

CHAPTER ONE

1.0 INTRODUCTION

1.1 Background to the Study

Copyright is the monopoly conferred by law or an institution to do or restrain others from doing certain acts with respect to the author's original literary, musical or artistic work. This is because nothing can be called a man's property than the fruit of his brain.¹ Copyright therefore creates a set of exclusive right in the holder who decides whether his or her work may be copied or transferred to an audience within permissible ranges of time. Thus, there is a basic correlation between work and wages. Hence, a person who has laboured or worked to produce copyrightable material ought to have a sole enjoyment of the benefits accruing from his work. Lord Atkinson concurred with this line of argument when he stated in *Macmillan & Co. v Cooper*² that the moral basis on which the principle of the protective provisions of Copyright rests is the eight commandments 'Thou shall not steal'. Thus, the primary purpose of Copyright is to promote public welfare by the advancement of knowledge with the specific intent of encouraging the production and distribution of new works for the public. It was held in *Gero v Seven-Up Company*³ that the goal of Copyright protection is to encourage dissemination of ideas by protecting the embodiment of expression of an idea in a creative work and reserving the right in it to the creator of the work. It was also held in *Oladipo Yemitan v Daily Times & Gbenga Odusanya*⁴ that the function of Copyright law is to protect from annexation by other people, the fruit of another's work, labour, skill or taste.

The problem faced by Copyright owners relates solely to the covetousness of deviants in the human society who enjoy reaping the benefits of intellectual exploits of others at the expense

¹ Copinger & Skone James, *Law of Copyright*, (London: Sweet & Maxwell , 1958)p.2.

² (1923) 40 T.L.R. p.186 at 187; R Dias, *Jurisprudence*, (5th edn, London: Butterworths, 1985) p.296; D Gardner, *Copyright*, (London, Butterworths, 1896) p.91.

³ 215 USPQ, p.512.

⁴ (1980) F.H.C.R. p.180; S John, *Jurisprudence*, (12th edn, London, Sweet & Maxwell, 1966) p.901.

of Copyright owners. The Universal Declaration of Human Rights provides:⁵

1. Everybody has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
2. Everyone has the right to the protection of the moral and material interest resulting from any scientific, literary or artistic production of which he is the author.⁶

This provision clearly shows that an author's work is the personal expression of his thoughts and his personality which he is entitled to claim respect for; to decide whether, when and how his work may be reproduced and performed in the public; and also to object to any distortion or mutilation of the work when it is used.⁷ In the same vein, it has been stated that:

The works of the authors of a country are the purveyors of the country's customs and cultural heritage. Apart from impacting positively on the country's image, both inside the country and abroad, it is also a source of inspiration to stimulate other subsequent creations.⁸

It must be pointed out that even though Copyright Law seeks to protect both the economic and moral interests of the creators/authors, sometimes, Copyright protection differs from country to country. For while some countries might give Copyright owners greater rights, it may not be so in other country.⁹ In Nigeria for instance, Copyright is automatic upon the creation of a work and no formal registration is required by law. This is opposite of what is obtained in the United State of America where there is need for registration. However, there is a significant improvement in the protection of Copyright in civilized countries of the world such as United Kingdom and the United States of America; although, this is not the trend in the third world countries like Nigeria and India where piracy thrives as a result of governments' insensitivity and indifference towards curbing Copyright infringements; lack of

⁵ Article 27 Universal Declaration of Human Rights (U.D.H.R.) 1948; J Bouvier, *Bouvier Law Dictionary*, (1st edn. London: Sweet & Maxwell, 1956) p. 89.

⁶ Article 27 Universal Declaration of Human Rights (U.D.H.R.) 1948; J Bouvier, *Bouvier Law Dictionary*, (1st edn. London: Sweet & Maxwell, 1956) p. 89.

⁷ A Adebambo, *Nigerian Copyright System, Principles and Perspectives: Selected Papers* (Abuja: Odade Publishers, 2012) p.7.

⁸ *Ibid.* p.8

⁹ D Vaver, 'Copyright Law' *Irwin Law, Toronto*, 2006.p.171.

awareness of the operations of Copyright laws; lack of effective enforcement procedures; lack of manpower needed to combat infringement; lack of economic empowerment to fight infringement on the part of right owners, as well as the proliferation of technological devices that aid Copyright infringement at supersonic speed.

This research work shall examine the concept of Copyright, Copyright ownership and rights conferred by Copyright, exceptions to Copyright control and the enforcement mechanisms put in place in the jurisdictions under consideration to checkmate Copyright infringement *vis a viz* access to copyrightable works for the advancement of knowledge and information, with a view to balance the conflict between the right owners' interests and the interests of the general public.

1.2 Statement of Problem

The whole essence of Copyright is the protection of the rights of authors from annexation by slavish copiers who derive joy in reaping the fruits of the works of another. The infringement of Copyright is thriving internationally simply because Copyright is enforced territorially and there are no mandatory/ compulsory legally binding Copyright instruments put in place by the United Nations to combat Copyright violations uniformly in all the States of the world. Some instruments so far articulated by the United Nations cannot be compulsorily enforced territorially as is the case with criminal law. This is worsened by the technical innovations of the 20th and 21st centuries which make it possible for infringers to download, duplicate, reproduce and pirate works of authors in a twinkle of an eye and make huge profits at cheaper rates. This works shall thoroughly examine the rights and interests inherent in Copyright works; the adequacy of the Copyright instruments of the countries under consideration in relation to enforcement *vis a viz* access to Copyrightable works for the advancement of knowledge and information; and also determine whether these

legal instruments actually protect copyrighted works in the face of the emergence of these modern technological devices used by violators to carry out Copyright infringement. The ways to achieve a holistic enforcement of Copyright through the balancing of these conflicting interests or right owners and those of the general public without inhibiting the right of access to copyrightable works shall be suggested.

1.3 Purpose of Research

The purpose of this research work is to analyze the concept of Copyright, the conflicting interests of authors and the general public, especially as it relates to access to copyrightable works for the advancement of knowledge to information and knowledge, as well as Copyright enforcement mechanism in the jurisdictions under consideration. It shall determine whether or not the enforcement mechanisms put in place to curb infringement of Copyright are best suited for the Creative Industries in the jurisdictions under consideration, especially in the face of the emergent technological advancement in the field of Copyright. It shall also address the following questions:

- (i) What are the interests of authors in copyrightable works *vis a viz* public interest's right of access to works for the advancement of knowledge and information?
- (ii) What are the areas of conflict between these interests of authors and those of the general public?
- (iii) How can these conflicting interests be balanced without inhibiting the right of access to work for the advancement of knowledge and information?

1.4 Scope of the Study

This research work covers the enforcement of Copyright in Nigeria, India, United Kingdom and United States of America. Thus, the Copyright Acts of Nigeria,¹⁰ England,¹¹ India¹² and

¹⁰ Copyright Act (Cap. C28) Laws of the Federation of Nigeria, 2004, hereinafter referred to as 'C.R.A.N.'

¹¹ Copyrights, .Designs and Patent Act of England, 1988, hereinafter referred to as 'C.D.P.A.'

¹² Copyright Act of India, 1957, hereinafter referred to as 'C.R.A.I.'

the United States of America¹³ and some Copyright related instruments operating in these jurisdictions; as well as other international Copyright instruments shall be critically examined.

1.5 Significance of the Study

The significance of this research work lies in the possibility of exploring, identifying and proffering solutions to the causes of infringement of Copyright against the backdrop of recurring problems that have ensued from the invention of modern technological devices used to circumvent anti-piracy measures. This work identifies the various rights and interests enjoyed by the Copyright owners, as well as the public interest's right of access to work for purposes of advancement of knowledge and information to know whether these rights/interests conflict. This work shall also examine the various steps so far taken to protect the rights of creators *vis a viz* the technological devices used to circumvent Copyright protective measures and make some recommendations on the ways to balance these conflicting interests in order to achieve a holistic enforcement of Copyright in Nigeria, India, United States of America and the United Kingdom.

1.6 Research Methodology

In conducting this research work, empirical and doctrinal research methods, as well as analytical and comparative approach shall be adopted. Hence, uses of primary source namely, Constitutions, Laws, Act, Gazettes, Law reports, etc; secondary sources such as law textbooks; and tertiary sources namely newspapers, journal and textbooks from other fields of studies shall be made.

1.7 Organizational Layout

This thesis has been divided into six chapters. Chapter one contains the general introduction. It was stated that Copyright is conferred on authors upon the creation of works so that authors

¹³ Copyright Act of the United States of America, 1976, hereinafter referred to as 'U.S.C.'

will reap the economic benefits accruing from their creation. This will encourage them to create more works and thereby add to the pool of knowledge. It was stated that technical innovations of the 20th and 21st centuries brought about digitization which threw the analogue enforcement of Copyright off balance. This development necessitated the use of some technical measures in Copyright enforcement which destroyed the original balance between the rights enjoyed by Copyright owners and the interest of the public known *as vis a viz* access to works. Empirical and doctrinal research methods were employed to examine the various Copyright instruments of the countries considered to determine the areas of conflicts between these interests. The relevant terms used in this work were also defined. Similarly, the relevant literatures existing in the area of Copyright were examined. It was stated that these literatures failed to consider the various modes of infringement in the 21st century *vis a viz* Copyright laws. They neither suggested any form of penalty to deter infringers, nor the ways towards a holistic enforcement of Copyrights.

Chapter two examined the nature of Copyright and historical development of Copyright starting from the primitive Nigeria till date was also considered. It was stated that Copyright has been existing in Nigeria from time immemorial, as forms of payment or service were offered in return for the grant of Copyright. It was stated that current Copyright laws as practiced in the jurisdictions considered were inherited from their colonial masters, the Great Britain. The subject matters of Copyright were also discussed in this chapter. It was stated that for works of literary, musical, artistic, cinematograph films, sound recordings and broadcasts to be protected, sufficient efforts must have been expended in making them to give them original character. Such works must also be fixed in any tangible medium of expression now known or yet to be known from where they can be perceived. It was stated that other requirements for protection such as deposit and registration are not mandatory in some of the jurisdictions considered.

Chapter three examined the scope of Copyright protection. It was stated that Copyright can be owned as any other tangible property. As such, the owner of Copyright can assign, license or bequeath Copyright. It was also stated that the rights enjoyed by Copyright owners include the exploitative rights of reproduction, publication, performance, communication, broadcasting, re-broadcasting, distribution, recording, taking of still photographs, making adaptation of the work, the right to claim authorship of their works, right to privacy in relation to certain photographs and films, right to share in the proceed of the sale of their works, right to bequeath, assign or license Copyright, as well as the right to relinquish Copyright. Copyright infringement was also discussed in this chapter. It was stated that Copyright infringement can be divided into (a) primary, which is the doing of any of the exploitative acts reserved to the Copyright owner without the permission of the Copyright owner; (b)secondary infringement, which is the importation of infringing copies, public exhibition, distribution or offering for sale, making or being in possession of contrivances; and (c) criminal infringement which is the making for purposes of business or gain, an infringing copy of the work, or importing of infringing copies into Nigeria, or the making of plates, master tapes, machines, equipment or contrivances for purposes of making an infringing copy of such work. It was also stated that the provisions of the Copyright Acts relating to infringement adequately address the issue on hand save for the requirement of the proof of reasonable knowledge, belief, and the defence of innocent infringement in infringement cases as contained in the Acts; as well as the limitation of time within which to bring actions for infringement specifically provided for by the U.S. Act. Finally, the use of the internet in relation to access to information was discussed. It was stated that the advent of the internet resulted into worldwide dissemination of digital media which are most times accessed without authority and knowledge of the right owners. It was stated that the technical enforcement mechanisms employed in relation to digital media in Nigeria inhibit access to information in that the Nigerian Copyright Act has no room for fair use of digital media.

Chapter four examined Copyright protection *vis a viz* access to information. It was stated that without prejudice to the rights granted Copyright owners in relation to their works, the law creates some exceptions to Copyright control for purposes of advancement of knowledge and information through access to work. The exceptions examined are; fair dealings, use of works for educational purposes, use of judicial proceedings, compulsory licenses, etc. The limitation of Copyright terms was also discussed. It was stated that these exceptions contain some conditions which are not Copyright friendly, such as the requirement of reasonable knowledge in Copyright infringement cases, as well as the defence of innocent infringement. It was also stated that the period of time given to Copyright owners to enjoy the economic benefits accruing from their works is too long to inhibit the public interest of access to work. On the other hand, the Copyright enforcement mechanisms such as the Nigerian Copyright Commission, Copyright Inspectors, Copyright Licensing Panels, Custom and Exise, the Police and Collecting Societies considered were also discussed. Some technical enforcement mechanisms such as encryption and watermarks were also discussed. It was stated that the aforementioned legal enforcement mechanisms have not performed optimally as a result of some statutory hitches inherent in the Nigerian Copyright Act such as the appointment of members of the Nigerian Copyright Commission, as well as non implementation of the relevant provisions of the Acts relating to the establishment and the procedure of these mechanisms. Again, corruption in the system is militating against the performance of these mechanisms. The impact of Copyright enforcement on access to information was also discussed. It was stated that the use of technical measures to protect digital works without room for fair use of such works is militating against the public interest of access to works for purposes of dissemination of information and knowledge.

Chapter five contains the comparative analysis of the enforcement of Copyright and access to information in England, India and the United States. It was stated that there is a great imbalance between the rights granted to authors and the public interest's right of access to work for advancement of knowledge and information. This is because the Copyright laws operating in the jurisdictions considered allow the defence of innocent infringement in Copyright cases. The enforcement mechanisms operating in England, India and the United States were thoroughly examined. It was stated that the enforcement mechanisms in Nigerian are more positioned to achieve a holistic enforcement of Copyright if not for corruption and other vices inherent in the Nigerian system. Again, Copyright enforcement and the technical protective measures used in these jurisdictions were considered. It was stated that unlike the U.S. and Indian Copyright Acts, the English and Nigerian Acts allow the use of technical protective measures which do not admit of fair use of protected works. It was stated that this omission amounts to an inhibition of the public interest of access to work for the development of knowledge and information especially in this digital era. It was also stated that finding the right balance between the authors' rights and the rights of the general public to access to work will promote creativity.

Chapter six contains conclusions and recommendations of this study. It was stated that the requirement of reasonable knowledge and belief, as well as the defence of innocent infringement contained in the Copyright Acts considered foster piracy in these jurisdictions. It was also stated that the use of technical measures to protect digital media as provided by the Acts considered without any room for fair use of such protected works militate against access to information at this time when education and knowledge are digital and internet based. Some recommendations were made towards the achievement of holistic enforcement of Copyrights through the balancing the conflicting interests of authors and those of the general public. These recommendations include the establishment of Copyright Courts

nationally, regionally and internationally; the amendment of the Copyright Acts considered to delete the requirement of the proof of reasonable knowledge, belief, and the defence of innocent infringement, as well as the inclusion in these Acts of the fair use provisions in relation to digital media. The creation of Copyright awareness through sensitization, seminars and introduction of same in the curricula of the secondary and tertiary institutions in Nigeria was also suggested.

1.8 Definition of Terms

1.8.1 Adaptation

Adaptation is ‘the modification of a pre-existing work from one genre of work to another and consists in altering a work within the same genre to make it suitable for different conditions of exploitation, and may involve altering the composition of the work’.¹⁴

1.8.2 Author

An author is ‘the party who actually creates the work, that is, the person who translates the idea into fixed, tangible expression entitled to Copyright protection’.¹⁵

1.8.3 Broadcast

Broadcast means ‘sound or television broadcast by wireless telegraph or wire or both or by satellite or cable programmes and includes re-broadcast’.¹⁶

1.8.4 Broadcasting Authority

Broadcasting Authority is defined to mean ‘any authority established under any law (in Nigeria or elsewhere) providing broadcasting services for public reception’.¹⁷

¹⁴ C.R.A.N. Section 51 (1).

¹⁶ *Community for Creative Non-Violence v Reid* (490 U.S. 5 p.46 at p.561; 178, USPQR p.129 at p.135 (1973); S Melamut, ‘Free Creativity: Understanding the Creative Commons Licenses’, *American Association of Law Libraries* 14, No.6. (April,2010), 22.

¹⁷ C.R.A.N. Section 51 (1).

1.8.5 Cable Programme

Cable programme is defined to mean 'visual images, sounds or other information sent by means of a telecommunication system otherwise than by wireless telegraph for reception in two or more places, whereas for simultaneous reception or at different times, in response to request by different users; or for presentation to members of the public'.¹⁸

1.8.6 Collecting Society

Collecting Society means 'an association of Copyright owners which has as its principal objectives the negotiating and granting of licenses, collecting and distributing of royalties in respect of Copyright work'.¹⁹

1.8.7 Computer Programme

Computer programme means 'a set of statement or instruction to be used directly or indirectly in a computer in order to bring about a certain result'.²⁰

1.8.8 Choreographic work

Choreographic work means 'a composition of movements for dancing or any other patterned succession of gestures mostly created to accompanying music'.²¹

1.8.9 Copy

Copy Means 'a production in written form, in the form of a recording or cinematograph film, or in any other material form, so however that an object shall not be taken to be a copy of architectural work unless the object is a building or model'.²²

¹⁸ *Ibid.*

¹⁹ L Lessig, 'The Vision for the Creative Commons? Where are We and Where are We Headed? Free Culture', in Fitzgerald, B, ed. *Open Content Licensing: Cultivating the Creative Commons*, (Sydney: Sydney University Press, 2007) p. 2.

²⁰ C.R.A.N. Section 39 (8).

²¹ *Ibid.* Section 51 (1).

²² *Ibid.*

1.8.10 Copyright

Copyright is defined as ‘the right to copy; specifically, a property right in an original work of authorship, including literary, musical, dramatic, choreographic, pictorial, graphic, sculptural, and architectural works; motion pictures and other audiovisual works; and sound recordings, fixed in any tangible medium of expression, giving the holder the exclusive right to reproduce, adapt, distribute, perform, and display the work’.²³

1.8.11 Enforcement

Enforcement is ‘the act of process or compelling compliance with a law, mandate, command, decree or agreement’.²⁴

1.8.12 License

License means ‘a lawfully granted license permitting the doing of an act controlled by this Act’.²⁵

1.8.13 Music

Music can be defined as ‘any conventional and repeatable inscription or record of vocal or instrumental expertise, which contains the recognizable elements of tone, pitch and rhythm’.²⁶

1.8.14 Performance

Performance is defined to include ‘any mode of visual or acoustic representation, including any such representation by the operation of wireless telegraph apparatus, or by the exhibition of a cinematograph film, or by the use of e record, or by any other means’.²⁷

²³ B Garner, *Black’s Law Dictionary* (9th edn, United States of America: Thomas Reuters, 2009). p.366;
C Bailey, ‘Strong Copyright + DRM + Weak Net Neutrality = Digital Distopia?’ *Information Technology & Libraries* 25, No. 3, (Summer 2006) p.11.

²⁴ C Bailey, ‘Strong Copyright + DRM + Weak Net Neutrality = Digital Distopia?’ *Information Technology & Libraries* 25, No. 3, (Summer 2006) p.11.

²⁵ B Garner, *Black’s Law Dictionary Op. Cit.* p.608; E Ojukwu, *et. al.* ‘Intellectual Property Rights Enforcement in Nigeria: A Property For Music Industry’ *US-China Review B.* June 2015, Vol. 5. No. 6. P. 374.

²⁶ C.R.A.N. Section 51 (1).

1.8.15 Re-broadcast

Re-broadcast means ‘a simultaneous or subsequent broadcast by one broadcasting authority of the broadcast of another broadcasting authority’.²⁸

1.8.16 Reproduction

Reproduction means ‘the making of one or more copies of a literary, musical or artistic work, cinematograph film or sound recording’.²⁹

1.8.17 Technology

Technology is defined as ‘a scientific knowledge used in particular ways in industry, for example, in designing new machines’.³⁰

1.8.18 Work of Joint-Authorship

Work of joint authorship means ‘work that is produced through the collaboration of two or more authors which the contribution of each is inseparable from the contribution of the other author or authors’.³¹

1.9 Review of Relevant Literature

A lot of authors and legal researchers have written on the protection and enforcement of Copyright in Nigeria, United States of America, India and United Kingdom. Faeji examined Copyright in the music industry.³² He considered the exploitative rights conferred on authors

²⁷ Philip & Karet, *Whale on Copyright* (4th edn, London: Sweet & Maxwell, 1993) p.92.

²⁸ Copyright Act, 1956 of England, section 48(1).

²⁹ C.R.A.N. Section 51 (1).

³⁰ Hornby, A, *Oxford Advanced Learners Dictionary of Current English* (8th ed. Oxford: Oxford University Press 2010) p.1534; A Albanese, ‘HathiTrust Suspends its Orphan Work Release’, *Publishers Weekly*, Sept, 16, 2011, <http://www.publishersweekly.com/pw/by/topic/digital/copyright/article/48722-hathitrust-suspends-its-orphan-works-release-htm>. accessed 30/08/18.

³¹ C.R.A.N. Section 51 (1); P Samuelson, ‘Google Book is Not a Library’, Huffington Post, October, 13, 2009, <http://www.huffingtonpost.com/Pamela-samuelson/google-books-is-not-a-lib-b-317518.html>. accessed 30/08/18.

³² A Faeji, ‘Copyright and the Music Industry’ in Asien & Nwauche (ed), *A Decade of Copyright Law*, (Nigerian Copyright Commission, Abuja, 2002).

of works by the Nigerian Copyright Act and concluded that these laudable provisions are put in place for the protection of the rights of owners of musical works. He noted that the Nigeria Copyright Commission met the required regulations; and complied with relevant provisions of the Nigerian Copyright Act regarding the registration of Collecting Societies in the music industry. These efforts of the Commission in conjunction with the Collecting Societies culminated in the use of the hologram stamp on musical works in the Nigerian Market. He however failed to address the issue of infringement of Copyright in the music industry as shall be discussed in this work.

James examined the concept, evolution and fair use exception to Copyright.³³ He concluded that while the Indian Copyright Law is equipped to face a number of new challenges posed by digital technologies, there is need to include new provisions through amendment in order to make the Indian Copyright Act more effective to combat 21st century infringement. He however failed to examine the digital technologies used by infringers to illegally access protected works. He also failed to make any recommendations towards establishing effective Copyright enforcement mechanisms under the Indian Copyright Law to combat infringement as shall be done in this research work.

Odonowo examined the Nigerian Copyright Laws from a judicial perspective.³⁴ He stated that Nigeria having acceded to the Berne Convention under which member states must accord the same protection to the Copyright of the nationals of other member states as it accords to those of its own nationals, it is inevitable that the Copyright laws of Nigeria would be affected by any modifications made from time to time by member countries. He also examined the modifications made from time to time by member countries. He also examined the penalties imposed on importers of pirated works and concluded that they are glaringly inadequate in

³³ T James, 'Indian Copyright Law and Digital Technologies', *Journal of Intellectual Property Rights* Vol. 7, September, 2002.

