).

⁶³ Section 36(1) and 36(3)(a).

⁶⁴ Letter of the Minister of Justice and Attorney General of the Federation (MoJ/AGF) to the Director General of NCC, N.I.149/1, 22 March 2017 (in file with author).

⁶⁵ Paragraph 2(1) and 2(3), Fourth Schedule.

⁶⁶ Section 1(1): '*Minister*' means the Minister of Trade and Industry.

Minister of Trade, Industry and Competition

The Minister indicates the countries to which the provisions of South Africa's Copyright Act extend to in line with international copyright treaties' principle of national treatment.⁶⁷ This power is to be exercised by publishing a notice in the Gazette indicating the works, the persons and/or entities to which the extension applies to in the case of any country so specified. The Copyright Act allows the Minister discretion in this as notices may indicate exceptions or modifications to provisions that are being extended.⁶⁸ Notices may also specify whether the extension applies to all works generally or only to some classes of works.⁶⁹ The Minister must also be *satisfied* before issuing the notice in respect of a country that is not a party to copyright conventions that South Africa is a party to, that such country has made or will make reciprocal provisions for copyright owners under South African copyright law.⁷⁰ It may be argued that specifying modifications or exceptions to national treatment and in satisfying itself that a non-convention country has made or will make reciprocal provisions, the Minister would engage in some interpretative activity.

The Minister also has regulatory powers or put differently, quasi-legislative powers. Section 39(a) of the Copyright Act empowers the minister to make regulations as to any matter that the Act stipulates that regulations are to be made for. These are regulations *permitting* reproduction of a work per s13; and regulations in regard to the circulation, presentation or exhibition of any work or production per s45(1). Section 39(b) of the Copyright Act empowers the minister to make regulations *prescribing* tariff of fees payable in respect of proceedings before the Copyright Tribunal; *prescribing* the remuneration of advisory committee members appointed under s40 of the Act;⁷¹ and *providing* for the establishment, composition, funding and functions of collecting societies.⁷² Regulations in respect of these matters are to be made in consultation with the Minister of Finance. However, s39(d) empowers the Minister to make regulations "generally as to any matter which *he considers it necessary or expedient* to prescribe in order that the *purpose* of [the Copyright Act] may be achieved" (emphasis added). Again, it is argued that in order to make regulations

⁶⁷ See s37(1).

⁶⁸ See s37(2)(a).

⁶⁹ See s37(2)(b).

⁷⁰ See s37(3).

⁷¹ Section 37(c).

⁷² Section 37(cA).

generally but also particularly for any matter that the Minister considers necessary or expedient, the Minister must needs engage in an interpretative exercise to decipher the *purpose* of the Act that needs to be achieved.

The Minister is also empowered to *appoint* an advisory committee to make recommendations regarding amendments to the Copyright Act. The Minister also has powers to refer any matter to the advisory committee.

Advisory Committee

The Advisory Committee is a statutory committee and a body on its own and may, as stipulated in section 40(3) *make recommendations* in regard to any amendments to the Copyright Act. The committee is permitted to *constitute subcommittees* and *appoint* other persons as members of such subcommittees.⁷³ It may also *call* any person to assist it with or to investigate matters relating to amendments to the Copyright Act and/or matters referred to it by the Minister.⁷⁴ As indicated above, the Minister determines the remuneration of the members of the advisory committee in consultation with the Minister for Finance. Two things are indicative of the significance of this advisory committee in terms of how it may be deployed to realise the right to research: its membership composition and the dependence of its powers on the actions of the Minister.

Pursuant to the appointment powers of the Minister, a Standing Advisory Committee on Intellectual Property (SACIP) was established in 2000 with Judge Ian Farlam as Chairperson.⁷⁵ It appears the committee did not advise on any matter during its term perhaps because there was no referral from the Minister. The term of that committee has since expired and has not been renewed nor a new committee established (even in the face of an ongoing Copyright Amendment Bill process).⁷⁶ A compulsory member of the advisory committee as stipulated under s40(1)(a) is a judge or a senior advocate of the Supreme Court of South Africa. The other members are persons determined by the Minister.

⁷³ Section 40(4).

⁷⁴ Section 40(5).

⁷⁵ See “Statement on Cabinet meeting of 20 September 2000” (2000) GCIS [Preprint]. Government Communications (GCIS). Available at: <https://www.gcis.gov.za/content/newsroom/media-releases/cabinet-statements/statement-cabinet-meeting-20-september-2000> (Accessed: March 19, 2023). See also, <http://www.thedtic.gov.za/legislation/legislation-and-business-regulation/statutory-committees/standing-advisory-committee-on-intellectual-property/>

⁷⁶ Karjiker, S. (2023) *Anton Mostert Chair of Intellectual Property Law, Written submissions on Copyright Amendment Bill B13B-2017*. Anton Mostert Chair of Intellectual Property Law. Available at: <https://blogs.sun.ac.za/iplaw/files/2023/02/Written-submissions-on-CAB-2023-WC-Final.pdf> (Accessed: March 19, 2023).

In all these copyright statutory provisions, there are no explicit stipulation to the executive regarding a right to research or the research exception. But, there is ample evidence of discretion and omnibus powers towards implementing the copyright statute and giving effect to its purpose. This position is expanded below by first highlighting provisions in the copyright statutes of Nigeria and South Africa that mention ‘research’ before turning to a discussion focused on features of ‘research’ as evidenced from the literature and copyright jurisprudence.⁷⁷ This would be helpful in suggesting considerations for the executive in exercising its statutory powers in realising a right to research. Before that discussion, it is important to also and first show the institutional basis for the executive to act in realising a right to research.

C. Institutional basis

The argument that the executive engages in statutory interpretation and that such activity is constitutional, offers so much promise particularly in view of its institutional uniqueness and capacities as well as its expertise or at least, access to expertise.⁷⁸ The executive, particularly executive agencies, is usually involved in the drafting of the statutes they implement. The executive is elected as is parliament and both are more intimately involved with statutory purpose and legislative intent.⁷⁹ As a result, it has a ‘very nuanced sense’ of legislative aims and statutory purpose⁸⁰ and its statutory interpretation takes place in a much more ‘information-rich environment’ than does statutory interpretation in the courts.⁸¹ This is true in South Africa as well as Nigeria where the NCC and Department of Trade, Industry and Competition respectively have/are actively led/leading the copyright legislative reform process. The executive branch has the opportunity to sponsor and promote bills before the legislature. By presenting draft legislations and appearing before and corresponding with the national assembly committees and parliamentary portfolio committees, these executive bodies are both more familiar and closely connected with the considerations that went into the statute's drafting and should be better able to place certain parts of the legislative record in the proper context. According to Morrison, this ‘informational superiority’ can make an

⁷⁷ See Part III, below.

