

Remedies and Defences for Copyright Infringement Under the Nigeria Copyright Act Cap C28 Laws of the Federation of Nigeria 2004: A Comparative Analysis

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doi: <https://doi.org/10.37745/gjplr.2013/vol13n21864>

Published May 18, 2025

Citation: Okoriko J. (2025) Remedies and Defences for Copyright Infringement Under the Nigeria Copyright Act Cap C28 Laws of the Federation of Nigeria 2004: A Comparative Analysis, *Global Journal of Politics and Law Research*, Vol.13, No.2, pp.18-64

Abstract: *The primary function of copyright under the law is to protect from annexation the fruits of a person's work. Various justifications have been put forward for this protection, the basic reasons being that a man should own what he produces or brings into being; for if what he produces can be taken away from him, then he is not better than a slave. It is the aim of this paper to focus on a critical appraisal of the copyright enforcement provisions (specifically the remedies and defences available in an action for infringement) under the Nigerian Act.*

Keywords: remedies defences, copyright infringement, Nigeria copyright act, laws, federation of Nigeria, comparative analysis

INTRODUCTION

In this work, the remedies and defences in an action for infringement under the Nigerian Act will be compared with some of those available in other selected jurisdictions, such as the United Kingdom, France and Germany. The work adopts a doctrinal approach and analyses the meaning, nature and role of copyright institution and enforcement agencies in the protection of copyright works in Nigeria, ownership and extent of right conferred upon an owner of copyright and a comparative analysis of the remedies and defences available in an action for infringement of copyright. The pertinent research question, which this work seeks to interrogate, among others, are whether Nigeria has most remedies and defences for copyright that are available in other jurisdictions. The work finds out that like any other proprietary right, enforcement of right is of utmost importance in copyright matters. It is however common knowledge that Nigeria has a weak

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copyright enforcement regime and piracy remains a mammoth challenge. The work further finds out that while there is a need to amend the Act to incorporate more effective remedies, the law in Nigeria contains most fundamental remedies available in other advanced jurisdictions. The work therefore concludes with recommendations on the need to maximize the current enforcement provisions as well as amend the copyright Act in order to have a more effective enforcement regime. In the context of this work, it intends to make a contribution to address the gaps – in copyright enforcement provisions (specifically the remedies and defences available in an action for infringement by offering a comprehensive and up-to-date analysis on the subject matter).

Infringement of Copyright

Infringement in intellectual property is an act that interferes with one of the exclusive right of a patent copyright or trademark owner.¹ Copyright infringement means, an unauthorized use of copyrighted work.² Furthermore, infringement of copyright occurs when any person without the licence or authority of the copyright owner does or causes any other person to do any of the restricted or prohibited acts in relation to a copyright work. In order to determine, prove or establish whether an infringement has occurred, recourse shall be made to the existing copyright law-since infringement can only occur in the context of the provisions of law.³

In other words, whether infringement has occurred is a question of law to be determined from the available facts and figures. The implication here is that subject to the statutory exception, the exclusive rights of the copyright owner granted and protected under the law is a subject of infringement or violation and when that occurs remedies are grantable by the court of law under the civil proceedings whereas punishment are imposed in some special situations, where criminal proceedings are embarked upon.

However, it is worth noting that the same person whose rights are alleged to have been infringed can pursue both civil remedies and criminal sanctions simultaneously.⁴ It should be noted that what constitute an infringement as observed earlier have been provided under the Act⁵ and for avoidance of doubt and clarity it state: copyright is infringed by any person who without the license or authorization of the owner of the copyright.

- a. Does or causes any other person to do an act, the doing of which is controlled by copyright;

¹ Blacks Law Dictionary. Supra p. 796.

² Yerima T.F. 'Remedies for Copyright Infringement; an Anglo Nigeria Comparison. (April 2003) Vol. 1 No. 1 Unilorin Journal of Business Law (UJBL) p. 105.

³ Chief Nlerum S. Okogbue. 'Property and contemporary law journals' (1995 – 1998) Vol. 4) Official Journal of Department of Private Law University of Ado-Ekiti, p. 126.

⁴ Section 24 of the Copyright Act which provides 'notwithstanding the provision of any law to the contrary, it shall be permissible for both criminal and civil actions to be taken simultaneously of the same infringement under this Act.

⁵ Section 15(1) and (2) (Ibid).

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- b. Import into Nigeria, otherwise than for his private or domestic use, any article in respect of which copyright is infringed under paragraph (a) of this subsection;
- c. Exhibit in public any article in respect of which copyright is infringed under paragraph (a) of this subsection;
- d. Distributes by way of trade, offers for sale, hire or otherwise or for any purpose prejudicial to the owner of the copyright, any article in respect of which copyright is infringed under paragraph (a) of this subsection;
- e. Makes or has in his possession, plates, master tapes, machine, equipment or contrivances used for the purpose of making infringed copies of the work.
- f. Permits a place of public entertainment or of business to be used for a performance in the public of the work, constitutes an infringement of the copyright in the work, unless the person permitting the place to be so used was not aware, and had no reasonable ground for suspecting that the performance would be an infringement of the copyright; and
- g. Performance or causes to be performed for the purpose of trade or business or as supporting facility to a trade or business, any work in which copyright subsists.⁶

A copyright owner whose right has been infringed through any of the acts above can enforce such rights through civil proceedings.⁷ In the case of *Masterpiece Investment Ltd and Anor v. World Wide Business Media Limited and Ors.*,⁸ the court held that the write-up by the plaintiff in the business magazine was a literary work.

In the case of *Adenuga v. Ilesanmi Press*,⁹ the court held that where the respondent publishes a book and sells copies of it to the members of the public he will be held to have infringe the copyright of the appellant unless he can show that he had the appellant's license to do so.¹⁰ Another case for consideration is the case of *Maurice Ukuoha v. Broad-base Mortgage Finance Ltd and Anor.*,¹¹ where the learned judge granted an injunction restricting the defendant whether by themselves or by their servants or agent from further infringing the plaintiff's copyright and a

⁶ Benjie Ogwo. Criminal liability for copyright infringement under the Copyright Act 2004. (2008) Vol. 1 No. 1. Commercial and Industrial Law Journal A Publication of Department of Commercial and Industrial Law Faculty of Law, Kogi State University Anyigba Kogi State. Pp. 67 – 68.

⁷ See Section 16(1) Copyright Act (Ibid). See further Section 16(2) Copyright Act (Ibid) which states that where an action for infringement of copyright brought by the copyright owner or an exclusive licensee relates to an infringement in respect of which they have concurrent right of action, the copyright owner or the exclusive licensee may not without the leave of the court proceed with the action unless the other is either joined as a plaintiff or added as a defendant. See also Section 42(1) (2) and 43 Copyright Act (Ibid) see further musical society (Nig) Ltd v cash "N" carry Nig Ltd (1992) FHCLR 2775.

⁸ (1977) FHCL 496.

⁹ (1991) 5 NLR 82.

¹⁰ *Plateau Publishing Co. Ltd and Anor v. Chief Chuks Adopthy* (1986) 4 NWLR 205.

¹¹ (1997) FHCL 477, see also *Joseph Ikhuoria v. Campaign Services Ltd and another* (1986) FHCR 308.

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sum of ₦250,000 (two hundred and fifty thousand Naira) as general damages for the infringement of the plaintiff's copyright.

On the other hand, in the case of the infringement of cinematograph film involving *American Motion Picture Export Co. (Nig.) Ltd. v. Minnesota (Nigeria) Ltd.*,¹² the learned judge Ekikunam-Bassey, J. referred with approval to Halsbury¹³ and held that a master will be held liable for any infringement of copyright committed by his employee in the course of his employment and it is not a defense that he must have given a general warning or prohibition against the doing of the acts which might amount to an infringement.¹⁴ The issue of infringement of copyright of a sound recording was also considered in the case of *Island Records Ltd. and Ors. v. Pandum Technical Sales and Services Ltd. and Anor.*¹⁵ In this case, the court held that for an infringement of copyright to take place there must be a copy amounting to a theft of the work created by an author or of one who records or owns the record at the time of recording.

It is pertinent to mention here that under Section 16(3) of the Copyright Act¹⁶ where in an action for infringement of copyright it is proved or admitted that an infringement was committed but that at the time of infringement the defendant was not aware and had no reasonable ground for suspecting that copyright subsisted in the work to which the action relates the plaintiff will not be entitled to any damages against the defendant in respect of the infringement, but will be entitled to an account of profit in respect of the infringement whether or not any other relief is granted under the section. In the case of *Plateau Publishing Company Ltd. and Ors. v. Chief Chuks Adophy*,¹⁷ the Supreme Court unanimously dismissed the appeal and stated inter alia:

1. For a defendant in a Copyright Action to plead innocence of copyright under section 12 (2) of the Copyright Act of 1970, the defendant must allege and prove that at the time of the infringement of the copyright, he was not aware and had no reasonable ground for suspecting that the copyright subsisted in the work.
2. Where however it is proved or admitted in an action for infringement that an infringement was committed but that at the time of the infringement, the defendant was not aware and had no reasonable ground to establish that copyright existed in the work, the plaintiff is not entitled to damages but to an account of profit whether any other relief is granted or not.
3. A person who knowing or suspecting that copyright exists makes a mistake as to the owner of the copyright and under that mistake obtains authority to publish from a person who is not in fact the owner is liable under an action for the infringement at copyright.

¹² (1981) FHCL 64.

¹³ Halsbury 4th edition at p. 922.

¹⁴ See also *Falcon v. Famous Player Film Company* (1926) CA at p. 474.

¹⁵ (1993) FHCL 318.

¹⁶ Ibid.

¹⁷ (1986) 4 NWLR 205; Section 16(3) Copyright Act (Ibid) Retains the same statutory provisions contained in Section 12 Copyright Act 1970.

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4. On the evidence before the trial court in the case, the appellant have failed to prove that at the time of the infringement of the copyright, they were not aware and had no reasonable ground of suspecting that copyright subsisted in the respondent article.
5. In a Copyright Action, where the court order an account of profit, the court by that order takes from the wrong doer all the profit he has made by his piracy and give them to the party who has been wronged as the nearest approximation which it can make to justices.
6. In an action for infringement of copyright, damages are at large and it is not necessary to prove actual or specific damage.
7. The defense of innocent infringement of a copyright is a defense for the protection of the author of the infringing article and not a defense for the publisher of the infringing article.
8. The right of action for infringement of copyright exists whether the infringement is intentional, malicious or innocent or whether the right to property is real or personal corporeal or incorporeal.
9. The object of Section 12(2) of the copyright Act 1970 is to take innocent infringer of copyright out of the general principles of the common law liability for copyright of unpublished manuscript which did not recognize innocent infringement.

Kawu J.S.C who read the leading judgment held

Now on the evidence adduced before the learned trial judge, could it be said that appellant had proved that at the time of the infringement, they were not aware and had no reasonable grounds for suspecting that copyright subsisted in the respondent article? I do not think so while it is true that in paragraph 8(ii) of the statement of claim, the appellant pleaded Section 12(2) of Copyright Act 1970, it is plain on the record that there was not a scrap of evidence adduced at the trials to substantiate the averment.

Similarly, in the case of *CBS Inc. And Ors v. Intermagnetic Co Ltd and Anor.*,¹⁸ the main issue was whether in the circumstances of this case the second defendant having admitted infringing the copyright of the plaintiff in their musical works was entitled to the defense that it was not aware or had any reasonable ground to suspect at all material times that the printed works actually did infringe the plaintiffs' copyright in granting the plaintiffs claim.

Kolo J. held:

Where it is proved or admitted that there has been an infringement of the copyright of a plaintiff but the defence of the defendant is that it was neither aware nor had any reasonable grounds to suspect that copyright subsist in the work of the plaintiff under Section 12(3) of the Copyright Act 1970, such a defendant must not only allege but should also prove that at the time of the allege infringement he was not aware nor had no reasonable ground for

¹⁸ (1987) FHCL 150 and see Section 16(3) of the Copyright Act (Ibid) see also vol. 9 Halsbury Laws of England 4th Ed at para. 938.

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suspecting that copyright subsisted in the work complained of. In the instant
case, the defendant only asserted but did not prove innocence.

It is therefore clear for the above that one must not only assert innocence, one must also prove one's innocence. In this connection, the case of *Master Piece Investment Ltd. and Anor. v. World Wide Business Media Limited and Ors.*,¹⁹ earlier referred to is indeed very illuminating. In this case, though the plaintiff sued three defendants, the court held that the third defendant had proved his innocence and would not, unlike the two defendants are made liable for the infringement. Odunowo J. said inter alia.

Secondly, having regard to exhibit S-excerpts of which have been reproduce above it is quite possible that the claim of innocence on their part is well founded. This belief is strengthened by the fact that they never had the intention of violating the plaintiffs' copyright in any way because they really addressed their mind to the possible consequences of the 1st defendants action furthermore, their claim to innocence is buttressed by the fact that they copied their letter, exhibit S, to the plaintiffs' counsel which they were not obliged to do. As this is a civil case, the standard of proof required of the 3rd defendant is not too exacting in that all they need to show is that their explanation is probably true. Based on this normal civil standard, I am satisfied that they have successfully discharged the burden of proof which devolves on them having regard to the views expressed in exhibit S which was tendered at the instance of the plaintiff, and to which reference has already been amply made above. Consequently, 1st and the 3rd defendants were not liable at all for the act of infringement in this case.²⁰

However, it is worth noting that the above stated grounds for civil infringement has an exception, as provided in *Section 15(2) of the Copyright Act*²¹ to wit.

Notwithstanding Subsection 1 of this section, or any other provision of this Act, where any work in which copyright subsist or a reproduction of any such work is comprised in:

- a. The archives stored in the National Archives established under the National Archives Act; or
- b. The public records of a state being records for the storage or custody of which provision is made by law. The copyright in the work is not

¹⁹ (Supra) p. 496.