³⁴ I Odonowo, Nigerian Copyright Law: A Judicial Overview, in Asien & Nwauche (ed), *A Decade of Copyright Law, Op. Cit.*

view of the current value of the Nigerian currency. He further stated that there is need to reconsider the present range of sanctions against pirates. He however failed to specify the range of sanctions that will help deter infringers from engaging in Copyright violation as shall be discussed in this work.

Ekpere discussed the Copyright law and national development.³⁵ He considered what amounts to copyrightable works; who owns these works, as well as the rights of Copyright owners. He emphasized the need to allow authors reap the economic benefits accruing from their works because a country's development depends to a great extent, on the creativity of its nationals. However, he failed woefully to discuss violations of Copyright and possible modes of enforcement of Copyright in this digital millennium as shall be done in this work.

Bulter examined the concept of fair use *vis a viz* current Copyright Laws such as Sonny Bono Copyright Extension Act, Digital Millennium Copyright Act, Technology, Education, and Copyright Harmonization Act, and the Uniform Computer Information Act, all of the United States of America.³⁶ She concluded that these laws do not adequately protect the rights of Copyright owners as they one way or the other, did not properly address the issues of Copyright regarding the interests of the general public and those of Copyright owners. She suggested among other things for the creation of Copyright awareness and Copyright education in the society. She failed to examine the various interests of Copyright owners as well as those of the general public before arriving at her aforementioned conclusion.

Babafemi examined all facets of Copyright including the infringement and enforcement of rights of authors.³⁷ He discovered that the Nigerian Copyright Commission has recorded a

³⁵ J Ekpere, 'Nigerian Copyright Law and National Development: Philosophical Economic Paradigm For the the Next Millenium' in Asien & Nwauche (ed), *A Decade of Copyright Law in Nigeria, Op. Cit.*

³⁶ P Butler Rebecca, 'Copyright Law and Organizing the Internet', *Library Trends* Vol. 52, No.2 Fall 2003.

³⁷ F Babafemi *Intellectual Property Law and Practice of Copyright, Trade Marks, Patents and Industrial Designs in Nigeria* (1st Edition, Ibadan: Justinian Books Limited, 2006).

huge success in the fight against piracy but pointed out that despite the stringent criminal provisions and penalties in the Nigerian Legal System, piracy still thrives because the law does not confer the right to prosecute criminal cases on Copyright owners. He suggested that both the state and the individual Copyrights owners must make combined efforts towards the achievement of this noble goal of achieving a holistic enforcement of Copyright through the creation of awareness of Copyright in Educational Institutions and the introduction of Copyright in the curricula of institutions of higher learning as compulsory course. He however failed to examine Copyright infringement *vis a viz* the emerging digital technologies that aid piracy in the 20th and 21st centuries.

Sami *et al* discussed the use of camera based mobile phones in the infringement of Copyright.³⁸ According to him, digital media offer several distinct advantages over analog media, such as high quality, easy editing, high fidelity copying, etc. As a result of this, infringers resorted to the use of such mobile phone to infringe Copyright at supersonic spread. They suggested the use of steganography and digital marking which are the arts of sending messages within the image such that the existence of the messages are not known to the Capturer, the goal being to avoid perception of hidden message within the image during transmission. By the insertion of these techniques by the manufactures of the phones, the owners of the phones can easily be apprehended using Graphic Information System. These authors however failed to examine other forms of adaptations done with mobile phone through the help of the internet as shall be discussed in this work.

Wheatley x-rayed the purpose of Copyright Law in the United Kingdom and United States,

³⁸ B Samir *et al*. 'Proposed Secure Mechanism for Identification of Ownership of Undressed Photographs or Movies Captured Using Camera Based Mobile Phones', *Journal of Information Assurance and security*, No. 2 (2007).

as well as the nature and function of Digital Rights Management Systems.³⁹ According to him, even though creators must reap the benefits of their labour through economic gains flowing from their works, a balance should be struck between such interests of the owners of the work and that of the society. He further stated that the Digital Millennium Copyright Act of the United State contains detailed provisions regarding the circumvention of technological measures controlling access to protected work. He however admitted that while the Copyright Laws of the United States forbid the circumvention of protective technological measures, fair use is specifically preserved. He also discovered that the Copyright Laws of the United Kingdom do not contemplate fair dealing exception to anti-circumvention laws. He further stated that if we are to take Copyright law as an attempt to achieve the appropriate balance between the interests of the Copyright owners and the interests of the society, the questions remain as to whether conducts by individual Copyright owners that could upset this balance should be controlled by legislative intervention; or whether those who use Copyrighted works that are fettered in such a way that lawful uses are impeded should have a right to remove the barriers to lawful use without fear of legal action? He however failed to examine the provision of fair dealings under the two jurisdictions he considered to ascertain whether such provisions are available.

Thamodaran *et al* considered encryption and watermarking as the primary and contemporary technologies for protecting multimedia contents.⁴⁰ After they analyzed these technologies, they presented a hybrid image protection scheme to establish a robust content based authentication by using novel cryptosystem based on matrix transformation for the generation of encryption on key and Copyright protection by using watermarking system. These authors

³⁹ C Wheatley 'Overreaching Technological Means for Protection of Copyright; Identifying the Limits of Copyright in works in Digital Form in the United States and the United Kingdom' 7 *WASH. U. GLOBAL STUD. L. Rev.* 353 (2008).

⁴⁰ K Themodaran, *et.al.* 'A Novel Security Mechanism for Image Authenticity and Copyright Protection' *International Journal of Computer Applications* (0975-8887) Volume 4-No 3, July 2010.

however failed to examine the legal framework existing at least in India where they came from, to determine the workability and efficiency of these technical enforcement technologies.

Ozioko examined the provisions of the Nigerian Copyright Act relating to access to knowledge.⁴¹ He comprehensively considered the provisions of the laws relating to fair dealings, Copyright terms, compulsory licenses, etc. He concluded that the concept of compulsory licenses under the English Act is wider in scope than that of the Nigerian Act. This is also the same with the powers exercisable by the licensing bodies of these countries. He suggested that given the low level of the development of this area of the law in Nigeria, as well as the high potential of abuse, such wider access should not be advocated in order not to sacrifice the opportunity of right owners to reap just benefit from their creations on the altar of promoting public access to knowledge and information. He however failed to enumerate the species of infringement of Copyright that regularly occur in the process of exercising public interests' rights on copyrightable works.

Garvis examined the collective management of Copyright and related rights in the United Kingdom and other Commonwealth countries, with a view to providing the theoretical foundation of collective management of Copyright. He also discussed the paradox of Copyright and the fragmentation of rights.⁴² He was of the view that while Copyright law seeks to maximize the creation of new works and their dissemination by affording Copyright owners the right to exclude others from copying, performing, and communicating those works. He stated that there will be a total inhibition of creativity if the society is completely shut out from improving on the works of these creators by way of fair dealing. He suggested that the management of Copyright by the owners should not work hardship on other creators

⁴¹ M Ozioko, 'Copyright Provisions Impacting on Access to knowledge: A Comparative Analysis', *UNIZIK Law Journal*, Vol 7 No. 1 2010.

⁴² D Gervais, *Collective Management of Copyright and Related Rights*, (2nd edition, Netherlands: Kluwer Law International, 2010).

and innovators due to unnecessary stagnating conditions at the instance of creators. He however failed to address the issues of Copyright violations emanating from the use of anti circumvention devices regularly employed by infringers to illegally access copyrighted works and the financial losses suffered by rights owners as a result of this.

Oguamanam examined piracy in the Nigerian film industry.⁴³ He considered the Nigeria's Intellectual Property Regulatory landscape and conceded that the Nigeria Copyright Commission has good intentions on Copyright protection. He however stated that one of the obvious draw backs to its role as the *de facto focal* point for Nigerian's IP policy is its limited and an understandable lack of manpower to operate in other regimes of IP. He however failed to consider the other organs used by the Commission to enforce Copyright protection such as the Copyright Inspectors and the Copyright Licensing Panel.

Arul examined the introduction of the WIPO Digital Rights Management provisions by the Indian Copyright (Amendment) Act, 2012.⁴⁴ He analyzed the Indian Digital Rights Management Systems *vis a viz* the U.S. Digital Millennium Copyright Act and stated that there is need for a careful consideration of the new Digital Right Management provisions under the Amended Indian Copyright Act; as this introduction was made without engaging in due economic analysis as to its need, as well as the consequences and risks associated with it. However, he failed to examine the legality of the anti piracy devices used to protect works and the concept of fair use in relation thereto.

Ouma wrote on the role of Copyright in Economic growth.⁴⁵ He examined the various Copyright related industries in Africa and stated that the film industry in Africa is still at its

⁴³ C Oguamanam, 'Beyond Nollywood and Piracy: In search of IP Policy for Nigeria', *Nials Journal of Interceptual Property (NJIP)* Maiden Edition November, 2011.

⁴⁴ G Arul 'Does Indian Need Digital Right Management Provisions or Better Digital Business Management Strategies?' *Journal of Intellectual Property Rights* Vol. 17, September 2012.

⁴⁵ M Ouma, 'The Role of Copyright in Economic Development: A Review from Kenya'. *Nials Journal of Intellectual Property (NJIP)* VOL. 1 No. 2.

instant stages with the exception of Nigeria South African, Burkina Faso and Mali. He stated that these industries are major contributors in terms of their relative aggregate value-added to a country's gross domestic products. He concluded that the activities of these industries are hampered by high level of unauthorized commercial use of protected works; limited enforcement of Copyright and related rights; limited finance and credit facilities to develop the industry; piracy, etc. He however did not discuss the infringement of Copyright and how to remedy same.

Adebambo examined the evolution of Copyright law in Nigeria.⁴⁶ He stated that Copyright has been a right enjoyed by the creators in primitive Nigeria from time immemorial. He stated that the first attempt to introduce legislation on Copyright in Nigeria was the extension in 1912 of the English Copyright Act, 1911 to the Southern Protectorate of Nigeria. He further stated that the inadequacies inherent in that Act led to the promulgation of the first indigenous Copyright Act of Nigeria which was promulgated by the Gowon Administration in 1970. According to him, it was the inability of the 1970 Act to address issues of infringement of Copyright that led to the promulgation of the 1988 Copyright Act and later, the 2004 Copyright Act. He admitted that the promotion and administration of Copyright has continued to develop despite many socio-economic, political and technological invocations that militate against the rapid growth of Copyright. He also stated that it is as a result of the wide spread use of the internet and the increasing sophisticated technologies that make it very difficult for Regulatory Bodies established by the Copyright Acts to combat piracy. He however failed to examine the Copyrights Acts of the other jurisdictions subject of this work with a view to determine the extent of infringement and enforcement of Copyright in these jurisdictions.

⁴⁶ A Adebambo, *Nigerian Copyright System, Principles and Perspectives: Selected Papers Op. Cit.*

Asein considered the Nigerian Copyright system as has not been done by any Nigerian author on Copyright.⁴⁷ He thoroughly examined the concept, evolutions, interests, and infringement of Copyright in Nigeria. He also extensively discussed other enforcement mechanisms put in place for the smooth administration of Copyright in Nigeria, such as the Nigerian Copyright Commission, Copyright Inspectors and Copyright Collecting Societies. He concluded that in spite of the establishment of these enforcement mechanisms, infringement of Copyright thrives in Nigeria as a result of corruption, lack of competent personnel to man these bodies as well as the porosity inherent in the Nigerian Act which tend to encourage Copyright infringement. He made adequate recommendations on the steps to achieve a holistic enforcement of Copyright. He however limited his research to Nigeria and England. He also failed to consider the technological protective measures and technological devices used to circumvent these protective measures.

Agrawal *et.al.* considered the rapid escalation of multimedia and network in the current digital era.⁴⁸ They stated that this development paved way for people to acquire, utilize and share multimedia information thereby engaging in infringing activities. They introduced a novel algorithm for hiding significant amount of data while preserving the image artifacts. The algorithm uses image details and identifies the good locations for hiding using a discriminative filter. They completely failed to examine any other form of technology that are either used to perpetrate infringement of Copyright or used to enforce the protection of Copyright.

Bhat wrote on the technological protective measures under the Copyright Laws of India, the

⁴⁷ J Asein, *Nigerian Copyright Law & Practice* (2nd edn, Abuja: Books and Gravel Ltd. 2012).

⁴⁸ S Agrawal *et.al.* 'A Novel Data Hiding Framework Using Switching Threshold Mechanism' *International Journal of Engineering and Advanced Technology* (IJEAT) ISSN: 2249-8958, Volume – 2, Issue-5, June 2013.

United States of America and under the WIPO Internet Treaties, 1996.⁴⁹ He acknowledged that the emergence of the Digital Millennium Copyright Act of the United States has introduced *via* amendment of the U.S. Copyright Act. He further stated that the relevant provisions of the aforementioned WIPO Treaties and that the Digital Millennium Copyright Act based provisions set out higher standards for the protection of Copyright in works than those set forth in the WIPO Treaties, 1996.’ He also stated that India has introduced provisions for the protection of anti-piracy devices through the amendment of the Indian Act in 2012. According to him, the amendment is a welcome step that will surely contain, if not put an end to the menace of digital piracy. He however expressed the opinion that the amended Act is capable of facing Copyright challenges of digital technologies, including those of internet; and that it seems inevitable that the digital networked environment will eventually necessitate more radical changes to the Copyright system, not only to ensure adequate protection of right holders, but also to protect the legitimate interests of users of protected works. He however failed to examine the enforcement mechanisms in the jurisdictions considered in his work.

Ishola examined violations of Copyright through photocopying in Tertiary Institutions in Delta State.⁵⁰ He also examined the functions of the Nigeria Copyright Commission and stated that a lot needs to be done to reposition the Commission to enable it effectively combat Copyright infringement. He however failed to consider infringement in the other component states that make up Nigeria in order to take a position on what to do to eradicate Copyright infringement in Nigeria.

⁴⁹ I Bhat, ‘Technological Protection Measure Under the Copyright Law’ *International Journal of Emerging Trends and Technology in Computer Science (IJETTCS)* Volume 2, Issue 2, March-April, 2013.

⁵⁰ Ishola Bolanle Clifford, ‘A Violation of Copyright Law Through Photocopying in Tertiary Institutions in Delta State: Case Study of Delta State University Abraka’, *Journal of Education and Practice* ISSN2222-1735 (Paper) ISSN 2222-288X (Online) Vol. 5, No 30, 2014.

Adewole wrote on incidences of optical disc piracy in Nigeria *vis a viz* the Copyright (Optical Disc Plants) Regulations 2006.⁵¹ He examined the duties imposed by the Regulations on the Nigerian Copyright Commission, the registration and licensing, obligations of registered persons, use of source identification code; and the enforcement powers conferred on the Commission. He concluded that if the provisions of the Regulations are incrementally implemented, it can facilitate the checking of the menace of piracy of optical disc products in Nigeria. He however failed to discuss the consequences of non compliance with the Regulations or the penalties against violators.

Okeke and Uzor examined the protection accorded to Copyrighted works at both international and state levels.⁵² They discovered that Copyright law has improved as a result of the International Copyright Treaties but that the long term protection conferred on creators by these Treaties interferes with the downstream creative endeavours and legitimate consumer expectations. According to them, the regulation of Copyright to the extent that it creates a no-go area for others could make it difficult and sometimes impossible, for a wide range of creativity that any free society would legally allow to exist. They suggested that it is important to review the duration of Copyright, in line with the provisions of Article 7 of the Berne Convention for the Protection of Literary and Artistic Works, 1971. They however failed to consider the exceptions to Copyright control with a view to determining the extent this concept conflicts with the legitimate rights of Copyright owners.

Adekola and Eze examined the activities of the Nigerian Copyright Commission in Fighting Copyright Infringement.⁵³ They discovered that in the United States and other countries,

⁵¹ Adedeji Adewole, 'Combating Piracy Through Optical Disc Plant Regulation in Nigeria: Prospects and Challenges', *Nials Journal of Interceptual Property (NJIP)* Maiden Edition November, *Op. Cit.*

⁵² C Okeke, & K Uzor, 'An Appraisal of the Protection of Copyright under International Law', *Journal of Law and Conflict Resolution* *Op. Cit.*

⁵³ F Adekola and S Eze, 'Intellectual Property Rights in Nigeria; A Critical Examination of the Activities of the Nigerian Copyright Commission', *Journal of Law, Policy and Globalization*, Vol. 35. 2015.

intellectual property has gained increased protection with the advances in technology and international trade, stressing that some countries still tolerate the widespread sale of counterfeit versions of intellectual property products. They concluded that there is no doubt that Nigeria's intellectual property and Copyright protection efforts have in recent times received a quantum leap resulting mainly from the dynamic impetus put into the modality of Nigeria's creative rights administration by the leadership of the Nigerian Copyright Commission, which has among other things, initiated collaborative measures to control piracy of intellectual property works. Since then, there has been tremendous improvement in the administration, enforcement and protection of Copyright works. These authors failed to examine the various arms of the Commission and their functions towards Copyright enforcement, nor did they state the achievement of the Commission if any.

Having the imperfection inherent in the above discussed literatures, steps shall be taken in this research work to thoroughly examine the rights conferred on Copyright owners, exceptions to these rights, the Copyright enforcement mechanisms, and the enforcement techniques employed in the jurisdictions under consideration in order to determine whether there are provisions of the law that promote or tend to piracy or distort the balance between the rights granted to authors and the public interest right of access to work for advancement of knowledge and information. Suggestions shall be proffered on the ways to balance these rights/interests in order to promote creativity.

CHAPTER TWO

2.0 NATURE OF COPYRIGHT

2.1 Meaning of Copyright

Copyright has been described as property in which an action to restrain the infringement of a right or property will lie even if no damage can be shown.⁵⁴ It is a *specie* of intellectual property, with its own unique character, a property right that at the same time exhibits features of a personal right.⁵⁵ Justice Erle rightly argued that:⁵⁶

It is true that property in the other of words is a mental abstraction, but so also are many other kinds of property; for instance, the property in a stream of water, which is not in any of the atoms of the water, but in the flow of the stream. The right to the stream is nonetheless a right of property, either because it generally belongs to the riparian proprietor, or the remedy for the violation of the right is by action in the case, instead of the detinue or trover. Copyright is an intangible; they are enjoyed as other property rights and can be transferred by assignment, by testamentary disposition or by operation of law as moveable property.

Copyright is therefore an automatic right that gives the creators of literary, dramatic, musical, artistic works, etc., the right to control the ways in which their materials may be used.⁵⁷ This is because there is a belief that there is property in creative works.⁵⁸ Thus, there is a basic correlation between work and wages. Hence, a person who has laboured or worked to produce copyrightable material ought to have a sole enjoyment of the benefits accruing from his work. Lord Atkinson concurred with this line of argument when he stated in *Macmillan & Co. v Cooper*⁵⁹ that the moral basis on which the principle of the protective provisions of Copyright rests is the eighth commandment 'Thou shall not steal'. Thus, the modern concept

⁵⁴ *Weatherby & sons v International Horse Agency and Exchange Ltd.* [1910] 2 Ch. p.297, at p.305; Choate *et.al. Cases and Materials on Patent Law including Trade Secrets-Copyright-Trademarks*, (Minnesota, West Publishing Co. St. Paul, 1987) p.800.

⁵⁵ J Asein, *Nigerian Copyright Law & Practice* (2nd edn, Abuja: Books and Gravel Ltd. 2012) p.6.

⁵⁶ *Jefferey v Boosey*.(1855) 4 H.L.C. p.815.

⁵⁷ G Okeke & K Uzor, 'Journal of Law and Conflict Resolution' Journal of Law and Conflict Resolution ALCR., Vol. 6.April, 2014.

⁵⁸ *Ibid.*

⁵⁹ (1923) 40 T.L.R. p.186 at p.187.

of Copyright law postulates that the primary purpose of Copyright is to promote public welfare by the advancement of knowledge with the specific intent of encouraging the production and distribution of new works for the public. It provides incentives for creators by granting them the exclusive rights to produce and distribute their works, and in so doing, reap the fruits of their labour. It was held in *Gero v Seven-Up Company* that the goal of Copyright protection is to encourage dissemination of ideas by protecting the embodiment of expression of an idea in a creative work and reserving the right in it to the creator of the work.⁶⁰ It was also held in *Oladipo Yemitan v Daily Times & Gbenga Odusanya* that the function of Copyright law is to protect from annexation by other people, the fruit of another's work, labour, skill or taste.⁶¹

2.2 Historical Development of Copyright

By virtue of the historical link between Nigeria and her Colonial Master, the Great Britain, the entire modern Nigerian legal system inextricably has its origin and roots mainly in English Law. As such, the history of Copyright laws in Nigeria is traceable to the Copyright law of Great Britain. It must be stated categorically that prior to the arrival of Britain to Nigeria and indeed Africa as a whole, many African traditional societies recognized some forms of property rights in certain intellectual products as being to some extent, the exclusive preserve of the person, group of persons or tribe that invented them. Asein agreed with this fact when he stated thus:⁶²

there is ample evidence pointing to the existence, from early times of some form of property rights in different kinds of intellectual products or works of the mind, although the exact nature of the rights differs from one culture to the other. Societies where writing had developed to some appreciable level recognized in the physical material embodying the writings, even if such rights were not exactly the same as the modern concept of Copyright.

⁶⁰ 215 USPQ, p.512.

⁶¹ (1980) F.H.C.R. 180; O Eze, 'Patents and Transfer of Technology with Special Reference to East African Community', *East African Law Review*, 1972, p. 127.

⁶² J Asein, *Nigerian Copyright Law & Practice*, Op. Cit. p.19.

Intellectual properties protected by the then primitive Nigerian Societies included dancing steps, musical compositions, artistic carvings, designs or patterns, etc. It was then common practice for anyone who desired to acquire any bit of those intellectual products or skills to approach the original inventor and pay certain customary tributes, or perform some requisite rituals before such transfer or acquisition could be made.⁶³ Some *quasi* Copyright practices have been found in Hausa-Fulani literature where poems have been reduced into writing with acknowledgements of their original authors.⁶⁴ Yoruba *Ijala* ballads are usually prefaced by the *Ijuba* which is an acknowledgement by the performer of the original author of the poetic piece being performed or adapted.⁶⁵ However, the obvious shortcomings of the Copyright concept of the Nigeria ancient societies were that apart from being imprecise, they were not codified and no serious enforcement procedure existed to prevent a potential infringement of Copyright. There was also no form of redress in cases of established violations of Copyright.

