

LEGAL FRAMEWORK FOR COPYRIGHT PROTECTION IN NIGERIA

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Abstract

Copyright protection provides benefits in the form of economic rights which entitle the creators to control use of their literary and artistic material in a number of ways such as making copies, performing in public, broadcasting, use on-line, etc. and to obtain an appropriate economic reward. Creators can therefore be rewarded for their creativity and investment. Effective copyright protection will afford the growth of the copyright-based industries, encourage creativity and contribute to economic growth. It is premised on this fact that in every jurisdiction, there is a legal regime for copyright protection. However, the existence of a legal right which the populace is ignorant of amounts to no right, hence this paper. This paper uses a doctrinal research methodology to critically examine the legal regime for copyright protection in Nigeria. It also traces the rationale for copyright protection, policy objectives of copyright protection, and discusses in details the sources of copyright laws in Nigeria which are Statute, case law, common law, international law and regulations. It further examines what constitutes infringement and available criminal and civil remedies. This paper finds that the legal framework of copyright in Nigeria is defective because the statute did make provisions that can tackle present digital technology challenges and the penalty clause in the statute is also obsolete. This paper therefore recommends inter alia that the Copyright Act be amended to make provision for stiffer penalties for copyright infringement and provision to tackle the present day technological challenges. It further recommends that Nigeria adopt a formal registration of copyright works like developed nations.

Key Words: Copyright, Technology, Legal, Protection, Nigeria, Creativity, Investment

I. Introduction

Over the past decade, the understanding of intellectual property and its economic benefits to the society has increased significantly. This is largely due to the expansion of research conducted across all disciplines.¹ The greatest source and foundation of every civilization is its creativity, innovation and invention which will invariably boost the economy of a nation.² Copyright is one of the fields of intellectual property dealing with creations of human intellect. Copyright protection exists from the moment a work is created in a fixed and tangible form of expression and it is original.³ It relates to literary and artistic works. The aim of such protection is ensuring that no one reaps the fruits of another man's labour without authorization.

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²Nwogu I.O 'The Challenges of the NCC in the Fight against Copyright Piracy in Nigeria' *Global Journal of Politics and Law Research*, Vol.2 No 5,2014 Pp 22-34

³ Copyright Act Cap C28, Laws of Federation 2004.

Copyright protection encourages individual effort and invariably enriches the society.⁴As the world experiences greater advancement in technology, more emphasis is now placed on innovative and knowledge based products. Nigeria, as a nation with huge creative capacity, has witnessed the gradual growth of her movie and music industries, which is beneficial to the country's economy.⁵ This paper examines the legal framework for copyright protection in Nigeria, It examines terms for copyright protection, it traces the rationale for copyright protection, policy objectives of copyright protection, and it also discusses in details the sources of copyright laws which are Statute, case law, common law, international law and regulations. It also examines what constitutes infringement and availability of criminal and civil remedies.

II. Conceptual Analysis and Definition of Terms

a. What is Copyright?

Cornish⁶, described copyright as: "The right of a person to protect his ideas and information from commercial exploitation". Copinger and Skone⁷ say that: "Copyright law is concerned with the negative right of preventing copying of physical materials existing in the field of literature and the arts".

Black's Law Dictionary offers the following meaning:

The right of literary property as recognized and sanctioned by positive law. An intangible incorporeal right granted by statute to the Author or Originator of certain literary or artistic productions, whereby he is invested for a limited period with the sole and exclusive privilege of multiplying copies of the same and publishing and selling them.

Copyright can be defined as a set of exclusive rights granted by government for a limited time to protect the particular form, way or manner in which an idea or information is expressed. Copyright may subsist in a wide range of creative or artistic form or "works"; including literary works, movies, musical works, sound recordings,

⁴Adewopo A. *Nigerian Copyright System: Principles and Perspectives* (Odade Publishers, 2012) Pp.120-123.

⁵Folarin, S. *Intellectual property Law, Studies in Industrial Design, Copyright and Trademark*, (Maxmunich Publication, 2003) Pp.42.

⁶ Cornish W.R, *Intellectual Property*, (Sweet & Maxwell) (1981). Pp.1-7.

⁷Copinger (*et al*) *On Copyright*, (12th ed., Sweet & Maxwell, 1980) Pp.123-125.

paintings, photographs, software and industrial designs. Copyright laws simply explain the legal protection given to authors against unauthorized copying of their work. Copyright is the exclusive right given under the law to the owner to control the reproduction of the work which is the subject of copyright.⁸ Copyright is a branch of Intellectual property which is the product of the mind and has been described as man's only genuine property worthy of protection.⁹

The property rights created as a result of legal recognition of ownership of Intellectual Property is known as Intellectual Property Rights¹⁰. There are Intellectual property law in place to protect all intangible products of human intellect or creativity. In the case of Copyright, there is the Copyright Act¹¹ in place in Nigeria and other applicable laws. Legal protection is undoubtedly the reason anyone will dissipate energy into creating intellectual property for public consumption. Intellectual property is a product of human creations; it can be created by an individual or an individual can pay someone else to create it for them. The tentacle of intellectual property spread across every aspects of human life, that is, the right of an author of a book, the right of the creator of a new invention, the right of the designer of a pen casing etc.¹²

Basically, intellectual property is a product of human ingenuity, most of the new medicines and other high technology are product of inventions and innovations, creators will then be given the right to prevent others from using their inventions or authorize its use. Generally, intellectual property law deals with the law relating to literary works and more.¹³ Copyright law did not exist before the invention of the printing press in Europe in the 15th century. To reduce the risk of adversaries printing politically dangerous books, the royal government of England granted a publishing monopoly to a group of book publishers, who all belonged to a guild called the

⁸Uvieghara, E.E “*Essays on copyright Law and Administration in Nigeria*’ (Ibadan) (1992) Pp.102-104. Copyright has been defined as” right to literary property as recognized and sanction by positive law, an intangible, incorporeal right granted by statute to the author or original of certain literary or artistic productions, whereby he is invested, for a limited period with the sole and exclusive privilege of multiplying copies of the same published work and selling them”.

⁹Ameh I ‘An Appraisal of the Role of the Nigerian Copyright Commission in the Enforcement of Copyright Laws in Nigeria’ *Ahmadu Bello University, Journal of Commercial Law(ABUJCL)*, vol5, no 1, (2010-2012) Pp 140-150.

¹⁰Adedeji A.A ‘*Conceptual and Legal Framework for the Protection of Intellectual Property Right*’ being a paper presented at the Nigerian Institute of Advanced Legal Studies, (July 18, 2016). p.4

¹¹ Onatola, A. (et al): “Nigerian Libraries and the Protection of Author’s Rights”, in Nigerian Libraries, *Journal of the Nigerian Library Association*, Vol. 39) (2005/2006) Pp. 49-64.

¹²International Bureau of WIPO “*The New Communication Technologies Copyright*”, WIPO/PO/ACAD/E/98/28.

¹³ Garner, B.A., Black’s Law Dictionary (8th ed., Thompson West Publishing Co, 2004) p.45

Stationers' Company¹⁴.

In Nigeria, a body known as the Nigeria Copyright Council (NCC) was established to cater for the Administration of Copyright system in Nigeria. The Commission is entrusted with all matters affecting copyright in Nigeria as provided for in Copyright Act¹⁵. To monitor and supervise Nigeria's position in relation to international conventions and regulate conditions for the conclusion of bilateral and multilateral agreements between Nigeria and any other country; enlighten the public on matters relating to copyright, maintain an effective data bank on authors and their works; and responsible for such other matters as relate to copyright in Nigeria as the Minister may, from time to time¹⁶.

Nigeria Copyright Act¹⁷ defined "copyright" as involving the sole right to produce or reproduce a work or any substantial part thereof in any material form, whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public, if the work is unpublished, to publish the work or a substantial part thereof. Copyright apply to creative works such as books, journal articles, research reports, novels, poems, piece of music, computer software, proceedings of a conference, artwork and so on. Section 51 of the Act¹⁸ states that "copyright" means copyright under this Act. This is not a sufficient definition, but, however it suggests that copyright protection in Nigeria can only derive its force from the provisions of the Act. That is, no copyright claim exists outside the statute. However, there are other sections of the Act, discussed infra, that provide for the nature and scope of the specific rights conferred on different kinds of work which copyright deals with.

III. Rationale for Copyright Protection

The main purpose of copyright protection is to ensure due fairness to authors and owners of work. *Article 27 of Universal Declaration of Human Rights*¹⁹ states that: (2) Everyone has the right to the protection of the moral and material interests

¹⁴ Cornish (n6) 12-17

¹⁵ Copyright Act Cap C28, LFN, 2004

¹⁶ P. Gleason: *International Copyright in Publishing and Development: (Book of Readings)* (1998). p12.

¹⁷ Section 1(2) (d) of Copyright Act Cap 28. Laws of the Federation, 2004.