²⁰ Babafemi F.O. Intellectual Property the Law and Practice of Copyright, Trademark, Patent and Industrial Design in Nigeria (1st Edition, Ibadan: Justinian Books Ltd, 2007) pp. 64 – 77.

²¹ Cap C28 LFN 2004.

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infringed by the making or the supplying to any person of any
reproduction of the work in pursuance of that Act or law.

It is the law that in a civil proceeding against infringement; the defendant cannot absolve himself from liability for copyright infringement by merely showing that he was unaware, that his act constituted infringement of copyright in a work. In the case of *Francis Day and Hunter and Anor. v. Bron and Anor.*,²² Lord Justice Diplock posited.

Once the two elements of sufficient objective similarity and causal connection are established it is no defence that the defendant was not unaware that what he was doing infringed the copyright in the plaintiff's work.

It suffices to say that where civil infringement is established in accordance with the law, the plaintiff (copyright owner, assignee or an exclusive licensee of the copyright) shall be entitled to such relieves as damages, injunction or accounts.²³ Other civil relieves are stoppage in transit, order for inspection and seizure, flowing from Anton pillar injunction, conversion, right, moral right, fair compensation etc.²⁴

There are stringent provisions in the law for any criminal act committed against the copyright owner. Thus Section 20 of the Copyright Act²⁵ provides thus:

1. Any person who:
 - a. Makes or causes to be made for sale, hire or for the purpose of trade or business any infringing copy of a work in which copyright subsist, or
 - b. Imports or causes to be imported into Nigeria a copy of any work which if it had been made in Nigeria would be an infringing copy; or
 - c. Makes causes to be made, or has in his possession, any plate, master tape, machine equipment or contrivance for the purpose of making infringing copies of any such work guilty of an offence under this act and liable on conviction to a fine of an amount exceeding ₦1,000 for every copy dealt with in contravention of this section or to a term of imprisonment not exceeding five years or to both such fine and imprisonment.
2. Any person who:
 - a. Sells or lets for hire or for the purposes of trade or business, exposes or offers for sale or hire any infringing copy of any work in which copyright subsists; or
 - b. Distributes for the purposes of trade or business any infringing copy of any such work; or

²² (1963) 1 Ch 587 at 589.

²³ Section 16(1) of the Act Ibid.

²⁴ Benjie Ogwo 'Criminal Liability for Copyright Infringement under the Copyright Act 2004', (2008) Vol. 1 No. 1, Commercial and Industrial Law Journal. A publication of Department of Commercial and Industrial Law, Faculty of Law, Kogi State University Anyigba Kogi State, pp. 68 – 69.

²⁵ (Ibid).

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- c. Helps 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 purpose of trade or business, or exposes others for sale or hire any copy of a work which, if it had been made in Nigeria would be an infringing copy.

Is 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, guilty of an offence under this act and liable on conviction to a fine of ₦100 for every copy dealt with in contravention of this section, or to a term of imprisonment not exceeding two years or in the case of an individual to both such fine and imprisonment.

3.Any person who without the consent of the owner, distributes, to public for commercial purposes copies of a work in which copyright subsists by virtue of Section 6(1)(a) (iv), 6(1)(c) (iv), 7(1)(b) or 8(1)(c) of this Act, by way of rental, lease, hire, loan or similar arrangement is guilty of an offence under this Act, and liable upon conviction to a fine of ₦100 for every copy dealt with or imprisonment for six months or to both such fine and imprisonment.

4.The court before which any proceedings are taken for any offence under Subsection (1)(2) and (3) of this Section, whether the alleged offender is convicted or not, may order all copies of the works, plates master tapes, machines, equipment and contrivances in the possession of the alleged offenders, which appears to be infringing copies of the works, to be destroyed or delivered up to the owner of the copyright or otherwise dealt with as the court may think fit.

5.Where an article has been seized by a police officer or an authorized officer in connection with a suspects offence under this Act, a court may on the application of the Attorney-general of the federation or owner of the copyright in connection with which such offence is suspected to have been committed, in order that the article be destroyed or delivered up to the owner of the copyright or otherwise dealt with as the court may think fit, notwithstanding that no person has been charged with the suspected offence.

The wisdom to criminalize copyright infringement in Nigeria is a demonstration of the serious attention the government of Nigeria has decided to pay to the subject of copyright. It shows that it is not only theft of materials and physical objects that is condemnable in our society but even theft of intangible right. Copyrights are also protected from being stolen not only to the detriment of the individual owner of the copyright but also to the society at large. Definitely, if copyright infringement is left unattended to by penal sanction and allowed to be handled only between the affected individual in a civil action, it would not only lead to breakdown of law and order, but it would also result in losses in the economy and probably a gross devaluation of moral or cultural values more so, that copyright was also attracting the attention of international community.

Secondly, the wisdom of the indigenous government to criminalize copyright infringement may be an accident or incidence of historical inheritance. This is so to the extent that the English

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Copyright Act 1911, which was originally applicable to the country, provided for criminal sanction flowing from its infringement.

However, the wisdom to criminalize copyright infringement calls for more attention and consideration especially as *Section 24 of the Copyright Act*²⁶ provides that:

‘Notwithstanding the provision of the law of the country, it shall be permissible for both criminal and civil actions to be taken simultaneously in respect of the same infringement under this Act.’

There is no doubt that, *prima facie*, copyright infringer are by this provision liable to double prosecution (both civil and criminal) especially as both proceedings could be instituted or commenced and duly pursued to their respective ends with respect to the same acts or facts which must have occurred at the same time. Can it be said that this provision does not violate the constitutional provision²⁷ against double jeopardy? Even if, by the technical provision of *Section 36(9) of the Constitution of the Federal Republic of Nigeria 1999*²⁸ it does not violate same. It still raises the issue of moral justification of the statute to provide for a double barrel attack against the infringer. May be, it is the only way the statute could explain or emphasize the seriousness of the government of the day on the subject matter of copyright.

Ochenne P.A.²⁹ in his own comment on the provision of *Section 24 of the Copyright Act*³⁰ describes same as a hybrid character of legislative judgment commonly associated with military government, and the military style of stamping out undesirable element from the nations legal economic, social and cultural life.

Another issue for consideration flowing from *Section 24 of the Copyright Act*³¹ is the phrase “taken simultaneously” within the section. Ordinarily, the word simultaneous means “happening or done at the same time as something else”.³² Does it mean that the provision of the law would only be satisfied if and only if both the civil and criminal proceedings are instituted at the same time?

In other word can the provision of *Section 24 of the Copyright Act*³³ be said to be satisfied if the copyright owner or the state decides to take up the criminal proceedings after the successful completion of the civil proceedings or vice-versa?

²⁶ Copyright Act (Ibid).

²⁷ Section 36(9) of the Constitution of Federal Republic of Nigeria 1999 (as amended).

²⁸ Ibid.

²⁹ Ochenne P. A. The Law and Practice of Copyright in Nigeria (Zaria: Ahmadu Bello University Press Ltd Zaria, 2000), p 20.

³⁰ Copyright Act (Ibid).

³¹ Ibid.

³² Oxford Advance Learner’s Dictionary Supra p. 1370.

³³ Ibid.

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Again, in any action for infringement of any right under this Act, where an ex parte application is made to the court supported by affidavit, that there is reasonable cause for suspecting that there is any house or premises any infringing copy or any place, film or contrivance used or intended to be used for, making infringing copies or any other articles books or document by means of or in reaction to which any infringement under this Act has been committed, the court may issue an order upon such terms as it deems just, authorizing the applicant to enter the house or premises at any reasonable time by day or night accompanied by a police officer not below the rank of an assistant superintendent of police and:

- a. Seize detain and preserve any such infringing copies of contrivances; and
- b. Inspect all or any document in the custody or under the control of the defendant relating to the action. Any person, who knowingly gives false information under this section of this Act, is guilty of an offence and liable on conviction to a fine of ₦1,000.³⁴

It is significant that some summary conviction for infringement of work of copyright have been recorded in the court. These cases³⁵ are however not yet reported in any law reports.

Under the Copyright Act, the law now makes provision for the appointment of copyright inspector.³⁶ A copyright inspector or prosecutor can now institute criminal proceedings against anyone found to have infringed the copyright of a person in the above situation. Section 38(2) of the Copyright Act³⁷ provides that a copyright inspector shall have the power:

- a. To enter, inspect and examine at any reasonable time any building or premises which he reasonably suspect is being used for any activity which is an infringement of copyright under this Act.
- b. To arrest any person who he reasonably believes to have committed an offence under this Act.
- c. To make such examination and inquiry as may be necessary to ascertain whether the provisions of this Act are complied with.
- d. To require the production of the register required to be kept under Section 14 of this Act and to inspect, examine or copy it.

³⁴ Section 25(1) (a-b) and 25(2) Copyright Act (Ibid).

³⁵ *Nigeria Copyright Commission v. J. Erugo and Anor.* (unreported) Suit No. FHC/PH/123 c/99 decided 4th November 1999, *Nigeria Copyright Commission v. Pee Video Production Coy and Anor.* (unreported) Suit No. FH/PH/131/99 decided 18th January 2000; *Nigeria Copyright Commission v. Chinenye Uwadi* (unreported) Suit No. PHC/PH/126C/99 decided 3rd February 2000; and *Nigeria Copyright Commission v. Maxwell Okorafor* (unreported) Suit No FHC/PH/128C/99 decided 3rd February 2000. However, in the case of *Nigeria Copyright Commission v. Engineer Christopher Edolo* (unreported) Suit No FHC/KD/89C/2001 decided on 6th February 2004, a conviction was not granted.

³⁶ Section 38 Copyright Act Cap C28 (Ibid).

³⁷ (Ibid).

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- e. To require any person who he finds in such building or premises to give such information as it is in his power to give in relation to any purpose specified in this Act.
- f. To carry out such examination, test or analysis within or outside the premises as it required to give effect to any provision of this Act and to take instant photographs where such examination, test, analysis or photograph is carried out within the premises and such examination, test analysis or photograph shall be required to be endorsed by the occupier of the premises or his agent, but a refusal by an occupier to endorse any document containing the result of an examination, test, analysis or photograph shall not invalidate the result or finding of the examination, test analysis or photograph.
- g. And to exercise such other powers as the commission may delegate to it to give effect to the provision of this Act.

It is further provided that a copyright inspector may prosecute, conduct or defend before a court any charge, information, complaint or other proceedings arising under the Act. Any person who obstruct a copyright inspector in the performance of his duties will be liable on conviction to a fine exceeding ₦500.00 or to imprisonment for a term not exceeding 3 months or to both such fine and imprisonment.

A copyright inspector shall have all the powers, rights and privileges of a police officer as defined under the Police Act and under any relevant enactment pertaining to the investigation, prosecution or defence of a civil or criminal matter under this act. In the case of *Nigeria Copyright Council v. Musical Copyright Society of Nigeria and Ors.*,³⁸ the issue that came before the court was whether the power of copyright inspector to prosecute criminal matters was not in conflict with the powers of the Attorney-General under Section 174 of the constitution. The facts of this case were that the accused persons were being prosecuted by the copyright inspector for infringement of copyright regulations in respect of a collecting society. In a motion on notice however, the accused applicant prayed for the following relief.

- a. An order dismissing the criminal charge against the applicant herein on the grounds of want of legal capacity of instituting criminal proceedings by the copyright inspector/prosecutor.
- b. An order discharging and acquitting the applicant herein on the ground of flagrant violation of their constitutional right to assemble or form association or their common good.
- c. And for such further order or orders as this honourable court may deem fit to make in the circumstance.

Dismissing the accused applicant' objection Okeke J. held:

My understanding of Section 174(1) of the constitution is that the Attorney-General has power to institute and undertake criminal proceedings at his instance. He also has power to take over and continue any such criminal

³⁸ (1999) FHCL 419 see also *Olusemo v. COP* (1998) 11NWLR (Pt. 575) 547.

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proceedings instituted by any other authority or person. It is therefore clear that any authority or person authorized by law may institute or undertake criminal proceedings, but without prejudice to the overriding power of the Attorney-General to take over and continue such proceedings or discontinue same before judgement. Section 13 of the copyright (Amendment) Act 1999 gives to the copyright inspector powers of the police in respect of offences created by the Copyright Act (as amended) I do not agree with the learned counsel for the applicants that the said Section 32 of Copyright (Amendment) Act is in direct conflict with Section 174(1) of the 1999 constitution.

Under the copyright law, certain anti-piracy measures have also been provided.³⁹ Accordingly, the Nigerian copyright commission has powers with the counsel of the minister, to prescribe any design, label, mark impression or any other anti-piracy device for use on, in or in connection with any work in which copyright subsists.

Any person, who sells, rents, hires, or offers for sale, rent or hire any work in contravention of the prescription will be deemed to commit an offence. Further, any person who without the permission of the commission, imports into Nigeria or has in his possession any anti-piracy devices, prescribed under this section or any machine instrument or other contrivance intended for use in the production of the anti-piracy devices, will also be deemed to commit an offence.

Equally, any person who without the permission of the commission is in possession of or reproduces or counterfeits any anti-piracy device prescribed under this section will be deemed to commit an offence.

There is provision under the Act from offences committed by bodies corporate. Thus “where an offence under the Act has been committed by a body corporate, the body corporate and every person who at the time the offence was committed was in charge of or was responsible to the body corporate for the conduct of the business of the body corporate shall be deemed to be guilty of an offence...”⁴⁰ However, a person shall not be liable to imprisonment, if he proves that the offence was committed without his knowledge or that he exercises all due diligence to prevent the commission of the offence. Similarly, if it is proved that the offence was committed with the consent or connivance of any director, manager, secretary or other officer, then such director, manager, secretary or officer shall be guilty of an offence and shall be punished accordingly.⁴¹

³⁹ Section 21 Copyright Act (Ibid).