It must be pointed out that in Britain, Copyright evolved as a by-product of political, religious and social conflicts. During the reformation movement in Britain, the press was viewed by the state as prejudicial to its interests and those of the church, hence the attempt to stem their influence through censorship.⁶⁶ The state stepped in at that time to regulate the printing industry not out of any desire to protect or advance the interest of authors, but in order to safeguard the perceived interests of the state. With the invention of movable types and the evolution of printing in England, it became easier and cheaper to make copies of works.⁶⁷ Thus, the authors right to the physical property in the manuscript no longer afforded him adequate protection as his work could be reproduced by strangers in a twinkle of an eye, at minimal cost. As a result of the interplay of various forces competing for control of the early press, the stationers, who were the forerunners of modern publishers emerged as risk

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

takers who invested in the printing and commercial exploitation of works of authors.⁶⁸ The stationers' company was founded in 1403 and was granted a Royal Charter of Incorporation on 4th May, 1557 as a guild with the monopoly over the business of book printing.⁶⁹ The company's notable stationers were printers, publishers and booksellers. The charter requires every published work to be entered on the register of the company and in the name of one of its members. Members brought manuscripts from authors and thereafter enjoyed perpetual monopoly over the printing of such works. This gave the stationers exclusive privileges in the book trade with the company authorized to destroy books that were printed or imported in contravention of the Charter. Having been registered in the names of stationers, the right to reproduce such works was transferred from the author to the stationer and his successors in title. All that the author was left with was his manuscript, which in view of the press restrictions, was hardly used unless in the hands of a stationer. With the abolition of the Star Chamber in 1640, Parliament took over the powers to regulate the business of printing including the Stationers Company.⁷⁰ This regulatory measure, along with strict control imposed on the operation of printing presses, was considered by many commentators as part of a grand design by the state to censor the business of printing rather than an attempt to confer Copyright or any other form of protection on authors. As a follow up to the agitation of authors, the Licensing Act was then promulgated⁷¹ which provided for prior licensing before any book should be printed. The consent of the owner of the book was also required before the book is printed; otherwise the copies printed without his consent could be forfeited to him. Penal sanctions against piracy were also introduced, thus, making every pirate liable to forfeiture of the infringing books and a fine.⁷² However, following the flagrant violations of Copyright upon the expiration of the Licensing Act in 1679, the Stationers complained to

⁶⁸ *Ibid.* p.21.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.* p.22.

⁷¹ *Ibid.*

⁷² *Ibid.*

the Government over the usurpation of their rights and the inadequacy of the remedies granted to them by the Courts upon the fulfillment of the condition of first proving the actual damage suffered in the face of the fact that most of the authors were men of straw. Parliament responded by passing the first Copyright Act of England in the same year.⁷³ The Act granted authors of books and their assignees, the sole rights to print such books for a period of fourteen years from the date of first publication, subject to an additional term of fourteen years during the lifetime of the author. Such authors were equally conferred with the exclusive control of the exploitative acts in relation to their work for a term of twenty one years for published works, and fourteen years for unprinted works.⁷⁴ There was a further requirement that the title of books be registered at the Stationers' hall and ninety copies of same be deposited with designated libraries.⁷⁵ Even though this Act was a radical departure from the old order by reason of vesting Copyright in authors, it still retained the traditional sympathy for entrepreneurs by extending the rights granted to booksellers and printers.⁷⁶ The term of Copyright in published works was extended in 1814 to twenty-eight years or for the author's natural life, whichever was longer.⁷⁷ Furthermore, the duration of Copyright was enlarged in 1842 to the life time of the author and seven years after his death, or forty-two years from the date of publication, whichever was longer.⁷⁸ Obviously, this extension was to redress the perceived anomaly in the 1814 Act which added the residue of the owner's life to the twenty-one years duration of protection for published works. Asien noted that:⁷⁹

as a result of other parallel developments that occurred in other fields of creativities outside the book industry in the United Kingdom necessitated the promulgation of other laws in relation thereto, for example, the Engraving Copyright Act was passed in 1734 conferring Copyright on engravings for a term of fourteen years; the Sculpture Copyright Act was passed granting protection to works of sculpture;

⁷³ Copyright Act of England, 1709 also known as the Statute of Anne.

⁷⁴ J Asein, *Nigerian Copyright Law & Practice (supra)*, p.19.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ Copyright Act of England, 1814, Section 4.

⁷⁸ Literary Copyright Act of England, 1842.

⁷⁹ J Asein, *Nigerian Copyright Law & Practice, Op. Cit.* p.25.

the Dramatic Copyright Act, 1833 and later the Copyright Acts, 1842 were passed to protect the performing rights in musical and dramatic works. Musical works received further protection under the Copyright (Musical Composition) Act, 1888 and the Musical Copyright Act, 1906.

However, inspite of the passage of these Laws, there was need for a consolidated Act to streamline the many Statutes at that time in the field of Copyright. Eventually, the English Parliament promulgated yet another Act on 16th December, 1911, which Act came into force in England on the 21st day of July, 1912.⁸⁰ The Act entirely repealed seventeen previous Acts and specific sections of four others.⁸¹ The Act was the first codified Copyright Law to apply to Nigeria.⁸² One major defect in the 1842 Act which the 1911 Act sought to correct was that the latter took into account the technological changes that followed progressive industrialization.⁸³ Consequently, upon the invention of the gramophone by means of which musical works were fixed on record plates that could be played, the owners of Copyrights in musical works protested against the exploitation of their works.⁸⁴ Their protests however, yielded no fruits in the absence of adequate statutory protection in that regard. This latter Act effected the desired change by extending an author's right to his musical work to 'any production 'thereof.'⁸⁵ It conferred statutory protection on unpublished works which until then, was a common law right. Under this Act, Copyright subsisted in every original literary, dramatic, musical and artistic work if in the case of a published work, the work was first published in any part of his Royal Majesty's dominion and, if unpublished, the author of the work was at the date of the making of the work, a British subject or resident within his Majesty's dominion.⁸⁶ The term of Copyright was generally for the life of the author and fifty

⁸⁰ Copyright Act of England, 1911, Section 37 (2)(a).

⁸¹ *Ibid.*

⁸² The application of this statute to Nigeria was by virtue of Order-In-Council No. 912 of 24th June, 1912.

⁸³ J Asein, *Nigerian Copyright Law & Practice Op. Cit.* p.25.

⁸⁴ *Ibid.*

⁸⁵ *Boosey v Whight* (1900) 1 Ch. p.122.

⁸⁶ Section 1 (1) Copyright Act of England, 1911.

years after his death.⁸⁷ However, it permitted a form of compulsory license after the expiration of twenty-five years from the death of the author.⁸⁸ It also provided that any person could reproduce the work for sale after having given the prescribed notice in writing of his intention to reproduce the work and upon payment of royalty calculated at 10 percent of the published price of the work.⁸⁹ While providing for the usual remedies including injunction, damages, accounts etc, the criminal sanctions contained in the Act were limited to the United Kingdom.⁹⁰

The 1911 Act was repealed by another Act⁹¹ which introduced some changes in the law especially with respect to the alienation of interest in a Copyright work. It stated that no assignment of Copyright had effect unless it was in writing which by implication meant a formal assignment and not a license.⁹² This was a sharp diversion from the 1911 Act which provides that any interest in Copyright can be granted by licence.⁹³ However, the 1956 Act was repealed in England by the 1988 Act, which is the current law on the subject in Britain.

Upon the attainment of independence on the 1st of October, 1960, Nigeria continued to apply the 1911 Act of England as she had no other indigenous legislation on Copyright. The need for a local legislation on Copyright among other reasons, gave rise to the promulgation of the first indigenous Copyright Act of Nigeria which repealed the 1911 English Act.⁹⁴ However, the Act failed to curb violations of Copyright for which it was brought into existence because of its lack of adequate penal sanctions for criminal infringement and other remedial measure. It failed to protect neighbouring rights and also failed to make provision for any administrative machinery for the enforcement of Copyright. It reduced the term of Copyright

⁸⁷ *Ibid.* Section 3.

⁸⁸ *Ibid.* Section 4.

⁸⁹ *Ibid.* Section 3.

⁹⁰ *Ibid.* Sections 11 and 13.

⁹¹ the Copyright Act of England, 1956.

⁹² *Ibid.* Section 10 (3).

⁹³ Copyright Act, 1911, Section 5 (2).

⁹⁴ Copyright Act, 1970.

from the previous period of fifty years under the 1911 Act, to twenty-five years from the death of author of a work.⁹⁵ The Act failed to take into consideration the fact that at the time of its promulgation, there were modern technologies which had opened new possibilities as the reproduction of Copyright works became cheaper and more evasive. This period coincided with the end of the Nigerian civil war which commenced in 1967 and ended in January, 1970; after which there was a surge in the popularity of music and an increase in the purchasing power of the average consumer brought about by the 1974 upward review of salaries in the public service popularly known as ‘Udorji Award’.⁹⁶ It became obvious that the light penal sanctions in the 1970 Act and the omission of Anton Pillar order and conversion rights which were included in the 1911 Act, led to a surge in violations of Copyright in Nigeria. The outcry by authors and musicians against the present Act resulted in the passing into law of the more elaborate Nigerian Copyright Act in 1988. This Act represents a great improvement on the previous Act in its definition of the nature and scope of Copyrights, the provisions on compulsory licensing, acts of infringement and criminal sanctions for Copyright abuses, and contains a separate section on the administration of Copyright Commission.⁹⁷ However, as a result of some inefficiencies decoded in the Act, it was amended in 1992 and 1999 respectively.⁹⁸ The 1992 Decree introduced four additional sections, obviously to facilitate the administration of Copyright in Nigeria.⁹⁹ The Act grants various powers to the Minister responsible for Culture and the Nigerian Copyright Commission, to make subsidiary legislations in the form of orders or regulations. The 1988 Act together with the relevant Copyright Amendment in Nigeria are contained in the current

⁹⁵ Copyright Act of Nigeria, 1970, Section 18.

⁹⁶ *Ibid.* First Schedule.

⁹⁷ J Asein, *Nigerian Copyright Law & Practice*, *Op. Cit.* p.31.

⁹⁸ The Copyright (Amendment) Decrees of 1992 and 1999.

⁹⁹ Section 37 (establishment of Copyright Licensing Panel); Section 38 (appointment of Copyright Inspectors); Section 39 (establishment and regulation of Collecting Societies) and Section 40 (Levy on Copyright materials). The Amended Decree of 1999 introduced novel provisions relating to anti-piracy measures and criminal liabilities in relation to infringement of Foklore.

Copyright Legislation of Nigeria.¹⁰⁰ Any Subsidiary Legislation made under the 1970 Act which was still in force at the date of the commencement of this present Act shall remain in force, subject to any necessary modifications, as if such Subsidiary Legislation had been made under the present Act.¹⁰¹ However, the relevant Order and Regulations¹⁰² which were made pursuant to the 1970 Act respectively were omitted in both the Acts of 1988 and that of 2004.¹⁰³

It is apposite to state at this juncture that the United States and India have similar experiences as Nigeria as they were at one time or the other, colonies of Great Britain. As such, they derived their Copyright laws from her. However, the Copyright Acts of United Kingdom, United States and India, like the Nigerian Act, have been variously amended towards achieving better protection and enforcement of Copyright.

2.3 Subject Matters of Copyright

It is not every work that is accorded Copyright protection. The Acts under consideration expressly provide for works that are subject matter of Copyright. For example, the Copyright Act of Nigeria enumerated works that are qualified to attract Copyright protection as: Literary works; Musical works; Artistic works; Cinematograph films; Sound recordings, and Broadcasts.¹⁰⁴ In the same vein, the U.S. Copyright Act states that works of authorship includes: literary works; musical works; including any accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; pictorial, graphic and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works.¹⁰⁵ On the other hand, the Copyright Act of England enumerates

¹⁰⁰ Copyright Act, Cap C28, Laws of the Federation of Nigeria, 2004.

¹⁰¹ C.R.A.N. Section 52 & paragraph 3 of the Fourth Schedule.

¹⁰² Copyright (Reciprocal Extension) Order, 1972 and the Customs and Excise (Copyright) Regulations, 1973.

¹⁰³ Copyright Act, 1970, section 14 and 15(5).

¹⁰⁴ C.R.A.N. Section 1.

¹⁰⁵ U.S.C. Section 102.

Copyrightable works to include: original literary, dramatic, musical or artistic works, Sound recordings, films or broadcasts, and the typographical arrangement of published editions.¹⁰⁶ Similarly, the Copyright Act of India states that Copyright subsists in the following works: original literary, dramatic, musical and artistic works; cinematograph films; and sound recordings.¹⁰⁷

It is crystal clear that the Acts under consideration listed similar subject matters of Copyright, though some of the Acts contain provisions that are broader in scope than others. It is also relevant to point out that under the Indian Act, broadcast is not expressly provided for. Furthermore, these Acts attempt to provide the exact meaning and scope of each of the foregoing categories of protectable works. For example, while the English and U.S. Copyright Acts seem to enumerate more items for protection, the Nigerian Act includes those works contained in the relevant sections of the former Acts dealing with these items and subsumed them under one item. Again, while the Nigerian Act does not expressly provide for the protection of typographical arrangement or published editions in its list of protectable works as is the case with the English Act,¹⁰⁸ in the interpretation section, these seemingly omitted works are subsumed in those works expressly provided for in this Act.¹⁰⁹ It provides to the effect that a literary work includes computer programmes, and written tables.¹¹⁰ Asien argued that:¹¹¹

the categorization of subject matters of protection is not always exclusive as the same material may fall under more than one category. So while a statutory definition may bring a material under more than one category, there are instances where the Act expressly limits certain works to only one category.

¹⁰⁶ C.D.P.A. Section 1 (l).

¹⁰⁷ C.R.A.I. Section 13.

¹⁰⁸ C.D.P.A. Section 1 (1) (C); P James, *International to English Law*, (10th edn, London, Butterworths, 1979) p.117.

¹⁰⁹ C.R.A.N. Section 51.

¹¹⁰ *Ibid.*

¹¹¹ J Asein, *Nigerian Copyright Law & Practice* , *Op. Cit.* p. 46.

This assertion is evident upon close examination of the Nigerian Act which defines cinematograph film to include ‘the recording of the associated sound track’. It also defined a sound recording to include a sound track associated with a cinematograph film.¹¹² Again, photograph not comprised in a cinematograph film is an artistic work.¹¹³ Similarly, a poem or a story may be both a literary work by virtue of its genre; and a sound recording by virtue of the format in which it is presented.¹¹⁴ In *Norowzian v Arks Ltd. & Ors.*, it was rightly held that a film could be both a recording of a dramatic work and a dramatic work *per se*; the reason being that it could also be a work of action which was capable of being performed before an audience and therefore, comes within the definition of dramatic work under the current English Act.¹¹⁵ It was also been held in *Obe v Grapevines Communications Ltd.* that the plaintiff’s book on the Nigerian Civil War titled ‘Nigeria: A Decade of Crises in Pictures’ qualified as a literary work while the photographs contained in it qualified as artistic works.¹¹⁶

On the other hand, it is not in doubt that a work may comprise separate identifiable works, each with its own distinctive and unique Copyright. Agreeing with this argument, lord Templeman noted in the case of *C.B.S. Songs Ltd. & Ors. v Amstrad Consumer Electronics Plc.* that:¹¹⁷

a sound recording of a performance of a song with words may involve three or more separate Copyrights, each with different durations. There is a composer’s Copyright in respect of his musical work; there is the Copyright of the lyricist in respect of his literary works and there is Copyright in the recording company in respect of its sound recording.

For a better understanding of these concepts and ideologies, the subject matters of Copyright protection shall be distinctly discussed below.

¹¹² C.R.A.N. Section 51 (l) (d).

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ [2000] F.R.S. p.363, or (2000) E.M.L.R. p.67.

¹¹⁶ (Suit No. FHC/L/CS/1247/97, quoted by *Nigerian Copyright Law & Practice*, *Op. Cit.* p.46.

¹¹⁷ (1988) A.C. p.1013 at p.1047.

2.3.1 Literary Works

Literary works can be said to be the earliest subjects of Copyright protection having emerged as a result of the struggles against the threats of violation of Copyright created by the emergence of the printing press. As a result of its aged history, the definition of what constitutes literary work has been a product of change relatively from time to time. For example, under the English Act of 1911 and the Nigerian Act of 1970, a literary work was defined to include maps, charts and plans; which works are now appropriately classified as artistic works.¹¹⁸ It is a fact that by reason of the invention of mechanical electronic writings and recording devices, the degree and importance of writing in the conventional sense has diminished over the years and one can now contemplate a literary work without pen and paper. Therefore, it must be stated that the meaning of literary work may not be confined to the sense in which the phrases ordinarily applies to such works as novels or poems of authors. In this sense, one is compelled to consider the quality, style and literary finish of the work. This makes the actual meaning and definition of literary works more problematic.

In Nigerian, the list of literary works includes, irrespective of literary quality: novels, stories or poetical works; plays, stage directions, film scenarios and broadcasting scripts; choreographic works; computer programmes; text books, treatises, histories, biographies, essays and articles; encyclopedias, dictionaries, directories and anthologies; letters, reports and memoranda; lectures, addresses and sermons; law reports, excluding the decisions of Courts; written tables and compilations.¹¹⁹ It is submitted that the use of the expression 'or works similar thereto' by the Nigeria Act in relation to literary work is suggestive of the fact that the list of literary works is not exhaustive; thus leaving the potential scope of literary

¹¹⁸ Copyright Act of England, 1911 Section 35 (1) & Copyright Act of Nigeria, 1970 Section 19 (1); C Millard, *Legal Protection of Computer Programme & Data*, (London, Sweet & Maxwell, 1985) p.1; J Philips, & A Firth, *Introduction to Intellectual Property Law*, (3rd edn, London, Butterworths, 1995) p.323; E Andrew, & D Sullivan, *World of Computing*, (Boston, Houghton Mifflin Co., 1998) p.33.

¹¹⁹ C.R.A.N. Section 51 (1).

works open. For example, 'poetical work' may be extended to include nursery rhymes. Textbooks may encompass pamphlets, booklets or loose bound publications. 'Treatises' may be extended to include research projects, thesis and dissertations. 'Biographies' may include author-biographies and biolate. 'Articles' may be extended to include diaries and year books. 'Dictionaries' may include concordances and commentaries.

However, it is not every work that is accorded Copyright protection as a literary work. In *Exxon Corporation & Ors. v Exxon Insurance International Ltd.*, the plaintiffs sued for Copyright infringement and passing off and contended on the issue of Copyright that the word 'Exxon' qualified for Copyright protection as an original literary work under the English Copyright Act, 1956.¹²⁰ They adduced evidence that the word was an original creation and a product of an extensive research and expense. The trial judge refused the Copyright claim, whereupon the plaintiffs appealed against this decision. In dismissing the appeal, the Court of Appeal rightly held that the original literary work was a composite expression to be construed as such and not a three separate words. The Court went further to adopt the dictum of lord Justice Davey in *Hollinake v Trusvell*¹²¹ and held that a 'literary work' should be something that afforded information, instruction and pleasure in the form of literary enjoyment. The Court concluded that since the word 'Exxon' was simply an artificial combination of five letters of the alphabet that served only the purpose of identification when used in juxtaposition with other words, for example 'Exxon Petroleum', it was not within the definition of an original literary work, as such, under the English Copyright Act, 1956. Similarly, simple phrases such as titles have been rejected as not being literary works.¹²² However, a plaintiff who fails in an action against the infringement of a book title under Copyright protection, may succeed under the common law of passing off if the unauthorized use of the title will likely lead to the confusion of the two titles used. In *Adebusi v*

¹²⁰ (1982) Ch. p.199.

¹²¹ (1894) 3 Ch. p.420, at p.428.

¹²² *Francis Day & Hunter Ltd. v Twentieth Century Fox Corp. Ltd. & Ors.* (1940) A.C. p.112.

Aromolaram, the plaintiff alleged that the defendant's book was similar to his own book titled 'English and Verbal Tests' and that there was likelihood of the two texts being confused.¹²³ The Court however held that the evidence adduced did not establish confusion or likelihood of confusion on the part of the buyers. It further noted that the heavy onus placed on a plaintiff in proving that the use in a title of descriptive words which are from the common stock of English language had acquired such reputation or secondary signification as to be regarded as pointing exclusively to that particular book was not discharged.

It is obvious that the English Act's list of literary works is endless as is the case under the Nigerian Act. The Act protects work or any of those descriptions mentioned by the Act.¹²⁴ In the same vein, the U.S. Act provides that literary works are works other than audiovisual works expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, photo records, film tapes, disks or cards, in which they are embodied.¹²⁵ The India Act also provides that 'literary work' includes computer programmes, tables and compilations including computer literacy data bases.¹²⁶ These provisions of both the U.S and India Acts are to the effect that the lists of literary works are restricted by the Acts to the works only expressly mentioned therein.

It is submitted that the mere restriction of literary works to the works expressly mentioned by the Indian and United State Acts was such an obvious oversight that requires the immediate amendment of these Acts along the line of the English and Nigerian Acts. This is because there is no way the protection of literary works will thrive under such conditions especially in this era of digitization where technologies are used to greatly advance piracy. This is

¹²³ (1917-1976) 1 I.P.L.R. p.379.

¹²⁴ C.D.P.A. Section 2 (1).

¹²⁵ U.S.C. Section 101; R Schlatter, *Private Property: The History of an Idea*, (New Jersey, Rutgers University Press, 1951) p.54; J Orojo, *Nigerian Commercial Law and Practice*, Vol. 1. (London, Sweet & Maxwell, 1979) p.1135.

¹²⁶ C.R.A.I. Section 2.

worsened by the fact that the list of literary works enumerated by both the U.S. and Indian Acts are so scanty.

2.3.2 Musical Works

It may be rightly said that musical works is the most generalized because of its direct impact on the people who are in turn, the ultimate consumers of Copyright materials. It can be asserted without challenge that a musical work under the Nigerian jurisprudence may be two-pronged, that is to say, the song and the accompanying instruments. Musical works may also be in different forms. They may consist of choruses, operas, songs, musicals and many be composed for one or more instruments. Asien argued that the keyword in relation to musical work is 'composition' and it is this element that distinguishes a musical work from mere lyrics; the first qualifies as a musical work while the second is a literary work.¹²⁷ Thus, it is necessary to distinguish between musical work in the strict sense and mere literary works intended to form the lyrics of the music. This is because the Copyright in both may not co-exist in the same person. In *Chappell & Co. Ltd. v Redwood Music Ltd.*,¹²⁸ it was rightly held that the music and lyrics of a song each had its own separate Copyright and that a song in which the words were written by one person and the music by another, was neither a collective work nor was there a separate and independent Copyright in the resulting song. In *C.F.A.O. v Archibold*,¹²⁹ the plaintiff sued the defendant for infringement of Copyright in some musical works. Of the twelve works in dispute, six were written in solfa letters without intelligible musical notation while the rest has no solfa writing. In determining whether all of them qualified as musical works, the Supreme Court of Ghana was of the opinion that 'Copyright with respect to musical works, implies the subsistence of a manuscript of written matters setting out the distinctive combination of melody and harmony or either of them. Mere words or verse with no intelligible musical notation indicating the melody were

¹²⁷ J Asein, *Nigerian Copyright Law & Practice, Op. Cit.* p. 59.

¹²⁸ (1981) R.P.C. p.337.

¹²⁹ (1964) C.L.R. p.718.

disqualified. These authorities cited above aptly captured the real intent of the drafters of the Acts under consideration which shall be considered hereunder.