⁷⁸ Stack 2014 (n17) p.884.

⁷⁹ Morrison 2006 (n23) p.1242.

⁸⁰ Ibid p.1240.

⁸¹ Ibid.

otherwise ambiguous statutory language clear.⁸² The executive, by its constitutional positioning has both close interaction and access to legislative process and history, which it is able to leverage on in the process of statutory interpretation for policy implementation.⁸³

The executive, specifically executive agencies, has responsibility to set the policy agenda, develop policy, promote relevant and needed reforms necessary to drive their policy and when parliament passes legislations, takes those statute forward through implementation. This responsibility may sometimes be quasi-regulatory or quasi-judicial but in all cases has a wider, more general and public application than court decisions.⁸⁴ In particular, the executive has on its side, a plethora of resources of statutory meaning not necessarily/readily available to the courts and also because the interpretative context of the judiciary differs considerably from that of the executive.⁸⁵ Unlike the judiciary whose interpretative context depends on and defers to the case of the parties before it, the executive has better and holistic knowledge of the statutory purpose.⁸⁶

The legal and institutional architecture of the Nigerian and South African copyright executive, the players and decision mechanisms within that architecture support the position that the executive not only engages in an interpretative exercise as a matter of course but that it has the capacity and institutional expertise to realise statutory purpose through articulation. These executive bodies and agencies are headed by copyright specialists, populated by expert staff members and/or have direct access to experts, with capacity for technical analysis.⁸⁷ For example, as pointed out above with respect to Nigeria, the Chairman of the NCC Governing Board is statutorily required to be a copyright expert and a large proportion of members of the NCC Governing Board is statutorily required to be representatives of authors of each category of protectable subject matter.⁸⁸ These executive bodies are therefore in a better position to know about the state of the industry, the scope of its reliance on other sectors, and the economic impact of any new rule.

⁸² Morrison 2006 (n23) p.1241.

⁸³ Ibid. See also, Fuo 2013 (n17) p.12.

⁸⁴ Ekpu, A.O. and Iwocha, P.I., 2017. Powers of the executive and legislature in budget making process in Nigeria: An overview. *JL Pol'y & Globalization*, 57, p.44. According to Mashaw, '[b]ecause agencies are responsible for agenda setting, policy development, enforcement, and maintenance of the political legitimacy of their programs, the agencies' responsibilities far outstrip reviewing courts' responsibilities in relation to those same statutory provisions'. See Mashaw 2007 (n18) p.902.

⁸⁵ See Stack 2014 (n17) p.889.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Section 35.

Executive bodies not only have subject-specific expertise, they also have ‘procedural flexibility’ in the choice of medium utilised to implement statutory provisions. Again, as the discussion in Part IB of this paper has shown, executive bodies could use regulations (whether the statutes explicitly so stipulate), policy documents, guidelines, comments and other forms of communication with varying degrees of binding force, to implement statutory provisions and purpose. Furthermore, executive bodies, because of their duty of accountability to the legislature through reports and obligatory appearances to summons from the legislature and to the judiciary when their decisions are subject of judicial review, are in prime position to implement statutory provisions and purposes in a way that benefits society. In particular, decisions to implement copyright provisions including copyright exceptions implicate matters of public policy, which the executive (constitutionally acting in conjunction with the legislature) is best placed to determine.⁸⁹ Moreover, the executive could access expertise and input where needed by sourcing public comments on any of its proposed implementation actions. Real life examples of this abound across many fields and jurisdictions where the executive has published requests and/or notices of public comments on its proposed actions.⁹⁰

For constitutional, statutory and institutional reasons, the executive has a much higher chance and expertise to actualise or realise a right to research. The rest of this paper proceeds on that basis.

II. Realising a right to research: Implementation equals interpretation equals articulation

Admittedly, the mere recognition of an obligation to enforce/execute the law does not necessarily indicate *how* that obligation is to be undertaken. Specifically, except in cases where the relevant statute prescribes regulation or notice, it is not explicit how certain statutory provisions are to be implement including whether the executive must silently (in spoken and written word) or non-verbally execute the law. Even where there is explicit statutory indication as to the medium of execution or implementation, the nitty-gritty in terms of the contents of such medium is at the discretion of the executive and based on its understanding of statutory purpose.⁹¹ This leaves the executive with a wide discretion in terms of tools with which to concretise statutory provisions.⁹² This Part argues suggests that the

⁸⁹ Karjiker 2021 (n11) pp. 248-249; Stack 2014 (n17) p.904.

⁹⁰ Stack 2014 (n17) p.909.

⁹¹ Fuo 2013 (n17) p.24.

⁹² Ibid. See also Morrison 2006 (n23) p.1238.

executive's interpretation or implementation works in practice by articulation. It argues that whatever be the executive interpretation, it should be publicly communicated (i.e., *articulated*).⁹³

Communication studies and administrative law are rife with the tools and platforms that are specifically used by the executive to cover their position on matters under their regulatory and/or administrative control.⁹⁴ In this Part, this paper explores some of these tools – referred to here as “tools of articulation”. These tools/moments/catalysts are suggested bearing in mind that they serve the purpose of realising the right to research though some (or even most) of them are of no legal consequence.⁹⁵

A. Tools of articulation

To the extent that the very nature of the everyday work of the executive branch of government, and indeed all branches of government, requires them to address various kinds of questions and issues that require them to understand and interpret and assert the government's legal position on a particular issue,⁹⁶ their understanding of the legal position on a particular issue, whether they are secret or articulated in public does not take away from the fact that that happens. The argument in this paper is that it should be asserted publicly, especially when it comes to research exception and indeed various copyright exceptions, because they not only help right holders to understand the limits of their copyright protection, but they also enable users and the general public to also understand what they are allowed or not allowed to do with copyright protected subject matter. Accordingly, tools of articulation are tools that allow the executive to publicly assert their position on any matter of legal interpretation. Tools of articulation can promote consensus, for example, where the government is taking a position informed by unifying points of scholarly positions.⁹⁷

Tools of articulation used, the identity of the articulator, when any tool of articulation is used, the unique nature of that particular tool, the circumstances in which it is used, the circumstances in which the articulation is made and the circumstances in which the articulation could be relevant determines to a large degree the weight that may be attached to

⁹³ Fuo 2013 (n17) p.487; Morrison 2007 (n23) p.1258.

⁹⁴ Fuo 2013 (n17) p.14 referring to ‘policies, plans, programmes and strategy’ as ways to concretize statutory provisions.