¹⁸ Section 57 of the Copyright Act Cap C28, LFN, 2004

¹⁹ Article 24 of Universal Declaration of Human Right Charter, 1948.

resulting from scientific, literary or artistic production of which he is an author. History has shown that the enrichment of the national cultural heritage depends directly on the level of protection afforded to literary and artistic works.²⁰ Copyright protection, for the creator of works, makes sense only if the creator actually derives benefits from such works. The essential role of Copyright protection is that of promoting and enriching the national cultural heritage.²¹

Different opinions have emerge on the necessity of copyright protection,²² One of the arguments in support of copyright protection is that since a man has a natural right to the product of his hand, he should have the same rights to the product of his brain. A school of thought against this believes that the author does not deserve the monopoly granted to him by law because no single idea is unique or truly original. ²³ Anyone else can use the idea as long as it is in another form of expression. So there is no monopoly of idea. Another argument in support is that it is only reasonable for a man to reap from his labour after spending time, money and energy to create a work to the advantage of the society having done these the author deserve an incentive by way of limited monopoly to promote more creativity.²⁴ Thus, basically the rationale for copyright protection is to encourage societal growth and creativity. However, this monopoly is a bit limited when it conflicts with a paramount public interest or the necessity for some members of the public to make a single copy of a work for non-profit, educational purposes.²⁵

²⁰ Marisella O. 'The Role of Copyright in Economic Development' *NIALS Journal of Intellectual Property (NJIP)* (2012) Pp 66-70.

²¹ *ibid*

²² Agbai, C, 'Trademarks Reform: Treaty Obligations and the Registry', (2012) *Nigerian Law Reform Journal NLRJ*, P.89.

²³ *ibid*

²⁴ Adeloye, A.; 'The Information Market in Nigeria' (2002). *Journal of Science* 26 (4): Pp282-285.

²⁵ Johnson, D.F. *Copyright Handbook*, (2nd ed.: E.R Bowker Company; 1983), Pp34-36.

IV. Policy Objective of Copyright Protection

The main purpose of copyright protection is to protect the creator of a work against infringement, to guarantee commercial exploitation and to stimulate new ideas. The modern concept of copyright law postulates that the primary purpose of copyright is to promote the public welfare by the advancement of knowledge, with the specific intent to encourage the production and distribution of new works for the public; it provides incentive for creators by granting them exclusive rights to reproduce and distribute their works.²⁶

Copyright protection is not intended to inhibit the free flow of information and ideas.

The goal of copyright protection is to encourage dissemination of ideas by protecting the embodiment or expression of an idea in a creative work and reserving the right in it to the creator of the work. What is being advanced here is the optimization of economic benefit of copyright without prejudicing the owners' proprietary interest in his work. In the words of Olueze,²⁷ copyright, apart from being a proprietary right, is a means of employment and economic sustenance of the owner. He states further, that a creator of copyright work expends some labour and skill in his creation. This is worthy of protection from undue appropriation by those who would like to reap from where they did not sow. The function of copyright law is to protect from annexation by other people the fruits of another's work, labour, skill or taste.²⁸

There are two policy objective of copyright protection. The first is that Copyright protection is a means of economic compensation of owners of IP for their invaluable contribution to the advancement of man's quality of life.²⁹ Another crucial reason is to balance the public use and reuse of a copyright work with the need to provide protection and incentive.³⁰ The justification for copyright protection exists under International Human Rights Standards such as the Universal Declaration of Human Rights (UDHR) of 1948 as well as the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966. Both bodies provides for the right of

²⁶ Nwogu M.I.O Copyright Law and the Menace of Piracy in Nigeria, *Journal of Law, Policy and Globalization*, Vol.34, 2015.

²⁷ I.M Olueze: *Nigerian Copyright Law*, (Maghlink Publishing; 1998) pP.1-5

²⁸ Nwogu. M.I.O, "The Challenges of the Nigerian Copyright Commission in the fight against copyright piracy in Nigeria". *Global Journal of Politics and Law Research vol2*, No 5, (2010) Pp 22-34.

²⁹ 'Purpose of Copyright; Protecting the creator against infringement' <<http://www.novagraaf.com/copyright>> accessed 4th August, 2016.

³⁰ 'Philosophy of Copyright' available at <<http://www.academia.edu>>introduction-to-copyright>

owners to have moral and material interest resulting from any scientific, literary or artistic production of which he is the author.³¹³²

The second lies in the perception that social value of copyright protection lies in their use by the public to promote public interest by providing access to variety of works and inventions. There by encouraging creativity and inventions, consequently, the monopolistic right of control accorded copyright protection rights owners must be tempered to avoid any undue restrictions on their use³³

On the surface this two ostensibly contradictory objectives has been the foundation of unending debates on enforcement.³⁴ Protection automatically means exclusion of public access, however it is not usually so. This is because creations are not always safe from the exploitations of free riders who will replicate such works.³⁵ Thus, lack adequate of legal provisions as well as poor enforcement mechanism will continue to make copying a profitable and lucrative option to the detriment and discouragement of right owner's thereby discouraging creativity.

V. Sources of Copyright Law

1 Statutes

Generally, intellectual property law deals with the law relating to literary works. Here in Nigeria like many countries of the world, apart from international laws regulating intellectual property relations amongst civilized nations, there are local laws, which regulate relationships amongst individuals in relation with intellectual property. Statute is one of the sources of copyright legal framework. Copyright is a legal recognition granting the authors the exclusive right to produce, publish, distribute, perform, broadcast or display their creative works³⁶. The goal of copyright law is to encourage authors to invest effort in creating new works of art and literature.

Law ensures copyright and sanctions for the breach of any of the provisions

³¹ Oyewunmi A.O, *Nigerian Law of Intellectual Property: (University of Lagos Press) (2015)*, Pp.6-7.

³² Article 27 of the Universal Declaration of Human Rights, United Nations, 1948, and Article 15 of the International Covenant on Economic, Social and Cultural Rights, 1966.

³³ Adedeji A.A, *Conceptual and Legal Framework for the Protection of Intellectual Property Right' being a paper presented at the Nigerian Institute of Advanced Legal Studies, (July 18, 2016). Pp.10.*

³⁴ Ibid Pp.10.

³⁵ Oyewunmi,(n31) 7

³⁶ Ezekude, A. 'Nigerian Copyright Commission Report of Activities of the year under Review'; (2012) Pp23-34.

relating to the right. However, these rights are subject to many exceptions, which are detailed in the copyright act. For instance, certain non-profit organizations can perform certain copyrighted works without the permission of the copyright owner, and libraries can make copies of damaged books without violating the copyright statute. The statute also permits owners of copies of computer software to make one copy as a backup.³⁷ Copyright notice informs the public that a given work is copyrighted. The notice is placed in each published copy of the protected work and consists of either the word copyright, or the symbol ©, accompanied by the name of the copyright owner and the date of first publication. For sound recordings, the symbol ® is used instead of the symbol ©.³⁸ Under the 1909 act, publication of a work without a proper copyright notice resulted in a complete loss of copyright protection.³⁹

In Nigeria, the Act in place to tackle the issues in copyright and copyright enforcement is the Copyright Act.⁴⁰ A writing need not be words on paper. Section 1(1) of the Copyright Act⁴¹ states the works that are eligible for Copyright protection. These works are literary, musical and artistic works, cinematograph films, sound recordings and broadcasts. The Act further clarifies these works in its Section 51⁴² and states that no work will attract the term ‘copyright’ unless it falls within the listed category. In copyright law, it could be a painting, sculpture, or other work of art. The writing element merely requires that a work of art, before receiving copyright protection, must be reduced to some tangible form.⁴³

This may be on paper, on film, on audiotape, or on any other tangible medium that can be reproduced (i.e., copied).⁴⁴ The writing requirement ensures that copyrighted material is capable of being reproduced. Without this requirement, artists could not be expected to know whether they were infringing on the original work of another. The writing requirement also enforces the copyright rule that ideas cannot be copyrighted: Only the individualized expression of ideas can be protected. Copyrighted material must be original.⁴⁵ This means that there must be something

³⁷ The Copyright Act, 1909.

³⁸ S.18 Copyright Act, 1909.

³⁹ Fabunmi, A.B, ‘The Roles of Librarians in Copyright Protection in Nigeria’ *International Journal of African & African American Studies Vol. VI, No. 1, (Jan 2007) Pp80-87*

⁴⁰ Cap C28 LFN 2004

⁴¹ *ibid*

⁴² S.51 *ibid*

⁴³ S.6(1)(b)(i) *ibid*

⁴⁴ ‘Understanding copyright and related rights’ <<http://www.wipo.net/publication>> Retrieved December 27th ,2017

⁴⁵ S. 1(2) (a) Copyright Act, Cap C28, LFN, 2004.

sufficiently new about the work that distinguishes it from previous similar works. If the disparity is more than trifling, the work will merit copyright protection. Functionality can be a factor in copyright law. The copyrights to architectural design, for example, are generally reserved for architectural works that are not functional.⁴⁶

If the only purpose or function of a particular design is utilitarian, the work cannot be copyrighted. The scope of protection is generally limited to the original work that is in the writing. For example, assume that an artist has created a sculpture of the moon. The sculptor may not prevent others from making sculptures of the moon. However, the sculptor may prevent others from making sculptures of the moon that are exact replicas of his own sculpture. Copyright protection gives the copyright holder the exclusive right to (1) Reproduce the copyrighted work; (2) Create derivative works from the work; (3) Distribute copies of the work; (4) Perform the work publicly; and (5) Display the work for a period of time.⁴⁷

The first two rights are infringed whether they are violated in public or in private. The last three rights are infringed only if they are violated in public. Infringement of copyright occurs whenever someone exercises the exclusive rights of the copyright owner without the owner's permission. The infringement need not be intentional. There are two types of infringements we have the primary and the second type of infringement. Copyright owners usually prove infringement in court by showing that copying occurred and that the copying was not authorized⁴⁸. These require analysis and comparison of the copyrighted work and the disputed work. The most important exception to the exclusive rights of the copyright holder is the "fair use" doctrine.⁴⁹

This doctrine allows the general public to use copyrighted material without permission in certain situations. Which includes some educational activities, literary and social criticism, some Parody and news reporting. Whether a particular use is fair, depends on a number of factors, including whether the use is for profit; what proportion of the copyrighted material is used; whether the work is fictional in nature; and what economic effect the use has on the copyright owner. See *John Stone v.*

⁴⁶ S.6 (3) Copyright Act, Cap C28, LFN, 2004.