According to the Nigerian Act, musical works include ‘any musical composition; irrespective of musical quality and includes works composed for musical accompaniment’.¹³⁰ Under the Indian Act, musical work means ‘a work consisting of music and includes any graphic notation of such work but does not include any work or any action intended to be sung, spoken or performed with the music’.¹³¹ Under the English Act, ‘musical work’ means ‘a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music’.¹³² It is submitted that these provisions of the English and Indian Acts are similar; each showing that the words or actions that are intended to be sung or performed are not part of the musical works. The Acts however, do not explain or illustrate the phrase ‘musical work’ in any other place. It might well be that the intent of the drafters of these Acts were that the written actions and words from which the music emanated do not form part of the musical work. This is however an obvious misconception that necessitates the immediate amendment of these Acts along the line of the more elaborate Nigerian Act.

On the other hand, the U.S. Act defines musical works to include ‘any accompanying words’.¹³³ The Act however contains no definition of the term ‘any accompanying words’ thereby leaving everyone in doubt as to the exact meaning of the phrase. This is worsened by the fact that none of the Acts under consideration contains such phrase in relation to musical work. It is therefore suggested that the Acts under consideration be amended to define this term. This will make for clarity and precision.

¹³⁰ C.R.A.N. Section 51.

¹³¹ C.R.A.I. Section 2 (P).

¹³² C.D.P.A. Section 3 (1).

¹³³ U.S.C. Section 107 (a).

It is also noted that under the U.S. Act, pantomimes and choreographic works are neither protected as literary works nor as musical works, but as independent works.¹³⁴ The Act contains no definition of the term ‘Pantomimes’ thereby making its meaning vague. This is quite distinct from the Nigerian Act which protects choreographic work as literary work.¹³⁵ An immediate amendment of the U.S. Act is suggested in order to incorporate the definitions of the relevant terms used by the Act into same.

It is observed that since the Acts under consideration do not contain the definition of the term ‘musical work’ in any language suggesting writing or other graphic representation. The only eligibility tests required are that of originality and fixation. Thus, for a musical work to be accorded Copyright protection, sufficient efforts must have been expended in making the works to give them original character.¹³⁶ This is buttressed by the fact that while mentioning musical work, the Indian and English Acts use the term ‘original musical work’ thereby implying the application of the originality test.¹³⁷ The U.S. Act provides for the requirements of both originality and fixation.¹³⁸ Again, even though the Indian Act does not expressly provide for fixation, the Nigerian, U.S. and English Acts provide for same.¹³⁹ Thus, what is required is that the work must be fixed in any definite medium of expression now known or later to be developed from which it can be perceived, reproduced or otherwise, communicated either directly or with the aid of any machine or device.

2.3.3 Artistic Works

According to the Nigerian Act, ‘Artistic Work’ includes, irrespective of artistic quality, any of the following works or works similar thereto: paintings, drawings, etchings, lithographs,

¹³⁴ *Ibid.* Section 102 (a) (2).

¹³⁵ C.R.A.N. Section 51; A William, ‘Has Copyright had its Days’, *International Business Lawyer*, April, 1999, Vol.27. No.4. p.148.

¹³⁶ C.R.A.N. Section 1 (2) (b).

¹³⁷ C.R.A.I. Section 13; C.D.P.A. Section 1.

¹³⁸ U.S.C. Section 102 (a).

¹³⁹ C.R.A.I. Section 13 (2); U.S.C. Section 102 (a); & C.R.A.N. Section 1(2) (b).

woodcuts, engravings and prints; maps, plans and diagrams; works of sculpture; photographs not comprised in a cinematograph film; works of architecture in the form of building models; works of artistic craftsmanship; pictorial woven tissue and articles of applied handicraft and industrial art.¹⁴⁰ It must be pointed out that the category of works protectable as artistic work under the Nigerian Act is not closed, hence, the use of the expression ‘or works similar thereto’. This phrase must therefore be given its ordinary meaning when construed to accommodate works like chat and designs within the meaning of artistic work. What is of utmost importance is that whatever type of work that is sought to be protected as an artistic work must not contravene the relevant provisions of the Act. This Section provides that an artistic work shall not be eligible for Copyright if at the time when the work is made, it is intended by the author to be used as a model or pattern to be multiplied by an industrial process.¹⁴¹ What this means is that if an artistic work was not intended for industrial multiplication, it will be protected under Copyright whether or not it could be a proper subject of a registered design. Thus, a right owner might decide to bring his artistic work under Copyright where he perceives that the requirements for protection under the Act are more stringent; or where the duration of protection accorded is shorter under the English Act. Moreover, the Nigerian Act does not define the term ‘industrial multiplication’. Asein lamented that since the Act expressly defines artistic work to include ‘works of architecture in the form of building models’, such architectural models are not to be confused with other models or patterns intended for industrial application.¹⁴² In *Ukaoha v Broad-Based Mortgage Finance Ltd.*, the plaintiff’s Copyright claim in a 17-story building model was rightly upheld by the Court as a work of architecture.¹⁴³

¹⁴⁰ C.R.A.N. Section 51.

¹⁴¹ *Ibid.* Section 1(3).

¹⁴² J Asein, *Nigerian Copyright Law & Practice, Op. Cit.* p. 69.

¹⁴³ [1992] 2 F.H.C.L.R. p.477; M Minnow, ‘Library Digital Table’, <http://www.copyright.com/DigitizationTable.Htm>. Accessed 10/10/17.

A situation may however arise where at the time the artistic work came into existence, there was no intention that it will be multiplied by an industrial process, but after being protected as an artistic work, it was later multiplied by an industrial process. In the only known case where such a situation arose, the Court held that where Copyright had come into existence in respect of artistic drawings, the fact that those drawings were subsequently used or were intended to be used as models or patterns to be multiplied by an industrial process, and thereby becoming eligible for protection under the Registered Designs Act, 1949 or its predecessor, would not lead to a forfeiture of the Copyright.¹⁴⁴ It is however doubtful whether this judicial decision will be applicable to Nigeria. This is because the present Copyright Act of Nigeria is narrow as far as artistic work is concerned. The only determinant factor as to whether an artistic work should be protected under Copyright or as a patent is the intention of the artist at the time of making the work. However, the Act does not leave any guidance as to what qualify as 'industrial multiplication'. It is submitted that this omission will obviously occasion a miscarriage of justice in cases involving breaches of Copyright in Artistic works. It is therefore suggested that the Act be urgently amended to provide the real intention of the drafters of the Act on what constitutes 'industrial multiplication' and to separate the works that should be protected as artistic works under the Act, and the works that should be protected as designs under the Patent and Designs Act. In the proposed amendment, the phrase 'irrespective of artistic quality' should also be expunged from the Act. This is because it is a source of confusion and leaves no doubt that any form of art is artistic work. This phrase also places uncertainty as to what qualifies as an artistic work.

It is observed that artistic works under the India and the English Acts are similar to those under the Nigerian Act above discussion.¹⁴⁵ Therefore, all the discussions under the Nigerian Act regarding artistic works are hereby adopted. On the other hand, the U.S. Act neither

¹⁴⁴ *King Features Syndicate Inc. v O.M. Kleeman Ltd.* (1941) A.C. p.417.

¹⁴⁵ C.R.A.N. Section 2 (d) ; C.D.P. A. Section 4.

expressly provides, nor defines artistic work. It only provides for the protection of pictorial, graphic and sculptural, and architectural works which ordinarily fall under artistic works, under the same section but in different paragraphs.¹⁴⁶ It is also clear that the works protected by this Act are not as broad as artistic works protected under the Nigerian Act. For example, it does not make mention of photographs, works of craftsmanship, articles of applied handicraft, industrial arts, etc. It is therefore suggested that the U.S. Act be urgently amended along the pattern of the Nigerian Act.

2.3.4 Cinematograph Film

According to the Nigerian Copyright Act, ‘cinematograph film’ includes the ‘first fixation of a sequence of visual images capable of being shown as a moving picture and of being the subject of reproduction, and includes the recording of a sound track associated with the cinematograph film’.¹⁴⁷ It was held in *Ugwuoti v Ezennia*,¹⁴⁸ that it will amount to ‘quibbling, redolent in farcical understanding of the evolution of audiovisual technology to state that video films cannot be subsumed in the definition of cinematograph films, although an anachronism in language, covers all motion pictures including cinematographic and audiovisual works’. It therefore follows that the definition of cinematograph film excludes slide shots since they are incapable of being shown as motion pictures. Such slide sets or shots are accorded Copyright protection as artistic works. This is because they fall within the class of photographs.

It must be pointed out that the Nigerian Act uses the phrase ‘first fixation’ in relation to cinematograph film but fails to define same. It is submitted that this phrase is a source of confusion which is capable of posing evidentiary problems on litigants, especially if it is

¹⁴⁶ U.S.C. Section 102 (a).

¹⁴⁷ C.R.A.N. Section 51; H Josh, ‘HarperCollins Put 26 Loan Cap on E-Book Circulations’, *Library Journal*, (February, 25, 2011) http://www.libraryjournal.com/lj/889452-264/harpercollins_puts_26_loancap.html.csp. accessed 30/11/17.

¹⁴⁸ [2003] 17 WRN p.122.

interpreted to mean the original copy of the film or copies. Furthermore, in a situation where the first fixation involves multiple copies. One may be confused as to whether the actual copies referred to are the master tapes or the copies derived from the master tapes which are already in the market. It is suggested that a liberal approach be adopted when interpreting the term so that the term 'first fixation' of the work will be understood to mean 'the first copy or set of copies of tapes, films, discs or other finished materials published or released to the public'.

Again, the use of the term 'includes' in relation to cinematograph films suggest that the definition of what constitutes artistic works is not exhaustive or limitative.¹⁴⁹ It is suggested that it would be better to have a comprehensive list of artistic works that make up artistic works instead of indulging in gaze work approach that will likely lead to miscarriage of justice in the event of actual breach of protected rights.

It is observed that the Copyright Acts of India and England clearly protect cinematograph films in the same manner as the Nigerian Act does. None of the former Acts expressly refer to the requirement of first fixation as is the case with the Nigerian Act.¹⁵⁰ This omission is unhealthy to Copyright enforcement. It is therefore suggested that these Acts be amended to expressly provide for the requirement of fixation of cinematograph films.

On the other hand, the U.S. Act merely provides for the protection of motion pictures and other audiovisual works without mentioning cinematograph films.¹⁵¹ According to the Act, 'audiovisual works' are works that consists of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or accompanying sounds, if any, regardless of the nature of the material objects,

¹⁴⁹ C.R.A.N. Section 51.

¹⁵⁰ C.R.A.I. Sections 2 (f) & 13; C.D.P.A. Section 5 (b).

¹⁵¹ U.S.C. Section 102 (a); K Smith, 'Streaming Video Case Dismissed', <http://blogs.library.duke.edu/scholcomm/2011/10/04/streaming-video-case-dismissed> accessed 30/11/17.

such as films or tapes in which the works are embodied.¹⁵² This no doubt, shows that the intendment of the Act is to protect cinematograph films, though in the names of motion pictures and audiovisual works. This is buttressed by the fact that the Act talks of series of related images intended to be shown by the use of a machine or other devices.

2.3.5 Sound Recordings

According to the Nigerian Act, ‘sound recording’ means the first fixation of a sequence of sound capable of being perceived aurally and capable of being reproduced but does not include a sound track associated with a cinematograph film.¹⁵³ This clearly shows that a sound recording is to the ear what a cinematograph film is to the eye. Again, it is evident that a sound track associated with a cinematograph film forms part of the film and protected not as a sound recording, but as part of the cinematograph film. It therefore follows that even though a sound track associated with a cinematograph film is protect as part of the film, any subsequent recording made therefrom or simultaneously as the sound track will qualify as a sound recording and no longer part of the cinematograph film. The term ‘first fixation’ used in the definition of sound recording implies that sound recordings must be fixed for it to enjoy Copyright protection. It should be noted that the aforementioned definition covers sound recordings on audiocassette tapes, compacts discs, computer discs, memory cards and other forms of sound corners. Other aspects of the conditions for eligibility in relation to works have been considered in details in the preceding sub-topics in relation to musical works and the arguments so canvassed apply to sound recordings *mutatis mutandis*. Hence, there is no need to revisit same in order to avoid unnecessary duplication and repetition.

¹⁵² U.S.C. Section 101.

¹⁵³ C.R.A.N. Section 101; H Stratman, ‘Protection of Software Titles under the New German Trademarks Act’ *Trademark World*, Issue 79, August, 1995, p. 11; M Minnow, ‘Library Copyright Liability and Pirating Patrons’, *California Library Association*, http://www.cla-net.org/resources/articles/minow_pirating.php. accessed 10/10/17.

It is submitted that the protection of sound recording under the Nigerian Act is a surplusage and therefore highly unnecessary. This is because such works have already been protected either as a musical work or a cinematograph film. This duplication may be a source of confusion as litigants may not readily make up their minds as to the actual section of the Act that is breached or under what heading to seek redress. This is further worsened by the fact that the Act does not define what sort of sounds that can come under sound recordings. It is therefore suggested that the Nigerian Act be amended to define the kind of sounds contemplated by the Act in relation to sound recording; or to protect sound recording either as part of cinematograph films or musical works.

It is observed that the protection of sound recording under the Indian, U.S. and English Acts are the same as under the Nigerian Act.¹⁵⁴ However, under the U.S. Act, for any work to be protected, it must first be fixed for the first time.¹⁵⁵ On the other hand, though the English Act does not use the expression, 'first fixation', it provides that Copyright does not subsist in a sound recording which is, or to the extent that it is a copy taken from a previous sound recording.¹⁵⁶ This clearly shows that there is a requirement of originality and fixation as in the Nigerian Act. However, under the Indian Act, no mention of first fixation was made in relation to a sound recording. It is suggested that this Act be amended along the line of the other Acts above discussed.

¹⁵⁴ C.R.A.I. Sections 2(XN) & 13; U.S.C. Sections 101 & 102 (a) (7); M Minnow, 'Library Digital Table', <http://www.copyright.com/DigitizationTable.Htm>. accessed 10/10/17.

¹⁵⁵ U.S.C. Section 101; K Cushla, 'Rethinking Copyrights for the Library through Creative Commons Licensing', *Library Trends* 58, No. 1. (Summer 2009) 106.

¹⁵⁶ C.D.P.A. Section 5A (2); A Efrati, & J Trachtenberg, 'Judge Rejects Google Books Settlement' *Wall Street Journal*, March, 23, 2011, <http://online.wsj.com/article/SB10001424052748704461304576216923562033348.html>. accessed 30/11/17.

2.3.6 Broadcasts

As earlier stated in this work, 'broadcast' means sound or television broadcast by wireless telegraph or wire or both, or by satellite or cable programmes and includes re-broadcast.¹⁵⁷

This shows that it is only sound or television broadcast by wireless telegraph or wire or both or by means of satellite or cable programmes that are protected. The keywords involved in this definition are wireless telegraph, cable programme and satellite. Accordingly, wireless telegraphy means 'the emitting or receiving of electromagnetic energy of a frequency not exceeding three million megacycles a second, over paths which are not provided by any material substance construed or arranged for that purpose'.¹⁵⁸ Cable programmes means 'visual images, sounds or other information sent by means of a telecommunication system otherwise than by wireless telegraphy for reception; at two or more places; whereas for simultaneous reception or at different times, in response to request by different users; or for presentation to members of the public'.¹⁵⁹ The Nigerian Act does not make any mention of fixation or first fixation in relation to broadcast as is the case with the other protected works. It is submitted that this omission may confuse the public as to whether the requirement of originality and fixation are not applicable to broadcasts. It is further submitted that in the absence of the express requirement of originality and fixation, it will be difficult to establish a case of violation of broadcast especially if the infringer claims that he did not receive the broadcast from the plaintiff. It is therefore suggested that the Act be amended to expressly provide for the requirement of originality and fixation as a condition precedent for the protection of broadcasts.

¹⁵⁷ C.R.A.N. Section 51.

¹⁵⁸ Wireless Telegraphy Act, Cap W5, Laws of the Federation of Nigeria, 2004, Section 2.

¹⁵⁹ C.R.A.N. Section 51 (1); H Josh, 'HarperCollins Put 26 Loan Cap on E-Book Circulations', *Library Journal*, (February, 25, 2011) http://www.libraryjournal.com/lj/889452-264/harpercollins_puts_26_loancap.html.csp. accessed 18/09/19.

It is noted that the protection of broadcasts under the English and Indian Acts are similar to that of the Nigerian Act.¹⁶⁰ However, it seems that the concept of broadcast under the Indian Act is broader than that under the Nigerian Act. According to the Indian Act, ‘broadcast’ means ‘communication to the public by any means of wireless diffusion, whether in any one or more of the forms of signs, sounds or visual images; or by wire, and includes a re-broadcast’.¹⁶¹ It is therefore not in doubt that so long as sounds or visual images are communicated to the public by wire or wireless diffusion, it will amount to broadcast. Thus, the showing of a movie in public will qualify as a broadcast under the Indian Act. So is the playing of recorded music and sound tracks. Furthermore, broadcasts are not distinguished from the other related works such as musical works and sound recordings by the Act. It is therefore suggested that the Indian Act be amended to embrace the definition of ‘broadcasts’ similar to the provisions of the Nigerian Act.

It is however observed with shock that the U.S. Act does not expressly provide for the protection of broadcasts, and does not even mention it even by way of definition. It is suggested that the Act be urgently amended to make provision for the protection of broadcasts along the line of the Nigerian Act.

It must however be pointed out that the other provisions relating to protectable works as contained under the English and U.S. Acts such as computer programmes and written tables shall not be considered in this work, reason being that such works are subsumed under other works protected under the Nigerian Act, as discussed above.

¹⁶⁰ C.D.P.A. Section 6; K Smith, ‘Streaming Video Case Dismissed’ [http://blogs.library.duke.edu/scholcomm/, 2011/10/04/streaming-video-case-ismitted](http://blogs.library.duke.edu/scholcomm/,2011/10/04/streaming-video-case-ismitted). accessed 30/11/17.

¹⁶¹ C.R.A.I. Section 2 (d).

2.4 Criteria for Copyrightability

For a work to be protected under the jurisdictions under consideration, it must pass some tests prescribed by law. This is because Copyright law does not protect mere ideas but rather, the expression of such ideas. For example, the U.S. Act provides that ‘in no case does Copyright protection for an original work of authorship extend to any idea, procedure, process, method of operation, concept, principle or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work’.¹⁶² In the same vein, the Nigeria Act expressly provides for eligible works which shall be protected as works upon the fulfillment of certain conditions stipulated in the Act,¹⁶³ a literary, musical or artistic work shall not be eligible for Copyright unless sufficient effort has been expended on making the work to give it original character; and the work has been fixed in any definite medium of expression now known or later to be developed, from which it can be perceived, reproduced or otherwise communicated either directly or with the aid of any machine or device.¹⁶⁴ This provision incorporates the two fundamental concepts of originality and fixation which also operates in the other three jurisdictions under consideration.¹⁶⁵

2.4.1 Originality

It has been stated earlier in this research work that the purpose of Copyright law is to confer a set of limited monopoly rights on an author upon the condition that he must have expended energy, resources and time in making the work to give it an original character. In other words, he must show that the work originated from him. He cannot gain these rights by merely appending his signature or his name to what would otherwise qualify as a common property. What then is the relevant extent of the skill or labour needed to make a work original? This question remains intriguing as the Acts under consideration do not define the

¹⁶² U.S.C. Section 102 (b); A William, ‘Has Copyright had its Days’, *International Business Lawyer*, April, 1999, Vol. 27. No.4. p.148.

¹⁶³ C.R.A.N. Section 1(2).

¹⁶⁴ *Ibid.*

¹⁶⁵ U.S.C. Section 102 (a).

term 'original'. However, the term 'originality' in relation to work may be understood to mean that the work was not copied slavishly; and that the author expended sufficient amount of labour, judgment and skill in making the work.¹⁶⁶ It has been rightly held that the skill and judgment involved in gathering and presenting vital information conferred originality on compilations.¹⁶⁷ This means that the originality contemplated by law does not mean that the work should necessarily be ingenious, inventive or imaginative, for the law needs not concern itself with measuring these qualities. Thus, while the divide between ideas and the expressions of ideas may not always be clear, the law recognizes the right of anyone to create from pre-existing materials, so long as he invests sufficient skills and labour to give the resultant work a new character. Hence, the law permits an author to draw upon the available stock of common knowledge to create his own work and if by co-incidence, two authors working independently were to come up with identical expressions, each of them would be entitled to his separate Copyright.¹⁶⁸ This is quite unlike the concept of originality required in Patent law. Stretching this further, Atkinson opined that:¹⁶⁹

...it is the product of the labour, skill, and capital of one man which must not be appropriated by another, not the elements, the raw materials, if one may use the expression, upon which the labour and skill and capital of the first have been expended. To secure Copyright for this product, it is necessary that labour, skill and capital should be expended sufficiently to impart to the product some quality and character which the raw material did not possess, and which differentiates the product from the raw material.

In line with this principle, the Court correctly held in *WarWick Film Productions Ltd. v Eisinger & Ors.*¹⁷⁰ That a work that contained some unoriginal matter may, nevertheless be subject of Copyright. However, apart from obvious cases such as a straight line or a circle, where Copyright are obviously denied, titles, slogans, familiar symbols and common phrases,

¹⁶⁶ *Bookmakers' Afternoon Greyhound Services Ltd. v Wilf Gilbert (Staffordshire) Ltd.* (1994) F.R.S.p.723. (Ch.D.).

¹⁶⁷ *Football League Ltd. v Littlewoods Pools Ltd.* (1959) Ch. p.637.

¹⁶⁸ *Creation Records Ltd. v News Group Newspapers Ltd.* (1997) E.M.L.R. p.444;

¹⁶⁹ *Macmillan & Co Ltd. v Cooper* (1923) 93 L.J.P.C. p.188.

¹⁷⁰ (1969) 1 Ch. p.508.

have been refused protection because there was no evidence of originality. In *Cramp v Symthson*,¹⁷¹ it was held that mere gathering of existing tables for inclusion in a project diary does not enjoy Copyright protection. In *Leslie v Young*,¹⁷² it was held that the extraction of information from a general train timetable is not protectable.

It is however noted that Copyright protection is accorded to some simple literary works such as anthologies, tables and compilation.¹⁷³ In *Elacno Products Ltd. v Mandops (Agrochemical Specialists) Ltd.*,¹⁷⁴ the Court held that a defendant is at liberty to make use of an information which was in the public domain but he is not entitled to copy the plaintiffs' compilation thereby making use of the latter's skill and judgment and saving himself the trouble and cost of assembling his own. In the same vein, the Supreme Court of the United States of America rightly held in *Feist Publications v Rural Telephone Services* that Copyright protection for factual compilations is thin and it does not prevent a subsequent compiler from using the facts contained in another's publication to aid in preparing a competing work.¹⁷⁵

It must be pointed out that while the Nigerian and U.S. Acts provide for the requirements of originality, both the English and Indian Acts make use of the phrase 'original' as a prefix to literary, dramatic, musical and artistic works, thereby implying the requirement of originality.¹⁷⁶ Apart from this, there is nowhere in the latter Acts that originality is required as a precondition for Copyright protection. It is however submitted that the non express provision of the requirement of originality as a pre-requisite for Copyright protection, by the English and Indian Acts is bound to generate confusion and chaos as infringers will thrive in their illicit business of infringement while proof of violations of Copyright remain elusive. It

¹⁷¹ (1944) A.C. p.329.