⁴⁰ Section 22 Copyright Act (Ibid).

⁴¹ Section 22 (2) Copyright Act (Ibid); 8, also Babafemi F.O. Intellectual Property the Law and Practice of Copyright, Trademark, Patent and Industrial Design in Nigeria, op.cit pp. 64 – 84.

How Action for Remedies of Infringement of Copyright Can Be Sustained

The Copyright Act has made veritable provisions for the protection of a copyright owner. Adequate sanctions have also been provided by the Act, even though these statutory measures are not self-enforcing.

The law, under *Section 15 Subsection (1) & (6) of the Copyright Act* provides for action of infringement. Subsection (1) of the section provides that infringement of copyright shall be actionable at the suit of the owner, assignee or an exclusive licensee of copyright, as the case may be, in the Federal High Court exercising jurisdiction in the place where infringement occurred, and in any action for such an infringement, all such reliefs by way of damages, injunction, accounts or otherwise, shall be available to the plaintiff as in any corresponding proceedings in respect of the infringement of other proprietary rights.

Copyright is an incorporeal right that may only be realized through legal action. The advisability of litigation in any particular instance would depend on the prevailing circumstances of each case. Litigation is not always the best option in intellectual property cases.⁴² Some of the factors that must be considered in determining whether to bring an action are:

- a. The availability of possible defences and exceptions in favour of the defendant;
- b. The strength of prospective litigant's claim to copyright;
- c. The availability of other remedies;
- d. The damages that may be awarded to a successful party;
- e. The willingness of other party to settle out of court.
- f. The cost of litigation in money terms, times, adverse publicity and other business interest.

The Act under subsection (2)⁴³ went further to provide that where an action for infringement of copyright owner or an exclusive licensee relates to an infringement in respect of which they have concurrent rights of action, the copyright owner or the exclusive licensee may not, without the leave of the court, proceed with the action unless the other is either joined as a plaintiff or added as defendant.

Also, subsection (3)⁴⁴ states that where in an action for infringement, it is proved or admitted that he is not aware and had no reason to be aware that copyright subsisted in the work to which the action relates, the plaintiff shall not be entitled to any damage against the defendant but shall be entitled to an amount of profit, whether or not any other relief is granted.

⁴² Ibid. P. 103.

⁴³ Copyright Act (Ibid).

⁴⁴ Copyright Act (Ibid).

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Furthermore, Section 25(1) of the Copyright Act, which provides for order for inspection and seizure. It states that in any action for infringement of any right under this Act, where an application is made to the court supported by affidavit, that there is reasonable cause for suspecting that there is, in any house or premises of any infringing copies of work(s), the court may order the applicant to enter the house or premises at any reasonable time, accompanied by a police officer not below the rank of Assistant Superintendent of police and seize, detain and preserve any such copies and inspect all or any documents in the custody or under the control of the defendant relating to the action.

It is an elementary principle of law that there cannot be criminal liability until and unless there is an establishment of guilt of the accused.

Generally, under the law, the burden or onus of proving copyright occurred⁴⁵ while the burden of proof in civil proceedings is that of balance of doubt. What is the standard of proof under this Copyright Act for the purpose of establishing copyright infringement?

With the coming into effect of the Copyright Act, Copyright Crimes or offences under *Sections 491, 492 and 493 of the Criminal Code Act*⁴⁶ are thereby repealed.⁴⁷ Does this equally affect the burden of proof of copyright offences under the Criminal Code Act to have been different from that of a work. The plaintiff must first show a valid ownership of copyright in the work alleged to have been infringed; and secondly that there was a substantial copyright of the part of the copyright work by the alleged infringer.

To Odion,⁴⁸ a Plaintiff is no longer required under the Act to prove his ownership of copyright in a work beyond reasonable doubt.⁴⁹ It is, therefore, contended that the burden of proof of infringement of copyright both in civil proceedings and criminal proceedings are one and the same. In other words, the evidence that is sufficient enough to establish the breach of statutory duty under the Copyright Act that would entitle the plaintiff to succeed in his or her claim against the defendant would also be sufficient enough to secure a conviction of the accused for criminal infringement of copyright under the Act. Consequently, copyright infringement can be established where the alleged infringer has copied the work of the copyright owner, and that there is a substantial objective similarity between the copyright work and the alleged infringing work so much that there is a reasonable inference that the infringing work so much that there is a reasonable inference that the infringing work derived substantially from the Copyright work. In the case of

⁴⁵ Section 135, 136 & 137 of the Evidence Act, cap 112 Laws of the Federation of Nigeria (as amended).

⁴⁶ Cap 38 LFN, 2004.

⁴⁷ Sections 40 (2) of the Copyright Act.

⁴⁸ Odion J. O. and Ogba N.E.O. Essay on Intellectual Property Law: Copyright Trademark, Patent and Industrial Design. (Benin City Ambik Press Ltd. 2010), p 25.

⁴⁹ Ibid.

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Hawkes & Sons (London) Ltd. v. Paramount Film Services Ltd.,⁵⁰ it was held that substantial similarity is not determined by word for word comparison of the copyright work and the infringing work but it depends on whether the alleged infringing work is substantially similar to the copyright work in question.

In determining whether the alleged infringing work is substantially similar, Odion⁵¹ asserted that there must be a causal and not causal, connection between the copyright work and the alleged infringing work, does not determine this causal connection in order to establish copyright infringement? This is necessary since the case of *Hawkes & Sons (London) Ltd. v. Paramount Film Services Ltd.*,⁵² maintained that it is not determined by word for word comparison. Hence, in determining the causal connection, the copyright work as a whole must be examined *vis-a-vis* the alleged infringing work. In the case of *Ladbroke (Football) Ltd v. Williamhill (Football) Ltd*,⁵³ the court was of the view that the correct approach to adopt is to determine, first of all, whether the work as a whole is entitled to copyright, and secondly, to inquire whether the part of the work reproduced by the defendant is substantial part of the whole. Of course, to inquire and/or determine whether the part of the work reproduced by the defendant is available evidence before making the necessary legal conclusion.

It is interesting to note that the Copyright Act,⁵⁴ has to some extent eased the process of discharging the burden of proof of copyright, authorship, place and time of first publication of the work by requesting for affidavit evidence. An affidavit made before a Commissioner for Oaths, notary public or other person competent to administer an oath in terms of the law of the country where the oath is made which: (a) purports to have been made by or on behalf of the owner of the copyright in a work; and

b. states that:

- i. At the time specified therein, copyright subsists in the work;
- ii. The person named therein is the owner of the copyright in the work;
- iii. A copy of the work exhibited to the affidavit is a true copy of the work;
- iv. The author of the work is a citizen of or domiciled in a country named in the affidavit;
- v. The author of the work is a body corporate established or incorporated by or under the laws of the country named in the affidavit;
- vi. The work was first made or published in the country named in the affidavit;
- vii. The certificate attached to the affidavit which, is a true copy of the certificate of registration of that incorporation, shall be admitted as evidence of the facts stated therein without

⁵⁰ (1934) Ch 593.

⁵¹ Odion J. O. and Ogba N.E.O. Essay on Intellectual Property Law: Copyright Trademark, Patent and Industrial Design, op.cit, p 30.

⁵² *Supra*.

⁵³ (1964) 1 All ER 465.

⁵⁴ Sections 72 and 43 of the Act.

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further proof in any proceedings under the Act. The court before which an affidavit is produced under subsection (1) of this section shall presume until the contrary is proved, that the statements made therein are true.

There is no doubt that for an affidavit referred to in this section to be used it must satisfy and comply or fulfil the rules set out in our Law of Evidence.⁵⁵ Once the affidavit satisfies the provisions of the Evidence Law,⁵⁶ there is a legal presumption of discharging the burden under the Copyright Act. It should be noted further that in addition to the affidavit, the Act,⁵⁷ made an express provisions for legal presumption in the hereunder-stated terms namely:

In any action for an infringement of copyright in a work, the following shall be presumed, in the absence of any evidence to the contrary

- a. That copyright subsists in a work which is the subject matter of an alleged infringement;
- b. That the plaintiff is the owner of copyright in the work;
- c. That the name appearing on a work purporting to be the name of the author, is the name of such author;
- d. That the name appearing on a work purporting to be that of the publisher or producer of a work is the name of such publisher or producer;
- e. That it was published or produced at the place and on the date appearing on the work.

It is contended that the efficacy of this provision⁵⁸ is dependent and determined by the potency of the affidavit evidence⁵⁹ earlier on considered. The implication here is that the affidavit evidence requirement and the legal presumption herein are cumulative and not in the alternative. It seems that Ochenne⁶⁰ supports this view when he asserts “in our view the combination of the above provisions⁶¹ clearly shift the legal burden on the defendant (in civil proceedings) or the accused (in criminal proceedings) to disprove either ownership or in deed an infringement of copyright.”

The cumulative effect of the two provisions of this Act⁶² is that there is a rebuttable legal presumption of regularity. The defendant or the accused of course can rebut this legal presumption

⁵⁵ Sections 78 – 90 of the Evidence Act, Cap 112, LFN, 2004.

⁵⁶ Ibid.

⁵⁷ Section 43 of the Copyright Act (Ibid).

⁵⁸ Ibid.

⁵⁹ Section 42 of the Copyright Act.

⁶⁰ Ochenne P. A. The Law and Practice of Copyright in Nigeria (Zaria: Ahmadu Bello University Press Ltd Zaria, 2000). P. 117.

⁶¹ Sections 42 and 43 of the Copyright Act.

⁶² Ibid.

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as the case may be. The legal presumption of regularity in favour of the plaintiff herein is not rebutted by the defendant merely denying the plaintiff's ownership of copyright and thereby putting him to the strictest proof thereof;⁶³ as it were under the normal rules of pleadings.

By subsection 2 of section 42 the operating phrase is “shall presume, until the contrary is prove...” while in section 43 the relevance phrase is “shall be presumed, in the absence of any evidence to the contrary.” How does the defendant establish the contrary of the presumptions? In the case of *Donoghue v. Allied Newspapers Ltd.*,⁶⁴ the court held that the presumptions are rebuttable by the defendant adducing preponderance of evidence to the contrary. Odion,⁶⁵ on his own part contended that the defendant could attack the legal presumptions by one or more of the rebuttals hereunder stated, viz,

- i. “that the defendant is entitled to ownership of copyright in the work;
- ii. that the plaintiff had vested copyright in his employer, thereby making his employer first owner of copyright thereof;
- iii. that the work is a commissioned work thereby making the commissioner the first owner of the copyright;
- iv. that the work was copied or published seventy years after the end of the year in which the author died or died or fifty years in which work was first published;⁶⁶
- v. in the case of a work not made by a “qualified person”, that the work was first published in a country other than Nigeria;
- vi. that the foreign author seeking protection under the Act does not come within the scheduled countries pursuant to the Copyright (Reciprocal Extension) Order 1972 or any other order made pursuant to Section 33 of the Act.”

It is submitted that by the general rule of denial of affidavit evidence, the defendant can only rebut these presumptions by attacking same by way of affidavit evidence too. This can be by way of a counter affidavit. Hence, in the case of *Alhaji Agbaje v. Ibru Sea Foods Ltd.*,⁶⁷ the court held that where the facts deposed to by the plaintiff's facts are not patently false or untrue to the knowledge of the court, the court would be at liberty to act on the plaintiff's depositions.

Naturally, there is an expectation of conflicts of affidavit evidence between that deposed to by the Plaintiff and the Defendant or Accused with respect to proof of ownership of copyright in the work and copying of substantial part of the copyright work by the alleged infringe. Of course, where such conflict exists, it becomes the duty of the court to resolve such conflicts. In resolving the conflicts in affidavit evidence produced by both parties, the court is expected to carry out certain

⁶³ Section 146 of Evidence Act.

⁶⁴ (1938) Ch. 106.

⁶⁵ Odion J. O. and Ogba N.E.O. Essay on Intellectual Property Law: Copyright Trademark, Patent and Industrial Design. (Benin City Ambik Press Ltd. 2010), p 34.

⁶⁶ This is a defence provided by the Act itself in Section 2 stated in the first schedule to the Act.

⁶⁷ (1972) 7 NSCC 338.

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procedural requirements. For instance, where the affidavit evidence is irreconcilably in conflict even from the documentary evidence before the court, the court shall call upon the parties to lead oral evidence in order to reconcile the conflicts.⁶⁸

Penalty

Penalty is the punishment imposed on a wrong doer, usually, in the form of imprisonment or fine especially a sum of money exacted as punishment for either a wrong to the State or a civil wrong as distinguished from compensation for the injured party's loss. For the offence under the Act,⁶⁹ the accused shall be liable on conviction to a fine of an amount not exceeding ₦1,000.00 for every copy dealt with in contravention or to a term of imprisonment not exceeding five years, or to both such fine and imprisonment. With every sense of commitment and responsibility the author is of the view that the punishment is adequate and whether the court should sentence the accused to a term of imprisonment and also order or direct payment of fine simultaneously is a matter of the discretion of the court which would be exercised by the court taking into consideration the manner, the circumstances and other materials placed before the court with respect to the commission of the offence. It should be borne in mind that part of the objectives of punishment is to serve as deterrence to others.

In the same vein, for the offence under the Act,⁷⁰ the accused shall be liable or convicted to a fine of ₦100.00 for every copy dealt with in contravention or to a term of imprisonment not exceeding two years or in the case of an individual to both such fine and imprisonment. Considering the fact that a body corporate may not be sentenced to both sum of fine and term of imprisonment at the same time, the author is of the view that the fine in the sum of ₦100.00 for every infringing copy is not adequate. It is advocated that the fine of corporate body in the event of conviction be increased.