⁹⁵ Ibid p.2. See also, Morrison 2006 (n23), pp. 1244-1246.

⁹⁶ Ingber 2013 (n20) p.367.

⁹⁷ See Part IIB below.

that particular tool in relation to the issues in question. It also determines the extent of the status, the influence and the ultimate authority of that particular tool of articulation.⁹⁸

Also, the tool of articulation selected for a particular purpose would to a large extent be informed by the executive body that is taking that decision and the way that the enabling statute is structured. For example, where the enabling statute requires implementation and articulation through regulations (i.e., a quasi-legislative tool), then there is usually no choice in terms of articulation than to go through regulation. For the research exception, the mode of articulation is not prescribed by the primary statute and therefore there is some discretion in the selection of the tool of articulation albeit bearing in mind that regulatory powers of executive bodies are usually construed strictly to for them to confine themselves within the ambit and scope of the enabling legislation.⁹⁹

Accordingly, the choice of each or any tool of articulation should be informed by the status of the executive personnel who could use the tool or who is statutorily permitted to operate in that sphere; the evidentiary weights of that tool of articulation, should it be relied on by private persons in defence of their activities or actions or conduct; the influence of that tool. Tools of articulation have impact and significance in the implementation of statutory provisions and purpose. Identifying tools of articulation and understanding the impact of these tools of articulation is therefore essential to informing public behaviour and also influencing policy agenda.¹⁰⁰

1. 'Signing' or 'rejection' or 'reservation' statements

In democratic societies, the executive, specifically the President is an integral part of the legislative process. When the legislative branch passes a bill, such bill is transmitted to the President for their assent or rejection or reservations. In both Nigeria and South Africa, bills must be assented to by the President in order for such bill to become law. In South Africa, even bills assented to by the President do not automatically become law. Before a new Act comes into force, the President must declare the Act's commencement date in the Government Gazette. Furthermore, the President may, if they have reservations as to any provisions of a

⁹⁸ Ingber 2013 (n20) p.368.

⁹⁹ This was also confirmed by South Africa's Constitutional Court in *Blind SA v Minister of Trade, Industry and Competition and others* Case CCT/320, paras 78-79. See also Ingber 2013 (n20) p.372.

¹⁰⁰ Ingber 2013 (n20) p.377.

bill, send the bill back to Parliament with his reservations stated.¹⁰¹ In each instance, the President's decision may be accompanied by statements providing further information as to the purpose of and executive plans regarding implementation. In this regard, presidential statements accompanying a bill provide an avenue for the executive to indicate its position and interpretation of statutory provisions.¹⁰² The significance of such statements as a tool of articulation is illustrated in Part IIB below.

2. Communications/reports to treaty and national law-making bodies

Another tool of articulation is the compliance or other communication issued to a treaty body in terms of specific international obligations. In this regard, various international copyright instruments respectively mention the committees or other bodies that signatory or member states may submit compliance and periodic reports to on measures that they have taken to implement their treaty obligations in relation to copyright. The level and extent of compliance have been discussed in the literature¹⁰³ but this paper only explores the outcomes of the reporting commitments as a tool of articulation of government position with respect to a particular copyright issue.

South Africa's engagement with other countries and international bodies over its copyright obligations is handled primarily by the Department of Trade, Industry and competition. Nigeria is handled by the NCC, in line with the provision of the Copyright Act that empowers it to do so. The executive prepares reports to the relevant treaty bodies.¹⁰⁴ The executive is also the entity that communicates with the treaty and other law-making bodies. Reporting or communication with treaty bodies can largely be proactive rather than reactive, because the obligation to report to treaty bodies are usually inherent and set by those treaty bodies in relation to the provisions of the specific treaty so nations already known ahead of time when the period in which they are required to make reports or to issue reports to treaty bodies, and that is a way of communicating their position or interpretation of the effect of international obligations on local laws or how local laws should proceed.¹⁰⁵ In the case of

¹⁰¹ See <https://pmg.org.za/page/legislative-process>. Also, s79 of the Constitution of the Republic of South Africa.

¹⁰² Morrison 2006 (n23) pp.1244-1246. See also Kelley, C.S. and Marshall, B.W., 2010. Going it alone: The politics of signing statements from Reagan to Bush II. *Social Science Quarterly*, 91(1), pp.168-187.

¹⁰³ See for example, Fasan, O., 2012. Commitment and compliance in international law: a study of the implementation of the WTO TRIPS agreement in Nigeria and South Africa. *African Journal of International and Comparative Law*, 20(2), pp.191-228 (Fasan 2012).

¹⁰⁴ Ibid.

¹⁰⁵ Ingber 2013 (n20) p.396.

South Africa and Nigeria, both have signed and ratified or in the process of ratifying several intellectual property specifically in copyright treaties that contain periodic reporting requirements. Moreover, treaties makes provisions that permit communication from member states to the relevant bodies and institutions established by those treaties. Also in this regard, South Africa's Communication to the WTO TRIPS Council on both the TRIPS waiver and the 3-step test for exceptions and limitations offer a good example of this tool in action and is discussed below.¹⁰⁶ For instance, both South Africa and Nigeria have had to prepare and issue compliance reports to the World Trade Organisation (WTO) regarding the TRIPS Agreement.¹⁰⁷ These reports offer both an avenue and platform for the executive to articulate their understanding and interpretation of the relevant legislative provision.¹⁰⁸ Articulation in the form of communication to treaty bodies or reports to treaty bodies as debate has shown and as illustrated in Part IIB below, can offer a forum for decision making that permits significant input from experts, offers room for interaction between governments and civil societies and the general public.¹⁰⁹

The above applies mutatis mutandis to reports to Parliament as required in the case of South Africa, by s92(3)(b) of its Constitution.¹¹⁰

3. Press statements/Written, published speeches/notices

Written, published speeches offer another tool of articulation that can be deployed proactively and strategically in a way that addresses and/or showcases each chosen policy path.¹¹¹ Because of the preparation that largely preface most government speeches and the careful considerations that attend the selection of the speechmaker, written published speeches by the executive have a high dose of legitimacy.¹¹²

Publicly delivered speeches create some sort of internal precedent going forward, at least among executive officers and officials with respect to the issue in question. Speeches are a more malleable tool (than say, response to litigation), because there is significant proactive control by the executive officials organizing and writing and drafting and delivering

¹⁰⁶ Part IIB(2).

¹⁰⁷ Fasan 2012 (n103).

¹⁰⁸ Inger 2013 (n20) p.397.

¹⁰⁹ Ibid.

¹¹⁰ Section 92(3)(b) of the Constitution provides that "members of the cabinet must provide Parliament with full and regular reports concerning matters under their control.