¹⁷² (1894) A.C. p.353.

¹⁷³ C.R.A.N. Section 51 ; Minnow, 'Library Copyright Liability and Pirating Patrons', *California Library Association*, http://www.cla-net.org/resources/articles/minow_pirating.php. accessed 10/10/17.

¹⁷⁴ (1979) F.R.S. p.46.

¹⁷⁵ 18 USPQ 2d p.1275(1991).

¹⁷⁶ C.D.P.A. Section 1; C.R.A.I. Section 13A.

is therefore suggested that these Acts be amended to include the express requirement of original as a pre-condition for Copyright protection as required under the Nigerian Act.

2.4.2 Fixation

According to the Nigerian Act, a literary, musical and artistic work shall not be eligible for Copyright unless such work has been fixed in any definite medium of expression now known or later to be developed from which it can be perceived, reproduced or otherwise communicated either directly or with the aid of any machine or device.¹⁷⁷ The Act also uses the phrase ‘first fixation’ in relation to sound recordings and cinematograph films.¹⁷⁸ It is correct to assume that by the use of this phrase in relation to sound recording and cinematograph film, it is intended by the drafters of the Act that the requirement of fixation is to be complied with in order for such works to attract protection under the Act. It is quite unfortunate that the Act does not define either ‘fixation’ or ‘first fixation’. However, fixation may be understood to mean the act of rendering a creation in tangible form or by means of which it can be perceived by other people.

Similarly, the Nigerian Act mentions the phrase ‘medium of expression’ in relation to works but fails to define same, or enumerate the media of expression contemplated by the Act in this regard. It merely states that the medium of expression may be one that is presently known or later to be developed. Thus, the meaning of the phrase is uncertain. Again, the list of medium of expression contemplated by the Act is endless. The list may include discs, tapes, video recorders, memory cards, writing on paper, painting on canvas, and any other medium that may be developed in the future. It also includes the media from which the materials can be perceived or reproduced either directly with human senses, or indirectly with the aid of any mechanical, electronic or other devices. The most important fact is that

¹⁷⁷ C.R.A.N. Section 1(2) (b).

¹⁷⁸ *Ibid.* Section 51; M Minnow, ‘Library Digital Table’, <http://www.copyright.com/DigitizationTable.Htm>. Accessed 10/10/17.

whatever medium that is used to fix the work must allow for some sustained existence of a permanent nature. In *Abernethy v Hutchinson*, the Court refused to grant an injunction to prevent a publication by unauthorized persons of oral lecture which were delivered by the plaintiff, partly because he could not produce the notes from which he prepared and delivered the lectures.¹⁷⁹ In the same vein, the High Court of India granted an injunction against the defendant where the plaintiff conceived the idea of a Television Reality Show on match making and spouse selection, on the ground that the idea has been set out in a document and disclosed to the defendant.¹⁸⁰

Under the England Act, Copyright does not subsist in a literary, dramatic and musical work unless and until it is recorded, in writing or otherwise.¹⁸¹ In the same vein, the U.S. Act expressly provides for both the requirement of originality and fixation as conditions precedent for the enjoyment of the protected works.¹⁸² The Indian Act however does not expressly provide for fixation even though the India Courts have been holding that fixation is required for a work to be protected.¹⁸³ It is submitted that the failure of the Indian Act to provide for the requirement of fixation totally defeats the whole essence and purport of Copyright as it will be impracticable to prove infringement under this current position. It is therefore suggested that the Indian Act be amended to provide for fixation of all Copyrightable work as in the other Acts of the other jurisdictions under consideration.

2.4.3 Other Requirements

Problem may arise as to whether to recognize any other formality for the protection of Copyright works apart from the express provisions of the Acts relating to eligibility of

¹⁷⁹ (1825) 47 E.R. p.1313.

¹⁸⁰ *Cupta v Dasgupta* ((2003) E.R.S. p.18.

¹⁸¹ C.D.P.A. Section 1(2).

¹⁸² U.S.C. Section 102 (a).

¹⁸³ *Cupta v Dasgupta* , *supra*. p.18.

works.¹⁸⁴ The Nigerian Act is clear as to what constitutes eligible works as it does not contain express reservation or further requirements for the grant of Copyright apart from the requirement of originality and fixation. This is quite unlike the Law of Trade Marks which expressly exempts from trademarks protection, any matter the use of which, by reason of its being likely to deceive or cause confusion is disentitled to protection in a Court of justice or is contrary to law or morality; or any scandalous design.¹⁸⁵ In *Okoyo v Prompt & Quality Services Nig. Ltd.*, the plaintiff sued the defendant for the infringement of his Copyright in some architectural drawings and plans.¹⁸⁶ The defendant raised a preliminary objection contending that the plaintiff, not being a registered architect under the Architects (Registration, etc.) Act¹⁸⁷ and as such, incapable of enjoying Copyright protection in his architectural drawings. In dismissing the preliminary objection, the Court noted that the only condition for eligibility under the Copyright Act is that the author must be a qualified person; and that he needed not be a graduate or a registered architect.

It will be recalled that in the history of the development of Copyright in England earlier discussed in this work, the law required that every published work be entered in the Stationers' Register. By 1637, the printing and importation of any book or copies thereof, which was not in the register was outlawed.¹⁸⁸ Registration at different points, therefore, served to confer and assist the enforcement of Copyright in published works in England.¹⁸⁹ The requirement of registration with the Stationers' Company prior to publication was abandoned under the 1942 English Act, although it remained a pre-condition for the commencement of actions.¹⁹⁰ However, since the Berlin Revision of the Berne Convention in 1908, it has been obligatory for member states of the union to grant Copyright without any

¹⁸⁴ *Nigeria Copyright Commission v Vitalis Ikukuoha* 6 I.P.L.R. p.59.

¹⁸⁵ Section 11 of Trade Marks Act (Cap. T 13) Laws of the Federation of Nigeria, 2004.

¹⁸⁶ (1996) F.H.C.L.R. p.814

¹⁸⁷ (Cap. A19) Laws of the Federation of Nigeria, 2004.

¹⁸⁸ J Asein, *Nigerian Copyright Law & Practice, Op. Cit.* p. 101.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

further requirement of formality. Thus, the exercise and enjoyment of Copyright are not to be subject of any formality because Copyright is deemed as right flowing naturally from the very act of creation.¹⁹¹ This conception prompted the abandonment of all requirements of notification or registration by the 1911 English Act. This position has since then been maintained in Nigeria under the 1970, 1988 and 2004 Acts. Till date, the position of the law is that the rights enjoyed by creators are the natural overflow very act of creation.¹⁹²

Another requirement for protection is the deposition of Copyright work. For instance, owners of Copyright or of the exclusive right of publication in a work published in the United State shall deposit, within three months after the date of such publication, two complete copies of the best edition; or if the work is a sound recording, two complete phonorecords of the best edition, together with any printed or other visually perceptible materials published with such phonorecords.¹⁹³ These copies are to be deposited in the Copyright Office for the use or disposition of the Library of Congress of United States.¹⁹⁴ The Registrar of Copyright shall upon request of the depositor and upon payment of the fees prescribed by the Act, issue a receipt for the deposit. Furthermore, the Registrar of Copyright may by regulation, exempt some categories of material from the deposit requirements or require deposit of one copy or phonorecord with respect to any category.¹⁹⁵ The Registrar of Copyright also has the duty to write authors to make the aforementioned deposit and if they fail to deposit their works within three months after the demand is received, they will be liable to pay different categories of fines as specified by the Act.¹⁹⁶

The deposition requirement applies to Nigeria and the United States. However, mere deposit of a work does not confer Copyright protection on the depositor. This was confirmed by the

¹⁹¹ Article 51(2) of Berne Convention, 1908.

¹⁹² *Millar v Taylor* (1769) 98 E.R. p.201; *Wheaton v Peter* (1834) 53 U.S. (8 Pet.) p.59

¹⁹³ U.S.C. Section 407(a).

¹⁹⁴ *Ibid.* Subsection (2) (b).

¹⁹⁵ *Ibid.* Subsection (2) (c).

¹⁹⁶ *Ibid.* Section 107(2) (d).

decision of Court in the case of *I.C.K. (Directory Publishers) Ltd. v Ekko Delta (Nig.) Ltd. & Anor.*¹⁹⁷ Where it was held that mere deposit of copies of a work with the National Library under the National Library Act¹⁹⁸ does not confer any right of authorship or Copyright on any one. In the instant case, the plaintiff who is the publisher of the National Telephone Directory of Nigeria had deposited a copy of its work with the National Library of Nigeria, upon which it obtained a delivery acknowledgement slip and the International Standard Book Number. The Court found out that the plaintiff is not the original author of the content of that publication, but merely copied nearly all that was put in the directory from documents supplied by the Federal Ministry of Trade who is a co-defendant in the suit. While denying the Copyright claim, the Court held that the mere fact of depositing a copy of the directory with the National Library was irrelevant.

Under the Nigerian Act, the author, publisher, the owner or other persons interested in the Copyright in any such work may make an application in the prescribed form, accompanied by the prescribed fee to the Registrar of Copyright for entering particulars of the work in the Register of Copyright.¹⁹⁹The Registrar is required to issue certificates in relation to applications for any artistic work which is capable of being used in relation to any goods or services to the effect that no trade mark identical with or deceptively similar to such artistic work has been registered under the Act in the name; or that no application has been made under the Act for such registration by any person other than the applicant.²⁰⁰ In all cases, the Register of Copyrights shall be *prima facie* evidence of the particulars entered therein and documents purporting to be copies of any entries therein, or extracts therefrom certified and

¹⁹⁷ (1977) F.R.C.R. p.346.

¹⁹⁸ (Cap. N 56) Laws of the Federation of Nigeria, 2004.

¹⁹⁹ C.R.A.N. Section 45 (1).

²⁰⁰ *Ibid.* Proviso to section 45(1).

sealed by the Registrar of Copyright; same shall be admissible in evidence without further proof or production of the original.²⁰¹

It is observed that this requirement contained in the Indian Act is related to the duties imposed by the Nigerian Act to keep register of all works published by them, including the names of authors, title, year of publication and the quality of the works produced.²⁰² The Act also requires that the names, title of works, the names and addresses of authors, publishers and owners of Copyright; and such other particulars as may be prescribed in the Register of Copyright be entered in the Register.²⁰³ It is clear that the Nigerian and India Acts have no provisions for registration of Copyright works as a condition precedent for the enjoyment of the Copyright. This is also the case with the English Act. This is indeed commendable as there is no Copyright target which this requirement is set to achieve. It is suggested that the U.S. Act be urgently amended to delete this deposition requirement.

Apart from the deposition requirement, it is noted that in compliance with International Standard in the book industry, the National Library of Nigeria encourages all publications emanating from Nigeria to obtain a code identifying that particular publication; which code is either ISBN²⁰⁴ for books, or ISSN²⁰⁵ for serials, such as magazines and Journals. The numbers are represented as a ten or thirteen-digit string of numbers allocated for each edition of a work and divided into four parts; the country or group of countries;²⁰⁶ the publisher; the title; while the fourth which serves as a control digit used to validate the remainder of the code.²⁰⁷ The numbers under discussion are administered and controlled in every country by a

²⁰¹ *Ibid.* Section 48.

²⁰² C.R.A.I. Section 14.

²⁰³ Section 44.

²⁰⁴ Meaning 'International Standardized Book Number'.

²⁰⁵ Meaning 'International Standardized Serial Number'.

²⁰⁶ (978 is for Nigeria).

²⁰⁷ J Asein, *Nigerian Copyright Law & Practice (supra)* p. 103; P Frank 'New Protection and New Rules for Internet Service Providers', *Intellectual Property and Technology Law Update*, Vol.2 Issue 1. March, 1999, 22.

national authority. In Nigeria, they are administered by the National Bibliographic Control Department of the National Library of Nigeria. These numbers do not on their own, confer Copyright on creators of works.

It is submitted that since this requirement does not serve any useful purpose either in the conferment or enforcement of Copyright, the continued observance of same is baseless and an effort in futility. This may be the reason for the absence of this requirement in the Acts under consideration.

Another requirement for Copyright protection is Copyright notice. Under the Universal Copyright Convention, a Copyright notice is required to be fixed on every work in order to gain protection in another member country different from the one in which it is published or made.²⁰⁸ The Convention provides that any contracting state which under its domestic law, requires as a condition of Copyright, compliance with formalities such as deposit, registration, notice, notarial certificates, payment of fees or manufacture or publication in that contracting state, shall regard these requirements as satisfied with respect to all works protected in accordance with this Convention and first published outside its territory and the author of which is not one of its nationals, if from the time of the first publication, all the copies of the work published with the authority of the author or other Copyright proprietor bear the symbol (c) accompanied by the name of the Copyright proprietor and the year of first publication placed in such manner and location as to give reasonable notice of claim of Copyright.²⁰⁹ The notice serves as sufficient compliance with and obviates the need to comply with any other formalities or deposit requirement that may be imposed by the domestic laws of member countries. Copyright notice is usually placed at the first page of monographs, the Copyright page of a book, or the foot of a one page work. The phrase ‘All Rights Reserved’ or ‘Copyright Reserved’ with or without the Copyright symbols is

²⁰⁸ Article 111 of Universal Copyright Convention, 1952.

²⁰⁹ *Ibid.*

popularly used by authors, although the Copyright notice alone would suffice. Both phrases derive from the Buenos Aires Convention under which an author who secures Copyright in his country enjoys Copyright protection in the other Convention countries so long as the notice is placed on the work.²¹⁰ On the other hand, the 'c' in a circle (c) prescribed under the Universal Copyright Convention suffices in countries that are members of both the Buenos Aires Convention and the Universal Copyright Convention.

It must be stressed that although Nigeria is a member of the Universal Copyright Convention, no provision appears to exist in the Nigerian Copyright Act requiring the mandatory use of Copyright notice. Nigeria is also a member of the Berne Convention and therefore under an obligation not to require any formalities as a precondition for the enjoyment of Copyright protection. Incidentally, virtually all the member countries of the Universal Copyright Convention are now members of the Berne Convention.

It is worthy to note that while (c) is used in relation to literary works, (p) is used in sound recordings. Rome Convention provides that where compliance with formalities are required as a condition for protecting the rights of producers of phonograms or performers in relation to phonograms, these shall be considered as fulfillment if all the copies of the phonogram in commerce or their containers bear a notice consisting of the symbol (p), accompanied by the year and date of first publication, placed in such a manner as to give reasonable notice of the claim of protection.²¹¹ Accordingly, the Copyright Act of the United States provides that whenever a work protected under this title is published in the United State or elsewhere by authority of the Copyright owner, a notice of Copyright as provided by this section 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.²¹² In fact, the notice and other requirements

²¹⁰ Buenos Aires Convention on Literary and Artistic Copyright, 1910.

²¹¹ Article 11 of Rome Convention, 1961.

²¹² U.S.C. Section 40 (a).

relating thereto discussed earlier in this work apply to United States *mutatis muntandis*.²¹³ Accordingly, the U.S. Act provides that if a notice of Copyright in the form and position specified by the Act appears on the published copy or copies to which a defendant in a Copyright infringement suit had access, then no weight shall be given to such a defendant's interposition of a defence based on innocent infringement in mitigation of actual or statutory damages except as provided in the Act regarding fair use of such works.²¹⁴ However, where a Copyright notice is omitted, a person who innocently infringes Copyright in that work by reason of that omission before the effective date of the Berne Convention Implementation Act of 1988 incurs no liability for actual or statutory damages.²¹⁵ Again, for any infringing acts committed before receiving actual notice that registration of the work has been made under the Act are excusable if the infringer proves that he or she was misled by the omission of the notice.²¹⁶ The Court may allow or disallow recovery of any of the infringer's profits attributable to the infringement, and may enjoin the continuation of the infringing undertaking; or may require, as a condition for permitting the continuation of the infringing undertaking, that the infringer pays the Copyright owner a reasonable license fee on an amount and on terms fixed by the Court.²¹⁷ However, the protection granted by the Act regarding Copyright notice is not affected by the removal, destruction or obliteration of the notice without the authorization of the Copyright owner, from any publicly distributed copies or phonorecords.²¹⁸

It is submitted that no matter how laudable the provisions of the U.S. Act relating to Copyright notice may seem, it is a clear basis for the denial of rights of authors who expended huge sums of money, energy and time to create such works. Little wonder the other

²¹³ *Ibid.* Subsection (2) (b).

²¹⁴ *Ibid.* Sections 401 to 406.

²¹⁵ *Ibid.* Section 401 (d)

²¹⁶ *Ibid.* Section 504

²¹⁷ *Ibid.* Section 405 (3) (b).

²¹⁸ *Ibid.*

Acts under consideration have no such provision. It is therefore suggested that the U.S. Act be amended to delete the relevant sections embodying the requirement of Copyright notice in the Act.

It is also required in some jurisdictions that Copyright works be registered before they will be accorded protection. It is a common misconception to confuse Copyright registration with the granting of Copyright.²¹⁹ Copyright in most countries today is automatic upon fixation in any tangible medium of expression.²²⁰ This standard is established internationally by a Convention which most countries of the world are signatories to.²²¹ Registration may be required by the domestic laws of these countries before they joined the Berne.²²² It is a well known fact that the Nigerian Act does not require registration of eligible works as a pre-condition for protection; though, as a purely administrative initiative, the Nigerian Copyright Commission has a voluntary Copyright notification scheme under which owners and assigns of Copyright may voluntarily deposit works with the Nigerian Copyright Commission.²²³ Such deposition is not conclusive proof of authorship or ownership of Copyright in such works.²²⁴ This administrative procedure can only be seen as a certificate attesting to the fact that such work has been brought to the notice of the Commission. Such deposit may however have evidentiary value and could be helpful in proving the date of the authorship of such deposited works.

In the United States, Copyright is registrable. The U.S. Act states that at any time during the subsistence of the first term of Copyright in any published or unpublished work in which the Copyright was secured before January 1, 1978, and during the subsistence of any Copyright

²¹⁹ U.S. Copyright Office, 'Copyright Law of the United States' www.copyright.gov/circs/circl/htm. accessed 10/10/17.

²²⁰ *Ibid.*

²²¹ Berne Convention, 1886.

²²² U.S. Copyright Office, 'Copyright Law of the United States' www.copyright.gov/circs/circl/htm. *Op. Cit.*

²²³ J Asein, *Nigerian Copyright Law & Practice, Op. Cit.* p. 104

²²⁴ *Ibid.*

secured on or after the date, the owner of Copyright or of any exclusive right in the work may obtain registration of the Copyright claim by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified by the Act.²²⁵ It further states that Copyright protection is accorded to every eligible work upon creation even though such works may be registered and certificate issued in that behalf.²²⁶ However, except for an action brought for a violation of the rights of an author under the relevant section of the Act, and subject to the provisions regarding the rights of attribution and integrity of visual authors, no civil action for the infringement of the Copyright in any United States work shall be instituted until pre-registration of the Copyright claim has been made in accordance with the title.²²⁷ Moreover, no award of statutory damages or attorney's fees shall be recovered by the Copyright owner where such works are not registered within three months of their first publication.²²⁸ In any case, where the deposit, application, and fees required for protection have been delivered to the Copyright Office in the proper form and registration has been refused, the applicant is entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint is served on the Registrar of Copyrights.²²⁹ The Registrar may if he so wishes, become a party to the action with respect to the issue of registrability of the Copyright claim by entering an appearance within sixty days after such service, though the Registrar's failure to become a party shall not deprive the Court of jurisdiction to determine that issue.²³⁰

The Indian Act provides for the registration of Copyright works in the Register of Copyright.²³¹ The Act mandates that a Register of Copyright be kept in the Copyright Office in which may be entered the names or titles of works and the names and addresses of authors,

²²⁵ U.S.C. Section 408 (a).

²²⁶ *Ibid.* Section 410.

²²⁷ *Ibid.* Section 411 (a).

²²⁸ *Ibid.* Section 412.

²²⁹ *Ibid.*

²³⁰ *Ibid.*

²³¹ C.R.A.I. Section 44.

publishers and owners of Copyright and such other particulars as may be prescribed.²³² Such registration must be made upon the application in the prescribed form, accompanied by the prescribed fee to the Registrar of Copyright by the applicant.²³³ Upon receiving such application in respect of any work, the Registrar of Copyright, may after holding such inquiry as he may deem fit, enter the particulars of the work in the Register of Copyrights.²³⁴ However, the registration contemplated here is a mere entry of works in the register by printers as mandated by the Nigerian Act. Thus, Copyright registration is not applicable in India.

It is submitted with greatest respect that it will serve the best interest of Copyright if authors are allowed to enjoy the rights attached to their works upon creating those works, whether such works are registered or unregistered. It is commendable that in Nigeria, India and England, qualified works automatically enjoy Copyright protection by operation of the law.²³⁵ It is therefore recommended that the U.S. Act be amended to eliminate the requirement of registration of Copyrightable works.

²³² *Ibid.*

²³³ *Ibid.*Section 45 (1).

²³⁴ *Ibid.*Subsection (2).

²³⁵ U.S. Copyright Office, 'Copyright Law of the United States' www.copyright.gov/circs/circl/htm. accessed 10/10/17.

CHAPTER THREE

3.0 SCOPE OF COPYRIGHT PROTECTION

3.1 Ownership of Copyright

It is necessary to identify with certainty the real creator or author of a work contemplated and protected by Copyright Laws. This will help to determine who is entitled to enjoy the various rights granted by Copyright law to owners of qualified works; or who can validly transfer or transmit such rights. The inquiry as to the identity of the real author will help solve the problem arising from the computation of the Copyright terms in certain works. For example, the term of Copyright in literary, artistic, except photographs, or musical work is defined under the Nigeria Copyright Act with reference to the life of the author of the work.²³⁶ It is therefore important that the author of the work be first known to help ascertain whether he is alive or dead. Moreover, moral rights are conferred on the author irrespective of the transfer or separate existence of the economic rights. For instance, the Nigerian Act provides that:²³⁷

Copyright conferred by sections 2 and 3 of this Act, shall vests initially in the author.

Notwithstanding subsection (6) of section 11 of this Act, where a work-

- a. is commissioned by a person who is not the author's employer under a contract of service or apprenticeship; or
- b. not having been so commissioned, is made in the course of the author's employment, the Copyright shall belong in the first instance to the author, unless otherwise stipulated in writing under the contract.

The question now is who is an author? An author may be understood to mean the person who originated the protectable elements of the work, or the person who created, selected or gathered together the detailed concepts, data or emotions used in making the work. It is clear from the definition that ownership of Copyright is not the same as authorship, although both may co-exist in the same person. For while the author of a work is the creator or maker of the work, the

²³⁶ C.R.A.N. First Schedule.