In the same vein, for the offence under the Act,⁷¹ the accused shall be liable upon conviction to a fine of ₦100.00 for every copy dealt with or imprisonment for six months or to both such fine and imprisonment. It seems that the punishments under the Act⁷² are prescribed taking into considerations the fact that the offences therein are ancillary to the offence under the Act,⁷³ which is the principal offence. In other words, it seems that the offences under the Act⁷⁴ cannot be committed without the commission of the principal offence under the Act.⁷⁵

⁶⁸ *Felobi v. Falobi* (1976) NNLR 169. See also *Akinsete v. Akinditire* (1966) 1 All NLR 147, *Annam Co. v. First Marine Trust Bank* (2000) 1 NWLR (Pt. 640) 309.

⁶⁹ Sections 20(1) of the Copyright Act Cap C28, Laws of the Federation of Nigeria 2004.

⁷⁰ Sections 20(2) of the Copyright Act (Ibid).

⁷¹ Sections 20(3) of the Copyright Act (Ibid).

⁷² Sections 20(2) & (3) of the Copyright Act (Ibid).

⁷³ Section 20(1) of the Copyright Act (Ibid).

⁷⁴ Sections 20(2) & (3) of the Copyright Act (Ibid).

⁷⁵ Sections 20(1) of the Copyright Act (Ibid).

Destruction or Delivery Up

The courts apart from exercising the power to sentence the accused upon conviction to a fine in the various sums of money and terms of imprisonment are at liberty under the Act⁷⁶ to order the destruction or delivery up to the owner of the copyright or otherwise dealt with it as the court may think fit. The power to order for destruction or delivery up seems to be exercisable even where the alleged offender is not convicted. In as much as the wisdom allowing the court to order for the destruction or delivery up of the copies of the work where the alleged offender is not convicted may not be readily justified, it seems that such exercise of power is necessary where the contents of the work may be dangerous or injurious to the peaceful co-existence of the society. In other words, where the contents of the work may or would likely affect the overall interest of the state or part of the state.

This submission seems to be fortified by the Act,⁷⁷ where it states that “where an article has been seized by a police officer or an authorized officer in connection with a suspected offence, a court may on the application of the Attorney-General of the Federation or owner of the copyright in connection with which such offence is suspected to have been committed, order that the article be destroyed or delivered up to the owner of the copyright or otherwise dealt with as the court may think fit, notwithstanding that no person has been charged with the suspected offence.” This wide power of punishment under this section⁷⁸ of the law becomes imperative where there is a *prima facie* evidence that an offence has been committed even where the alleged offender may not have been formally charged to the court of law for prosecution or trial. It is interesting to note that either the Attorney General of the Federation or the owner of the copyright has the right to apply to the court for the invocation of this punishment. This supports the contention that both the State and individuals are under a legal duty to ensure the prevention of commission of crimes or offences and where crime or offences are alleged to have been committed, that they are adequately punished.

Failure to Keep Register or Making False entries

A cursory examination of the Act,⁷⁹ reveals that failure to keep a register or where such register is kept but the entries are falsified or writing knowing, the same to be false renders the offender on conviction to be liable to a fine not exceeding the sum of ₦10,000.00. The punishment seems to be too harsh yet, it may be justified in order to curb the indolence or non-sensitivity of an average Nigerians to the performance of statutory duties and/or obligations, especially the erring activities of the publishers, printers, producers or manufacturers of works subject to copyright controls.

⁷⁶ Sections 20(4) & (5) of the Copyright Act (Ibid).

⁷⁷ Section 20(5) of the Copyright Act (Ibid).

⁷⁸ Ibid.

⁷⁹ Sections 14 & 23 of the Copyright Act (Ibid).

False Information

By the provisions of the Act,⁸⁰ the court has the power to grant an order popularly referred to as an Anton Piller Order which of course is in pursuance to an Anton Piller application where the court noticed that there is a grave danger that vital evidence will be destroyed, that all papers will be burnt or lost or hidden, or taken beyond the jurisdiction and so the ends of justice be defeated to prevent the occurrence of same. By the provision of the act,⁸¹ any person who knowingly gives false information under Section 25(2) herein shall be guilty of an offence and liable on conviction to a fine of ₦1,000.00. It seems that the punishment is so wide to cover all persons who are involved either in providing false information that culminated into obtaining an order of Anton Piller wrongly or persons who treats an Anton Piller order with levity or makes material alteration or misrepresentation in the execution of the order. This is necessary because law serves, amongst others, the preservation and/or protection of peace and order in the society.

How Defences for Infringement of Copyright Can Be Sustained

Where a defendant is able to show that the nature or circumstances of his actions falls within any of these defences, he may be absolved from liability.⁸² The major statutory defences to copyright infringement actions have been codified in schedule two of the Copyright Act. For the sake of convenience, the various exceptions will be discussed under the following broad headings:

- a. Fair dealing.
- b. Parody, pastiche or caricature.
- c. Ephemeral use of artistic works.
- d. Use for educational purposes.
- e. Use for other public interest.
- f. Use for archival purposes.

a. Fair Dealing

The Act stipulates that the right conferred in respect of any work does not include the right to control the doing of any of the acts mentioned by way of fair dealing for purposes of research, private use, criticism, review or the reporting of current events.⁸³ It appears that the primary requirement is that the action qualifies as fair dealing and that enumerated purposes are the more specific application of this general principle. Unfortunately, there is no definition of fair dealing under the Act, neither have any rules been stipulated for determining fair dealing under Nigerian law.

The fair dealing exception applies to all works protected under section 5, 6, 7.⁸⁴ As a general rule, the defence is only available where the act was done by way of fair dealing and for any of the

⁸⁰ Section 25(1) of the Copyright Act.

⁸¹ Ibid.

⁸² *Johnson v. Bernard Jones Publication Ltd and Beauchamp* (1938) 1 Ch 599, Per Morton, J. at 603.

⁸³ Copyright Act Schedule 2 para. (a).

⁸⁴ Copyright Act (Ibid).

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following purposes, (i) Research (ii) Private use (iii) Criticism or review, or (iv) The reporting of current events.

Fair dealing, for the purpose of the Copyright Act, is an excuse only if it pertains to one or more of the approved purposes. It is not unlikely that the courts will interpret this provision very strictly, the general understanding, being that this kind of defence should apply in special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interest of the right holder.

b. Parody, Pastiche or Caricature

The Copyright Act, Schedule 2, paragraph (b) grants wide range of exemptions to any act done by way of parody, pastiche or caricature. The Oxford Advanced Learner's Dictionary defines a parody as "speech, writing or music that imitates the style of an author, composer, etc. in an amusing and often exaggerated way: comic imitation".⁸⁵ Similarly, a caricature is defined as a "picture, description or imitation of somebody or something that exaggerates certain characteristics in order to amuse or ridicule". A pastiche refers to a literary, musical or artistic work in the style of another author, composer etc. These exemptions apply only to literary, musical and artistic works as well as cinematograph film. It has no relevance to sound recording and broadcast.

The court may deny a plea of parody, pastiche or caricature where the defendant engages in complete or almost verbatim copying.⁸⁶

According to the court in *Berlin v. E.C. Publication Inc.*,⁸⁷ a plea of parody should be upheld where the parody has neither the intent nor the effect of fulfilling the demand for the original, and where the parodist does not appropriate a greater amount of the original work that is necessary to recall or conjure up the object.

The court also noted that parodists will seldom get permission from the owners of the works to be parodied hence the defence exists "to make possible a use that generally cannot be brought."

c. Ephemeral Use of Artist Works

There are cases where the works used is not the primary target. Other defences that would appear to apply to all works excluding sound recording and broadcast, but are in fact specifically meant for artistic works are instances of ephemeral or incidental use. The following ephemeral uses of artistic works are exempted from the control of the copyright owner;

1. The inclusion in a film or a broadcast of an artistic work situated in a place where it can be viewed by the public.⁸⁸ This exemption is justifiable since a work that is situated in a public

⁸⁵ Hornby, A.S. Oxford Advanced Learner Dictionary of Current English (4th Ed., London: Oxford University Press, 1989).

⁸⁶ *Benny v. Loew's Inc.* 356 U.S. 43 (1958).

⁸⁷ (1952) 6 B and Ald 22.

⁸⁸ Copyright Act, Schedule 2, para. (c).

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place may, for purposes of filming and telecast be treated as forming a part of the environment.

2. The reproduction and distribution of copies of any artistic work permanently situated in a place where it can be viewed by the public.⁸⁹
This exception applies to an artistic work that is permanently situated in a place where it can be viewed by the public. The artistic work must have the character of fixture. For instance, a statute or wall painting that is displayed in a public place would fall under this defence but not where the painting although, at an exhibition stand open to the public is not the object of exhibition or is not of a permanent nature.
3. The incidental inclusion of an artistic work in a film or broadcast.⁹⁰ A defendant would have to show that the inclusion of the work was incidental that is, that it does not form the major part of the film or broadcast. The work, however, does not have to be in a place where it can be viewed by the public.

d. Use for Educational Purpose

The Act makes special defences for certain uses which are educational or institutional in nature;

1. Inclusion in a collection of literary or musical works which includes not more than two excerpts from the work.⁹¹
2. The broadcasting of a work if the broadcast is approved by the broadcasting authority as a educational broadcast.⁹²
3. Any use made of the work in an approved educational institution for the educational purpose of the institution subject to the condition that it be destroyed before the end of the prescribed period, within 12 months.⁹³
4. The reading or recitation in public or in a broadcast by any person of any reasonable extract from a published literary work if accompanied by a sufficient acknowledgement. The reading of recitation must not however be for commercial purposes.⁹⁴ The court will take into consideration the quality and quantity of the extract made.
5. Any use made of work by or under the direction or control of the government or by such public libraries, non commercial documentation or other institutions as may be prescribed.⁹⁵
6. The making of not more than 3 copies of a book by or under the direction of the person in charge of a public library if such a book is not available for sale in Nigeria.⁹⁶

⁸⁹ Ibid. Para. (d).

⁹⁰ Ibid. Para. (e).

⁹¹ Ibid. Para. (f).

⁹² Ibid. Para. (g).

⁹³ Ibid. Para. (h).

⁹⁴ Ibid. Para. (j).

⁹⁵ Ibid. Para. (k).

⁹⁶ Ibid. Para. (q).

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7. The reproduction of the purposes of research or private study of an unpublished literary or musical work kept in a library, museum or other institution to which the public has access.⁹⁷
8. Reproduction of published work in Braille for the exclusive use of the blind, and sound recording made by the institute or other establishments approved by the government for the promotion of the welfare of other disabled persons for the exclusive use of such blind or disabled person.⁹⁸

The various defences concerning use for educational purposes discussed above are generally applicable only to literary, musical and artistic work as well as cinematograph film.

e. Use for Other Public Interest

The Copyright Act also makes provision for defences that facilitate involvement in and the dissemination of information about public administration and also puts into consideration the ultimate interest of the larger society. These defences are enshrined in the Copyright Act.

f. Use For Archival Purposes

This defence is made available for the purpose of keeping public records and historical documents. Those public records, documents, etc. are kept in a depository; e.g., for historical remembrance.⁹⁹ Apart from the specific defences, a defendant also has the more general defences such as limitation of time, trade custom, acquiescence and estoppels.

Comparison of Copyright Enforcement Provisions in Some Other Jurisdictions

It is pertinent at this point to consider the criminal remedies obtainable under the Ghanaian Copyright Act. By Section 42 of the Ghanaian Act, it has to be proved that the alleged offender knew or had reasonable grounds to know that his action induces, enables, facilitates or conceals an infringement of copyright or related rights protected under the Act without the authority of the copyright owner and his agents. Hence, the burden of proving guilty knowledge lies on the prosecution. Nigeria's position of a presumption of guilty knowledge on the part of the alleged infringer may have been necessitated by the high prevalence of piracy, bootlegging and other forms of copyright infringement in the country. However, the court must also consider the fact that a large percentage of Nigerians are ignorant of the concept of copyright ownership and infringement. Most people think copyright is all about books and music. Many have no knowledge of the need for consent, allowable and non-allowable act. The court therefore has an important duty to balance the need to curb the prevalence of flagrant copyright infringement in the country as well as protect the interests of the public.

⁹⁷ Ibid. Para. (r).

⁹⁸ Copyright Act Schedule 2, Paragraph(s).

⁹⁹ The New International Webster's Comprehensive Dictionary of English Language.

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Furthermore, under the Ghanaian Act,¹⁰⁰ the offender is liable on summary conviction to a fine not more than 1,000 penalty units and not less than 500 penalty units or a term of imprisonment not more than 3 years or to both. If it is a continuing offence, a further fine of not less than 25 penalty units and not more than 100 penalty units can be imposed for each day during which the offence continues. It should be noted that 1 penalty unit is 12 Ghanaian Cedis (GHC 12.00).¹⁰¹ The court can order that the infringer pays the fine for the offence to the right owner as well as a forfeiture and disposal of the infringing goods.¹⁰² While the fines specified under the Nigerian Copyright Act are paltry, those imposed under the Ghanaian Act are more deterrent. There is therefore a need for the Nigerian Act to be amended to inculcate more deterrent fines.

Although the inspection and Seizure (Anton Piller) Order under Section 25 of the Nigerian Copyright Act is an important tool for gaining access to evidence, no provision is made to make the grant of the order subject to the protection of confidential information of the defendant as is obtainable in some other jurisdictions where the law expressly provides for this.¹⁰³ Nevertheless, nothing stops a defendant in Nigeria from protecting his confidential information by opposing such an application and stating his reasons in his counter-affidavit.¹⁰⁴ The court would usually consider the arguments of the parties and make a ruling on whether such a document may be admitted/used as evidence in the case or not. Other ways of obtaining evidence in the control of the opposing party under the civil procedure law include the discovery procedure which could be in form of interrogation or inspection.¹⁰⁵ Since an applicant can ask the court for a relief by bringing an application to the court supported by an affidavit setting out the facts and attach all evidence upon which he relies, litigants must explore this avenue.¹⁰⁶ Such a relief may be granted based on the provisions of the law and at the discretion of the court.