¹¹¹ Inger 2013 (n20) pp.397-398; Morrison 2006 (n23) p. 1249.

¹¹² Inger 2013 (n20) p.399.

the speech in question. Because of the proactive nature of speeches, they also allow the executive to carefully think about what it wants to put out there carefully, think about the scope of its powers, and allows it to think of the position that will satisfy a broader audience and deliver it at a time that is crucial to the issue in question. Because of all these, it is suggested that the executive would be more amenable to delivering speeches if they are able to understand the significance and impact of speeches and the amount of control that they have over what they put out there by way of explanation or clarification on a given issue.¹¹³ Further, the availability of the internet also enables published speeches to be accessible as reference points.

Again, like other tools of articulation, speeches are accepted as the coordinated view of the given government agency on a specific issue and because of that, it has a considerable measure of weight in influencing decisions of people and businesses alike perhaps better than judicial precedent that is in many cases applicable to the specific parties before the court and in which the courts are constrained in their decision to the case pleaded by the respective parties before it. Speeches perhaps unlike other tools of articulation like litigation response or treaty report/communication, allow a much wider, all-encompassing kind of application to persons, situations and circumstances. With speeches, there is no usually no specific class of society being addressed. Instead, everyone - experts and non-experts, lawyers and non-lawyers alike - is being addressed. Accordingly, speeches are usually drafted and delivered in such a way that it is accessible both in language, meaning and content, to all members of society.¹¹⁴

Some tools of articulation focus on highlighting the status and the extent of powers of specific executive bodies. For example, in the NCC's intervention in the corporate governance of some collective management organization and in the disputes regarding granting operating licence to aspiring collective management organisation, press releases and public notices were the tools of articulation used by the Commission to convey its understanding of the extent of its powers to regulate collective management organizations.

4. Litigation response by executive bodies

Where the executive's action or inaction with respect to a given issue is challenged in court, the executive's court processes filed would naturally assert its understanding of the specific

¹¹³ Ibid pp.401-402.

¹¹⁴ Ibid.

legal interpretation on a particular issue. Within their briefs of argument and their addresses to court and their processes filed in court in respect of a particular matter, the executive allows the public to see for themselves what the executive's understanding of a particular legal provision is on a particular issue. In order to adopt a position on the matter, the executive would have considered that matter internally and arrived at an angle or a position, or an approach or strategy to that specific litigation. The heads of argument filed by the Minister of Trade, Industry and Competition in *Blind SA vs Minister of Trade, Industry and Competition and others* serves a good example and is discussed, below.¹¹⁵

Articulation made in the course of defensive litigation is reactive as opposed to proactive because in that kind of situation the government is reacting to processes filed by the applicant in the case.¹¹⁶ The executive's position and interpretation is dictated to a large extent by the case filed by the applicant/complainant as well as pressures such as time, external enforcement, etc. because they are bound by the court's calendar to a large degree and they must come up with a position as quickly as possible. Take *Blind SA v Minister of Trade, Industry and Development*, for example. Because of the reactive nature of defensive litigation, the Minister was forced to declare views on such critical issues as the scope of the exceptions for people with disabilities, the scope of disabilities covered by the exception, who is to be regarded as beneficiary persons, who is to be regarded as authorized entities, the propriety of first amending the copyright legislation before then ratifying the Marrakesh Treaty, and even the scope of exceptions on the appropriate action when a statutory provision is declared unconstitutional.¹¹⁷ Thus, the position of the executive on these important legal questions of copyright law were largely formed, not through proactive tools of articulation or formed through the normal channels of decision making in government, but through the litigation strategizing process.¹¹⁸

Litigation or defensive litigation is not only reactive, it is also constrained to the legal issues set out by the parties in the specific litigation. *Blind SA vs Minister of Trade, Industry and Competition and others* as an example demonstrates that the impact of tools of

¹¹⁵ Part IIB(2).

¹¹⁶ Rosati, E., 2020. What Does the European Commission Make of the EU Copyright Acquis When It Pleads Before the CJEU? The Legal Service's Observations in Digital/Online Cases. *European Law Review*, 45(1), pp.67-99.

¹¹⁷ See paras 29-32.

¹¹⁸ Ingber 2013 (n20) p.375.

articulation is informed in large part by the unique nature of that specific tool, the issue being articulated, the articulator themselves and the circumstances of articulation.¹¹⁹

Apart from the above-listed tools of interpretation, other tools of articulation such as executive's legal opinions; memos; notices; communications; tweets; policies; guidelines etc. exist. The nomenclature of such tools does not matter as much as their effect and enforceability.¹²⁰ The list of tools of articulation is by no means intended to be exhaustive. They only represent a fraction of the numerous ways in which the executive who would communicate its interpretation and understanding of a particular statutory provision or particular understanding of a particular issue for the benefits of the public. As technology advances, various tools of communication with varying degrees of impact will continue to emerge and will be open to the executive to use. Public articulation of executive statutory interpretation is ideal because it is difficult, if not impossible, to access and assess secret or informal legal interpretation.¹²¹ For realising a right to research, secret articulation of the position or legal interpretation on the question of research will not do. By publicising its articulation, the executive offers basis for either legislative or judicial clarification.¹²² Conversely, by hiding or failing to verbalise their interpretation and implementation, the executive loses the opportunity for transparency, for public participation and providing guidance to the public. The need for articulation is even higher when the courts have not reached any conclusion or articulation on the matter whether because the matter/issue is non-

¹¹⁹ See also, Ingber 2013 (n20) p.376.

¹²⁰ Fuo 2013 (n17) p.28 arguing that 'The nomenclature of the instrument used by the executive when it exercises delegated legislative powers should therefore not automatically determine the legal effect thereof'. See also, Steytler, N., 2011. The legal instruments to raise property rates: policy, by-laws and resolutions: journal. *Southern African Public Law*, 26(2), pp.484-496.

¹²¹ Ingber 2013 (n20) pp.377-378 commenting on the difficulty in assessing secret or simply informal legal interpretation and arguing for "formal crystallization" and "public declarations". See also, Mokrosinska, D., 2020. Why states have no right to privacy, but may be entitled to secrecy: a non-consequentialist defense of state secrecy. *Critical Review of International Social and Political Philosophy*, 23(4), pp.415-444; Morrison, T.W., 2011. Constitutional alarmism. *Harvard Law Review*, 124(7), pp.1688-1749.

¹²² Morrison 2007 (n23) p.1238.

justiciable or because it is an "underenforced" norm.¹²³ Research like other copyright exceptions is a judicially underenforced statutory norm across the subject jurisdictions.¹²⁴

It is of course left for the specific executive body to decide depending on the significance of that particular issue to specific classes or members of society in determining the tools of articulation or the tool of articulation that they decide to use to communicate their position.