²³⁷ *Ibid.* Section 10.

Copyright owner is the person conferred with the right to control the doing of any of the restricted acts in relation to the Copyright work whether he or she is a human being or an artificial person. Except the U.S. Act, the Copyright Acts of the jurisdictions under consideration specific definitions of authorship in the different categories of works protected by them in virtually the same manner, even though these definitions are in many cases, inadequate.²³⁸ For example, under the Nigerian Act, ‘author’ of literary, artistic or musical works means the creator of the work; the author in the case of a photographic works is the creator of the work; the author of a sound recording is the person by whom the arrangements for the making of the sound recordings were made; the author of a sound recording of a musical work means the artist in whose name the recording was made, unless in either case, the parties to the making of the sound recording, provide otherwise by contract; ‘author’ in the case of a broadcast transmitted from within any country, means the person by whom the arrangements of the making or the transmission from within that country were undertaken.²³⁹

In a case where more than one person made contributions to the creation of the work, the authorship can be determined by identifying the resultant work to know who was responsible for ascertaining the necessary skill and labour as a result of which the work attracted protection under the law.²⁴⁰ Where all that was contributed by a person is no more than an idea which is subsequently clothed by another, in his own words or other forms of expression, the Copyright in the work shall subsist in the person who has clothed the idea so received in a protectable form.²⁴¹ Similarly, if a man employs the services of a ghost writer to write his biography based on the materials supplied by the subject, the Copyright in the final product would belong to the ghost writer.²⁴² In *Donoghue v Allied Newspapers Ltd.*, the

²³⁸ C.R.A.I. Sections 2 (d).; C.R.A.N. Sections 51 (1); C.D.P.A. Section 9.

²³⁹ C.R.A.N. Section 51 (1).

²⁴⁰ J Asein, *Nigerian Copyright Law & Practice* (2nd Ed, Abuja: Books and Gravel Ltd. 2012) p.116.

²⁴¹ *Ibid.*

²⁴² *Evans v Hulton & Co. Ltd.* (1923-28) Mac. C.C. p.51; *Chaplin v Leslie Frewin (Publishers) Ltd.* (1966) Ch.

defendant's newspaper published a series of articles written by its employees, detailing the racing career of the plaintiff.²⁴³ The plaintiff gave several interviews sharing his experience and also supplied materials for the articles. Manuscripts for the articles were read over to him from time to time and he suggested alterations which were not always adopted in the final version of the articles. The articles were duly published by the defendant who later gave consent for their use in another publication with the title: 'My Racing Secrets by Steve Donoghue' and made to appear as if they had been authorized by the plaintiff. The Court noted that this raised a statutory presumption of authorship and placed the onus on the defendant. It nevertheless came to the conclusion that the plaintiff was not the author and subsequently could not maintain the action. The Court had also held that the mere fact that a person was the subject matter of a production, in that the story was an incident from his life, for which he provided the materials, did not make him a joint author if he did not take any part in producing the express matter which is the original literary work, the subject matter of Copyright.²⁴⁴

Special provisions are made under the Acts in relation to ownership of Copyright in commissioned works and works made in the course of the author's employment.²⁴⁵ It follows from the above provision that an author can only be divested of his initial ownership of Copyright by the prior written contract entered into between him and his employer or the commissioner of the work in that regard. This can be achieved through a 'vesting' clause in the contract of employment or contract of commission; or the parties may enter into a separate vesting agreement supplemental to an existing contract of employment or commission.²⁴⁶ This is also the position in the United States.²⁴⁷ It was also held in *National*

p.71.

²⁴³ (1938) Ch. p.106.

²⁴⁴ *Evans v Hulton & Co. Ltd. supra.* p.71.

²⁴⁵ C.R.A.N. Sections 2; U.S.C. Section 20 (b).

²⁴⁶ *Joseph Ikhuria v Campaign Services Ltd. & Anor.* [1986] F.H.C.L.R. p.308; *C. P. L. Industries Ltd. v Glaxo Smithkline Consumer Nigeria P.L.C. & Anor.* I.P.L.R. p.247.

Bank (Nig) Ltd. v Compagne Franssist that an author who enters into an agreement to confer ownership of Copyright on another could be compelled in equity to make good his promise on the ground that equity looks on that as done which ought to be done.²⁴⁸ This is because equity imputes an intent to fulfill and obligation.²⁴⁹ The Court may also declare an implied trust where for instance, an employee creates a work in the course of his employment using the time and materials of his employer. In *Antocks Laim Ltd. v I. Bloohn Ltd.*, the Court declared a trust in favour of the company and held that although the managing director owned the Copyright in the drawings he made, the company was entitled to have them assigned to it.²⁵⁰ Similarly, in *Merchant Adventures Ltd. v. M. Grew & Co. Ltd.*, the Court was of the view that since the defendant had been paid for the work he produced, it would be inequitable for him to retain the Copyright therein; and that the plaintiff was entitled in equity to the assignment of the Copyright to him under the principles of implied trust.²⁵¹ It has been held that the requirement that an agreement to vest the initial ownership of Copyright in a work on another person other than the author under the Nigerian Act should be in writing and that this is in accord with the general principle that no assignment of Copyright and no exclusive license to do an act the doing of which is controlled by Copyright shall have effect unless it is in writing.²⁵²

It is the law that where a person commissioned to do a work sub-contracts the whole or a part thereof, the person who ultimately pays for the commission is the owner of Copyright in the work.²⁵³ It should be noted that while an independent contractor is one employed under a contract of services, his employee counterpart in the course of his employment is employed under a contract for service. Although the distinction between the two types of employment is

²⁴⁷ U.S.C. Section 201 (b).

²⁴⁸ (1948) 19 N.L.R. p.4.

²⁴⁹ *Ojule v Okoya* (1968) 2 All N.L.R. p.349 at p.388.

²⁵⁰ (1971) F.S.R. p.490.

²⁵¹ (1971) 2 All E.R. p.675.

²⁵² *Adenuga v Ilesanmi & Sons (Nig) Ltd.* [1991] NWLR (Pt. 189) p.82 at p.98.

²⁵³ *James Arnold & Co. Ltd. v Miafern Ltd.* (1980) R.P.C. p.397.

often very tenuous, decided authorities appear to have identified the basic difference between them. In *Stevenson Jordan & Harrison Ltd. v Macdonald & Evans Ltd.*, lord Denning propounded what has come to be known as the ‘organizational test’ as follows:²⁵⁴

One feature which seems to run through the instances is that under a contract of service, a man is employed as part of the business and his work is done as an integral part of the business, whereas under a contract for service, his work although done for the business is not integrated into it, but is only accessory to it.

It is noted that special provisions are made by the Nigerian Act in respect of the ownership of Copyright in a literary, artistic or musical work made by an author in the course of his employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship. In such a situation, Copyright vests initially in the proprietor in the absence of any agreement to the contrary, provided that the Copyright relates to the publication of the work in ‘any’ newspaper, magazine or similar periodical or to the reproduction published.²⁵⁵ In this regard, the work must be made for the purpose of such publication in a newspaper, magazine or similar periodicals. This means that apart from the proprietor’s right in this connection, all other rights in the work such as the right to control the dramatization, exhibition or performance of such work belong to the author in the first instance.

It is apposite to state at this juncture that the concept of ownership of Copyright in commissioned work is the same in both England and India²⁵⁶ except that the English Act expressly states that the section under consideration does not apply to Crown Copyright, Parliamentary Copyright, or Copyright relating to certain International Organizations mentioned by the Act.²⁵⁷

²⁵⁴ (1952) 1 L.T.R. p.101.

²⁵⁵ C.R.A.N. Section 10(3).

²⁵⁶ C.R.A.I. Section 17; C.D.P.A. Section 11.

²⁵⁷ C.D.P.A. Section 11 (3).

Situations may arise where a work is created by more than one person. For example, where the work was brought about through the combined efforts of more than one person. Under such circumstances, there is need to determine whether all persons who are so involved are joint authors. The Nigerian Act does not define 'co-authorship' but inference can be drawn from the Act to the effect that the phrase co-owners are persons who share a joint interest in the whole or any part of a Copyright, or if they have interest in various Copyrights, in a composite production.²⁵⁸ It should be noted that although Act uses the phrase 'co-owners', reference is made in other sections to joint authors. This simply shows that the phrases are synonymous. The meaning and the definition of these terms are similar in the Acts under consideration.²⁵⁹ Once a person claiming joint authorship of a work establishes that he made significant and original contributions to the creation of the work and that he had done so pursuant to a common design, the Court will hold that he is a joint author.²⁶⁰ It has been rightly held that a person does not become a joint author of a work by merely suggesting or making constructive criticisms towards the improvement of a play.²⁶¹

Ordinarily, a part owner of Copyright does not have the power to assign or grant a license with respect to a work of joint authorship without the concurrence of the other co-owner.²⁶² This is because such a joint author is deemed not to be in a position to do the acts reserved for the Copyright owner without the concurrence of the co-author; otherwise he would be in breach of Copyright.²⁶³ The Nigerian Act provides that an assignment or license granted by one Copyright owner shall have effect as if granted by his co-owner also, and, subject to any

²⁵⁸ C.R.A.N. Section 11 (6).

²⁵⁹ C.R.A.N. Section 51 (1); U.S.C. section 101; C.R.A.I. Section 2 (Z); C.D.P.A. Section 10A (1).

²⁶⁰ *Godfrey v Lees* [1995] E.M.L.R. p.307.

²⁶¹ *Wiseman v Weindenfeld & Nicholson Ltd.* [1985] F.S.R. p.525.

²⁶² *Powel v Head* [1879] 12 Ch. D. p.686.

²⁶³ *Cescinky v George Routledge & Sons Ltd.* (1916) 2 K.B. p.325.

contract between them, fees received by the grantors shall be divided equitably between all the co-owners.²⁶⁴

In the case of compilation, the compiler could qualify as the author of the work even though he did not make any direct written contribution to the compilation.²⁶⁵ Such a compilation must satisfy the basic requirements of eligibility, including originality; and must not be a mere copy.²⁶⁶ It has been rightly held that though the compilers are not the original authors of the work, this should not be viewed as authority for denying authorship to them.²⁶⁷ However, slightly different rules apply to composite works such as Encyclopedias or collection of Essays where separate Copyrights exist in the work and in each of the components works respectively. In such cases, the person responsible for the entire work, eg, the general editor will pass as the author of such work as a whole, while each contributor remains the author of his own separate contribution with distinct Copyright.²⁶⁸

On the other hand, a work may be a derivate or an adaptation of a pre-existing work. The resultant work will qualify for separate Copyright protection as such if sufficient skill and labour has been invested in its production. In that case, the author of the new work will be the person who has brought about the new work through his skill and labour.²⁶⁹ Similarly, where a computer is used to produce a copyrightable work, the computer is no more a mere tool by which the work is produced to instructions. The Copyright in the work shall belong to the persons that gave instructions to the computer.²⁷⁰ However, where the aspect of the work was entirely created by the computer without human intervention, the English Act expressly provides that the author should be taken to be the person by whom the arrangements for the

²⁶⁴ C.R.A.N. Section 11(5).

²⁶⁵ Copinger and Skone on copyright quoted by Asein, from p.119.

²⁶⁶ *I.C.I.C.(Directory Publishers) Ltd. Ekko (Nig.) Ltd.* (1977)F.R.C.R. p.346.

²⁶⁷ *Black Ltd. v Claude Stacey Ltd.* (1929) Ch. p.177.

²⁶⁸ *Barfield v Nicholson* (1824) 2 Sim &St. p.1.

²⁶⁹ J Asein, *Nigerian Copyright Law & Practice, Op. Cit.* p.116.

²⁷⁰ *Express Newspapers Plc. v. Liverpool Daily Post and Echo Plc.* (1985) F.S.R. p.306.

creation of the work were undertaken.²⁷¹ It is only the English Act that contains this laudible provision. It is suggested that this provision be incorporated into the other Acts of the jurisdictions under consideration through amendment.

Other classes of Copyright owners are the heirs, assignees and licensees of Copyright. Copyright, being a property is transmissible by assignment, by testamentary disposition, or by operation of the law as movable property.²⁷² It has been stressed that there is a clear difference between the Copyright in a work and the materials object embodying the right.²⁷³ The transfer of any material object, including the copy or phonorecord in which the work is first fixed does not in itself convey any rights in the Copyrighted work embodied in the object; nor in the absence of an agreement does any transfer of ownership of a Copyright or any exclusive rights under a Copyright convey proprietary right in any material object.²⁷⁴ It has been held that by virtue of the provisions of the Nigerian Act, it is the right of every Nigerian to make a will and to freely dispose of his property irrespective of his personal law.²⁷⁵ Copyright can therefore be disposed through testamentary disposition. Since the testamentary disposition of property only takes effect upon the death of the testator rather than the date probate was granted, Copyright so granted only passes to the heir upon the death of the testator. However, where the author died intestate, Copyright owned by him would be passed to his heirs in accordance with the personal law of the deceased.²⁷⁶ If the deceased contracted a marriage under the Act, his movable properties including Copyright, will pass in accordance with the general rules of intestacy under the Act. But, where he

²⁷¹ C.D.P.A. Section 9(3).

²⁷² C.R.A.N. Section 11(1); U.S.C. Section 201 (d) (i).

²⁷³ U.S.C. Section 202.

²⁷⁴ *Ibid.*

²⁷⁵ *Yinusa v Adesubokan* (1971) N.N.L.R. p.77.

²⁷⁶ C.R.A.N. Section 11(8).

contracted a marriage under the native law and customs, he is subject to the rules of intestacy and succession applicable under customary law.²⁷⁷

As in the case of testamentary disposition of Copyright, the law recognizes the transfer of Copyright or any of the constituent rights by way of assignment. An assignment involves a transfer of ownership, whether partial or limited, from the assignor to the assignee.²⁷⁸ An assignment must be given or must have been made by the owner of the Copyright or with his specific or general authority.²⁷⁹ This means that the law of agency will be applicable when determining a case of assignment of Copyright with the authority of the owner. Thus, an agent

who acted in excess of the authority conferred on him by his principal will not succeed in assigning rights not within the scope of the authority conferred on him. On the other hand, where a partial assignment of Copyright has been made to an assignee, he is deemed to be the owner of the Copyright mentioned in the assignment and therefore entitled to take the necessary steps to prevent an infringement of the rights so conferred on him.²⁸⁰

A license is a valid permission to do certain things or acts which otherwise would have constituted infringement of the Copyright in a work owned by the creator of such work. The position of an assignee is radically different from that of an exclusive licensee under the Nigerian Act. Although the Act renders an infringement actionable by the owner/assignee or exclusive licensee of the Copyright, the assignee's position is superior where concurrent rights of action in the subject matter of infringement vest in both the owner of the Copyright and the exclusive licensee.²⁸¹ In such a case, the owner or the exclusive licensee is required

²⁷⁷ *Dawodu v Danmole* (1962) 1 All N.L.R. p.702.

²⁷⁸ C.R.A.N. Section 15(1).

²⁷⁹ *Beloff v Pressdram Ltd.* (1973) 1 All ER. p.241.

²⁸⁰ *British Actors Film Co. Ltd. v Glover* (1918) I.K.B. p.299.

²⁸¹ C.R.A.N. section 16 (1).

by law, with the leave of Court, to join the other as a plaintiff or defendant in the action.²⁸² It is thus very clear that an assignee steps into the position of the Copyright owner upon the assignment of the right to him, while an exclusive license does not.

It must be pointed out that the formal requirements for the transfer of interest in case of assignment and licenses are clearly set out by law. According to the Nigerian, Indian and U.S. Acts, no assignment of Copyright, and no exclusive license to do an act the doing of which is controlled by Copyright shall have effect unless it is in writing.²⁸³ Thus, a verbal assignment of Copyright to an assignee by the owner is ineffective. However, any assignment that does not satisfy the formal requirements stipulated by law may still be upheld as an equitable assignment; though it will be inferior to a subsequent legal assignment and will not bind an innocent purchaser for value who takes in good faith without notice; as well as any person deriving title from him.²⁸⁴

It is interesting to note that the Nigerian, English and Indian Acts permit the granting of an assignment or license in respect of a future work or an existing work in which Copyright does not yet subsist; and the prospective Copyright in any such work would be transmissible by operation of the law.²⁸⁵ It is intended that the legal ownership of Copyright in such work automatically vests in the assignee from the very moment it comes into being. Such Copyright can be assigned.²⁸⁶ This provision is the opposite of the common law rule to the effect that the assignment of a work which is yet to come into existence would be no more than equitable assignment or at best, an agreement to assign.²⁸⁷ It is submitted that the recognition of assignment of future Copyright is a welcome development which goes to

²⁸² *Ibid.* Section 16(2).

²⁸³ C.R.A.N. Section 11(3); C.R.A.I. Section 19(1); U.S.C. section 204(3).

²⁸⁴ *Roban Jig & Jool Co. Ltd. v Taylor* (1979) F.S.R. p.130, at p.143.

²⁸⁵ C.R.A.N. Section 11 (7); C.D.P.A. Section 91; C.R.A.I. Section 18 (1).

²⁸⁶ C.D.P.A. Section 91; C.R.A.I. Section 18 (1).

²⁸⁷ *Wah Sang v Takmay* [1980] F.S.R. p.303; *Performing Right Society Ltd. v London Theatre of Varieties Ltd.*[1924] A.C. p.1

substantiate the precepts of intellectual property law. It is very unfortunate that the U.S. Act has no such provision. It is therefore suggested that the U.S. Act be urgently amended to incorporate this laudable concept.

It is noted that apart from the requirement of formality under the Acts regarding assignment and exclusive license, there is need to comply with the general rules of the law of contract particularly as it concerns proper execution;²⁸⁸ capacity;²⁸⁹ consideration;²⁹⁰ and permissible limits of fairness.²⁹¹

It must be stated that even though an assignee is free to assign or grant a license unless expressly prohibited under a contract;²⁹² a licensee is generally disallowed from transferring where there is some elements of personal rights, skills or reputation involved in the grant of the license to him.²⁹³ It is obvious that the Acts under consideration do not demand or dictate any particular phrase or words to be used to effect an assignment or exclusive license. Thus, the Court will have to decide if the words used by the parties are capable of being construed as an assignment or as an exclusive license depending on the circumstances of each and peculiarity of each case. The Court will resort to the rules of construction in determining the nature and extent of the rights assigned or licensed.²⁹⁴

On the other hand, a non exclusive license may be written, oral or inferred from the conduct of the parties.²⁹⁵ It has also been judicially confirmed that a non exclusive license does not pass any interest but only makes an action lawful which without it would have been

²⁸⁸ *Wah Sang v Takmay spura*. p.303.

²⁸⁹ *Chaplin v Leslie Frewin (Publishers) Ltd.* {1960} Ch. p.71.

²⁹⁰ *A. Schroeder Music Publishing Co. Ltd. v Macaulay* {1974} 3 All E.R. p.616 (HL).

²⁹¹ *Messenger v B.B.C.* [1929] A.C. p.151 at p.156.

²⁹² *Hole v Bradbury* {1879} 12 Ch. D. p.886.

²⁹³ *Redwood Music Ltd. v B. Feldman & Co. Ltd. & Ors.* {1979} R.P.C. p.385.

²⁹⁴ *Hospital for Sick Children v Walt Disney Productions Inc.* [1966] I W.L.R. p.1055.

²⁹⁵ *Blair v Candiware* [1980] F.S.R. p.352.

unlawful.²⁹⁶ Like an exclusive licensee, a non exclusive licensee may not assign or grant such license if his license was based on personal consideration or his own reputation.²⁹⁷ Therefore, since a non exclusive licensee does not have legal interest in the right, he cannot maintain an action without joining the owner of Copyright as a party in an infringement suit.²⁹⁸ In *Banier v News Group Newspaper Ltd.*,²⁹⁹ the defendant claimed in its defence that it was the practice of newspapers in anticipation of a subsequent grant with retrospective effect, to publish Copyright photographs before obtaining a license if the same photographs had already been published by another newspaper. In rejecting this claim, the Court held that such a practice may have been one which they normally got away with, but it was plainly unjustified and unlawful.

It is interesting to note that transmission of Copyright by way of conveyance, operation of the Law, bequeathal by will, as discussed under the Nigerian Act are virtually the same in the other jurisdictions under consideration.³⁰⁰ However, it must be pointed out that while it is required under the English Act that only an exclusive license must be in writing;³⁰¹ under the U.S. and Indian Acts, only transfer must be evidenced in writing.³⁰² The license granted by the owner of a future Copyright to an assignee is binding on his successor-in-title, except where there is a purchaser in good faith for valuable consideration and without notice.³⁰³ Similarly, the Acts under consideration recognize the concept of transmission, assignment and licenses as contained under the Nigerian Act.³⁰⁴ The assignment contemplated herein may be whole or partial.³⁰⁵

²⁹⁶ *Frisby v BBC* [1967] Ch. p.932.

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid.*

²⁹⁹ [1997] F.S.R. p.812.

³⁰⁰ C.D.P.A. Sections 90-93; C.R.A.N. Sections 11 (2); C.D.P.A. Section 91 (2); C.R.A.I. Section 18; U.S.C. Section 201 (d) (2).

³⁰¹ C.D.P.A. Section 92.

³⁰² C.D.P.A. Section 91; C.R.A.I. Section 18.

³⁰³ C.R.A.I. Sections 18 & 30; U.S.C. Section 201 (d) & 204 (a); C.R.A.N. Section 20 (1); C.R.A.I. Sections 19.

³⁰⁴ C.D.P.A. Sections 91 (3); C.R.A.I. Section 18 & 30; U.S.C. Section 205 (e); C.R.A.N. Section 11 (4).

³⁰⁵ C.R.A.N. Section 6.

3.2 Rights Conferred by Copyright

Copyright consists of the exclusive rights of the owner to control the doing of certain specified acts in respect of the copyrightable work subject to certain exceptions. The exact nature of the rights conferred on Copyright owner depends on the type of work involved. The Copyright Act of Nigeria provides that:³⁰⁶

subject to the exceptions specified in the Second Schedule to the Act, Copyright in a work shall be the exclusive right to control the doing in Nigeria of any of the following Acts, that is-

- a. in the case of a literary or musical work, to do and authorize the doing of any of the following acts:
 - i. to reproduce the work in any material form;
 - ii. to publish the work;
 - iii. to perform the work in public;
 - iv. to produce, reproduce, perform or publish any translation of the work;
 - v. to make any cinematograph film or a record in respect of the work;
 - vi. to distribute to the public, for commercial purposes, copies of the work, by way of rental, to lease, hire, loan, or similar arrangement;
 - vii. to broadcast or communicate the work to the public by a loud speaker or any other similar device;
 - viii. to make any adaptation of the work;
 - ix. to do in relation to a translation or an adaptation of the work, any of the acts specified in sub-paragraphs (i)-(vii) of this paragraph;
- (b) In the case of an artistic work, to do or authorize the doing of any of the following acts, that is-
 - i. to reproduce the work in any material form;
 - ii. to publish the work;
 - iii. to include the work in any cinematograph film;
 - iv. to make any adaptation of the work;

³⁰⁶ *Ibid.*

- v. do in relation to an adaptation of the work any of the acts specified in sub-paragraphs (i) to (iii) of this paragraph;
- (c) In the case of cinematograph film, to do or authorize the doing of any of the following acts, that is-
 - i. to make a copy of the film;
 - ii. to cause the film, in so far as it consists of visual images to be seen in public and, in so far as it consists of sounds, to be heard in the public;
 - iii. to make any record embodying the recording in any part of the sound track associated with the film by utilizing such sound track;
 - iv. to distribute to the public, for commercial purposes copies of the work, by way of rental, lease, hire, loan or similar arrangement.