Nigeria lacks a practice direction on Anton Piller order, nevertheless, lessons can be learnt from the United Kingdom (UK) where the country inherited this legal remedy. This lack of a clear-cut practice direction results in the abuse of the order by litigants as evidenced in *Akuma Ind. Ltd (supra)*. This order is now referred to as the Search and Seize order in the UK.¹⁰⁷ *Chappell v United Kingdom*¹⁰⁸ explains the content of the order in the UK:

¹⁰⁰ Copyright Act 690, Section 43.

¹⁰¹ Copyright Office, 'Frequently Asked Questions' <<http://www.copyright.gov.gh/faqs>> accessed 26 January 2014.

¹⁰² Ghanaian Copyright Act 690, Section 46; Nigerian Copyright Act 1988, Section 20(4) & (5) In Nigeria, the court can order that the infringing goods and equipment used in producing them should be destroyed or delivered up to the copyright owner.

¹⁰³ Directive 2006/48EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights, Article 7(1).

¹⁰⁴ Federal High Court CPR, Order 9 Rule 14.

¹⁰⁵ Ibid, Order 33.

¹⁰⁶ Ibid, Order 9 Rule 1.

¹⁰⁷ G. Tritton et al, *Intellectual Property in Europe* (3rd ed.), (London: Sweet & Maxwell, 2008), p. 1135.

¹⁰⁸ (1990) 12 EHRR 1.

An Anton Piller order will normally contain restrictive or mandatory injunctions: prohibiting the defendant from dealing with materials that are the subject of the action; requiring the defendant to disclose the whereabouts of all such materials and details of suppliers and customers, and to deliver up the materials to the claimant; requiring the defendant to make an affidavit containing all the information to be disclosed by him under the order; requiring the defendant to permit the claimant to enter the premises for the purpose of searching for the items. As regards this last injunction, the court will confine the items specified to documents and materials directly relating to the action. It will also restrict the time of entry and the number of persons who are to be permitted to enter (very rarely more than four or five). The latter will include the claimant's solicitor, who is an officer of the court.¹⁰⁹

Before granting the order, the court must be satisfied that the claimant has made out an extremely strong *prima facie* case that his claim will succeed on the merits; the actual or potential damage is very serious for him; there is clear evidence that the defendant has in his possession incriminating documents or things, and that there is a real possibility that if he is forewarned, he may destroy such material.¹¹⁰ Both the solicitor and the claimant are required to make undertakings as determined by the court in its discretion.¹¹¹ This could be an undertaking as to damages and also that the order and other relevant documents (affidavit evidence, writ instituting the proceedings, notice of the next hearing) will be served on the defendant.¹¹² The undertaking by the solicitors to wit: to explain to the person served, fairly and in everyday language, the meaning and effect of the order, and to inform him that he has the right to obtain legal advice before complying with the order provided such advice is obtained forthwith, to retain in their custody any items taken by or delivered to them pursuant to the order; to answer any question from the defendant as to whether an item is within the scope of the order; to prepare, before their removal from the premises, a list of the items taken; to use any information or document obtained under the order to ensure that the exercise of rights under the order remains at all times under the control of a solicitor.¹¹³

The defendant can apply for the variation or discharge of the order on notifying the claimant usually 24 hours or less.¹¹⁴ The court will not grant this request except it was applied for soon and it will serve some practical purposes. In addition to this or in the alternative, the defendant can seek damages under the claimant's cross-undertaking on the ground that the order was improperly

¹⁰⁹ Emphasis added.

¹¹⁰ L. Harms, *The Enforcement of Intellectual Property Rights: A Case Book* (3rd ed.), (Geneva, WIPO, 2012), p. 413.

¹¹¹ *Ibid*, pp. 413 – 414.

¹¹² *Ibid*.

¹¹³ *Ibid*.

¹¹⁴ *Chappell v United Kingdom* (1990) 12 EHRR 1.

Publication of the European Centre for Research Training and Development –UK
obtained or executed.¹¹⁵ Where the claimant or his solicitors breach their undertakings under the order or the latter acted improperly in executing it, the defendants may proceed against them for contempt of court.¹¹⁶

It is therefore clear that the requirements for and execution of the Search and Seize Order in the UK is such as to ensure justice to both the right owner as well as the alleged infringer. A strict burden is placed on the copyright owner to prove that this order is indeed necessary and there must be an undertaking as to damages and to serve the alleged infringer the necessary court processes. The claimant's solicitor also has a duty to explain the order to the alleged infringer and take a list of all evidence that was taken. This will probably be the duty of the court bailiff in Nigeria.

Unlike the practice in the UK, Section 25 is couched in such a way that it is difficult to protect the interest of the alleged infringer during the execution of the inspection and seizure order. A police officer not below the rank of an Assistant Superintendent of Police is to be present in the execution of the order. This is indeed intimidating. Although the writer is aware that there have been instances where raids on infringers were met with aggression and lynching by the alleged infringers,¹¹⁷ this does not mean that the rights of the alleged infringers should not be protected. Nothing in Section 25 also provides for an opportunity for the alleged infringer to be given time to seek legal counsel or call his lawyer. The Act is also silent on the right of the defendant to apply to revoke this order. The Act therefore needs to be amended to do justice not only to the copyright owners but also the alleged infringers. The law must not weigh excessively in favour of copyright owners.

In France, the order for preservation of evidence is the *saixie-contrefaçon*.¹¹⁸ It is usually granted upon proof of the Intellectual Property Right (IPR) relied upon and some infringing copies. The police usually accompany the execution of this order. An equivalent order to the Netherlands is the *korigeding* which does not require the applicant to institute proceedings on the merit before its gain.¹¹⁹ However, the applicant must institute proceedings on the merit within a reasonable time and cannot rely forever on this provisional measure.¹²⁰ The bailiff executes the order and an independent technical expert may accompany the bailiff if necessary. Also in the Netherlands, preserving evidence does not mean access to the seized evidence. The applicant has to bring an

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ For instance, when the NCC raided Ariaria International market, Aba, Abia State in July 2014 and seized pirated books from the traders, this was met by aggression, pelting of the NCC officials with stones, water and other objects. The traders smashed the windscreen of one of the vehicles used in the operation. Some officials were also physically attached. See Riverine Reporter, 'NCC Officials, Police Escape Lynching in Ariaria Market Raid' <<http://riverinenews.com/ncc-officials-police-escape-lynching-in-ariaria-market-raid>> accessed 16 February 2014.

¹¹⁸ G. Tritton et al (n. 71), p. 1135.

¹¹⁹ See the Dutch Code of Civil Proceedings, Article 1019 (b), (c), (d) and (e). Dutch Civil Law, 'Code of Civil Proceedings' <<http://www.dutchcivillaw.com/civilprocedureleg.htm>> accessed 16 February 2014.

¹²⁰ *Hermes International v FHT Marketing Choice* (1998) E.C.R.I – 3603 (Case C-53/96).

Publication of the European Centre for Research Training and Development –UK
application to access the seized evidence before such can be disclosed to him or used in the proceedings.¹²¹

In Germany, an inspection order allows the applicant to gain opinion of a court-appointed expert on the question of infringement who inspects the alleged infringing works on the premises of the defendant. §809 of the German Civil Code (Bürgerliches Gesetzbuch [BGB]) and §485 of the German Code on Civil Procedures (Zivilprozessordnung [ZPO]) allow for independent proceedings for the preservation of evidence and also §935 ZPO permits a preliminary court order. During such procedures, the claimant's counsel is the one who takes the evidence and keeps all information confidential even from the claimant. The inspection can be delayed for at least 2 hours at the request of the defendant so he can seek legal counsel. An applicant must prove urgency before such preliminary injunctions can be granted.¹²²

Furthermore, some foreign jurisdictions provide for right of information which applies only where it has been decided that infringement has indeed taken place.¹²³ The claimant can make a justified and proportionate request that the court orders that information on the origin and distribution networks of the infringing goods or services be provided by the infringer and/or any other person who was found in possession of the infringing goods or using the infringing services in commercial scale, found to be producing commercial services used in infringing activities or was indicated by any of the above persons as being involved in the production, manufacture or distribution of the goods or the provision of the services. It applies also to third parties or intermediaries who may not be infringing. This provision is indeed effective as it helps the IPR holder to be able to get detailed information about the infringing persons and activities.

In the UK, this is achieved through the Norwich Pharmacal order.¹²⁴ This is an application to obtain names and addresses of infringers from third parties. It was first used in *Norwich Pharmacal v. Commissioners of Customs and Excise*.¹²⁵ The order is useful where without disclosure, the claimant cannot bring an action against the wrongdoer because he does not know who he is and the applicant has a cause of action against the respondent in relation to the same wrong or that party's services are being used to facilitate wrong doing. The essence of the Norwich Pharmacal relief is that an innocent but involved party should assist an applicant in relation to an action against a wrongdoer. In the Netherlands, the grant of this kind of order is a question of the balance of

¹²¹ Dutch Code of Civil Proceedings, Article 843a.

¹²² M. Hans, 'The Enforcement of Patent Rights in Germany' (2000) 31, *International Review of Industrial Property and Copyright Law (IIC)*, 657.

¹²³ See generally the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights, Articles 7(1) & 8.

¹²⁴ Guy Tritten, 'Interim Remedies in Intellectual Property Cases' in *IP Remedies: What are the Limits* (2003), Hogarth Chambers, Royal College of Surgeon, pp. 17 – 18.

¹²⁵ (1973) FSR 365.

Publication of the European Centre for Research Training and Development –UK
interests and also at the discretion of the court.¹²⁶ In Germany, this can be obtained through the *Auskunftsanspruch* procedure.¹²⁷

In *Golden Eye (International) Ltd and Others v. Telefonica UK Ltd*,¹²⁸ Golden Eye (International) Ltd and 13 others brought a claim for Norwich Pharmacal orders against Telefonica UK Ltd (trading under the name O2). The essence was to obtain disclosure of the names and addresses of O2 customers who were alleged to have committed copyright infringement through peer-to-peer (P2P) file sharing using the Bit Torrent protocol. The court granted the order to only Golden Eye and Ben Dover on the condition that their letter to the alleged infringers was in a form approved by the judge and that any proceedings that might be brought would proceed in the Patents County Court (PCC). The court granted the order after it was satisfied that the said claimants indeed intended to seek redress for the wrongs done and that a disclosure was necessary to enable them do so. It concluded that the claimant's interest in enforcing their copyright outweighs the intended defendant's interest in protecting their privacy and data protection rights.

At the moment, the Nigerian Copyright Act has no provision that allows a successful copyright owner to have access to information within the confines of the infringer or relevant third parties. The Act needs to be amended to incorporate such an order. This is necessary in order to effectively curb infringement. Through such an order, the copyright owner can frustrate the infringing activities of a syndicate or chain of infringers. Till such an amendment is made, a copyright owner must consider exploiting the procedures available under civil procedure law by bringing an application before the court that an infringer discloses the necessary information in his purview that the applicant could make use of to another infringer. It is unknown whether the courts would be willing to grant such an order especially where the order is sought against a third party/an intermediary who is not a party to the suit. The writer is not aware of any case in which such an order has been brought before the court. Such an application would have to be brought before the courts to test whether such would be granted. However, such an application must not prejudice legal provisions that govern the use of such information in civil or commercial proceedings. The applicant must also take responsibility for the misuse of the right of information. The respondent must be given an opportunity to refuse to provide information if it would force the affected person to admit to his/her participation or that of his/her close relatives in an infringement of an IPR. Provisions that govern confidentiality of information sources or the processing of personal data must also be put into consideration in such an application.

Another legal remedy that is relevant for Nigerian copyright enforcement regime is that of the payment of the legal costs and other expenses incurred by the successful party by the unsuccessful

¹²⁶ Dutch Code of Civil Procedure, Article 1019.

¹²⁷ M. Hans, 'The Enforcement of Patent Rights in Germany' Vol. 31 (2000) *International Review of Industrial Property and Copyright Law (IIC)*, p. 656.

¹²⁸ (2012) EWHC 723 (Ch).

party except equity does not allow this. This is a strong deterrence for infringers and would-be infringers. In the UK, this would amount to a recovery of about 75% - 80% of the legal costs incurred by the successful party.¹²⁹ It should be noted that this does not mean all the costs incurred by the successful party. There is usually a table for calculating the costs as set by the court in many countries.¹³⁰

In Nigeria, the civil procedure rule provides for remedies in form of costs though not in strong terms as in Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights.¹³¹ The court has the discretion to determine who shall pay the cost of the whole suit, of particular or every proceeding.¹³² The court does not however have the power to order the unsuccessful party to pay the cost of the whole suit to the successful party. The amount of costs to be paid is at the discretion of the court which, if practicable, may be summarily determined by the court.¹³³ The practice is to include this as part of the claims in a party's Statement of Claims as special damages. The successful party must therefore insist on it during the final/written address and provide evidence as to the legal cost if the court is to grant a substantial amount.