B. Illustrating executive articulation in the copyright field

This section demonstrates how the executive has given effect to and/or exercised its powers in the copyright field in Nigeria and South Africa. This further goes to show how executives processes and actual articulation of its interpretation contribute to meaningful implementation of copyright statutory provisions. As Fuo argues with respect to the socio-economic rights contained in the South African Constitution, rights are 'abstract entitlements which become meaningful entitlements only when government adopts legislation, policies, plans and programmes to give effect to them. Without these processes of translation, the socio-economic rights remain vague guarantees'.¹²⁵ Although it may be difficult to draw broad conclusions from the jurisprudence in both countries on the effect of utilising tools of articulation especially, because most often the courts do not hinge their decisions on the tools of articulation themselves,¹²⁶ the impact and utility of tools of articulation is evident from a number of events in the copyright field in both countries.

¹²³ For example, Nigeria's fundamental objectives and directive principles of state policy (dealing with socio-economic rights) contained in Chapter 2 of the Constitution of the Federal Republic of Nigeria are non-justiciable. See Ako, R., Stewart, N. and Ekhator, E.O., 2016. Overcoming the (non) justiciable Conundrum: The Doctrine of Harmonious Construction and the Interpretation of the Right to a Healthy Environment in Nigeria. *Justiciability of Human Rights Law in Domestic Jurisdictions*, pp.123-141. See also, Morrison 2007 (n23) p.1224 asserting the concept of 'judicially underenforced constitutional norms' so-called because they are constitutional norms that may be formally justiciable, but that receive relatively little (or weak) judicial enforcement.

¹²⁴ Okediji, R.L., 2006. The international copyright system: limitations, exceptions and public interest considerations for developing countries. https://unctad.org/system/files/official-document/iteipc200610_en.pdf, pp.1-2. Gervais, D.J., 2008. Making copyright whole: a principled approach to copyright exceptions and limitations. *U. Ottawa L. & Tech. J.*, 5, p.1; Wright, R., 2009. The "Three-Step Test" and the Wider Public Interest: Towards a More Inclusive Interpretation. *The Journal of World Intellectual Property*, 12(6), pp.600-621; Okediji, R.L., 2018. The limits of international copyright exceptions for developing countries. *Vand. J. Ent. & Tech. L.*, 21, p.689.

¹²⁵ Fuo 2013 (n17) p.487.

¹²⁶ Judicial reviews largely focus on actual interpretation as opposed to tool used. See Morrison 2007 (n23) p. 1198.

1. The executive and copyright collective management in Nigeria

As indicated in Part IIB(1) above, both the NCC and the AGF have powers that engage statutory interpretation and articulation of the copyright statute. In the area of copyright collective management, the Copyright Act (Nigeria) requires the NCC to make regulations to regulate the establishment and activities of collective management organisations (CMOs). In this regard, the NCC had issued the CMO Regulations 2007 which, it is argued, offers insights into the NCC's understanding and interpretation of what the Copyright Act meant by "the purposes of [section 39] of [the] Act".¹²⁷ As argued elsewhere, the NCC understood this provision as conferring it with powers to intervene in the corporate governance of CMOs.¹²⁸ More importantly, for present purposes, the NCC has had to use directives and press releases as tools of articulation to further explain to CMOs and the general public, its interpretation of the scope of its powers to regulate the activities of CMOs in Nigeria.¹²⁹ Furthermore, the press releases and directives served to inform public behaviour and decisions as to dealing with the Copyright Society of Nigeria (COSON) because they (i.e. the press releases and directives) explained how the activities of COSON had contravened relevant provisions of the Copyright Act and the CMO Regulations including thwarting the purpose of CMO regulations leading to the decision to revoke its operating licence.¹³⁰ This event and NCC's use of press statements and directives as tools of articulation demonstrate the scope of the NCC's powers in the field of copyright collective management as well as the purposes of CMO regulations without the need for judicial pronouncement.

With respect to Nigeria, the NCC's articulation in the litigation instituted by the various collective management organizations at various times has also prompted the executive, in this case, the Nigerian Copyright Commission, to adopt and publicly state its supposed position on the extent of its powers to regulate the affairs of copyright collective management organization. It has also led to policy change in the from the aspect of including

¹²⁷ See section 39(7) of the Copyright Act.

¹²⁸ Okorie 2018 (n42).

¹²⁹ See Afam Ezekude 'Text of press briefing by the Director General, Nigerian Copyright Commission, Mr. Afam Ezekude, on the dispute in the governing board of Copyright Society of Nigeria Ltd/Gte (COSON)', (*Nigerian Copyright Commission*, 19 April 2018) < <http://www.copyright.gov.ng/index.php/news-events/item/427-textof-press-briefing-by-the-director-general-nigerian-copyright-commission-mr-afam-ezekudeon-the-dispute-in-the-governing-board-of-copyright-society-of-nigeria-ltd-gte-coson>> accessed on 18 March 2023. Bob Aroture, 'Nigeria News | Press Briefing By Copyright Commission On Dispute In Governing Board Of COSON' (*Nigerian Law Intellectual Property Watch Inc.*, 1 May 2018) <<https://nlipw.com/nigeria-news-press-briefing-by-copyright-commission-on-dispute-in-governing-board-of-coson/>> accessed 29 July 2019.

¹³⁰ Ibid.

more collective management organization in the music sector by the Attorney-General's action and directive to issue a license to the Musical Copyright Society of Nigeria. in addition to the one held at the time by the Copyright Society of Nigeria.

2. The executive and copyright reform in South Africa

The ongoing copyright reform in South Africa offers another good evidence of how the executive's engagement with and use of various tools of articulation has made abstract provisions of the copyright statute to become meaningful.

There is consensus that copyright reform truly began in South Africa with the then Department of Trade and Industry (now Department of Trade, Industry and Competition) establishing a Copyright Review Commission (CRC) to assess artists' concerns regarding royalty distribution and payment and unfair contractual terms.¹³¹ Given that the same Judge Ian Farlam headed both the CRC and the Standing Advisory Committee on Intellectual Property (SACIP) established in 2000, it is quite plausible that the establishment of the CRC was influenced by or based on the advice of the SACIP. The CRC report including recommendations on how to address various copyright issues contributed significantly to the formal drafting of the Copyright Amendment Bill.¹³² What is important to note for current purposes is that the CRC report has remained a reference point for the far-reaching reforms contained in the Copyright Amendment Bill and has tempered or at least influenced submissions of public agencies, private entities and individuals on the Copyright Amendment Bill.¹³³

Since the presentation of the Bill before Parliament, the Bill has gone through several iterations. For purposes of this paper, the focus is on the roles played by various executive bodies in interpreting the scope and limitations of the existing copyright statute and deciphering what needs to be done to address challenges posed by the statute. The following actions utilising various tools of articulation are relevant: the communication issued by the executive in 2020 to the World Trade Organisation's (WTO) Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS Council) titled Intellectual Property and the Public Interest: The WTO TRIPS Agreement and the Copyright Three-Step

¹³¹ Nicholson, D. (2019) *The Copyright Amendment Bill: Its genesis and passage through Parliament*. Infojustice. Available at: <https://infojustice.org/archives/41167> (Accessed: March 19, 2023).