The Act specifically provides that the right of the owner to control the doing of any of the above mentioned activities extends to the whole or a substantial part of the work either in its original form, or in any form recognizably derived from the originals.³⁰⁷ It is further provides that Copyright in a work of architecture shall also include the exclusive right to control the erection of any building which reproduces the whole or a substantial part of the work either in its original form, or in any form recognizable derived from the original, but not the right to control the re-construction in the same style as the original of a building to which the Copyright relates.³⁰⁸ The Act also provides that Copyright in a sound recording shall be the exclusive right to control in Nigeria, the direct or indirect reproduction, broadcasting or communication to the public of the whole or a substantial part of the recording either in its original form or in any form recognizably derived from the original; the distribution to the public for commercial purposes of copies of the work by way of rental, lease, hire, loan or similar arrangement.³⁰⁹ In the same vein, the Act provides that Copyright in broadcast shall

³⁰⁷ *Ibid.* Subsection (2).

³⁰⁸ *Ibid.* Section 8.

³⁰⁹ *Ibid.*

be the exclusive right to control the doing in Nigeria any of the following acts:³¹⁰ the recording and the re-broadcasting of the whole or a substantial part of the broadcast;

- a. the communication to the public of the whole or a substantial part of a television broadcast, either in its original form or in any form recognizably derived from the original; and
- b. the distribution to the public for commercial purposes, of copies of the work, by way of rental, lease, hire, loan or similar arrangement.

An owner of a Copyright in television broadcast shall also have the exclusive right to control the taking of still photographs from the broadcast.³¹¹ It therefore follows that any person who without the license or authorization of the Copyright owner, does or causes any other person to do any of the acts enumerated above will be liable for infringement of Copyright.³¹²

It can be gleaned from the provisions of the Act stated above that the primary rights granted to Copyright owners consist mainly of the exclusive rights of reproduction, publication, performance, adaptation, commercial distribution and broadcasting. It is clear that not all forms of exploitations mentioned by the Act are appropriate for every kind of work. For while a literary or musical work may be the subject of public performance, artistic works are not.³¹³ It is also noted that the Act employed different expressions as the context demands which suggest the same meaning. For example, literary works and cinematograph films are protected against unauthorized reproduction. In the case of literary works, the rights expressed are the rights to reproduce the work in any material form.

It must also be pointed out that the rights conferred on authors by Copyright are not restricted to the exploitation of their works as discussed above. There are some other rights enjoyed by authors such as the right to claim authorship, right to privacy, right to share in the proceeds of sale/right to remuneration.

³¹⁰ *Ibid.* Section 15 (1).

³¹¹ J Asein, *Nigerian Copyright Law & Practice Op. Cit.* p.172.

³¹² C.R.A.I. Section 14; U.S.C. Section 106; C.D.P.A. Section 16.

³¹³ C.R.A.N. Section 6.

It is noted that there is harmony in the meaning and purport of the exploitations of copyrightable works in all the other jurisdictions under study.³¹⁴ Thus, in discussing these forms of exploitations as shall be done below, only the Nigerian Act shall be mostly considered.

3.2.1 Publication of Literary and Musical Works

Although literary and musical works are treated together and defined to have the same nature and scope, all the rights reserved for the exclusive control of the Copyright owner do not apply equally to both.³¹⁵ For instance, the right conferred in respect of a literary or musical work includes the publication or performance of a translation of the work.³¹⁶ It is inconceivable that a musical work can be translated. The only part of the work that can be translated are the lyrics which itself, constitutes a literary work different from the accompanying music. This difference notwithstanding, it is safer to go into the consideration of the rights granted to a Copyright owner bit by bit.

The first right granted to a Copyright owner of a literary or musical work is the right to publish the work. According to the Nigerian Act, a work shall be deemed to have been published if copies of it have been made available in a manner sufficient to render the work accessible to the public.³¹⁷ Where a part of the work is published, that part so published is treated for the purposes of the Act as a separate work.³¹⁸ Publication here involves the entrepreneurial activity of producing and distributing copies of a work in the sense of a ‘music publisher’ or ‘book publisher’.³¹⁹ Asien rightly submitted that publication may or may not involve prior reproduction of the same person; and that what really matters is the

³¹⁴ *Ibid.* Subsection (1) (a) (iv).

³¹⁵ *Ibid.* Section 51 (2) (A).

³¹⁶ *Ibid.* Paragraph (b).

³¹⁷ J Asein, *Nigerian Copyright Law & Practice, Op. Cit.* p.172.

³¹⁸ *Ibid.*

³¹⁹ *Ibid.*

making of the work available to the public either for sale or gratuitously.³²⁰ In *Adenuga v Ilesanmi Press & Sons (Nig.) Ltd.*, the Appellant had in 1977 submitted the manuscript of a book to the Respondent without expressly authorizing its publication, although he consented to its being printed.³²¹ He even corrected the page proofs of the manuscripts but appeared not to have heard from the respondent again until a few years later when he discovered that the respondent had printed the book and that copies of it were being sold to the public. The Court of Appeal expressed the opinion that a person might have the authority to publish a book by another without infringing the Copyright of that person if there had been an assignment of the Copyright to him, or a grant of an exclusive or non-exclusive license by the owner of the Copyright. Since the respondent in this case was both a publisher and a printer, the Court held that all that the appellant did could be construed as evidence that he requested the book to be printed rather than published, that is to say, an implied grant of license to reproduce rather than one authorizing publication. The Court rightly held that the defendant was liable for Copyright infringement because the publication was unauthorized.³²² This decision confirms that in determining whether the defendant is liable for infringement, there may be no need for actual distribution of the work. There is also no need to establish sale of the work so published to the public in order to incur actual liability. Merely giving away copies of the work to the public is sufficient publication. Thus, the sale to the public or display, and or free gift of copies of a work constitute the commonest acts of publication.³²³

3.2.2 Reproduction of Literary and Musical Works

Reproduction is the making of one or more copies of a literary, musical or artistic work, cinematograph film or sound recording.³²⁴ ‘Copy’ means reproduction in written form, in the

³²⁰ *Ibid.*

³²¹ [1991] 5 N.W.L.R. p.82.

³²² *Ibid.*

³²³ *Merchant Adventures Ltd. v M Crew & Co. Ltd.* [1972] 1 Ch. p.242.

³²⁴ C.R.A.N. Section 51 (1).

form of a recording or cinematograph film, or in any other material form, so however that an object shall not be taken to be a copy of an architectural work unless the object is a building or model.³²⁵ It is crystal clear from the above definition that the reproduction of a literary work for purposes of the Act, needs not be in the conventional written format, although it must be in a material form. Accordingly, the Court held in *Kabushiki Kaisha Sony Computer Entertainment Inc. v Ball* that a RAM chip containing a Copyright work constitutes a reproduction in a material form under the current English Copyright Act and that the mere fact that it did not retain the Copyright protected data for more than a very short time was of no significance.³²⁶ This authority buttresses the fact that a temporary storage or downloading a Copyright work with a computer through its Random Access Memory³²⁷ would constitute reproduction within the meaning of the Act.

3.2.3 Public Performance, Broadcasting or Communication to the Public of Literary and Musical Works

The Nigerian Act does not define ‘public performance’ but it states that ‘communication to the public’ includes, in addition to any live performance or delivery, any mode of visual or acoustic presentation, but does not include a broadcast or re-broadcast.³²⁸ The Act does not also define the term ‘public’ which is the operating word with respect to performance of work under consideration. However, the Courts have attempted to lay down general guidelines recognizing that the determination of what amounts to a public performance must necessarily be a question of fact with no fixed criteria. In *Harms Ltd & Chapel Ltd. v Martans Club Ltd.*,³²⁹ the Court considered the performance of the plaintiffs’ musical work played by an Orchestra at a club established primarily for dining and dancing. The audience comprised one hundred and fifty members and fifty guests, although the club had a total membership of one

³²⁵ *Ibid.*

³²⁶ [2004] E.C.D.R. p.33 (Ch. D).

³²⁷ Hereinafter referred to as ‘RAM’.

³²⁸ C.R.A.N. Section 51 (1).

³²⁹ [1927] I Ch. p.526.

thousand, eight hundred ladies and gentlemen of high social standing. By the rules of the club, there was no limit on the number of guests a member could introduce, but visitors introduced after 9pm had to pay 10 shillings. The Court held that there had been an infringing performance in public of the work in question, noting that the audience at the club comprises a number of people belonging to the class likely to go to a similar performance if an entrance fee were required. In *Performing Right Society Ltd. v Hawthorns Hotel Ltd.*,³³⁰ the Court considered the performance of a musical work in a lounge of a residential hotel, the audience being mainly resident guests. The plaintiff's official had been admitted to dine at the hotel in the company of a friend and subsequently they both listened to the music. The defendant contested the claim of Copyright infringement arguing that the performance was of a domestic or quasi-domestic nature and not public. The Court rejected this claim on the ground that any member of the public so desiring would have been admitted to dine and go into the lounge to listen to the performance of the music. The Court further held that the performance was therefore open to any member of the public and hence, a public performance.³³¹ In *Performing Right Society Ltd. v Hammond's Bradford Brewery Co. Ltd.*,³³² what came up for consideration was whether the use of a radio receiver and loudspeaker to receive live broadcast of a musical show amounted to public performance. The plaintiff had a licensing agreement with the British Broadcasting Corporation authorizing the latter to broadcast its musical works for domestic and private reception. The defendant had its radio set and recorder installed for wider audibility; this in the view of the trial Court, amounted to giving or authorizing a performance within the meaning of Copyright Act of England, 1911. The license from the British Broadcasting Corporation did not cover making the musical work audible to members of the public through a radio receiver and loudspeaker. The English Court of Appeal upheld this view expressing the opinion that the reception at the hotel

³³⁰ [1933] Ch. p.855.

³³¹ *Ibid.*

³³² [1934] I Ch. p.121.

constituted a separate performance and could not be seen as a mere extension of the cinema audience. It further held that the defendant has by its device, expanded the audience and since these people were outside its domestic circle, the performance was an infringing public performance.³³³ In *Performing Right Society Ltd. v Camelo*, the defendant's radio set was in a living room adjoining another room which was being used as a public restaurant.³³⁴ Evidence showed that the set was often loud enough to be heard in the restaurant and that the plaintiff had complained against this as an unauthorized performance. It was also shown that customers paid attention to the music from the set. The Court rightly upheld the plaintiff's claim and held that the performance, although in a private living room, extended beyond and was audible in the public part of the building.

It is submitted that in determining whether a public performance has occurred, the character of the audience is crucial, although the Courts are free to approach each case bearing in mind the surrounding circumstances. In *Turner Electrical Instrument Ltd. v Performing Right Society Ltd.*,³³⁵ the proprietor of a factory, in order to prevent boredom and increase the efficiency and output of his workers, relayed to the workers programmes of music broadcast by the British Broadcasting Corporation and also played gramophone records which were replayed by loudspeakers in the factory. The audience comprised only the workers as strangers were excluded from the factory. In determining the test to be applied in a case of this nature, the honourable Court restated its earlier view in *Jennings v Stephens*³³⁶ that the primary consideration in determining the character of an audience was the relationship of the audience to the owner of the Copyright, rather than the relationship of the audience to the persons allegedly performing the music publicly. The Court stated that the monopoly conferred by the Copyright Act was intended to be real and not an illusory right of property.

³³³ *Buck v Jewell. La Salle Realty Co.* [1931] 283 U.S p.191.

³³⁴ [1936] 3 All E.R. p.557.

³³⁵ [1943] 1 Ch. p.167.

³³⁶ [1936] Ch. p.469.

It is therefore important to consider whether a particular performance, the character of which is in issue, is of a kind calculated to whittle down that monopoly to any substantial extent. The Court also considered the argument on the implication of this conclusion for the thousands of factories where music is similarly performed for millions of employees. It reasoned that to hold otherwise would mean that employers would be giving to their employees without payment, the fruit of the brains, skill, imagination and taste of the author, or the property of his successor-in-title without paying any remuneration. By so doing, the employer would be getting the advantage of that work, taste and skill in obtaining increased or improved output at the expense of the author or his successor-in-title. Furthermore, in *Performing Right Society Ltd. v Rangers F.C. Supporters Club*,³³⁷ the Court considered the relationship between the audience and the Copyright owner in a case where the performance had been in a private club which was not established for profit. The membership of the club was selective and there was no invitation to the public. Based on this fact, the Court of first instance was of the opinion that the entertainment provided had the favour of a private rather than a public performance. In reversing this decision, the English Court of Appeal rightly held that the performance was in public and went ahead to reason that although the club made no profit, the circumstances were more similar to a public place like a dance hall or club, than a domestic environment. In *Performing Right Society Ltd. v Harlequin Record Shops Ltd.*,³³⁸ the defendants played music in their record shops purportedly in order to promote sales of the records. In defending the allegation of infringement through public performance, the defendant contended that the public performance benefited the authors through increased sales and royalties. It was also the contention of the defendants that their actions did not adversely affect the composer, nor did it interfere with their proprietary rights and particularly, that the performance was not given to the 'owners public'. The Court rightly

³³⁷ [1927] 1 Ch. p.526.

³³⁸ [1979] 2 All E.R. p.828.

rejected these arguments and stressed that the decisive factor in these cases is the character of the audience. In the opinion of the Court, a performance given to an audience consisting of persons present in a shop which the public at large are permitted, and indeed encouraged, to enter without payment or invitation and with a view to increasing the shop owner's profit can only properly be described as a performance in public.

3.2.4 Adaptation and Translations of Literary and Musical works

The exploitative rights of the Copyright owner in a literary or musical work to control the production, reproduction, performance or publishing of the work do not end with the original work itself. The owner also has the exclusive right to control the production, reproduction, performance and publishing of any translated version of the work; or the right to do in relation to any translation or any adaptation of the work, any of the acts prohibited in relation to the original work.³³⁹ Adaptation simply means the modification of an existing work from one genre of work to another; and may involve the alteration of the composition of work as, for instance, the adaptation of a story to a film script or play.³⁴⁰ An adaptation will necessarily differ from the original work in some respects as in a case where a novel is dramatized without taking the exact words from the novel if the incidents are reproduced; or where a story is adapted into a ballet.³⁴¹ Thus, the concept of adaptation does not derogate from the point earlier made that the law does not protect mere ideas. It also confirms the thin divide between the expressions of ideas and the ideas themselves, particularly with reference to the plot of a story.

The Copyright in any adaptation of a literary or musical work is vested on the person who made such adaptation, whether or not he is the author of the original work, so long as that adaptation qualifies for protection under the Act. For example, if a man writes a script

³³⁹ C.R.A.N. Section 6 (1) (a) (iv).

³⁴⁰ *Ibid.* Section 51 (1).

³⁴¹ *Holland v Vivian Van Damm Productions Ltd.* [1935-45] Mac. C.C. p.69.

adapting Flora Nwapa's novel 'Efuru' for a movie or screen play, Copyright in such script resides in the maker of such work so long as the adapted work fulfils the elements of originality, fixation, and author or work connection principle under the Act. But if such adaptation is made without the consent of the author of the original work, it will constitute an infringement of the Copyright in such original work. It should also be noted that a second derivative work may be made from an adaptation of an original work. For example, a movie produced from a script made from a novel qualifies as such and is protectable as a cinematograph film. Copyright in such work resides in the maker of the film who would ordinarily have obtained the consent of the script writer to make such further adaptation.

In any event, the protection accorded to a derivative work extends only to the original contribution of the maker who has no right to authorize someone else to use those parts of the derivative work that were taken from the original. It needs not be stressed that the Copyright owner in derivative works also enjoys the entire rights incidental to Copyright as has already been discussed in this work in relation to original works.

3.2.5 Commercial Distribution of Literary and Musical Works

Copyright is a property right with economic values. It is considered that the right to distribute the work to the public for commercial purposes or by way of rental, lease, hire, loan or similar arrangement resides with the author or owner of the Copyright in such work.³⁴² It is therefore an offence for any person to distribute the work for commercial purposes without the authorization of the Copyright owner.³⁴³ This is because it will be unfair to give a person who is not the Copyright owner the advantage of exploiting the economic benefits accruing from the work without the authorization or license of the owner. Normally, the Copyright owner is deemed to have granted an implied license where he makes his work available to

³⁴² C.R.A.N. Section 6.

³⁴³ J Asein, *Nigerian Copyright Law & Practice Op. Cit.* p.194.

distributors and retailers for the purpose of sale.³⁴⁴ But this authorization does not cover commercial rental, lease, hire and loan of the work to the public.³⁴⁵

It can be stated categorically that as far as Nigeria is concerned, it is uncommon to see where literary works are subject of lending, loan, hire, except in libraries which is not done with any economic consideration. The only thing that applies to literary works here is massive reproduction by way unauthorized photocopying and reproduction. Most often, musical works and films are usually rented or loaned in rental shops. This practice is actually flourishing and poses great threat to the economic interests of right owners. It should be noted that the provisions of the Act does not cover distributions to the public for commercial purposes by way of sale.³⁴⁶ This might be a deliberate avoidance of the implication of the first sale doctrine, although this has been whittled down by the provision relating to publication.

3.2.6 Broadcasting or Communicating of Literary and Musical Works to the Public

Nigerian Courts have not drawn a clear distinction between the two forms of exploitation, namely performance of a work in public, and broadcasting the work in public. In *Musical Copyright Society of Nig. Ltd.v D.P.Lekki Ltd.*,³⁴⁷ the plaintiff was held to have established that its musical works were publicly performed through hired bands and by means of mechanical devices; while in *Musical Copyright Society Nig. Ltd. v Nigeria Hotels Ltd.*,³⁴⁸ the performance was held to amount to infringement by means of devices as tapes, recorders, radio and television sets and also over loudspeakers. One thing that is clear in both forms of exploitations is that the Act does not prohibit a private or domestic performance; or

³⁴⁴ *Ibid.*

³⁴⁵ *Ibid.* p.195.

³⁴⁶ C.R.A.N. Section 6 (1) (b).

³⁴⁷ FHC/L/168/90 quoted by J Asein, *Nigerian Copyright Law & Practice, Op. Cit.* p.186.

³⁴⁸ FHC/L/43/95. Quoted by J. Asein, *Nigerian Copyright Law & Practice, Op. Cit.* p.365.

communication of a work even by loudspeaker. Thus, a private reception of a broadcast or rebroadcast does not fall within the meaning of public communication.

3.2.7 Exploitative Rights in Artistic Works

The Nigerian Act states that subject to certain exceptions, Copyright in an artistic work shall be the exclusive right to do or authorize the reproduction of the work in any material form; the publication of the work; the inclusion of the work in any cinematograph film; making any adaptation of the work; doing in relation to an adaptation of the work, any of the acts specified by the Act in relation to the work.³⁴⁹ This provision reveals a few obvious departures from the provisions relating to literary work, which may have been necessitated by the peculiar nature of artistic works. Most often, artistic works co-exist with literary works even in the same medium. For instance, a magazine, text book or newspaper may contain text materials as well as illustrations of drawings, paintings or photograph. This may pose problem when determining ownership of such works in the event of infringement.

It is noted that as is the case with literary and musical works, the Nigerian Act only confers on an author rights in respect of the whole or a substantial part of the work either in its original form or in any form recognizably derived from the original.³⁵⁰

3.2.8 Reproductions of Artistic Works

Much of what was discussed in relation to the rights of a Copyright owner of literary and musical work applies to the rights enjoyed by an owner of an artistic works especially as it concerns reproduction. Thus, where a copy or reproduction of a work is not exact, the Court must examine the degree of semblance to determine whether infringement has actually occurred. In *Bauman v Fussel*, the appellant, a reputable photographer, had gone to Cuba and there took a photograph of a cock-fight, which was published subsequently in the illustrated

³⁴⁹ C.R.A.N. Section 6 (2).

³⁵⁰ *Ibid.*

Magazine Picture Post.³⁵¹ The first respondent, an artist, saw this photograph, cut it out of the magazine and painted it in a vigorous style. The artist admitted that the idea for his painting was indeed taken from the picture. The second set of respondents, who are art dealers, displayed the picture in their showroom and subsequently sold it to the third respondent. The appellant brought this action claiming damages for the infringement of Copyright and for delivering up of the painting to him. Although the Court accepted the possibility of an infringement in a case like this, the question was whether the painting was a substantial copy of the appellant's photograph. While agreeing with the fact that an infringement has occurred, the Court held that the general colour of the birds was broadly similar and their positions the same although the general effects of both pictures were different. In *Brooks v Religious Tract Society*,³⁵² it was contended that part of an engraving of a collie dog had been copied and part altered. The Court held that the defendant had not only taken the dog but also 'the feeling and artistic character of the plaintiff's work'. In *Bradbury Agnew v Day*,³⁵³ the Court considered whether the defendant's living pictures infringed the plaintiff's Copyright in a cartoons. The Court rightly held that breach of Copyright was established under the 1911 Copyright Act of England which made living pictures possible subjects of infringement.

In the United States case of *Kish v Ammirati & Puris Inc.*,³⁵⁴ the facts involved two photographs which were taken in the same corner of a night club with the same background and the underlying tone, mood lightening, camera angle and position appearing similar. In denying the defendant's motion to dismiss the plaintiff's claim for Copyright infringement, the Court rightly held that there were sufficient similarities in both pictures to prove copying. It went further to hold that it did not matter that the first photograph was a woman holding a concertina while the second was of a man holding a bottle. In the Nigerian case of *Ukaoha v*

³⁵¹[1895] A.C. p.20 at p.27.

³⁵²[1897] 45 N.R. p.476.

³⁵³ [1916] 32 T.L.R. p.349.

³⁵⁴ 657 F. Supp. p.380 (S.D.N.Y. 1987).

Broad-Based Mortgage Finance Ltd.,³⁵⁵ the plaintiff sued the defendants for the infringement of his Copyright in a 17 story building model. He alleged that he had loaned the building model to the defendants for display in the latter's conference room until he could complete the model of a bungalow which the second defendant had specifically requested him to make. Although the defendants neither made drawings nor actual buildings from the model, the plaintiff's complaint was that the defendants had caused several photographs of the model to be published in newspapers without his consent and that the model was described by the defendants as their proposed corporate headquarters in Abuja. This was after the defendants had, at the formal commissioning of its Lagos Office, exhibited the same model to members of the public. The plaintiff also alleged that the authorship of the model in one of the newspaper publications was wrongly attributed to another firm. The Court correctly held that the acts done or caused or permitted to be done by the defendants amounted to Copyright infringement.