⁴⁷ Fabunmi, A.B, 'The Roles of Librarians in Copyright Protection in Nigeria' *International Journal of African & African American Studies Vol. VI, No. 1, (Jan 2007) Pp80-87.*

⁴⁸ Cambridge University 'Intellectual Property and Copyright in the Digital Environment'. *Information Current* (12 September, 2005). Pp.24-34

⁴⁹ Second schedule to S. 6 (1) Copyright Act, Cap C28, LFN, 2004.

Bernard Publication Limited.⁵⁰ Lord Denning M.R. in *Hubbard v. Vosper*⁵¹ stated:

It is impossible to define what is 'fair dealing,' it must be a question of degree; you must consider first the number and the extent of the quotations and extracts. Are they altogether too many and too long to be fair? The more you consider the use made of them, if they are used as a basis for comment, criticism or review that may be fair dealing. If they are used to convey same information as the author, for a rival purpose, that may be unfair.

However there are many loopholes in this Act which hinder effective enforcement, for example, section 20(2)(a)-(d) of the Copyright Act⁵² provides that any person who ;

sells or let for hire or for the purposes of trade or business, exposes or offers for sale or hires any infringing copy of any in which copyright subsists, or (b) distributes for the purposes of trade or business any infringing copy of any such work or (c) has in his possession, other than for his private or domestic use, any infringing copy of any such work, or (d) has in his possession, sells, lets for hire or distribution for the purposes of trade or business or exposes or offers for sale or hire any copy of work which if it had been made in Nigeria, would be an infringing copy unless he proves to the satisfaction of the court that he did not know and had no reason to believe that any such copy was an infringing copy of any such work, is guilty of an offence under this Act and liable

From the above provisions an infringer is exempted from criminal liability if he can show that he did not know and had no reason to believe that the materials in his possession are infringing copies. This test makes the proof of infringement against the accused difficult and encourages most infringers to evade punishment. The test should have been that of reasonable man who engaged in the business of such circumstances who should know the difference between pirated copies and legitimate ones and the credibility of his sources of materials so as to establish the guilty. Also section 44(1)⁵³ of the Copyright Act, provides:

the owner of the copyright in any published literary, artistic or musical

⁵⁰ (1938) 1 CH 603.

⁵¹ (1972) 2 QB p.98.

⁵² Copyright Act, Cap C28, LFN 2004

⁵³ *ibid*

work or sound recording may give notice in writing to the Nigerian Customs Service (a) that he is the owner of the copyright in the work, and (b) that he requests the Nigerian Customs Service during the period specified in the notice, to treat as prohibited goods, copies of the work to which this section applies...

This restricts the importation of printed copies of literary, artistic, musical works or sound recordings, made outside Nigeria which, if it had been made in Nigeria, would be an infringing copy of the work.⁵⁴ This is probably the reason why infringing materials are exported to other countries from Nigeria with ease. Under Berne and Universal Copyright Conventions, Nigeria has an obligation to accord national treatment to foreign authors and their works⁵⁵. The conventions provide that each contracting state shall provide for the adequate and effective protection of the rights of authors and other copyright proprietors in various copyrighted works.⁵⁶

2 Judicial Decisions

Case law is another source of the legal framework for copyright protection in Nigeria. Case law is the body of principles and rules of law formulated through pronouncement of courts which are subsequently adhered to and followed in similar situations. Thus decisions of Nigerian courts on copyright, serve as precedent cases on the same subject matter. The laws on copyright infringements are geared towards protecting the right owner. The rights of an owner of copyright are infringed when one of the acts requiring authorization of the owner is done by someone else without his consent. The unauthorized copying of copyright materials for commercial purposes. The act provides punitive measures against infringement by way of inspection and seizure order.⁵⁷

An essential part of piracy is that the unauthorized activity is carried on for

⁵⁴ S. 44 (2) Copyright Act, 2004.

⁵⁵ Article 2(1) of the Berne Convention for the protection of literary and artistic works, of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, revised at Brussels on June 26, 1948, and revised at Stockholm on July 14, 1967.; Article 1 of the Universal Copyright Convention as revised at Paris on 24 July 1971, with Appendix Declaration relating to Article XVII and Resolution concerning Article XI 1971.

⁵⁶ Ibid.

⁵⁷ Known as Anton pillar Order which permits an alleged injured parties to visit and search the premises of the defendant where the alleged infringement is taking place and keep the infringing copies in his custody as prove in the court of law

commercial gain. This element of commercial gain implies that piracy will often be carried out on an organized basis, since not only is the unauthorized reproduction of a work involved, but also the subsequent sale or distribution of the illegally reproduced work, which will require some form of organized distribution network or contact with potential purchasers. To the consumer, often only the end of the chain of such a distribution network will be visible in the form of one sales outlet selling a pirated product. It is important to bear in mind, however, particularly when addressing the question of the means of dealing effectively with piracy that behind one such outlet will often lie a systematically organized illicit enterprise, which illegally reproduces a copyrighted work and distributes it to the consumers.

A copyright owner whose right has been infringed through any of the acts state above can enforce such right through civil proceedings. infringing copy of any such work, or has in his possession, sells, lets for hire or distribution for the purposes of trade or business, or exposes or offers for sale or hire any copy of a work which, if it had been made in Nigeria, would be an infringing copy, unless he proves to the satisfaction of the court that he did not know and had no reason to believe that any such copy was licensed and thus requires authorization.

Under Section 15 of the Copyright Act,⁵⁸ copyright is infringed by any person who, without the license or authorization of the copyright owner, undertakes any of the acts provided under s. 15(1)(a-g) of the Copyright Act.⁵⁹ When infringement occurs, an action for infringement will be brought against the infringer. An action for infringement of copyright is provided for under Section 16 of the Copyright Act.⁶⁰ Copyright infringement is actionable at the initiation of the owner, assignee or an exclusive licensee of the copyright in the Federal High Court which has jurisdiction in the place where the infringement occurred. Remedies for infringement of copyright or for violation of related rights consist of civil redress.

Some laws also provide for penal remedies in the form of fines and/or imprisonment. Infringing copies, receipts resulting from infringement and any implement used for the same are usually subject to seizure.⁶¹ Main remedies which are available to a copyright owner in respect of infringement in common-law jurisdictions are an injunction to restrain the continuation of the infringement, and damages to

⁵⁸ S.15 of the Copyright Act Cap c28, LFN 2004.

⁵⁹ S. 15(1) (a-g) *ibid*.

⁶⁰ Copyright Act cap C28 LFN 2004.

⁶¹ Obianuju N, *Global Journal of Politics and Law Research* Vol.2, No.5, 2011 Pp.22-34, (Published by European Centre for Research Training and Development UK).

compensate the copyright owner for the depreciation caused by the infringement to the value of his copyright. In the context of piracy, because it is often carried out as an organized activity, the effectiveness of these remedies may be jeopardized for a number of reasons.⁶²

Thus in May 2016 a telecommunication giant in Nigeria, MTN⁶³ was charged with copyright Infringement in an action brought by the Nigerian Copyright Commission (NCC) against them by Copyright Society of Nigeria (COSON).⁶⁴ A restraining order was sought by COSON at Federal High Court, restraining MTN, its agent's privies or servants from the continued unauthorized copying, communication to the public, streaming, selling, broadcasting, making available for downloading and permitting the unauthorized performance and infringement of the copyright in the musical works and sound recordings belonging to the members, affiliates and assignors of COSON.⁶⁵

The copyright owner may be confronted with a situation in which it is possible to locate only a small proportion of these outlets, without being able to prove any link between the outlets, or any common source of supply for the outlets. Furthermore, the service of a writ commencing an action for infringement, by giving notice to the pirate or to those distributing the works which he has illegally reproduced, may hasten the destruction of vital evidence required to indicate the source of supply and the extent of sales which have taken place. In addition, since piracy often involves an international dimension, there is a risk that the financial resources and other assets of a pirate may be removed from the jurisdiction in which legal proceedings are commenced against him, thereby depriving the copyright owner of the possibility of recovering damages.⁶⁶

These difficulties have accentuated the need for preliminary remedies which may be obtained speedily, which will assist in the collection of evidence against a pirate, and which will prevent the destruction of evidence and the removal of financial resources against which damages may be claimed. In many common-law jurisdictions

⁶²J.O Asein (*et al*) 'A Decade of Copyright Law in Nigeria(ed.) published by NCC, (2002) p.34

⁶³FHC/L/CS/619/2016

⁶⁴Action against MTN, for non-payment of requisite royalties for the musical works and sound recordings deployed by the company

⁶⁵'COSON slams MTN with 16 billion infringement law suit' Nigerian Law Intellectual Property Watch, available at <http://nlipw.com/copyright-infringement-cosom.com> accessed 5th August,2017.