¹³² Ibid.

¹³³ See submissions and comments on the Copyright Amendment Bill on the website of Parliamentary Monitoring Group. <https://pmg.org.za/bill/705/>

Test’ (henceforth, the ‘IP and public interest Communication’);¹³⁴ the communication issued by the executive in 2020 titled ‘Waiver from certain provisions of the TRIPS Agreement for the prevention, containment and treatment of COVID-19’ (henceforth, the ‘TRIPS Waiver Communication’)¹³⁵

The IP and public interest Communication was issued to consult WTO Member States on the flexibilities available to Member States in crafting copyright limitations and exceptions within the principles and objectives of the TRIPS Agreement. For the present purposes, what is significant about the Communication is that it offered some interpretation and/or understanding that ‘fair use and fair dealing exceptions *per se* are not in conflict with the international three-step test, including under the more specific approach that the TRIPS Agreement takes to the three-step test under Article 13’.¹³⁶

Also in 2020, the executive government in South Africa (together with India at the time) recommending the adoption of text indicating a waiver from certain provisions of the TRIPS Agreement to ‘ensure that intellectual property rights such as patents, industrial designs, copyright and protection of undisclosed information do not create barriers to the timely access to affordable medical products including vaccines and medicines or to scaling-up of research, development, manufacturing and supply of medical products essential to combat COVID-19’.¹³⁷ While the eventual text adopted by TRIPS Member State differs quite materially from the original proposed text of the waiver,¹³⁸ it is argued that the proposal as communicated and articulated in the waiver text offers another evidence of executive statutory interpretation and articulation of what needs to be done with international copyright treaties and agreements to address pressing health and societal challenges. This evidence extends to the issue of utilising tools of articulation to realise a right to research.

Because new events and new strides have so broadened the definition on possible definitions of research now involving things that include text and data mining and other forms of technology enabled research that has now raised questions that states did not necessarily

¹³⁴ See South Africa (2020) *Intellectual property and the public interest: The WTO TRIPS Agreement and the copyright three-step test: Communication from South Africa*. World Trade Organisation. Document number: IP/C/W/663.

¹³⁵ See the Original waiver text: India and South Africa (2020) *Waiver from certain provisions of the TRIPS Agreement for the prevention, containment and treatment of COVID-19: Communication from India and South Africa*. Document number: IP/C/W/669.

¹³⁶ See IP and public interest Communication, para 9.

¹³⁷ See TRIPS Waiver Communication.

¹³⁸ Amin, T. and Kesselheim, A.S., 2022. A Global Intellectual Property Waiver is Still Needed to Address the Inequities of COVID-19 and Future Pandemic Preparedness. *INQUIRY: The Journal of Health Care Organization, Provision, and Financing*, 59, p.00469580221124821.

grapple with at the time of negotiating or ratifying the various copyright treaties. These circumstances have called for updating the executive's understanding of its obligations and executive understanding of how its obligations and that treaty and legislative provisions applies to these novel situations or contexts.¹³⁹ In this regard and considering the way that the outcome of the TRIPS waver debate and conversation in the international forum all from a communication instigated by South Africa and India during the height of the COVID-pandemic. These Communications reveal and show that communication or articulation generally is significant. So, to promote progressive change in both law and policy, the status of a specific articulation tool then goes a long way to promote innovative reasoning and to involve various kinds of players and to bring various kinds of issues onto the policy agenda. It can promote engagement with the scholarly community and expert community within the field of copyright law and even other fields of intellectual property law.

Furthermore, as already indicated above in Part IIA(1) of this paper, the reservation letter/statement from the President of South Africa offers another evidence of impact. In order to head off judicial interference in the executive's participation in the legislative reform process, the government took the action of communicating to Parliament of constitutional reservations with respect to the Copyright Amendment Bill and presented Parliament with the opportunity to change its course in terms of at least the process of the copyright Amendment Bill. This history has a role to play in future articulation of the research and other exceptions.

In some circumstances, the institutional posture of the executive branch and the specific interpretative context reveals that the executive branch squandered an opportunity for articulation of statutory interpretation. Such is the case with the posture of Department of Trade, Industry and Competition both in the events leading up to and in the course of the suit instituted by Blind SA.¹⁴⁰ The response of the Department of Trade, Industry and Competition to the confirmation proceedings instituted by Blind SA before the Constitutional Court of South Africa offers evidence of both the positives from executive articulation and the negatives from executive's reluctance to articulate. The litigation instituted in *Blind SA* allowed the executive to publicly confirm its support of the exceptions for persons with disability in Section 19D and to articulate its approach and thinking towards domesticating

¹³⁹ Ingber 2013 (n20) p.396 pointing out that treaty reporting process offers an opportunity for the executive to 'engage in a process of stocktaking and self-examination'.

¹⁴⁰ *Blind SA v Minister of Trade, Industry and Competition and others* supra.

the Marrakesh Treaty for persons with visual disabilities. This is a matter that has been under the radar all these years.

Blind SA essentially shown a spotlight on the plight of persons with visual and print disabilities and the fact that all these while the executive had not taken the steps to interpret or articulate interpretation of a policy direction in favour of persons with disabilities. It took that litigation to call to attention the fact that the executive had had the power all this while to regulate on the issue of reproduction of exceptions to reproduction rights in favour of persons with disability, but chose not to, and which led to the court declaring contrary to arguments of amicus curiae, Professor Owen Dean that the particular provisions of the Copyright Act in relation to the reproduction rights, and its effect was unconstitutional. What is important to note in this context is the fact that the DTIC's response as contained in its heads of argument provided certainty that South Africa's approach to domesticating the Marrakesh Treaty was to expand the scope of 'beneficiary persons' to go beyond persons with visual disabilities.

* * * * *

While the weight of a tool of articulation largely turns on the status of the executive personnel deploying it and while the actual impact of the tool may be difficult to establish with specificity, the utility of deploying tools of articulation is undeniable.