For instance, in *A.C.B Ltd v. Ajugwu*¹³⁴ the court elucidated on the award of costs. The award of costs is at the discretion of the court which discretion must be exercised judiciously and judicially. Costs follow events and a successful party is entitled to costs except where there are special circumstances depriving him of such which must be shown by the judge. However, costs are not imposed as a punishment to the party who lost nor are they awarded as a bonus to the successful party. A party awarded should only be indemnified for his out of pocket expenses and compensated for the true and fair expenses for the litigation. Costs merely serve as a cushioning or palliative effect on the financial burdens of the successful party and cannot cure all the financial loss. It is awarded in the ordinary principle of genuine and reasonable out of pocket and normal counsel cost usually awarded for a leader and one or two juniors. The court acknowledged in this case that there is no universal table for fixing costs because costs follow the events; the court must therefore take the peculiar circumstances of each case into 4/12/2000 and judgment was delivered on 3/6/2004. On the whole there were 22 appearances during the period under review. The court held that for a suit handled by a Senior Advocate of Nigeria, it seemed that the award of ₦25,000.00 in favour of the respondent cannot be properly termed outrageous or done *mala fide*.

This remedy is not as developed or commonly used in Nigeria as it is in other jurisdictions. The attitude of the court is generally negative towards a claim for solicitor's cost despite satisfactory

¹²⁹ Ibid.

¹³⁰ M. Hans (n. 92), p. 668.

¹³¹ Federal High Court CPR, Order 52.

¹³² Ibid, Rule 3.

¹³³ Ibid, Rule 4.

¹³⁴ Ibid, Rule 6.

Publication of the European Centre for Research Training and Development –UK
proof by the claimant. The few instances the court has granted such a claim, it has been a meager sum ranging from ₦2,000.00 to N10,000.00.¹³⁵ For example, in *Emirtes Airlien v. Tochukwu Aforka & Anor*¹³⁶ the Court of Appeal held that:

Claims for both special damages and general damages or for solicitor's fees are not appropriate in an action for breach of contract except where there is an agreement by the parties to that effect... The claim for Refund of the sum of ₦2.5m (Two Million, Five Hundred Thousand Naira) paid by the Plaintiffs to its Solicitors is not recoverable because there was no agreement to that effect and it was not a loss foreseeable from the breach of contract.¹³⁷

Another decision that illustrates the attitude of most judges in Nigeria to a claim for payment of solicitor's cost is *Guinness (Nig) Plc v. Nwoke*¹³⁸ where the Court of Appeal held as follows:

It is also unethical and an affront to public policy to pass on the burden of Solicitor's fees to the other party, in this case the correspondent... I am of the strong view that this type of claim is outlandish to the operation of the principle of special damages and it should not be allowed. It is absolutely improper to allow the cross-appellant to pass his financial responsibility couched as 'special damages' to the cross-respondent.¹³⁹

This position was not different at the apex court as the Supreme Court in *Christopher Nwanji v. Coastal Services (Nig) Ltd*¹⁴⁰ adopted the decision of the Court of Appeal in *Simon U. Ihekwoaba & Anor. v African Continental Bank Ltd. & Ors*¹⁴¹ and held that 'The issue of damages as an aspect of solicitor's fees is not one that lends itself to support in this country.'¹⁴² It is therefore clear that before the payment of legal costs can be effective as a means of deterrence, the court must be willing to change its attitude by granting costs of higher monetary values. The grant of solicitor's fees becomes an effective tool particularly in cases where a defendant has flagrantly infringed on the plaintiff's copyright and refused to stop its act of infringement despite warning letters sent to the defendant.

¹³⁵ (2012) 6 NWLR (Pt. 1295) 97.

¹³⁶ In *Shukka v. Abubakar* (2012) 4 NWLR (Pt. 1291) 497, only ₦8,000.00 was awarded as costs.

¹³⁷ (2014) LPELR-22686 (CA).

¹³⁸ Ibid, 42 – 43.

¹³⁹ (2000) 15 NWLR (Pt. 689) 135.

¹⁴⁰ Ibid, 150. See *Joseph Nduka Igbo v. Gabriel Kalu Agwu* (Unreported Suit No.: FCT/HC/CV/1670/2013) where it was held that the courts are not in favour of a party to a suit passing the burden of his solicitor's fees to the other party as the plaintiff wanted the Court to do in the instant case.

¹⁴¹ (2004) 11 NWLR (Pt. 885) 552.

¹⁴² (1998) 10 NWLR (Pt. 571) 590.

Publication of the European Centre for Research Training and Development –UK

Fortunately, the apex court seems to have overruled itself in this regard as seen in its recent decision in *Union Bank of Nigeria Plc v Mr. N.M. Okpara Chimaeze*¹⁴³ which has become a precedent upon which a successful litigant may rely on to claim solicitor's cost. The Plaintiff in this suit claimed the sum of ₦250,000.00 as special damages for his solicitor's fees. The Supreme Court affirmed the decisions of the lower courts on the basis of the principle that a claimant who has suffered special damages and proves same such that the court can glaringly see and appreciate the nature of the damage or loss is entitled to the award of such special damages.

Another remedy that would be beneficial in copyright enforcement in Nigeria is the publication of judicial decisions at the request for the copyright owner at the expense of the infringer. Such remedy is essential to be able to show customers and others that have commercial dealings with a party to the suit that he or she is not infringing, or serve as deterrent to other intending infringers that the copyright owner would not accommodate an infringement of his rights. While the Copyright Act does not provide for this remedy, it may not be impossible for a copyright owner to request such an order from the court where he provides evidence to prove that it is necessary such as is done in defamation cases. Otherwise, he would not have such a remedy as a matter of course. In the absence of certain remedies in Nigeria, copyright owners can maximize the flexibility of the law in obtaining effective remedies. The Nigerian Copyright Act makes a non-exhaustive provision for civil remedies: '... all such reliefs by way of damages, injunction, accounts or *otherwise* shall be available to the claimant as is available in any corresponding proceedings in respect of infringement of other proprietary rights'.¹⁴⁴ Although the law and remedies in Nigeria are not as developed as that of some other countries, there may be possibilities of obtaining similar remedies within Nigeria. Parties may not have been maximizing the possibility of asking for more effective remedies.

The fact that cases from other common law jurisdictions such as the UK can be cited, though merely of persuasive effect, may also be helpful in persuading the courts in granting novel remedies which are not available explicitly in the laws of Nigeria. more so, the courts have been known to fill any lacuna that exists in the laws and some laws have developed from the practice of the courts. This may be employed to combat the challenge where the laws of Nigeria do not provide for an appropriate remedy.

Legal Framework for the Protection of the Entertainment Industry in United States of America

The Principal Act regulating copyright in the entertainment industry in the United States is the Copyright Act of the United States.¹⁴⁵ The constitution of the United States¹⁴⁶ contains a

¹⁴³ *Christopher Nwanji v. Coastal Services (Nig.) Ltd* (2004) 11 NWLR (Pt. 885) 552, 569.

¹⁴⁴ (2014) 9 NWLR (Pt. 1411) 166; (2014) LPELR-22699 (SC).

¹⁴⁵ The Copyright Act, 1976, Pub. L. Notice. 94 – 553, 90 stat. 2541, enacted on October 19, 1976 (hereafter referred to as U.S. Copyright Act) is contained in Chapters 1 – 8 and 10 – 12 of title 17 of the United States Code.

¹⁴⁶ United States Constitution, 1787.

Publication of the European Centre for Research Training and Development –UK
constitutional provision in respect of Copyright. It states that “the congress shall have power ... to promote the progress of science and useful Arts, by securing for limited time to Authors and Inventors the exclusive Right to their respective writings and discoveries.”¹⁴⁷ The U.S. copyright Act has undergone several amendments to respond to emerging issues in the copyright which resulted in many amendments to address the issues.

Subject Matter of Copyright

The US Copyright Act provides that copyright protection subsists, in original works of authorship fixed in any tangible medium of expression, now known or later developed from which they can be perceived reproduced or otherwise communicated, either directly or with the aid of a machine or device.

Works of authorship are categorized as follows:¹⁴⁸

- i. literary works;
- ii. musical works, including any accompanying work;
- iii. dramatic works, including any accompanying music;
- iv. pantomimes and choreographic works;
- v. pictorial, graphic and sculptural works;
- vi. motion pictures and other audiovisual works;
- vii. sound recordings; and
- viii. architectural works.

The U.S Copyright Act provides that Unpublished works are subject to protection without regard to nationality or domicile of the author.

The U.S. Copyright Act further provides that copyright protection does not extend to any idea, procedure, process, system, method of cooperation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated or embodies in such work.¹⁴⁹

Such works as mentioned under Section 102 when published, are subject to protection if

1. on the date of first publication, one or more of the authors is a national or domiciliary of the United States, or is a national, domiciliary, or sovereign authority of a treaty state, or is a stateless person, wherever that person may be domiciled; or¹⁵⁰
2. the work is first published in the United States or in a foreign nation, that, on the date of first publication, is a treaty party; or¹⁵¹
3. the work is a sound recording that was first fixed in a treaty party; or

¹⁴⁷ Ibid, article 1, Section 8.

¹⁴⁸ U.S Copyright Act, supra, Section 102(a).

¹⁴⁹ Ibid, Section 102(b)

¹⁵⁰ Ibid, Section 104(b)(i).

¹⁵¹ Ibid, Section 104(b)(ii).

Publication of the European Centre for Research Training and Development –UK

4. the work is a pictorial, graphic, or¹⁵² sculptural work that is incorporated in a building or other structure, or an architectural work that is embodied in a building and the building or structure is located in the United States or a treaty party; or¹⁵³
5. the work is first published by the United Nations or any of its specialized agencies; or¹⁵⁴
6. the work comes within the scope of a presidential proclamation.

The Act further provides for reciprocity by the United States to countries that offer the same protection to nationals and domiciliaries of the United States as it offers to its own nationals.¹⁵⁵

Exclusive Rights in Copyrighted Works

The U.S Copyright Act provides that subject to Sections 107 – 122, the owner of copyright has the exclusive rights to do and to authorize any of the following:

1. to reproduce the copyrighted work in copies or phonorecords;¹⁵⁶
2. to prepare derivative works based upon the copyrighted work;¹⁵⁷
3. to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;¹⁵⁸
4. in the case of literary, musical, dramatic and choreographic works, pantomimes, and motion picture or other audiovisual works, to perform the copyrighted work publicly;¹⁵⁹
5. in the case of literary, musical, dramatic and choreographic works, pantomimes, and pictorial, graphic or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly;¹⁶⁰ and
6. in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.¹⁶¹

It also provided for right of attribution and integrity which gives the author of visual art the right to claim ownership of his work and to prevent the use of his or her name as the author of any work of visual art which he or she did not create.¹⁶² He can also prevent the use of his name as the author of the work in the event of distortion or mutilation or other modification of the work which would be prejudicial to his or her honour or reputation.¹⁶³

¹⁵² Ibid, Section 104(b)(iii).

¹⁵³ Ibid, Section 104(b)(iv).

¹⁵⁴ Ibid, Section 104(b)(v).

¹⁵⁵ Ibid, Section 102(b)(vi).

¹⁵⁶ Ibid, Section 106(1).

¹⁵⁷ Ibid, Section 106(2).

¹⁵⁸ Ibid, Section 106(3).

¹⁵⁹ Ibid, Section 106(3).

¹⁶⁰ Ibid, Section 106(5).

¹⁶¹ Ibid, Section 106(6).

¹⁶² Ibid, Section 106A(1)(A) & (B).

¹⁶³ Ibid, Section 106A(2).

Limitation on Exclusive Rights: Fair Use

The United States made elaborate provision on limitations on exclusive rights to copyright.¹⁶⁴ It provides that subject to the provisions in exclusive rights in copyrighted works, the fair use of a copyrighted work, including such sue by reproduction in copies or phonorecords by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not as infringement of copyright.

It further provides that in determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include:

1. the purpose and character of the use, including whether such sue is of a commercial nature or is for non profit educational purpose;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the sue upon the potential market for or value of the copyrighted work.¹⁶⁵

Limitation of Copyright for Libraries and Archives

The fair sue is generally viewed as an open-ended flexible regime which allows courts to determine what qualifies as fair sue within certain criteria fixed by the United States Copyright Act and developed by US courts.¹⁶⁶ This approach requires a test for determining whether new sues should be permitted and is done on a case-by-case basis.¹⁶⁷

The US copyright specifically provides that it is not an infringement of copyright for a library or achieves to reproduce no more than one copy or phonorecord of a work¹⁶⁸ except as provided under sub-sections (b)¹⁶⁹ and (c)¹⁷⁰ or to distribute such copy or phonorecord under the conditions specified by this section, if –

¹⁶⁴ Ibid, Section 107.

¹⁶⁵ Ibid, Section 107(1) – (4).

¹⁶⁶ G. Geist, 'Fairness Found: How Canada Quietly shifted from Fair Dealing to Fair use' in M. Geist, (ed.), *The Copyright Pentology: How the Supreme Court of Canada shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013), pp. 157 – 186.

¹⁶⁷ R. Ghafele, G. Gibert, 'A Counter Factual Impact Analysis of Fair use Policy on Copyright Related Industries in Singapore', (2014) 3, Laws, pp. 327 – 352, available at <www.mdpi.com/2075-471x/3/2/327> visited 3 March 2017.

¹⁶⁸ US Copyright Act, supra, Section 108(a).

¹⁶⁹ The rights of reproduction and distribution under this section apply to three copies or phonorecords of Unpublished work duplicated solely for purposes of preservation and security or for deposit for research sue in another library or achieve of the achieve described by clause (2) of subsection (a) if the copy or phonorecord in the collections of the library or archives and is reproduced in digital format and not made available to the public in that format outside the premises of the library or achieve.