⁶⁶ WIPO Intellectual Property Handbook, WIPO PUBLICATION, ISBN 978-92-805-1291-5, 2004, P.53.

a number of developments have occurred in recent years in response to this need.⁶⁷

3 Common Law

Common law of England is also a source of law in Nigeria. It dates back to its introduction to the colony of Lagos in 1863 via Ordinance No. 3, Through S.45 (1) Interpretation Act the Common law and doctrines of Equity are recognized sources of Nigeria Law. In Nigeria, protection of copyright was governed until 1970 by the English Copyright Act of 1911.⁶⁸

The Nigerian Copyright Act 1970 has since its enactment into law undergone series of amendments in 1988, 1992 and 1999. For instance, the Copyright Act 1988, provided for the establishment of the Nigerian Copyright Commission, the establishment of a Governing Board for the Commission and a Copyright Licensing Panel. Also the 1988 Act unlike the 1970 Act allowed both a civil suit and a criminal suit against the infringer.

Right to institute the civil suit was vested in the owner while the right to bring a criminal action was vested in the Nigerian Copyright Commission; and both suits can run simultaneously.⁶⁹ Likewise, the sanctions available under the 1988 Act are heavier than what was obtainable under the 1970 Act. The 1992 Act and the 1999 Act allowed the appointment of Copyright Inspectors with the same powers as the Police.⁷⁰ At present, the Copyright Act Cap C28 Laws of the Federation of Nigeria, 2004 is a prototype of the 1999 Act.⁷¹ However the decisions of English Courts are not binding on Nigerian courts but would only operate as a guide.⁷²

Nigeria is also signatory to a number of treaties and conventions, including the Berne Convention for the Protection of literary and Artistic Works 1886, the Rome Convention for Protection of Performers, Producers of Phonograms and Broadcasting

⁶⁷ Ibid.

⁶⁸ ibid p.27

⁶⁹ S.21 Copyright Act, 1988.

⁷⁰ S.38 (5) Copyright Act, 1999.

⁷¹ <www.ngex.com/news/public/article> accessed October 23,2017

⁷² Adedeji (n33) 67

Organizations etc. There is therefore need for a new order to integrate these developments, and to avoid the misconception that Nigerian law does not protect foreign works. There is also the recent Copyright (Levy on Materials) Order, 2012 which prescribes levies to be paid on materials used or capable of being used for the infringement of copyright, Part of the funds from the collection of such levies is to be distributed equally among all approved collecting societies, to compensate for the infringement of copyright through the use of such materials, while the remaining funds are to be deployed for administrative and other purposes.

4 Regulations

The source of copyright law also includes regulations. Such as Copyright Optical Disc Regulations 2006 made by the Nigerian Copyright Commission to regulate Optical Disc Plants in Nigeria, and Copyright (Collective Management Organisations) Regulations 2007 to regulate collective management of Copyright and *Video Rental) Regulations 1999*.

5 International Law

International law is another source of copyright legal framework which provides the legal platform for cross-border protection. Nigeria is a signatory to the following conventions and treaties on Copyright. They include; Universal Copyright Convention, Berne Convention, Trade Related Aspect of Intellectual Property Rights (TRIPS) Agreement, the Rome Convention, WIPO Copyright Treaty, the Madrid Agreement, the Patent Cooperation Treaty (PCT), the Paris Convention, inter alia.⁷³⁷⁴

There are some solid arguments that could be stated in favour of international protection of works: if protection were to be limited only to national works, foreign

⁷³ Universal Copyright Convention as revised at Paris on 24 July 1971, with Appendix Declaration relating to Article XVII and Resolution concerning Article XI 1971; the Berne Convention for the protection of literary and artistic works, of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, revised at Brussels on June 26, 1948, and revised at Stockholm on July 14, 1967.; Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1896 U.N.T.S, 299, 33 I.L.M. 1197 (1994).; the Convention of Rome of June 19, 1980 on the Law Applicable to Contractual Obligations.; WIPO Copyright Treaty, adopted December 20, 1996, WIPO Doc. CRNR/DC/94.; the Madrid Agreement Concerning the International Registration of Marks and the Protocol Relating to the Madrid Agreement, April 14, 1891, as last revised, Stockholm, July 14, 1967, 828 U.N.T.S 389; the Patent Cooperation Treaty, June 19, 1970; the Paris Convention for the Protection of Industrial Property, March 20, 1883.

⁷⁴ WIPO Intellectual Property Handbook: Policy, Law and use, 2nd (Geneva: WIPO, 2004) at 262.

works would be allowed into the local market without any copyright cost. They would be sold at cut prices. Of course, consumers may benefit from such low prices. But this practice could detrimentally affect the sale of locally made products, which would have to compete with works of foreign origin distributed at a more attractive price. The dangerous result is that consumers might reject nationally made products and buy foreign ones. National culture, whether it is the music, or book or other industry may, therefore, suffer.

At international level an important step towards a strengthened international copyright protection was the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement). It was signed in Marrakesh in 1994. The TRIPS Agreement covers areas such as copyright and related rights, trademarks, geographical indications, industrial designs, and patents, among others. In respect of each of the main areas of intellectual property covered by the TRIPS Agreement, the agreement sets out the minimum standards of protection to be provided by each member. The Agreement sets out these standards by requiring first, that the substantive agreements of the main conventions of WIPO, the Paris Convention and the Berne convention, in their most recent versions, must be complied with. With the exception of Article 6b of the Berne Convention⁷⁵ which concerns moral rights, and added provisions on computer programs, databases, rental rights and so on.⁷⁶ The TRIPS Agreement is a trade-related agreement since it was adopted as part of the outcome of the Uruguay GATT round of trade negotiations and it is administered by the World Trade Organization (WTO).⁷⁷

VI. Eligibility Requirements for Copyright Protection in Nigeria

The preconditions for legal protection are the requirement of originality and fixation;

1 Originality

⁷⁵Article 6 of the Berne Convention for the protection of literary and artistic works, of September 9, 1886, completed at Paris on May 4, 1896, revised at Berlin on November 13, 1908, completed at Berne on March 20, 1914, revised at Rome on June 2, 1928, revised at Brussels on June 26, 1948, and revised at Stockholm on July 14, 1967.

⁷⁶ See Article 2.1 and 9.1 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1896 U.N.T.S, 299, 33 I.L.M. 1197 (1994).

⁷⁷WIPO Intellectual Property Handbook, (WIPO Publication, 2004).

The Act⁷⁸ provides that for a literary, artistic or musical work to be eligible for protection such work must pass the originality test. It provides that such work shall not be eligible for copyright unless, sufficient effort has been expended on making the work to give it an original character. *Pearce L.J in Ladroke (Football) Ltd v. Williams Hill (Football Ltd)*,⁷⁹ explained that the question as to whether the plaintiffs are entitled to copyright in their coupon depends on whether it is an original literary work. The word ‘original’ does not demand original or inventive thought, but only that the work should not be copied and should originate from the author. Originality means the work must be the author’s intellectual creation.⁸⁰

In *Express Newspapers Plc. v News (UK) Ltd*⁸¹ a work comprising selections of quotations from an interview was held to be an original copyright work involving the exercise of judgment and discretion in the selection and arrangement of the quotations.

2 Fixation

The second criteria for protection is in S.2(b) of the Act⁸² which states that; “The work has been fixed in any definite medium of expression now known or later to be developed from which it can be perceived, reproduced or otherwise communicated either directly or with the aid of machine or device”. The court in *Donoghue v. Allied Newspaper Ltd*⁸³ further reiterates the principle that a work must be fixed in a material form if it is to enjoy copyright, and stated:

There is no copyright in an idea or ideas. A person may have a brilliant idea for a story or for a picture or for a play and one which appears to him original, but he if he communicates that idea to an author or an artist or playwright, the production which is the result of the communication of the idea....⁸⁴

Nigeria is also a signatory to some international Conventions and Treaties that provide protection for works of Copyright owners. The main purpose of copyright protection is to ensure due fairness to authors and owners of work. Article 27 of

⁷⁸ Section 1(2)(a) of the Act

⁷⁹(1964) 1WLR 273

⁸⁰Oyewunmi A. O *Nigerian Law of Intellectual Property*, (University of Lagos Press; 2015). Pp.32-33.

⁸¹Ibid, Pp.34-42

⁸² Copyright Act cap C28, LFN 2004.

⁸³(1938) CH 106 at 109

⁸⁴ *Donoghue v. Allied Newspaper Ltd.* (supra).

Universal Declaration of Human Rights⁸⁵ states that: (2) everyone has the right to the protection of the moral and material interests resulting from scientific, literary or artistic production of which he is an author.