III. Realising a right to research in copyright law: possible articulation contents

A situation where the government would like to promote and ensure that there is research or significant research in a particular sector or across all sectors in a given country. Or, where the executive intends to support an environment where copyright law does not unduly hinder or encumber research activities. This would require them to determine the scope of the research exception, or, the copyright status and for the executive body, they might want to determine the scope of their legal authority to address things in those fields. As has been established in the preceding sections of this paper, the executive clearly has the legal authority to interpret not just the other provisions of the copyright and but also to interpret 'research' and/or the research exception.¹⁴¹ This is specifically based on the responsibility over all matters affecting copyright (in the case of Nigeria) and the directive to make regulations

¹⁴¹ Part IB, above.

generally as to any matter which the Minister of Trade, Industry and Competition “*considers it necessary or expedient* to prescribe in order that the *purpose* of [the Copyright Act] may be achieved”.¹⁴² In the context of the research exception, the pertinent question relate to the content of any tool of articulation deployed in response to these obligations.

1. ‘Research’ in the context of Nigerian copyright law

Unlike South Africa, Nigeria’s research exception is not limited to specific classes of works. Instead, paragraph 6(1)(a) of the Second Schedule to the Copyright Act exempts from copyright protection the doing of any acts covered by copyright protection by way of fair dealing for inter alia purposes of research provided the title and authorship of the work is acknowledged. Paragraph 6(1)(r) of the Second Schedule also exempts from copyright protection, reproduction for the purpose of research of an unpublished literary or musical work kept in a library, museum or other institutions to which the public has access.

Some definition of ‘research’ exists under the Act but it is restricted to compulsory licence for translation and reproduction of literary or dramatic work which has been published in analogous forms of reproduction. Paragraph 2 of the Fourth Schedule allows applications to the NCC for a licence to produce and publish a translation of literary or dramatic works for purposes of research as well as teaching and scholarship. Such licences are non-exclusive and are subject to royalty rates fixed by the NCC. Paragraph 1 of the Fourth Schedule stipulates that:

In this Schedule-

"research" shall not include industrial research, or research carried out by bodies corporate (not being bodies corporate owned or controlled by the Government), companies, associations or bodies of persons carrying on any business;

"purposes of teaching, research or scholarship" includes-

(a) purposes of instruction activity at all levels in educational institutions; and

(b) purposes of all types of organised educational activity.

Like South Africa, Nigeria is in the process of amending its copyright statute and a Copyright Bill 2022 is awaiting presidential assent to become law. A proposed s20 of the Bill continues the trend of not limiting the research exception to specific classes of works. However, that

¹⁴² Part IB2, above.

provision now prefaces the research exception with “non-commercial” such that the exception now only covers non-commercial research. What constitutes ‘non-commercial research’ is not defined, creating another interpretative gap that could jeopardise certain research activities.¹⁴³

2. ‘Research’ in the context of South African copyright law

In the case of South Africa, “research” is mentioned only once in the Copyright Act and with reference to the fair dealing exception. In essence, the research exception is limited to classes of works similar to countries such as Namibia, Mali, Morocco, etc.¹⁴⁴ Where there is fair dealing with a literary or musical work,¹⁴⁵ artistic work as far as is applicable,¹⁴⁶ broadcasts,¹⁴⁷ and/or published editions,¹⁴⁸ for the purposes of research, copyright is not infringed. ‘Research’ is not defined in the Act nor is fair dealing defined in the Act. This creates an interpretative gap if the gains of research exception are to be realised. In this regard, South Africa’s Copyright Amendment Bill addresses some of these issues but still leaves some interpretative gap. The proposed s12A(a)(i) provides that fair use in respect of a work or the performance of that work, for purposes such as research does not infringe copyright in that work. While ‘research’ is not defined in the Bill, the proposed s12A(b) provides inter alia for considerations such as whether the research use was for non-profit research in determining whether an act constitutes fair use. However, this also leaves some interpretative gaps including regarding what should constitute “non-profit research”.

3. General and possible features of research

Following from the foregoing, how may the executive agency approach the task of interpreting and articulating the research exception based on its discernment and understanding of the boundaries of the purposes or principles espoused by the relevant copyright statute? Given basic premises of legislative supremacy in terms of the doctrine of

¹⁴³ Neumann, D., Borisenko, A.V., Coddington, J.A., Häuser, C.L., Butler, C.R., Casino, A., Vogel, J.C., Haszprunar, G. and Giere, P., 2018. Global biodiversity research tied up by juridical interpretations of access and benefit sharing. *Organisms Diversity & Evolution*, 18, pp.1-12. See also, Kamau, E.C., Winter, G. and Stoll, P.T. eds., 2015. *Research and development on genetic resources: public domain approaches in implementing the nagoya protocol*. Routledge, pp. 60-74.

¹⁴⁴ Flynn, S., Schirru, L., Palmedo, M. and Izquierdo, A., 2022. Research exceptions in comparative copyright. <https://digitalcommons.wcl.american.edu/research/75/>, p. 28.

¹⁴⁵ Section 12(1)(a).

¹⁴⁶ Section 15(4).

¹⁴⁷ Section 18.

¹⁴⁸ Section 19A.

separation of power, it makes sense to first ask whether the legislature offers interpretive directions to the executive in the relevant copyright statutes,¹⁴⁹ particularly given that there is not much by judicial guidance as to the contents and criteria for executive exercise of powers delegated or stated in statutes.¹⁵⁰ According to Stack, there is a “sufficient commonality” in all regulatory statutes that supports the claim that regulatory statutes impose a duty upon agencies to interpret the statutes they administer in a purposive manner.¹⁵¹ In the context of copyright law in South Africa and Nigeria, this approach allows the identification of powers vested and duties imposed on specific executive bodies and the implications of these duties in relation to executive action with respect to research. It also allows suggestions as to the performance of these duties in a purposive manner to realise a right to research.

The interpretation of the research exception and the content of any tool of articulation adopted to give effect to the research exception must be reasonable, purposive, balanced and inclusive, taking cognisance of the differences in their impact on different classes of society.¹⁵² On reasonableness, it has been argued that a statute (and by extension, executive interpretation and articulation) that discriminates against a large section of the society is not reasonable.¹⁵³ Similarly, executive implementation that does not take cognisance of or address adverse effects caused by differences in the economic, social, physical and other status of various classes of society is not inclusive and could therefore be unconstitutional.¹⁵⁴ Moreover, executive statutory interpretation cannot override, amend or be in conflict with existing laws to avoid offending the doctrine of separation of powers.¹⁵⁵

On purposiveness, it has been argued that it is the interpretative activity of the executive body that courts review when judicial review applications are made.¹⁵⁶ If a teleological interpretation (and/or articulation of statutory interpretation) implicates an individual right or other provision limiting executive involvement, the individual whose rights are implicated would have standing to sue and challenge the executive interpretation. Though it is argued that executive articulation of interpretation will not as a general rule implicate any one with

¹⁴⁹ Stack 2007 (n17) p.886.