¹⁷⁰ The right of reproduction under this section applies to three copies or phonorecords of published work duplicated solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, or if

1. the reproduction or distribution is made without any purpose of direct or indirect commercial advantage;
2. the collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field.¹⁷¹

The fair use doctrine is fact intensive as it requires an assessment of the “fairness” of the use in question based on balancing of several factors as enumerated under Section 107(1) – (4).¹⁷² Thus where there is no established precedent it is difficult for prospective users to know whether a fair use defense will avail them.¹⁷³ The fair use doctrine is flexible and is adaptable to new technologies and has been used to determine fair use in the online environment.¹⁷⁴ It has been used by the courts to enable the use of thumbnail images in internet search results,¹⁷⁵ caching of web pages by a search engine,¹⁷⁶ and a digital plagiarism detection service.¹⁷⁷

The DMCA,¹⁷⁸ amended Section 108 of the US Copyright Act to allow libraries and archives to take advantage of digital technologies when engaging in preservation activities. Libraries and archives are permitted by DMCA to make up to three copies or phonorecords in digital as well as analog formats, for purposes of preservation and security or for deposit for research use in another library or archive.¹⁷⁹ The amendment imposed restrictions on the use of any digital copies made, in order to ensure that they are not freely distributed outside library premises.¹⁸⁰

Exemption of Certain Performances and Displays

The US Copyright Act provides that despite the provisions of Section 106 that the following are not infringement of Copyright:

the existing format in which the work is stored is obsolete if the library or archive has after a reasonable effort determined that an unused replacement cannot be obtained at a reasonable price and the reproduced digital format is not made available outside the premises of the library or archive in lawful possession.

¹⁷¹ US Copyright Act, *supra*, Section 108(i) & (7).

¹⁷² The provisions are already reproduced. See footnote 21.

¹⁷³ US Department of Commerce, ‘Copyright Policy, Creativity and the Innovation in the Digital Economy’, (The Department of Commerce Internet Policy Taskforce study on Copyright and the Internet Technology) 21 <<http://www.uspto.gov/sites/default/files/news.../copyrightgreenpaper.pdf> accessed 1 Nov. 2016.

¹⁷⁴ *Ibid*.

¹⁷⁵ *Perfect 10, Inc v. Amazon.com, Inc.*, 508 F.3d 1146, 1163 – 68 (9th Cir. 2007) but see *Associated Press v Meltwater U.S. Holdings, Inc.*, No. 12 Civ. 1087, - F. supp. 2d.-, 2013 WL 1153979 (S.D.N.Y. mar. 21, 2013) rejecting subscription news clipping service that used algorithm similar to search engines to locate and excerpts news stories.

¹⁷⁶ *Field v Google Inc.*, 412 F. Supp. 2d 1106, 1117 – 23 (D. New, 2006).

¹⁷⁷ *A.V. v. Iparadigms, LLC*, 562 F.3d 630, 637 – 45 (4th Cir. 2009).

¹⁷⁸ Digital Millennium Copyright Act, 1998.

¹⁷⁹ See US Copyright Act, *supra*, Section 108(b).

¹⁸⁰ US Department of Commerce; *op.cit*, 23.

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1. performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a non-profit educational institution in a classroom or similar place devoted to instruction, unless in the case of motion picture or other audiovisual work, the performance or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made;
2. except with respect to a work provided or marketed primarily for performance or display as part of mediated instructional activities transmitted via digital networks, or a performance or display that is given by means of a copy or phonorecord that is not lawfully made and acquired under this title, and the transmitting government body or accredited non-profit educational institution knew or had reason to believe was not lawfully made and acquired, the performance of a non-dramatic literary or musical work on reasonable and limited portions of any other work, or display of a work in an amount comparable to that which is typically displayed in the course of a line classroom session, by or in the course of a transmission.¹⁸¹

The foregoing provisions is subject to where amongst others, the work is limited to instructional educational activities that is non-profit and accessible only to students who are registered in the course and there are information that the content may be protected by copyright and the performance and display is made by the direction or supervision of the instructor as an integral part of classroom session offered as a regular part of the systematic mediated instructional activities of the government body or non-profit educational institution.¹⁸² In the case of digital transmission where the institution applies technology measures that prevent retention of the work in accessible form by recipients of the transmission for longer than the class session; and present unauthorized further dissemination of the work in accessible form by such recipients to others and does not interfere with technological measures used by the Copyright owners to prevent such retention or unauthorized further dissemination.¹⁸³

The Technology, Education, and Copyright Harmonization (TEACH) Act¹⁸⁴ amended Sections 110(2) and 112(f) of the Copyright Act. The amendment allows instructors to sue wider range of works in distance learning environments; students may participate in distance learning sessions from virtually any location and participants have more latitude to store, copy and digitize materials.

¹⁸¹ US Copyright Act, supra, Section 110(1) & (2).

¹⁸² Ibid, Section 110(2)(a) – (d).

¹⁸³ Ibid, Section 110(2)(D)(ii).

¹⁸⁴ Technology, Education and Copyright Harmonization Act of 2002, Division C, title 11, subtitle C of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107 – 273, 116 stat. 1758, 1910 (amending chapters, title 17, United States Code to incorporate provisions relating to use of Copyrighted works for distance Education) enacted November 2, 2002.

The academic institution must however comply with requirements to protect against piracy of digital content and to preserve the viability of markets for educational materials.¹⁸⁵

Secondary Transmission

The US Copyright Act exempted from copyright secondary transmission of a performance or display of a work embodied in a primary transmission if

1. the secondary transmission is not made by a cable system, and consists entirely of the relaying, by the management of a hotel, apartment house, or similar establishment, of signals transmitted by a broadcast station licensed by the federal communications commission, within the local service area of such station, to the private lodgings of guests or residents of such establishment, and no direct charge is made to see or hear the secondary transmission;¹⁸⁶ or
2. the secondary transmission is made solely for the purpose and under the conditions specified under clause (2) of Section 110; or
3. the secondary transmission¹⁸⁷ is made by any carrier who has no direct or indirect control over the content or selection of the primary transmission¹⁸⁸ or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others. This provision extends only to the carrier's secondary transmission and not to third parties' primary or secondary transmissions.
4. the secondary transmission is made by satellite carrier for private home viewing
5. the secondary transmission is not made by a cable system but is made by a government at body, or other non-profit organization, without any purpose of direct or indirect commercial advantage, and without charge to the recipients of the secondary transmission other than assessment, necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service.¹⁸⁹

However, the willful or repeated secondary transmission to the public by a cable system of a primary transmission made by a broadcast station embodying a performance or display of a work

¹⁸⁵ US Department of Commerce, op.cit, 25.

¹⁸⁶ US Copyright Act; supra, Section 111(a)(1).

¹⁸⁷ A Primary transmission is a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted.

¹⁸⁸ "A secondary transmission is the further transmitting of a primary transmission simultaneously with the primary transmission, or non-simultaneously with the primary transmission, or non-simultaneously with the primary transmission..."

¹⁸⁹ US Copyright Act, supra, Section 111(2) – (5).

Publication of the European Centre for Research Training and Development –UK
is actionable as an act of infringement;¹⁹⁰ if the primary transmission is not made for reception by the public at large but is controlled and limited to reception by particular members of the public.¹⁹¹

Copyright Notice, Deposit, and Registration

The US Copyright Act has a system of registration of copyright. The Act provides that works published in the United States or elsewhere by the authority of the copyright owner, a notice of copyright may be placed on publicly distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device.¹⁹² The notice shall consist of three elements namely:

- i. the symbol (c) (the letter “c” in a circle), or the word “copyright”, or the abbreviation “copr”;¹⁹³ and
- ii. the year of first publication of the work; in the case of compilations or derivative works incorporating previously published material, the year date may be omitted where a pictorial, graphic, or sculptural work, with accompanying text matter, if any, is reproduced in or on greeting cards, post cards, stationery, jewelry, dolls, toys, or any useful articles;¹⁹⁴ and
- iii. the name of the owner of Copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owners.¹⁹⁵

It further provides that such notice shall be affixed to the copies in such manner and location as to give reasonable notice of the claim of copyright. The Registrar of Copyrights is empowered to prescribe by regulations the methods of fixation and positions of the notice on various types of works.¹⁹⁶

The same provision goes for phono records except that the notice shall comprise the following:¹⁹⁷

- i. the symbol (P) (the letter P in a circle); and
- ii. the year of first publication of the sound recording;
- iii. the name of the owner of copyright in the sound recording, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner; if the producer of the sound recording is named on the phonorecord labels or containers, and if no other name appears in conjunction with the notice, the producer’s name shall be considered part of the notice.

¹⁹⁰ Ibid, Section 111(b).

¹⁹¹ Ibid, Section 111(b).

¹⁹² Ibid, Section 401(a).

¹⁹³ Ibid, Section 401(b) (1).

¹⁹⁴ Ibid, Section 401(b) (2).

¹⁹⁵ Ibid, Section 401(b) (3).

¹⁹⁶ Ibid, Section 401(c).

¹⁹⁷ Ibid, Section 402 (a) – (b) (1) – (3).

Publication of the European Centre for Research Training and Development –UK

The notice shall be placed on the surface of the phonorecord, or on the phonorecord label or container, in such manner and location as to give reasonable notice of the claim of copyright.¹⁹⁸

The evidentiary weight of the notice is the same as in Section 401(d)¹⁹⁹ for collective works each work may bear the notice, however a single notice applicable to the collective work is sufficient to invoke the provisions of Sections 401(d) and 402(d).²⁰⁰

The Act further provides²⁰¹ that owner of copyright or of the exclusive right of publication is a work published in the United States shall deposit, within three months after the date of such publication.

- i. two complete copies of the best edition; or
- ii. if the work is a sound recording, two complete phonorecords of the best edition, together with any printed or other visually perceptible material published with such phonorecords. The copies shall be deposited with the copyright office for the use of library of Congress. However the deposit is not a condition of copyright protection.²⁰²

Application for Copyright Registration

The US Copyright Act provides that the application for Copyright registration shall include:

1. the name and address of a work other than of the copyright claimant;
2. in the case of a work other than an anonymous or pseudonymous work, the name and nationality or domicile of the author or authors, and, if one or more of the authors is dead, the dates of their deaths;
3. if the work is anonymous, the nationality or domicile of the author or authors;
4. in the case of a work made for hire, a statement to this effect;
5. if the copyright claimant is not the author, a brief statement of how the claimant obtained ownership of the copyright;
6. the title of the work, together with any previous or alternative titles under which the work can be identified;
7. the year in which creation of the work was completed;
8. if the work has been published, the date and nation of its first publication;
9. in the case of a compilation or derivative work, an identification of any pre-existing work or works, that it is based on or incorporates, and a brief, general statement of the additional material covered by the copy right claim being registered;
10. in the case of a published work containing material of which copies are required by Section 601²⁰³ to be manufactured in the United States, the names of the persons or organizations

¹⁹⁸ Ibid, Section 402 (c).

¹⁹⁹ Ibid, Section 402(d)

²⁰⁰ Ibid, Section 404

²⁰¹ Ibid.

²⁰² Ibid, Section 407 (a) (1) & (2).

²⁰³ The section prohibits manufacture; importation and public distribution of copies of a work consisting predominantly of non-dramatic literary materials unless the material is manufactured in the United States or Canada.

Publication of the European Centre for Research Training and Development –UK

- who performed the processes specified by Sub-section (c) of Section 601 with respect to that material and the places where those processes were performed; and
11. any other information regarded by the Registrar of Copyrights as bearing upon the preparation or identification of the work or the existence, ownership, or duration of the copyright.²⁰⁴

When after examination, the Registrar of Copyrights determines that, in accordance with the provisions of this title, the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements have been met, the Registrar shall register the claim and issue to the applicant a certificate of registration under the seal of the copyright office. The certificate contains the information given in the application, together with the number and effective date of the registration.²⁰⁵

Where the Registrar determines that the material deposited does not constitute copyright table subject matter or that the claim is invalid for any other reason, the Registrar shall refuse the registration and shall notify the applicant in writing of the reasons for such refusal.²⁰⁶

Copyright Infringement and Remedies

The US Copyright Act provides that any of the exclusive rights of the copyright provided by Sections 106 – 122 or of the author as provided in Section 106 – 122 or of the author as provided in Section 106A(a), or who imports copies or phonorecords into the United States is an infringer of the copyright or right of the author as the case may be.²⁰⁷ The legal or beneficial owner of an exclusive right under a copyright is entitled to institute an action for any infringement of that particular right committed while he or she is the owner of it.²⁰⁸

In the case of a secondary transmission by a cable system that embodies a performance or a display of a work which is actionable as an act of infringement under Section III (c), a television broadcast station holding a copyright or other license to transmit or perform the same version of that work shall be treated as a legal or beneficial owner if such secondary transmission occurs within the local service area of that television station.

In case of transmission under Section III (c) (3)²⁰⁹ by a cable system that amounts to infringement; the primary transmitter whose transmission has been altered by the cable system and any broadcast

²⁰⁴ US Copyright Act, *supra*, Section 409 (I) – (II).

²⁰⁵ *Ibid*, Section 410(a).

²⁰⁶ *Ibid*, Section 410 (b).

²⁰⁷ *Ibid*, Section 501 (a).

²⁰⁸ *Ibid*, Section 501 (b).

²⁰⁹ The section provides that the secondary transmission to the public by a cable by system of a performance or display of a work embodied in a primary transmission made by a broadcast station duly licensed is actionable as an act of infringement under Section 501.