Therefore, copyright owners have a right to the protection of their interest in their work.

VII. Nature of Copyright

As with all fields of intellectual property copyright is concerned with protecting the work of the human intellect which are literary and artistic works. These include writings, music, and works of the fine arts, such as paintings and sculptures, and technology-based works such as computer programs and electronic databases.⁸⁶ Copyright protects the expression of thoughts, and not ideas. So an imaginary work is not protected.⁸⁷ Copyright in works comes into existence automatically upon the fulfilment of two basic conditions; (a) Sufficient effort has been expended on the work to give it an original character, (b) the work must be in a tangible medium of expression from where it can be perceived, reproduced, or otherwise communicated.⁸⁸

All works under copyright protection usually enjoy a wide range of economic and moral rights.⁸⁹ These are the two types of rights under copyright, “economic rights”, which allow the owner of rights to derive financial reward from the use of his works by others, and “moral rights,” which allow the author to take certain actions to preserve the personal link between him and the work. Moral right is in two folds: The first is referred to as the Paternity Right – the right to claim authorship over the work which effectively stamps the author’s personality to his work. This right still remains in the author even after transferring copyright to another person, thereby ensuring that an author is always acknowledged even after the sale of his economic right in the

⁸⁵ Article 24 Of Universal declaration of Human Right Charter.

⁸⁶ S.1 of the Copyright Act, Cap C28, LFN, 2004.

⁸⁷ Chapter 2 - Fields of Intellectual Property Protection, WIPO Publication P.43.

⁸⁸ Section 1(2) (a)(b) of the Copyright Act, Cap C28, LFN, 2004.

⁸⁹ Oyewunmi, A.O: Nigerian Law of Intellectual Property;(1st Ed) (Lagos: University of Lagos Press) (2015) Pp 51-54

published work.⁹⁰

The second leg of this right is to object and seek relief with any distortion, mutilation, or other modification of and any other derogatory action in relation to his work, where such action would be or is prejudicial to his honour or reputation. This is referred to as the Integrity Right. A clear example of the violation of an author's moral right to claim authorship is the case of *Maurice Ukaoha V. Broad-Based Mortgage Finance Limited & Anor.*⁹¹ The plaintiff, who was an architect, entered into a contract with the defendants to make a model of a bungalow building to be displayed in the defendant's premises. Before the model was ready, the plaintiff loaned the defendant another model of a 17-storey building created by him while he was a student at the department of Architecture, University of Lagos.

To the plaintiff's chagrin, the model was advertised by the defendants in some national newspapers as its proposed headquarters in Abuja, while the authorship of the model was also being ascribed to a certain Gori & Associates, instead of the plaintiff. The plaintiff's action against the defendants for infringements of copyright in the model succeeded, as the court held that the acts of the defendants in publicly exhibiting and publishing the model, while also ascribing authorship to a third party, without the consent, authorisation or licence of the plaintiff constituted a violent infringement of the plaintiff's honour and reputation as the author and owner of the model.

In order for a work to be eligible for protection it must fall within these categories:

(a) Literary works (b) Musical works (c) Artistic works (d) cinematograph films (e) Sounding recording (f) Broadcasts.

1 Literary Works⁹²

For literary works, the Act⁹³ provides that copyright in a work shall be the exclusive right to do or authorize the doing of any of the acts provided under Section

⁹⁰Intellectual Property and Copyright in the Digital Environment. *Cambridge University Information Current* (12 September) (2005) Pp.45-47

⁹¹(1997-2003) 4 I.P.L.R 48.

⁹² Section 1(a) Copyright Act Cap C28, LFN 2004.

⁹³ Section 6(1) (a) Copyright Act, 2004.

6(1) (a) of the Copyright Act.⁹⁴ It must be original and fixed(It can be in form of): (I) Novel, stories and Poetic works (II) Plays, stage directions, film scenarios and broadcasting scripts (III) Choreographic works (VI) Encyclopedias, dictionaries, directories and anthologies (VII) Letters, reports and memoranda (VIII) Letters, Address and Sermons (IX) Law reports, excluding decisions of coverts (X) written tables or compilations.

For a work to be eligible for protection it must be original however, originality does not mean inventiveness or novelty. It means not copying verbatim, so any compilation of another person's work will suffice as original work. Because the person has put in his own skill, judgment, effort and labour in the creation of the compilation. In Nigeria, the Copyright Act provides that copyright in literary or musical works is the exclusive right to do and authorise the doing in Nigeria of any of the following acts ;Reproduction of the work in any material form; Publication of the work; Performance of the work in public; Production, reproduction, performance or publication any translation of the work; Making any cinematograph film or a record in respect of the work; Distribution to the public, for commercial purposes, of copies of the work, by way of rental, lease, hire, loan or similar arrangement; Broadcasting or communication of the work to the public by a loudspeaker or any other similar device; Making any adaptation of the work⁹⁵

2 Musical Works⁹⁶

Any musical work, irrespective of musical quality and includes works composed for musical accompaniment will be eligible for protection. The requirement of originality and fixation is also applicable to musical works, so if the musical work is in writing, it will contain the musical notes to differentiate it from an ordinary literary works.⁹⁷

3 Artistic Works⁹⁸

Artistic works includes (I) Paintings, drawings, sketching, lithographs,

⁹⁴Adedeji A.A 'Conceptual and Legal Framework for the Protection of Intellectual Property Right' being a paper presented at the Nigerian Institute of Advanced Legal Studies, (July 18, 2016).p.7.

⁹⁵ S.6 (1)(a) Copyright Act, 2004.

⁹⁶ Section 1(b) Copyright Act, Cap C28, LFN, 2004.

⁹⁷Philips, J., The Economic Importance of Copyright: *Common Law Institute of Intellectual property (1st Ed) ;(London)1985 p.67*

⁹⁸ Section 1(c) Copyright Act Cap C28, LFN 2004

woodcuts, engravings and prints; (II) Maps, plans and diagrams; (III) Works of sculpture (IV) Photographs not comprised in a cinematograph films; (V) works; and (VI) Works of artistic craftsmanship.⁹⁹ The right owner has the exclusive right to reproduce the work in any material form of choice. Thus in *Peter Obe v Grapevine Communications Ltd*,¹⁰⁰ the plaintiff, a professional photographer, successfully sued the defendant who had reproduced and published in its magazine, the plaintiff's photographic work without authorization.

4 Cinematograph Film¹⁰¹

This is the first fixation of a sequence of visual image's capable of being shown is a moving picture and of being the subject of reproduction and with the recording of a sound track associated with the Cinematograph film.¹⁰² The owner of this right has exclusive rights to produce or make a copy of the film in any form he deems fit. Based on the era of digitalization and internet technology, uploading the film online is within the exclusive right of the owner.¹⁰³

5 Sound Recording¹⁰⁴

Copyright in sound recording means the right to reproduction, broadcasting or communication to the public of the recording, as well as the distribution to the public for commercial purposes of copies of the work by way of rental, lease, hire, loan or similar arrangement. Thus any form of unauthorized copying will constitute infringement.¹⁰⁵

⁹⁹ S.51 (1) of the Copyright Act, 2004.

¹⁰⁰ *Peter Obe v. Grapevine Communications Ltd (2003-2007)5 I.P.L.R 354*

¹⁰¹ Section 1(d) Copyright Act Cap C28, LFN, 2004.

¹⁰² Section 51(1) Copyright Act, 2004.

¹⁰³ Adedeji A.A (n94) 35

¹⁰⁴ Section 1(e) Copyright Act Cap C28, LFN, 2004

¹⁰⁵ Oyewunmi A.O (n89) 51-55

6 Broadcast¹⁰⁶

Copyright in a broadcast is the exclusive right to manage the recording and re-broadcasting, as well as the communication to the general public by any of the following means: wireless telegraph, wire or both, satellite, cable programs and rebroadcast. The broadcast may be of visual Images, sounds or a combination of the two. The right owner also has the exclusive right to distribute to the public for commercial purposes or similar arrangement. where there is an infringement the court will decide on the appropriate fair compensation.¹⁰⁷

VIII. Infringement of Copyright

The protection of copyright is backed by some legal safe guards aimed at protecting the rights of copyright owners in cases of infringement with appropriate legal remedies in place. To succeed in an infringement action, the plaintiff must satisfy certain requirements as follows: That copyright subsists in the work allegedly infringed; that the plaintiff is the true owner of the said work; that the defendant has done an act without authorization. Under section 15,¹⁰⁸ copyright is infringed by any person who, without the license or authorization of the copyright owner; carries out, or causes any other person to carry out, an act that is controlled by copyright; imports or causes to be imported into Nigeria any copy of a work that, if it had been made in Nigeria, would be an infringing copy under this section of the copyright Act; exhibits in public any article in respect of which copyright is infringed; distributes by way of trade, offers for sale, hire or otherwise or for any purpose prejudicial to the copyright owner any article in respect of which copyright is infringed; makes or has in its possession plates, master tapes, machines, equipment or contrivances used for the purpose of making infringing copies of the work.¹⁰⁹

Anyone who exercises any of the exclusive rights held by a copyright holder,

¹⁰⁶ Section 1(f) Copyright Act Cap C28, LFN, 2004

¹⁰⁷ Section 9(3)

¹⁰⁸ Section 15 of the Copyright Act, LFN, 2004

¹⁰⁹ Olowu B. Nigeria: Protecting and Enforcing Trademarks and Copyrights available at <http://www.building.pvalue.com/06mena/296_299.htm> pp.23-34 accessed December 27th, 2017.

without permission or authorization by the rights holder, is an infringer, that is, unless he or she is excused by legal defense or exemption. Such infringement may be primary or secondary.¹¹⁰ The issue of intent (or lack thereof) is often a misunderstood and confused aspect of matters involving copyright infringement. What constitutes copyright infringement? Copyright infringement occurs when an individual other than the right owner. Subject to certain defences, it is copyright infringement for someone other than the author to do the following without the author's permission:¹¹¹ copy or reproduce the work; create a new work derived from the original work (for example, by translating the work into a new language, by copying and distorting the image, or by transferring the work into a new medium of expression); sell or give away the work, or a copy of the work, for the first time (but once the author has done so, the right to sell or give away the item is transferred to the new owner.