¹⁵⁰ See *Blind SA v Minister of Trade, Industry and Competition* supra. See also, Fuo 2013 (n17) p.26.

¹⁵¹ Stack 2007 (n17) p.887.

¹⁵² This accords with techniques of executive statutory interpretation proposed by various administrative law scholars. See Morrison 2007 (n23) pp.1240-1242; Hart, H.M. and Sacks, A.M., 1994. *The legal process: Basic problems in the making and application of law.* (Foundation Press, 1994); Stack 2007 (n17) p.905; Van Staden 2020 (n21); Singh 2016 (n21); etc.

¹⁵³ Fuo 2013 (n17) pp.18-19.

¹⁵⁴ *Ibid.* See also, *Blind SA v Minister for Trade, Industry and Competition and others* supra.

¹⁵⁵ *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 4 SA 501 (SCA), para 7.

¹⁵⁶ Stack 2007 (n17) p.883.

standing to sue.¹⁵⁷ Given the high level of generality with which the purpose of the copyright statutes is stated and in particular, the absence of definition of ‘research’ as an activity exempted from the scope of copyright protection, the executive’s responsiveness (if it chooses to), expertise or access to expertise, and ability to assess a range of views make it better equipped to adopt a teleological approach to realising the promise of a right to research.¹⁵⁸ Given its distinct institutional characteristics,¹⁵⁹ the executive branch has a significant role to play in realising a right to research.

Scholarly literature and copyright jurisprudence that have at some point attempted to define, describe or explain what ‘research’ means in the context of copyright law. These offer some basic features of research viz:

1. Research requires access to information and links closely with fundamental human rights such as the right to science and culture, right to education, right of access to information, etc.;¹⁶⁰
2. Research cuts across various fields such as science and scientific research;¹⁶¹
3. Research may be formal (i.e., undertaken in an institutional or organisational context largely academic)¹⁶² or informal (i.e., where it is undertaken without the intention or expectation of creating new knowledge)¹⁶³
4. Research requires direct or indirect participation of and sharing with others¹⁶⁴
5. Research may be commercial/for-profit or non-commercial/not-for-profit¹⁶⁵

Based on the foregoing, there is range for the interpretation of research to be confined or expanded to some of these conceptions. In many ways, this poses a dilemma for persons who

¹⁵⁷ See Morrison 2007 (n23) p.1193.

¹⁵⁸ Stack 2007 (n17) p.876.

¹⁵⁹ Morrison 2007 (n23) p.1201

¹⁶⁰ Universal Declaration of Human Rights (UDHR); United Nations Educational, Scientific and Cultural Organization’s Recommendation on Science and Scientific Researchers, 2017; Oriakhogba, D.O., 2022. The Right to Research in Africa: Making African Copyright Whole. PIJIP/TLS Research Paper Series no. 78. <https://digitalcommons.wcl.american.edu/research/78>, p. 9 (‘Making whole’); Armstrong, C. and De Beer, J., 2010. *Access to knowledge in Africa: The role of copyright*. UCT Press.

¹⁶¹ United Nations Educational, Scientific and Cultural Organization’s Recommendation on Science and Scientific Researchers, 2017.

¹⁶² *NRF Engaged Research Framework* (2022). National Research Foundation. Available at: <https://www.nrf.ac.za/wp-content/uploads/2022/08/NRF-Engaged-Research-Framework.pdf> (Accessed: March 19, 2023).

¹⁶³ Appadurai, A., 2006. The right to research. *Globalisation, societies and education*, 4(2), pp.167-177; *SOCAN v Bell*, [2021] 2 R. C. S. 326 (Canada).

¹⁶⁴ Appadurai 2006 (n167).

¹⁶⁵ Oriakhogba *Making whole* (N164) p. 10; *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] SCC 13 (Canada) para 51.

wish to use copyright-protected materials for purposes of research. Without an understanding or some assurance as to the scope of the research exception, it may be difficult if not impossible to conduct research relying on the exception. Across many fields, the absence of clarity on the scope of exceptions poses a risk to using copyright-protected materials that users are not willing to take.¹⁶⁶ It is argued that the executive can and should play a significant role in promoting and realising research. The mandates specified for the executive in national constitution and national copyright legislation offer various avenues for realising research (outcomes). These mandates must be deployed in multiple ways, including for example, via the use of communication and articulation tools to promote and guide decision-making in undertaking research and using copyright-protected materials for research purposes.¹⁶⁷ If the gains of research exception are to be realised, the executive has a significant interpretative opportunity to explore.

CONCLUSION

Several utilities or advantages are inherent in an understanding of the role of the executive in statutory interpretation and articulation. For each tool of articulation, an awareness of its availability, legitimacy and impact could or should inform the executive's choice of a given tool depending on the objective that it seeks to achieve be it change in policy; change in policy implementation. An understanding of and transparency in its understanding of the legal position with respect to its obligation as a matter of law. These objectives should influence the choice of tools of articulation. With an especially contentious matter such as copyright exceptions where there are strong arguments against legislative flexibility and judicial participation in interpreting such flexibilities,¹⁶⁸ executive's choice to articulate its legal position or understanding of the boundaries of a given exception may well be the only way to effect change, positive change on the part of copyright users, but also on the part of copyright owners. Otherwise, copyright exceptions, including the research exceptions may well lie fallow in the pages of statute books without ever getting expression in public and private life.

¹⁶⁶ Deazley, R., & Stobo, V. (2013). Archives and Copyright: Risk and Reform. (CREATE Working Paper Series). CREATE. DOI: 10.5281/zenodo.8373; Stobo, V., 2018. Copyright and E-learning: A Guide for Practitioners. *Archives and Records*, 39(1), pp.97-99.

¹⁶⁷ Du Plessis 2018 (n14) pp.200-201 asserting a similar position in relation to the environment.

¹⁶⁸ Karjiker 2021 (n11) pp. 248-249; Rosati, E., 2022. Copyright reformed: the narrative of flexibility and its pitfalls in policy and legislative initiatives (2011–2021). *Asia Pacific Law Review*, pp.1-22.

Given the institutional limitations of the judiciary in giving effect to copyright statutory provisions, utilising these tools of articulation to realise a right to research within the field of copyright law, offer more than a way to, as Nigerian pidgin goes, *take hold bodi*.¹⁶⁹

¹⁶⁹ (Something) to tide one over or support one.

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