Publication of the European Centre for Research Training and Development –UK
station within whose local service area the secondary transmission occurs has locus standi to sue.²¹⁰
In the case of any secondary transmission made by a satellite carrier of a performance or display of a work embodies in a primary transmission and is actionable as an act of infringement under Section 11a(a) (5),²¹¹ a network station holding a copyright or other license to transmit or perform the same version of that work shall be treated as a legal or beneficial owner if such secondary transmission occurs within the local service area of that station.²¹²

Remedies for Infringement

i. Injunction

The Act provides that any civil court having jurisdiction may grant temporary or final injunction on such terms as it deems reasonable to prevent or restrain infringement of a copyright.²¹³

ii. Impounding and Disposition of Infringing Articles

The Act empowers the courts while an action is pending to order the impounding, on such terms as it may deem reasonable, of copies or phonorecords claimed to have been made in violation of the copyright owner's exclusive rights, and of all plates, molds, matrices, masters, tapes, film negatives or other articles by means of which such copies or phonorecords may be produced.²¹⁴

The court may order the destruction of such articles as mentioned earlier as part of its final judgment.²¹⁵

iii. Damages and Profits

The copyright owner is entitled to recover from the infringer actual damages and profits which comprise of actual damages suffered by him or her as a result of the infringement and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages.²¹⁶ The copyright owner may elect at anytime before final judgment is given to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action.²¹⁷ The court are also empowered to award additional damages.²¹⁸

²¹⁰ US Copyright Act, supra, Section 501 (d).

²¹¹ The Section provides that it is actionable as an infringement for a satellite carrier to willfully or repeatedly make a secondary transmission of a primary transmission made by a network station embodying a performance or display of a work to a subscriber who does not reside in an unreserved household.

²¹² US Copyright Act, supra, Section 501 (e).

²¹³ Ibid, Section 502 (a).

²¹⁴ Ibid, Section 503 (a).

²¹⁵ Ibid, Section 503 (b).

²¹⁶ Ibid, Section 504 (b).

²¹⁷ Ibid, Section 504 (c).

²¹⁸ Ibid, Section 504 (d).

iv. Cost and Attorney's Fees

The court may in its discretion allow the recovery of full costs by or against any party other than United States or its officer, the court may also award a reasonable attorney's fee as part of the costs.²¹⁹

v. Criminal Offences

The US Copyright Act also created offences for Copyright infringement. It provides that any person who infringes a copyright willfully either for purpose of commercial advantage for purpose of commercial advantage or private financial gain, or by the reproduction or distribution, including by electronic means during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works which have a total value of more than \$1,000 shall be punished under Section 2319 of title 18 of United States Code.²²⁰

Where any person is convicted under the above section, the court may in addition to conviction order the forfeiture or destruction or other disposition of all infringing copies or phonorecords or other machines or devices used for such infringement.²²¹ It also makes it an offence for any person to fraudulently put a notice of copyright on any article or words of the same purport which he knows to be false or who, with fraudulent intent, publicly distributes or imports for public distribution any article bearing such notice or words that such person knows to be false shall be fined \$2,500.²²² The same fine goes to any person who with fraudulent intent removes or alters any notice of copyright appearing on any copyrighted work.²²³ Actions for infringement must be brought within 5 years and 3 years for criminal and civil infringement respectively.²²⁴ The foregoing does not apply to right of attribution and integrity.

vi. Seizure and Forfeiture

All copies or phonorecords manufactured reproduced, distributed or sold or otherwise used intended for use or possessed with intent to use in violation of Section 506(a) and all plates, molds matrices, masters, tapes, film negatives or other articles by means of which such copies or phonorecords may be reproduced, and all electronic, mechanical or other devices for manufacturing, reproducing or assembling such copies or phonorecords may be seized and forfeited to the United States.²²⁵

The Digital Millennium Copyright Act 1998

The digital Millennium Copyright Act²²⁶ is an Act that addressed the challenges of Copyright in the Online environment. the legislation implemented two World Intellectual Property Organization (WIPO) treaties namely: WIPO Copyright Treaty (WCT) and WIPO performances and

²¹⁹ Ibid, Section 505.

²²⁰ Ibid, Section 506 (a) (1) & (2).

²²¹ Ibid, Section 506 (b).

²²² Ibid, Section 506 (c).

²²³ Ibid, Section 506 (d).

²²⁴ Ibid, Section 507 (a) & (b).

²²⁵ Ibid, Section 509.

²²⁶ Pub. L. No. 105 – 304, 112 Stat. 2860 (Oct. 28, 1998).

Publication of the European Centre for Research Training and Development –UK Phonograms Treaty (WPPT). The DMCA created new prohibitions in the Copyright Act on circumvention of technological measures used by copyright owners to protect their works and one on tampering with copyright management information. It also adds civil remedies and criminal penalties for violating the prohibitions.

Circumvention of Technological Protection Measures and Copyright Management System

The two WIPO treaties contain similar provisions obligating member states to prevent circumvention of technological measures used to protect copyrighted works, and to prevent tampering with the integrity of copyright management information. These obligations serve as technological adjuncts to the exclusive rights granted by copyright law. They provide legal protection that the international community deemed critical to the safe and efficient exploitation of works on digital networks.

Circumvention of Technological Protection measures Article 11 of the WCT provides:

Contracting parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this treaty or the Berne Convention and that restricts acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.²²⁷

Section 103 of DMCA added a new Section 1201 which implements the obligation to provide adequate and effective protection against circumvention of technological measures used by copyright owners to protect their works. The section divides technological measures into two categories: measures that prevent unauthorized access to a copyrighted work and measures that prevent unauthorized copying of a copyrighted work. Making or selling devices or services that are sued to circumvent either category of technological measure is prohibited in certain circumstances. As to the circumvention itself, the provision prohibits circumventing the first category of technological measures but not the second.²²⁸

This distinction was employed to assure that the public will have the continued ability to make fair use of copyrighted works. Since copying of a work may be a fair use under appropriate circumstances, Section 1201 does not prohibit the act of circumventing a technological measure that prevents copying. By contrast, since the fair use doctrine is not a defence to the act of gaining unauthorized access to a work, the act of circumventing a technological measure in order to gain access is prohibited.²²⁹ Section 1201 outlaws the following:

²²⁷ WIPO Copyright Treaty, 1996, Article II. The WPPT also contains similar provision in Article 18 of the treaty.

²²⁸ US Copyright Office 'The Digital Millennium Copyright Act of 1998' <<http://www.copyright.gov/legislation/dmca.pdf>> visited 10 March, 2017.

²²⁹ Ibid.

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- i. devices and services primarily designed to circumvent.
- ii. devices and services that have only limited commercially significant purpose or use other than to circumvent.
- iii. devices and services that are marketed for use in circumventing.

Integrity of Copyright Management Information

Article 12 of the WCT and Article 19 of the WPPT makes identical provisions as follows:
Contracting parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know that it will induce, enable, facilitate or conceal an infringement of any right covered by this treaty or the Berne Convention:

- i. to remove or alter any electronic rights management information without authority;
- ii. to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

The DMCA in Section 1202 makes provisions implementing this treaty obligation. The first paragraph deals with copyright management information and the second with removal or alteration of Copyright Management Information (CMI).

DMCA prohibits the knowing provision or distribution of false CMI, if done with the intent to induce, enable, facilitate or conceal infringement.²³⁰ The Act also bars the intentional removal or alteration of CMI without authority, as well as the dissemination of CMI or copies of works, knowing that the CMI has been removed or altered without authority.²³¹ Liability under (D) requires that the act be done with knowledge or, with respect to civil remedies, with reasonable grounds to know that it will induce, enable, facilitate or conceal an infringement.²³²

Section 1202 is subject to exceptions for law enforcement, intelligence and other government activities.²³³ It also contains limitations on the liability of broadcast stations and to induce, enable, facilitate or conceal an infringement.²³⁴

²³⁰ Ibid, Section 1202 (a).

²³¹ Ibid, Section 1202 (b).

²³² CMI is defined as identifying information about the work, the author, the copyright owner, and in certain cases, the performer, writer, or director of the work, as well as the terms and conditions for use of the work, and such other information as the Registrar of copyright may prescribe by registration. Information concerning users of works is excluded. See Ibid; Section 1202 (c).

²³³ Ibid, Section 1202 (d).

²³⁴ Ibid, Section 1202 (e).

Remedies

Contravention of Sections 1201 and 1202 gives the courts power upon the institution of civil action by an aggrieved person to grant equitable and monetary remedies similar to those available under the US Copyright Act including statutory damages.²³⁵

Criminal action may also be instituted against offenders under Sections 1201 and 1202 who willfully and for purposes of commercial advantage or private financial gain violates the section. Penalties ranges up to a \$500,000 fine or up to 5 years imprisonment for a first offense and up to \$1,000,000 fine or up to 10 years imprisonment for subsequent offenses.²³⁶ Non-profit libraries, archives and educational institutions are exempted from liability.²³⁷

Online Copyright Infringement Liability Limitation

The DMCA adds a new Section 512 to the Copyright Act to create four new limitations on liability for copyright infringement by online services providers. The limitations re based on the following four categories of conduct by a service provider.

- i. Transitory communications;
- ii. System caching;
- iii. Storage of information on systems or networks at direction of users; and
- iv. Information location tools.

The limitation bars monetary damages and restricts the availability of injunctive relief against the providers of the service mentioned above.²³⁸ There are conditions set for qualification or the limitations²³⁹ but failure of a service provider to qualify for any of the limitations in Section 512 does not necessarily make it liable for copyright infringement. The service provider can still avail itself of Defenses in the other sections of the Copyright Act. Service providers are not required to monitor its service or access material in violation of any law.²⁴⁰

Limitation for Transitory Communications

Section 512(a) limits the liability of service providers in circumstances where the provider merely acts as a data conduit transmitting digital information from one point on a network to another at someone else's request. This limitation covers acts of transmission, routing, or providing connections for the information, as well as the intermediate and transient copies that are made automatically in the operation of a network.²⁴¹

²³⁵ Ibid, Section 1203.

²³⁶ Ibid, Section 1204.

²³⁷ Ibid, Section 1203 (B) (5)(3), 1204(6).

²³⁸ Ibid, Section 512(j).

²³⁹ Ibid, Section 512(l).

²⁴⁰ Ibid, Section 512(m).

²⁴¹ U Copyright Office; op.cit, p. 10.

Limitation for System Caching

The US Copyright Act limits the liability of service providers for the practice of retaining copies, for a limited time, of material that has been made available on line by a person other than the provider, and then transmitted to a subscriber at his or her direction. The service provider retains the material so that subsequent requests for the same material can be fulfilled by transmitting the retained copy, rather than retrieving the material from the original source of the network.²⁴² The limitation applies to acts of intermediate and temporary storage, when carried out through an automatic technical process for the purpose of making the material available to subscribers who subsequently request.

Limitation for Information Residing on Systems or Networks at the Direction of Users

The Act also limits liability of service providers for infringing material on websites (or other information repositories) hosted on their systems. It applies to storage at the direction of users.²⁴³

Limitation for Information Location Tools

The US Copyright Act provides limitation of liability for service like upperlinks, online directories, search engines etc. It limits liability for the acts of referring or linking users to a site that contains infringing material by using such information location tools.²⁴⁴

These limitation of liability is to exempt providers of online services from liability for infringement resulting from the services they provide for people when they have no control over the content of materials they pass on to users. The limitation of the liability avails them if they meet the conditions set out in the law. This is because while hosting, routing and linking to “infringing material harbouring” sites or services, internet service providers themselves become vulnerable to changes of copyright infringement.²⁴⁵

CONCLUSION

Conclusively, it has been discerned from the foregoing analysis that like any other proprietary right, enforcement of right is of utmost importance in copyright matters. It is however, common knowledge that Nigeria has a weak copyright enforcement regime and piracy remains a mammoth challenge. While there is a need to amend the Act to incorporate more effective remedies, the law in Nigeria contains most fundamental remedies available in other advanced jurisdictions.

The current law that regulates copyrighted works in Nigeria is not adequate to protect rights of owners especially in this era of technologies. The Act has no provision relating to circumvention of technological protection measures. The Copyright Act is also deficient in other measures that

²⁴² US Copyright Act, supra, Section 512(b).

²⁴³ Ibid, Section 512(c).

²⁴⁴ Ibid, Section 512(d).

²⁴⁵ A. Kumar, ‘Internet Intermediary (ISP) Liability for Contributory Copyright Infringement in USA and India: Lack of Uniformity as a Trade Barrier’ (2014) 19 Journal of Intellectual Property Law, p. 272.

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may be taken by enforcement agencies in case of online infringement of copyrighted works. The Nigeria Copyright Commission has not embarked on international collaboration and partnership with other international copyright offices and non-governmental organizations on intellectual property to share ideas, information and strategies on the fight of copyright infringement. Impediments to effective role of the judiciary to enforce copyright includes, high cost of litigation, inadequate knowledge of judicial officers in copyright matters, the challenge of new technology especially the internet and its impact on copyright and lack of local legal jurisprudence on the subject in Nigeria, delay in prosecution of cases in our courts has all contributed in the inability of the judiciary to effectively tackle the menace of copyright infringement in Nigeria. Penalty for copyright offences particularly the fines are not adequate to deter infringers in the face of the endemic nature of copyright infringement in Nigeria.

Recommendations

From the research work, it is imperative to make the following recommendations to ensure efficient copyright enforcement regime in Nigeria.

- i. The need to maximize the current enforcement provisions as well as amend the Copyright Act in order to have a more effective enforcement regime.
- ii. Matters arising from interest and other exploding technologies be given express provisions in the Nigeria copyright statute.
- iii. A better appreciation of copyright would be achieved if owners are statutorily required to register for copyright protection. This would make him or her more conversant with the concept, and streamline the apparatus of enforcement for better result.
- iv. Partnership between the Nigeria Copyright Commission and other agencies should be strengthened. This would checkmate incidence of cross-border copyright violation.
- v. Copyright owners also have a role to play for optimum administration of copyright in the country. Authors, creators and various copyright owners should decisively litigate any serious case of infringement and ask for novel remedies that will encourage a more effective copyright enforcement regime.

It is the view of this paper that if the recommendations given above are implemented, copyright infringement could be curbed to a reasonable level. This will encourage creativity and lead to economic development in Nigeria.