This is known as the "first sale" doctrine: once a copyright owner has sold or given away the work or a copy of it, the recipient or purchaser may do as she pleases with what she possesses; perform or display the work in public without permission from the copyright owner.¹¹² To make it perfectly clear, intent is not required to bring a claim (or have a claim brought against an infringer) for copyright infringement. To plead a case of direct copyright infringement, a plaintiff need only show (1) that the plaintiff has a valid copyright in the work, and (2) that the defendant copied protectable expression from the plaintiff's copyrighted work. So, simply making or distributing even one unauthorized copy of a copyrighted work may constitute as infringement whether or not someone intended to infringe, or knew that they were otherwise violating copyright law.¹¹³

1. Civil action for infringement

An action for infringement of copyright is provided for under Section 16 of the Copyright Act. The Act provides for both civil and criminal actions for infringement of copyright and both actions can be taken simultaneously in respect of

¹¹⁰ Primary infringement is a direct infringement by a person or organization of an exclusive right. It is the duty of the copyright owner to prove that his work was copied without permission. The final requirement is to prove the defendant took enough of the copyright holder's material as to warrant a finding of infringement. And Secondary infringement may occur when an organization or individual facilitates another person or group to infringe upon a copyright. Generally, in copyright infringement cases, to be found liable for contributory infringement, the person/organization accused of contributory infringement must have benefited from the infringing act.

¹¹¹Section 15 of the Copyright Act Cap C28, Laws of Federation, 2004

¹¹²<www.cyber.law.harvard.edu/property/library/copyprimer.html> accessed January 14th, 2018

¹¹³Copyright Infringement and Strict Liability: What's Intent Have to Do with It'

<<http://sparkmanfoote.com/copyrightinfringementintent/>>

same infringement. Copyright infringement is actionable at the initiation of the owner when it is a civil action, such action will be instituted at the Federal High Court which has jurisdiction in the place where the infringement occurred. The Act provides for three categories of persons who may institute action for copyright infringement—the right owner, an assignee, as well as exclusive licensee of the copyright.¹¹⁴

In the case of *Compact Disc Technologies Ltd and 2 Ors. v Musical Copyright Society of Nigeria Ltd/Gte (MCSN)*,¹¹⁵ the appellant prayed for dismissal of the action brought against it for infringement of copyright in respect of the unauthorized importation, recording, reproduction, distribution, offering for sale, communication to the public and public performance of some copyright works. The ground for the prayer for dismissal was that the plaintiff respondent as alleged owner, assignee and exclusive licensee lacked *locus standi*, to commence action under the Copyright Act (as amended).¹¹⁶ The trial judge dismissed the motion, holding that the plaintiff had no *locus standi*. The learned trial judge relied on the Court of Appeal decision in the Ade-Okin case¹¹⁷. On appeal however, the learned justices of the Court of Appeal distinguished the case from the earlier decision in Ade-Okin, primarily on the basis that the applicable law in the former was the Copyright Act of 1988, while in the latter, it was the Copyright Act 2004.¹¹⁸

2 Criminal Action for Infringement of Copyright

The law also provides for criminal action in respect of certain offences which are considered as public concerns, due to its socio-economic wellbeing in the society. Acts which may be subject to criminal action are provided for in the Act.¹¹⁹ The proof of criminal liability goes beyond evidence of physical act or intention. The defence of not being aware that an infringing act is committed is acceptable. In the case of *Nigerian Copyright Commission v Edolo*,¹²⁰ the accused, an engineer, was charged with offences bordering on the rebroadcasting of the signals of the Multi-Choice Company programmes, without the consent of the company. The major issue before the court was whether or not the prosecution had proved its case beyond reasonable

¹¹⁴ Section 16(1)

¹¹⁵ (2008-2011) 6 I.P.L.R 198

¹¹⁶ Onyido J.C, 'Intellectual Property Protection for Software Rights in Nigeria: Need for law reform' *Modus International Law and business quarterly June Vol5, No.2 (2000) Pp13-19*

¹¹⁷ *Musical Copyright Society of Nigerian Ltd. v. Adeokin Records* 47 NIPJD (CA. 2004) 498/1997.

¹¹⁸ Oyewunmi A.O: *Nigerian Law of Intellectual Property*; (University of Lagos Press; 2015) 51-54

¹¹⁹ Section 20-21 of the Copyright Act

¹²⁰ (2008-2011) 6 I.P.L.R 1

doubt. It was held by the court that it was the duty of the prosecution to show that the items were indeed contrivances within the meaning of section 18(1) (a) and (c) of the Act.¹²¹ The failure of the prosecution to prove that the accused caused the smart card to be made for sale, hire or for the purpose of trade and business, other than for private use as alleged by him. The case was dismissed for lack of proof.

3 Remedies for Infringement

The Copyright Act as a legislation for the regulation of copyright provides an ample range of remedies for copyright infringement. The remedies available to a copyright owner in this regard are mostly civil in nature and they are mostly post trial remedies like damages, injunction account of profits and delivery up. The primary remedy granted under the Act for infringement of copyright is a right of action vested in the owner of the copyright. S.16 (1) of the Act¹²² provides thus:

subject to this Act, infringement of copyright shall be actionable at the suit of the owner, assignee or an exclusive licensee of the copyright, as the case maybe, in the Federal High Court exercising jurisdiction in the place where the infringement occurred; and in any action for such an infringement, all such relief by way of damages, injunction, account or otherwise shall be available to the plaintiff in any corresponding proceedings in respect of infringement of other proprietary rights.

Thus, the remedies are given to the owner of the copyright that is to say the original owner or a person deriving title under him by assignment or exclusive license. Furthermore, it is only federal high court that has jurisdiction on matters arising from infringement of copyright.¹²³ It is only the original owner, assignee or exclusive licensee that can sue for infringing copyright. The remedies available to the owner of copyright under the Act include civil and criminal remedies.¹²⁴

4 Civil Remedy

Injunction

Injunction is an order of court which compels a party to do or refrain from

¹²¹ Section 18(1)(c) of the Copyright Act renders criminally liable any person who makes or causes to be made or has in his possession, any plates, master tapes machines, equipment or contrivances for the purpose of making any infringing copy a such work

¹²² Copyright Act Cap C28, Laws of Federation, 2004.

¹²³ S.16 (1) Copyright Act Cap C28 Laws of Federation of Nigeria 2004.

¹²⁴ S.24 Copyright Act Cap C28 Laws of Federation of Nigeria 2004.

doing an act.¹²⁵ The operation of injunction illustrate the equitable maxim, equity act in personam¹²⁶ and such orders are most commonly cowed in a negative, ordering the person not to do something. But, in certain circumstances, the court will make a positive order known as mandatory injunction which may order a stated order to be done. The general principles governing the granting of injunction are enunciated in the case of *Obeya Memorial Specialist Hospital v. A.G. Federation*¹²⁷ and *Kotoye v. CBN*¹²⁸. There are various forms of injunction which includes the following:

Final or perpetual injunction- this is an injunction granted after the infringers have been finally found liable by the court for infringement of copyright.

- a) **An interlocutory injunction-** This is granted upon evidence by affidavit only. However, a plaintiff must show that the case is of urgency and the granting of injunction will not cause an irreparable damage to the defendant if it should turn out at the trial that the defendant was right.¹²⁹
- b) **Interim injunction-** This type of injunction is based on ex parte motion. The term “ex parte” means that the application is made without the defendant having the chance to prepare or present evidence. Generally, such application is made without any notice to the party against which the order is sought. This type of injunction can only be applied for by the plaintiff and granted when the plaintiff can show real urgency. It is only granted for a sufficient time for both sides to prepare evidence for a full interlocutory injunction.

However, S. 15(5) of the Act¹³⁰ provides that no injunction shall be issued in proceeding for infringement which requires a completed or a partly completed building to be demolished or prevents the completion of a partly completed building.

- c) **Mareva injunction-** A mareva injunction is an order designed to prevent a defendant from spiriting his asset abroad or otherwise dissipating them or concealing them during the pendency of an action so as to deprive the plaintiff of any monetary compensation should he eventually succeed at trial. This order will only be granted where the plaintiff can show likelihood that he defendant would be held liable to pay damages or some other monetary award

¹²⁵ Wolvehampton and Clifford Miller, Commercial exploitation of Intellectual Property, 1st Ed. P. 224.

¹²⁶ Nassar V. Moses (1960) LLR 170.

¹²⁷ (1987) 3 NWLR (pt 60) 325.

¹²⁸ (1987) 1 NWLR (pt 98) 419 at 441.

¹²⁹ Spottis Wood v. Clarks (1846) FSR.

¹³⁰ Copyright Act Cap 68 Laws of Federation of Nigeria 1990.

to the plaintiff at the end of the litigation. And that the defendant will transfer asset out of the country or dissipate them to avoid paying. A Mareva injunction is obtained without notice to the defendant.

Damages

S.16 (1)¹³¹ provides that relief may be granted by way of damages for infringement of copyright. Damages for infringement of copyright had as early as 1914, in the case of *Fenning Films Services v. Wolvehampton Cinemas*¹³² been said to be “at large”. Consequently, in *Plateau Publishing Co. v. Chief Chucks Adophy*¹³³ an arbitrary award which had no direct relevance to any ascertainable economic indices was made. A successful plaintiff will be entitled to recover damages for the infringement of his copyright. However, the principal head of damages to be considered is the loss of profit caused the plaintiff by the diversion of trade from him and in this regard. The profit made by the infringers is not a very relevant consideration. Damages for copyright would be the actual monetary loss resulting from the infringement. As the court have said,¹³³ “the measure of damages is the depreciation caused by the infringement to the value of copyright as a chose in action.”

Additional Damages

By virtue of S.16(4)¹³⁴ the court is empowered to award additional damages where it is satisfied having regard to the flagrancy of the infringement and any benefit shown to have accrued to infringer by reason of the infringement, that effective relief will not otherwise be available to the copyright owner. However, it is not clear whether this subsection contemplate the award of aggravated exemplary damages. The English court of appeal in *William v. Settle*¹³⁵ approved award of substantial and heavy damages of a punitive nature which are exemplary damages. But the House of Lord rejected award of such damages. In *Rookes v. Barnard*¹³⁶ the House of Lord further held that such award can only be justified as aggravated damages.

¹³¹ Copyright Act Cap C28, Laws of Federation 2004.

¹³² (1914) 2 KB 1171.

¹³³ Per Lord Wright in *Sutherland Publishing Co. Ltd. v. Caxton Publishing Co. Ltd* (1936) all ER 117.

¹³⁴ Copyright Act Cap C28, Laws of Federation, 2004.

¹³⁵ (1960) 2 ALL ER 806.

¹³⁶ (1964) A.C. 1129.

Also, in *Cassell & Co. Ltd. v. Broome*¹³⁷ the House Of Lord affirmed its decision in the above case and Lord Kilbradon said that S.12 (3) of English Copyright Act of 1956 which impari material with S.16 (4) of Nigeria Act does not authorize the award of exemplary damages. In *Ezeani v. Njidike*¹³⁸ Supreme Court of Nigeria warned against the award of excessive damages. In the case of *Bellot v. Pressdram Ltd.*¹³⁹ Thomas J was clearly of the view that this section,¹⁴⁰ did not contemplate the award of either aggravated or exemplary damages.

From the above cases, it is submitted that the better view is that the court cannot award exemplary or punitive damages in copyright cases the reason is that the imposition of punitive damages amounts to the introduction of the criminal law element of punishment. The principle of civil law is compensatory rather than punishment. Thus, additional damages may be awarded only on the basis of compensation.

Innocent Infringer

S.16 (3)¹⁴¹ provides a limited form of defence for infringer. This subsection like the criminal law and copyright make allowance for innocent infringement of copyright, where although an infringement has been committed, but at the time of the infringement, the infringer was not aware and had no reasonable ground for suspecting that copyright subsist in the work. The copyright owner is entitled not to any damages but only to an account profit, however, the innocent infringer is not allowed to profit from his conduct. Thus, other relief such as injunction other than damages will be appropriate. In *Plateau Publishing Co. V. Chief Chuck Adophy*¹⁴² the Supreme Court held that account of profit rather than damages will be appropriate only where innocent is established.

5 Anton Pillar Order

¹³⁷ (1972) A.C 1129.

¹³⁸ (1965) NMLR 95.

¹³⁹ (1973) 1 ALL ER 241.

¹⁴⁰ S.12 (3) English Copyright Act (1956).

¹⁴¹ Copyright Act Cap C28, Laws of Federation, 2004.

¹⁴² Supra.

An Anton Pillar order is an order which will enable the claimant, accompanied by his solicitors and law enforcement agents and court bailiff, to enter the premises where the offending materials and articles are kept and remove them, or have copies made, so they can be produced at the trial. It is an order, which is obtained without notice to the other party, so as to remove evidence which ought to otherwise be destroyed. The order originated in Lord Denning's judgment in the case of *Anton Piller KG v. Manufacturing Processes Ltd.*¹⁴³

The object of a search order in this context is the preservation of evidence. In this instance, the claimant has to give an undertaking as to damages in case he is wrong and the defendant suffers damages as a result of then granting and execution of the order. The purpose of the order is to fulfil a legitimate purpose, that is, protecting the claimant's copyright. see *Columbia Pictures v. Robinson.*¹⁴⁴

It is imperative to note that search orders have been abused in their exercise in the past. For this reason, they are granted sparingly and with strict compliance with guidelines set down in *Universal Thermosensors Ltd v. Hibben.*¹⁴⁵ Anton pillar order is an order which may be given ex parte for inspection, photographing and the delivery up of infringing material in the possession or control of an infringer. The decision in the case of Anton pillar has been enacted into the copyright Act of Nigeria by virtue of S.25.¹⁴⁶

Application for this order is based on urgency and secrecy. Lord Denning MR has stated the basis for granting of an Anton pillar order has follows;

It seem to me that such an order can be made by a judge ex parte but it should only be made where it is essential that the plaintiff should have inspection so that justice can be done between the parties; and when or if the defendant were fore warned, there is a grave danger that vital evidence will be destroyed, that papers will be burnt or loss or hidden, or taken beyond the jurisdiction, and so that the end of justice be defeated; and when the inspection would do no real harm to the defendant or his case.

¹⁴³ 193 (1976) 1 Ch. 55.

¹⁴⁴ 194 (1987) 1 Ch.

¹⁴⁵(1992) 3 ALL ER 257.

¹⁴⁶ Copyright Act Cap C28 Laws of Federation of Nigeria 2004.

Before the coming of the Nigerian Copyright Act, this type of order was sought under the civil procedure rule¹⁴⁷ of the Federal High Court and its inherent jurisdiction by which the court may have recourse to common law. This was because the then Nigerian Copyright Decree¹⁴⁸ had no provision on inspection and seizure. There were two important decisions of Federal High Court prior to the current Act which illustrated the principle for and against the granting of Anton Pillar Order. The order was granted in the case of *Ferodo Ltd. v. Unibros Stores*¹⁴⁹ according to Anyaegbunam .J as he then was “this application is novel. So far, I have no seen where such an application is reported in our law reports”.¹⁵⁰ He traced it to Lord Denning’s book¹⁵¹ where it was reported that the procedure was invented by an ingenious member of the English Chancery Bar, Hugh Laddie.

In a subsequent Nigerian case also decided prior to the current Copyright Act this type of order was refused by Justice M.B Belgore, who was also then of Federal High Court, Lagos. The case was *Sony Kabushixi Kaisha v. Shahani and Co Ltd.*¹⁵² which was an action for infringement of registered trademarks. The plaintiff sought for an order to restrain the defendant from selling or disposing cassette tapes bearing the world “Sony” which infringed their trademark, and for inspection and seizure of such material or document relating to the alleged infringement either from the defendant directly or from their agents.

Thus, Anton Pillar Order are intended to provide a quick and efficient means of recovering infringing articles and of discovering the source from which they are being supplied and the person to whom they are being supplied and the person to whom they are distributed before those concerned have time to destroy or conceal them.

In *Ferodo Limited v. Unibros Stores*¹⁵³ the plaintiff Ferodo Limited, were the sole distributor in Nigeria of Ferodo Products, certain products said to be Ferodo Brake lining which are Ferodo products were being sold by the defendants who were

¹⁴⁷ Order XX Rules 3, 4 and 5 of Order 33 Rules of the Federal High Court (Civil Procedure Rules).

¹⁴⁸ Decree no 61 of 1970.

¹⁴⁹ Unreported suit no; FHC/L/21/80 before the Lagos Judicial Division of Federal High Court. (Ruling Delivered on 29th May 1980).

¹⁵⁰ Ibid at p.1.

¹⁵¹ The Due Process of Law p.123.

¹⁵² Unreported suit no: FHC/LL/35/81 Before the Lagos Division of Federal High Court with ruling delivered on 26th May 1981.

¹⁵³ Supra.

not consumer of the plaintiffs. The plaintiffs brought an action and filed a motion the same day asking the federal High Court to make a number of orders. The following order asked for were granted:

1. The defendants to permit up to six persons (including a police officer) to enter upon the premises of the defendants at No 168 F, Nnamdi Azikwe Street, Lagos for the detention, preservation and inspection of any moveable property or thing that will constitute a breach of injunction prayed in this suit.
2. The defendants to allow the plaintiff's solicitor to inspect all or any document in the custody or under the control of the defendants to this suit.

The order does not authorize the plaintiff to enter the premises of the defendant against his will. The plaintiff can only enter if permitted by the defendant, however, the defendant, runs the risk of being charged for contempt of court if he refuses to permit entry. The original form of the order as formulated by the English courts can however not be applied in a Nigerian situation. The order entails a requirement on the defendants to disclose the names and addresses of person he has had dealing with in the pursuit of the illegal trade, and also the trade. This aspect of the Anton Pillar Order runs counter to the provisions of S.176 of the Evidence Act¹⁵⁴ which provides:

No one is bound to answer any question if the answer thereto would in the opinion of the court have a tendency to expose the witness or the wife or husband of the witness to any criminal charge or to any penalty or forfeiture which the judge regards as reasonable likely to be sued for

Thus under the Nigerian Law court cannot and will not order a defendant suspected of infringing the plaintiff copyright to disclose any information regarding the sources or outlets of the infringing copies which he deals in.

6 Rendering of Account

One of the remedies provided in S. 16 (1) of the Act¹⁵⁵ is the rendering of account by the infringers. Rendering of account of profits is an equitable remedy incidental to the right of injunction. However, a plaintiff cannot obtain both account

¹⁵⁴ Cap 112 Laws of Federation of Nigeria (1990).

¹⁵⁵ Copyright Act Cap C28 Laws of Federation of Nigeria 2004.

of profit and damages at the same time since a claim for an account condones the infringement.¹⁵⁶ The principle upon which such an account is granted was stated by Wilgram V.C in *Calburn v. Simmons*¹⁵⁷

It is impossible to know how many copies of the dealer books are excluded from sale by the inter position of the cheaper one. The court by the account, as the nearest approximation which it can make to justice, takes from wrong doer all the profits he has made by his piracy and gives them to the party who has wronged.

On the other hand, an account of profit will be refused if it is clear that there are is no profit.²⁰⁹ But the plaintiff has the right to claim the damages.

7 Criminal Remedy

The Act provides various criminal liability to infringers of the copyright, S.20 of the Act¹⁵⁸ provides various punishment for the infringement. For instance S.20(2) (a)¹⁵⁹ provides that “any person who sells or lets for hire or for the purpose of trade or business, expose or offer for sale or hire any infringing copy of any work in which copyright subsist unless he proves to the satisfaction of the court that he did not know and had no reason to believe that any such copy was infringement of any such work be guilty of offence under the Act and shall be liable on conviction of this section or to a term of imprisonment not exceeding two years.” S.28 (1)¹⁶⁰ also provides criminal liability in respect of infringement of performance right.

In addition, S.491 of the Criminal Code¹⁶¹ provides that “any person who knowingly infringes copyright for a commercial purpose, let for hire or by way of trade, expose or offer for sale or distributes either for the purpose of sale or to such an extent as to affect prejudicially the owner of the copyright or by way of trade, exhibit in public any infringing copy of any work is guilty of a simple offence and liable to a fine not exceeding N4 for each copy dealt with or a maximum of N100”.

8 Delivery Up

¹⁵⁶ Cap 112 Laws of Federation of Nigeria (1990).

¹⁵⁷ Supra.

¹⁵⁸ Copyright Act Cap C28 Laws of Federation of Nigeria 2004.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

¹⁶¹ Criminal Code, Cap C38, LFN, 2004.

Apart from injunction, the only non-monetary civil remedy available for the infringement of copyright is delivery up.¹⁶² This is an order made by the court directing the infringers to deliver up to the plaintiff, all the infringing articles of the copyright. The owner of copyright is regarded as if he is the owner of the infringing article(s). Therefore, he can exercise the option to ask for delivery up as well as claim consequential damages for conversion.

The court has an inherent jurisdiction to order the delivery up to the plaintiff for destruction of items which came into existence through a breach of the plaintiff property right and this is an equitable remedy. However, it appears that this order can only be made for destruction and not for any other purpose. The purpose of this order is to prevent infringing goods from getting on to market and to prevent the defendant from profiting from his infringement by stock piling goods made during the period of infringement. The remedy is limited to articles in the possession or control of the defendant so it cannot be used to remove infringing goods from innocent third parties such as independent distributors.

9 Inspection and Seizure

By virtue of S.25 (1)¹⁶³ any interested party may bring an ex parte application supported by an affidavit showing reasonable cause for suspecting the presence in any premises, of an infringing copy, plate, film, or capable of being used or intended to be used for making infringing copies or capable of being used for the purpose of making copies or any other articles, book or document associated with an infringement. The court, after hearing the application may authorize the application to enter the premises at any reasonable time accompanied by a police officer not below the rank of Assistance Superintendent of Police. In pursuance of that order, the application is allowed to seize, detain and preserve any infringing copy or contrivance relating to the action found in the premises and to inspect any document in the custody or under the control of the defendant relating to the information pursuant to the execution of this order.

¹⁶² S.20 (4) Copyright Act, 2004.

¹⁶³ Copyright Act Cap C28 Laws of Federation of Nigeria 2004.

IX. Defences to Infringement Action¹⁶⁴

The first exception is the fair dealing exception, which may apply to uses in relation to the exercise of any of the rights of the copyright owner, where it is used for the purpose of research, private use, criticism or review. Thus the reproduction, translation, performance or other act in respect of a work would not constitute infringement. The second exception is for educational purpose, however; such work must include an acknowledgment of the title and authorship of the work.¹⁶⁵ The act provides that “the inclusion in a collection of literary or musical work which includes not more than two excerpts from the work, if the collection bears a statement that it is designed for educational use and includes an acknowledgement of the title and authorship of the work.¹⁶⁶ Other exceptions include; public interest use by Government, public libraries and institutions for the disabled.¹⁶⁷

X. Legal Framework for Copyright (Digital) Protection in Nigeria.

The law of copyright accords protection to computer software and this is to be found expressly in section 51(1)¹⁶⁸ of the Act, which defines computer software or programs as; a set of statements or instructions to be used directly or indirectly to bring about a certain result. Furthermore, the section defines computer software as an aspect of literary works. Hence, any provision of the copyright Act applicable to literary works is applicable to computer software. Section 1(a)¹⁶⁹ of the Act list works eligible for protection and two requirements are needed for their eligibility to be accorded, which includes (1) that sufficient effort must have been expended to give it originality of character and (2) it must be fixed in a definite medium of expression.

Section 10(1)¹⁷⁰ of Act stipulates that ownership of a computer software is vested on the author first, more so, this is subject to cases of computer software created as part of an employment duty in cases of contract employment, as held in *Joseph Ikhudiora v campaign service ltd and Anor*¹⁷¹, where the plaintiff’s claim to

¹⁶⁴ Onyido, J.C, ‘Intellectual Property Protection for Software Rights in Nigeria: Need for law reform’ *Modus International Law and business quarterly June Vol 5, No.2(2000) pp19-23*

¹⁶⁵ Para(f) of the 2nd schedule of the copyright Act

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ Copyright Act Cap C28 Laws of Federation of Nigeria 2004.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ (1986) F.H.R (federal high court report), 308.

entitlement to copyright in a work he created in the course of working for the defendant was dismissed by the court and the defendant was held to be entitled to the copyright work.

The Nigerian copyright Act¹⁷² confers the under listed scope of right in relation to digital works on copyright owners:

- i. The right of production and related rights.
- ii. The right to control the distribution of copyrighted work and issuing of copies¹⁷³ to the public.
- iii. The rights to control the making of adaptation⁸ which have been define as the modification of pre-existing works from one genre to another and consist in altering works within the same genre to make it suitable for different conditions of exploitation.

After considering the legal framework already in place in Nigeria and relating it to our digital age today, it will still be right to say that Nigeria still have a long way to go with respect to the protection of digital broadcast by cable and satellite and also the area of adequate protection for computer software. The greatest concern is the impact produced by the skeletal nature of our copyright Act with regards to copyright regulation in this subject.¹⁷⁴

Another worrisome challenge is that, before a computer program becomes eligible for protection, it must be subjected to the test of originality and expression in a definite form. In consideration of this, some new innovations may not fit into the requirement, for instance, most computer programs in their technical nature may involve computer language made by different authors which differs from the interface that might be created by another author. It is worthy of note that, as far as our jurisdiction is concerned the creator of a computer language is not entitled to a distinct copyright on the creation of language only under the copyright Act; whereas this is not obtainable in the united states. The implication of the whole consideration is that new technological advancement have really exposed the lacunas of copyright protection in Nigeria.

XI. Recommendation and Conclusion

¹⁷² s.6 (1) of copyright Act, Supra.

¹⁷³ s. 6(1)(a) vii, *ibid*.

¹⁷⁴ s.1 (2) of copyright Act, *ibid*.

In the appraisal of the legal and institutional frameworks of copyright protection in Nigeria, findings showed that the legal framework of copyright in Nigeria is defective because the statute did not make provisions that can tackle present digital technology. This paper therefore recommends inter alia that the Copyright Act be amended to make provisions to tackle the present day technological challenges. It further recommends that Nigeria adopt a formal registration of copyright works like developed nations.