It should be noted that artistic works include works of architecture in the form of building models; and that Copyright in a work of architecture includes the exclusive right to control the erection of any building which reproduces the whole or a substantial part of the work either in its original form, or in any form recognizably derived from the original.³⁵⁶ Thus, the right of the Copyright owner of a work of architecture is qualified under the Act by excluding the right to control the reconstruction in the same style as the original of a building, to which the Copyright relates. In line with this provision, the United States District Court rightly held in the case of *Altken & Ors. v Empire Construction Co.* that neither the developer nor the constructor had Copyright in an architect's drawings.³⁵⁷ Therefore, when an architect prepares a building plan at the request of a client, the Copyright remains vested in law in the architect. What the client obtains is the right to construct his house in accordance with the

³⁵⁵[1992] 2 F.H.C.L.R. p.477.

³⁵⁶C.R.A.N. Section 6 (2).

³⁵⁷ 542 F. Supp. p.252; 218 USPQ p.409.

plan and neither the client, nor the builder, can reproduce that plan or any substantial part thereof except with the license of the architect, express or implied. *In Blair v Osborne & Anor.*,³⁵⁸ lord Denning succinctly put the position thus:

Where the owner of a building plot employs an architect to prepare plans for a house on that site, the architect impliedly promises that, in return of his fees, he will give a license to the owner to use the plans for the building on the site. The Copyright remains in the architect, so that he can stop anyone else from copying his plans or making a house from them, but he cannot stop the owner who employed him from doing a work on the site in accordance with the plan. If the owner employs the builder or another architect, the implied license extends so as to enable them make copies of the plans and to use them for that very building on the site but for no other purpose. If the owner should sell the site, the implied license extends so as to avail the purchaser also.

3.2.9 Publication, Inclusion in a Cinematograph Film, and Adaptation of an Artistic Work

As is the case of literary and musical work, an artistic work is published if copies of the work have been made available in a manner sufficient to render the work accessible to the public.³⁵⁹ It must be pointed out that a Copyright owner of an artistic work reserves the right to include such work in any cinematograph films.³⁶⁰ The owner of the artistic work also has an exclusive right to the exploitation of that work as an animated character.³⁶¹ In the same vein, photographs, which the Act includes in the definition of artistic works, may be included in a cinematograph film as footage.³⁶² The Act however states that the rights conferred on the author of an artistic work under the Act does not include the rights to control the inclusion in a film or a broadcast of an artistic work situated in a place where it can be viewed by the public; or an incidental inclusion of an artistic work in a film or broadcast.³⁶³ An incidental inclusion would suggest the inclusion of an artistic work in the background or general

³⁵⁸ [1971] 2 Q.B. p.196.

³⁵⁹ C.R.A.N. Section 51 (1).

³⁶⁰ Asein, *Nigerian Copyright Law & Practice, Op. Cit.* p.202.

³⁶¹ *Ibid.*

³⁶² *Ibid.*

³⁶³ C.R.A.N. Paragraphs (c) & (e) of the Second Schedule.

scenery not having any significant connection with the principal subject of the film.³⁶⁴ It is worthy to note that what has been discussed with respect to adaptations of literary and musical works also apply to artistic works.

3.2.10 Exploitative Rights in Cinematograph Films

The rights granted by the Nigerian Act to a Copyright owner of a cinematograph film includes the right to do or authorize the making of a copy of the film, causing the film, in so far as it consists of visual images to be seen in the public and, in so far as it consists of sounds, to be

heard in public; making any recording embodying the recording in any part of the sound track associated with the film by utilizing such sound track; the distribution to the public, for commercial purposes copies of the work, by way of rental, lease, hire, loan or similar arrangement.³⁶⁵ The Act further provides that the doing of any of the acts referred to in the relevant section of the Act in respect of the original form or in a form recognizably derived from the original.³⁶⁶ However, the Act does not expressly provide for the rights in relation to an adaptation of the cinematograph film as is the cases with literary, musical and artistic works. Asien argued that since an adaptation does not necessarily involve copying, merely making an adaptation of a film will not constitute an infringement of Copyright in the film.³⁶⁷

However, this argument is unsustainable as there is no basis for thinking that the taking of a still photograph from single frames of a cinematograph film should not amount to making copies of the work. This is because as far as the Nigerian Act is concerned, copy means ‘a reproduction in written form, in the form of a recording or cinematograph film, or any other material form’.³⁶⁸ The Court is saddled with the responsibility of determining whether the copy in any particular instance is substantial enough to constitute an infringement of the

³⁶⁴ *Ibid.* Section 51 (1).

³⁶⁵ *Ibid.* Section 6 (1) (b) (iii).

³⁶⁶ *Ibid.* Subsection (2).

³⁶⁷ J Asein, *Nigerian Copyright Law & Practice, Op. Cit.* p.203.

³⁶⁸ C.R.A.N. Section 51 (1).

Copyright of the owner. In *Spelling Goldberg v B.P.C. Publishing Ltd.*,³⁶⁹ the plaintiff was the producer of some detective films and owned the Copyright in them. The defendant had produced the photographs and a display poster derived from the film without the plaintiff's authorization. As still photographs, they were in fact, a reproduction of single frames from the film. The plaintiff argued that the reproduction of a single frame of the film was in effect the making of a copy of the film. The Court of first instance wrongly rejected this argument and held that the copy of a film meant a sequence of images capable of being shown as a moving picture. In reversing this decision, the English Court of Appeal rightly held that a single frame taken from a film was an integral part of that film and its reproduction in any material form constituted the making of a copy. The honourable Court remarked that it was indeed difficult in the ordinary use of languages to say that a single frame taken from all the frames contained in a cinematograph film was not itself, part of that film. The Court further held that a still photograph was a copy of a cinematograph film. In adopting this approach, lord Justice Buckley opined that "this view does not seem to be surprising when one remembers that under the old law, every single frame in a film constituted an individual photograph for Copyright purposes."³⁷⁰ The Court correctly held in this particular case that a newspaper publication of still photographs taken from a video recording constituted an infringement of the Copyright in the work.

It is observed that the rights granted to Copyright owners of cinematograph films are not as wide as the rights granted to Copyright owners in television broadcasts which the Act defines to include 'the right to control the making of still photographs from the broadcast'.³⁷¹ It is suggested that the Nigerian Act be amended to expand the rights granted to Copyright owners of cinematograph film to be as wide as the rights granted to owners of the right in broadcasts.

³⁶⁹ (1981) R.P.C. p.283; (1979) F.S.R. p.494.

³⁷⁰ *Hyde Park Residence Ltd v Yelland* [2001] Ch. p.143.

³⁷¹ C.R.A.N. Section 8 (2).

It should however be noted that as is the case with the performance of musical work in public, it is a question of fact to be determined by the Court depending on the circumstances of each case whether the audience to which a film is shown or the sound is played constitutes a public in relation to public performance. The crucial factor is the relationship between the viewing or listening audience and the owner of the film, rather than the relationship between the audience and the person exhibiting the film.³⁷²

There is however a presumption of law to the effect that where the owner of the Copyright in a literary, musical or artistic work authorizes a person to incorporate his work in a film and such film is broadcast by a broadcasting authority, the owner of the Copyright in the underlying work is deemed to have authorized the broadcast; which presumption can be rebutted by showing that there was no express agreement to the contrary between the owner of the underlying work and the person incorporating the work in a film.³⁷³

3.2.11 Exploitative Rights in Sound Recordings

A Copyright owner of a sound recording is conferred with the exclusive to control in Nigeria the direct or indirect reproduction, broadcasting or publication to the public of the whole or a substantial part of the recording either in its original form or in any form recognizably derived from the original; the distribution to the public for commercial purposes of copies of the work by way of rental, lease, hire, loan or similar arrangement.³⁷⁴ The Act also states that the exceptions specified in the Second Schedule to the Act shall apply to the Copyright in sound recording in like manner as they apply to Copyright in literary, musical or artistic work or a cinematograph film.³⁷⁵ Thus, the exploitative rights in sound recording are similar to the

³⁷² J Asein, *Nigerian Copyright Law & Practice, Op. Cit.* p.205.

³⁷³ C.R.A.N. Section 9 (1).

³⁷⁴ *Ibid.* Section 7 (1).

³⁷⁵ *Ibid.* Subsection (2).

rights earlier discussed in this work concerning literary, musical artistic or broadcast works. The arguments proffered in respect of these works are applicable to sound recordings.

In *Gramophone Co. Ltd. v Cawardine & Co. Ltd.*,³⁷⁶ the plaintiff, a manufacturer of gramophone records on which sound recordings were embodied, sued the defendant for playing one of the records in its tea rooms which was a place of entertainment. The plaintiff's action was for an injunction restraining the defendant from performing the record otherwise than in private. The Court upheld the plaintiff's sole right under the Copyright Act to use the record for public performance. What the Court did in this case is a welcome development which is also in line with the provision of the Nigerian Copyright Act to the effect that the owner of the Copyright in the work continues to have the right of control even after the sale of the work. However, the position in Nigeria is somewhat different from what exists in England where the rights granted to Copyright owner of a sound recording work are now subject to more exceptions unlike in Nigeria. For example, in the English case of *C.B.S. Inc. v Ames Records and Tapes Ltd.*,³⁷⁷ the plaintiff's company, on behalf of a number of Copyright owners in sound recordings, sued the defendant company as the owner of a chain of retail shops operating record lending library as an alternative to direct sale. The library lent out records and simultaneously offered blank tapes for sale at a discount. The Court held that this does not constitute authorization of infringement of Copyright in the records. The defendant could not be said to have sanctioned or encouraged home taping, so its activities did not constitute infringement. The Court further held that the purchaser of a record was free to sale, hire or destroy it at will. The Court cautioned against stretching the Copyright law to give protection to creative talents and activities, the protection of which was probably never in the contemplation of those who made the law.

³⁷⁶ [1934] I Ch. p.450.

³⁷⁷ [1982] Ch. p.91.

It is important to clarify when one is dealing with a live performance and when one is dealing with a sound recording. One can be said to have violated the rights of the owner of a sound recording only when the work has been fixed in a format, although it would still amount to an infringement even where the illicit reproduction is made from a broadcast of the sound recording as against a live broadcast. In the same vein, where a broadcasting authority broadcasts a cinematograph film in which a musical work is incorporated, the owner of the right to broadcast the musical work is entitled subject to the provision of the Act, to a fair compensation from the broadcasting authority.³⁷⁸ In the absence of any agreement on the amount of compensation payable, then the matter would have to be determined by the Federal High Court of Nigeria.³⁷⁹

3.2.12 Exploitative rights conferred on an owner of a broadcasting Work

According to the Nigerian Act, Copyright in a broadcast shall be the exclusive right to control the doing in Nigeria of any of the following acts:³⁸⁰

- (a) the recording and the re-broadcasting of the whole or a substantial part of the broadcast;
- (b) the communication to the public of the whole or substantial part of a television broadcast, either in its original form or in any form recognizably derived from the original; and
- (c) the distribution to the public for commercial purposes, of copies of the work, by way of rental, lease, hire, loan or similar arrangement.

Copyright in a television broadcast also includes the right to control the taking of still photographs from the broadcast.³⁸¹ These rights granted to authors of broadcasts are subject to five basic exceptions provided for in the Second Schedule to the Nigerian which shall be

³⁷⁸ C.R.A.N. Section 9 (2).

³⁷⁹ *Ibid.* Subsection (3).

³⁸⁰ *Ibid.* Section 8 (1).

³⁸¹ *Ibid.* Subsection (2).

treated later in the next chapter under exceptions to Copyright control.³⁸² The exploitative rights relating to broadcast shall be considered below.

3.2.13 Recording and Re-broadcasting of Broadcasts

The rights given to the owner of a work of broadcast are the rights to record and re-broadcast the television broadcast. It is submitted that there is no cogent reason why broadcast under the provisions of the Nigerian Act should have be limited to television broadcasts. Asein argued that television broadcast here could be understood in its very broad sense to mean the broadcast of vision as against audio.³⁸³ It may well be that the drafters of the Act foresaw that it will amount to duplication to assign the same rights already given to owners of works of sound recording to owners of works of broadcast if the provisions of the Act relating to broadcast are not limited to television broadcast. Thus, only video works are contemplated under this Section of the Act, while audio works are contemplated under another section of the Act. It is suggested that the Nigerian Act be amended to include radio broadcast in the category of works protected as broadcast.

3.2.14 Communication to the Public of Broadcasts

The Nigerian Act grants owners of works of broadcasts the right to communicate the work to the public of the whole or a substantial part of a television broadcast, either in its original form or in any form recognizably derived from the original.³⁸⁴ In *Cable News Network Inc. v S.A. Hoteliere Novotel Paris Les*,³⁸⁵ the plaintiffs sued the defendant hotel for the broadcasting of their programmes without license. The hotel, by means of a parabolic antenna directed towards the satellite transmitting CNN broadcasts and by using technical equipment, transmitted the signals by cable to the room. The defendant argued in its defence that its activity was merely a ‘passive reflection of TV programmes and not broadcasting by cable’.

³⁸² *Ibid.* Subsection (3).

³⁸³ J Asein, *Nigerian Copyright Law & Practice, Op. Cit.* p.208; C.R.A.N. Section 8 (1).

³⁸⁴ *Ibid.* Section 51(1).

³⁸⁵ [1996] E.C.E. p.370.

The Court of first instance dismissed the plaintiff's claim and held that a hotel room is a private place which could not be classified as a place open to the public. The Court of Appeal rightly reasoned that although the clients of a hotel each occupied separate rooms, taken together they constitute a public to whom CNN broadcasts were communicated in the exercise and for the purpose of its trade. It went ahead to hold that it was not necessary to prove that the broadcast had in fact been listened to and watched by the hotel clients, since the very fact of providing such clients with the wherewithal to receive them constituted the communication. In *Entidad De Gestion De Derechos De Los Productions Audiovisuales v Hosteleria Asturiana SA*,³⁸⁶ the European Court of Justice rightly reached the same conclusion that the reception by a hotel of satellite or terrestrial television signals and their distribution by cable to its rooms was an 'act of communication to the public' or reception by the public. Similarly, in *Mornington AB v STIM*,³⁸⁷ it was held that:

The provision of radio and television sets in hotel bedrooms constitutes a performance for Copyright purposes and that performance is public where the hotel rooms are freely available to the public *albeit* for free. It did not matter that the signals were received directly over the air or *via* a community antenna and; whether or not the individual hotel guests make use of the sets.

It can be gleaned from these legal precedents cited above that once there is reception of broadcast whether audio or visual, *via* electrical gadget in a public place, such a transmission or reception constitutes broadcast of the work in the public. It is immaterial that nobody actually watched or listened to the broadcast, or that it was watched or listened to by a good number of persons capable of being addressed as the public. Moreover, Mornington's case quoted herein is an authority in support of the fact that the broadcast contemplated under the act is not limited to television broadcast, but embraced audio broadcast.

³⁸⁶ [2000] E.M.L.R. p.523.

³⁸⁷ [1982] E.C.C. p.17.

It should also be noted that broadcast can be communicated wholly or partially to the public either in its original form or an adaptation of it. The communication of the original work or a form recognizably derived from the original has been fully discussed in this chapter in relation to other protected works which works are similar to broadcast. There is therefore no need to repeat such arguments herein to avoid repetition.

3.2.15 Commercial Distribution of Copies of Broadcasts

As stated earlier in this research work, a copy to means ‘a reproduction in written form, in the form of a recording or cinematograph film, or in any material form’.³⁸⁸ This means that the broadcast must be embedded in some material form. For example, an audio recording of a radio broadcast or, in the case of a television broadcast, a video or audio recording. Whatever be the case, the materials in question must qualify as copies of the broadcast which in this case would include both television and radio broadcast. Similarly, the rights granted to the owner of broadcast include the right to distribute the copies embodying the broadcast to the public for commercial purposes in the form of rental, lease, hire, loan or similar arrangement.³⁸⁹ It should be noted that these modes of distribution enumerated above imply a temporary transfer of possession of copies, usually with a condition of payment in return.

It is submitted that the phrase ‘similar arrangements’ mentioned by the Nigerian Act in relation to the commercial distribution of broadcast works should be read to mean the arrangements similar to the ones specified by the Act. Thus, it is not restricted to the acts specified, but does not include any other kind of commercial distribution such as outright sale.

³⁸⁸ C.R.A.N. Section 51(1).

³⁸⁹ *Ibid.* Section 8 (1) (c).

3.2.16 Taking of Still Photographs from Works of Broadcasts

The taking of still photograph from works of broadcasts is one of the rights conferred on an owner of a broadcast work.³⁹⁰ Thus, unauthorized taking of a still photograph of a broadcast by another is prohibited even if the still photograph is a snapshot. It will be of no consequence to argue that such still snapshot would not ordinarily qualify as a substantial part of the broadcast. It is however commendable that the Act does not require that the photograph or snapshot taken from the broadcast should have been distributed or otherwise dealt with commercially. This suggests that strict enforcement is contemplated by the drafters of the Nigerian Act. It is submitted that this is a welcome development especially in view of the ongoing indiscriminate violations of Copyright.

3.3 Right to claim authorship

The Nigerian Act provides that:³⁹¹

the author of a work in which Copyright subsists has the rights to:

- a. claim authorship of his work, in particular that his authorship be indicated in connection with any of the acts referred to in section 6 of this Act except when the work is included incidentally or accidentally when reporting current events by means of broadcasting;
- b. object and to seek redress in connection with any distortion, mutilation or other modification of, and any other derogating action in relation to his work, where such action would be or is prejudicial to his honour or reputation.

It has been stated earlier in this work that a creator of a work who spent a lot of energy, resources and time in creating a work is entitled to reap the economic benefits accruing from the work. He has the right to do or cause any other person to do on his behalf any of the acts enumerated in the Nigerian Act, ie, the right to reproduce, publish, perform the work in public, broadcast, make any adaptation of the work, etc. These rights are conferred not only on the author of the work but on the heir or heirs, as well as the successors-in-title of the

³⁹⁰ *Ibid.* Section 8 (2).

³⁹¹ *Ibid.* Section 12.

author.³⁹² The rights of the author enumerated above are so sacrosanct and inalienable that the law empowers the author to claim authorship of his work and to stop people from using his work without indicating his authorship except when such work is included incidentally or accidentally when reporting current affairs or events by means of broadcasting. These rights are perpetual, inalienable and imprescriptible.³⁹³

Under the Indian Act, the author continues to enjoy these rights independently of his Copyright and even after the assignment either wholly or partially of the Copyright.³⁹⁴ However, the author has no right to restrain or claim authorship in respect of any adaptation of a computer programme to which the provisions of the Act on the exception for the use of works for fair use apply.³⁹⁵ Similarly, the English Act provides that authors of published and issued works enjoy the rights similar to the rights provided by the Nigerian and Indian Acts.³⁹⁶ However, the right is not infringed unless authorship has been asserted in accordance with the relevant provisions of the English Act.³⁹⁷ Authorship of a work is asserted generally, or in relation to any specified act or description of acts by including a statement that the author or director asserts his right to be identified as the author of the work.³⁹⁸ This assertion must be in writing and signed by the author or director as the case may be.³⁹⁹ The assertion may be contained in the instrument of assignment, license, etc.⁴⁰⁰ It should be noted that under the English Act, the right to be identified as the author or director does not apply in relation to computer programme; the design of typeface; and any computer generated

³⁹² *Ibid.* Subsection (3).

³⁹³ *Ibid.* Subsection (2).

³⁹⁴ C.R.A.I. Section 57.

³⁹⁵ *Ibid.*

³⁹⁶ C.D.P.A. Sections 77 & 80.

³⁹⁷ *Ibid.*

³⁹⁸ *Ibid.* Section 78 (2).

³⁹⁹ *Ibid.*

⁴⁰⁰ *Ibid.* Subsection (1) & (2).

work.⁴⁰¹ Furthermore, the right to claim authorship does not apply to works produced by employees in the course of their employment.⁴⁰² The Act further provides that:

the right is not infringed by an act which by virtue of the following provisions would not infringe Copyright in the work:⁴⁰³

- (i) Section 30 (Fair dealings);Section 31 (incidental inclusion of work in an artistic work, sound recording, film or broadcasting);
- (ii) Section 45 (Parliamentary or Judicial proceedings);
- (iii) Section 46 (1) or (2) (Royal Commissions and Statutory Inquiries);
- (iv) Section 51 (Use of designs documents and models);
- (v) Section 52 (effect of exploitation of design derived from artistic work);
- (vi) Section 57 or 66A (acts permitted on assumptions to the expiry of Copyright).

The right is also not infringed by an act done for the purposes of an examination which by virtue of any provisions of the Act would not infringe Copyright.⁴⁰⁴ However, the right does not apply in relation to the publication in a newspaper, magazine or similar periodicals; or an encyclopedia, dictionary, year book or other collective work of reference of a literary, dramatic, musical or artistic work made for the purposes of such publication or made available with the consent of the author for the purposes of such publication.⁴⁰⁵ In the same vein, the right does not apply in relation to a work in which crown Copyright or Parliamentary Copyright subsist; or a work in which Copyright is originally vested in an International Organization.⁴⁰⁶ In all cases, the right to object to the derogation of the work is also subject to a similar exception discussed above.⁴⁰⁷ Furthermore, an author has the right not to have a work falsely attributed to him.⁴⁰⁸

⁴⁰¹ *Ibid.* Section 79.

⁴⁰² *Ibid.* Subsection (3).

⁴⁰³ *Ibid.* Subsection (4)-(7).

⁴⁰⁴ *Ibid.* Subsection (4A).

⁴⁰⁵ *Ibid.* Subsection (5).

⁴⁰⁶ *Ibid.* Subsection (7).

⁴⁰⁷ *Ibid.* Sections 81 & 82.

⁴⁰⁸ Section 84.

On the other hand, the U.S. Act provides for the author's right to claim authorship of the work; right to prevent intentional distortion, mutilation, or modifications of his work in a way that is prejudicial to his honour or reputation, or which violates his rights; and the right to prevent destruction of a work of recognized stature, and any intentional or grossly negligent destruction of such work.⁴⁰⁹ However, the right to claim authorship only avails an author or co-author of a work of visual arts. The author also reserves the right to prevent the use of his name in such a derogatory work.⁴¹⁰ The Act also empowers an author to prevent the use of his name in a derogatory visual work.⁴¹¹ It further provides that:⁴¹²

right and the right to claim authorship provided under subsection (1) of the Act shall not apply to any reproduction, depiction, portrayal, or any use of a work in, upon, or in any connection with any item described in subparagraph (A) or (B) of the definition of 'work of visual art' in Section 101, and any such reproduction, depiction, portrayal, mutilation, or other modification described in paragraph 3 of subsection (a) thereto.

It is submitted that where a work is alleged to have been distorted or modified, the test to be applied by the Court in determining whether such act is prejudicial or derogatory to the owner of the work, is the objective test. Thus, if the distortion or modification is one which ordinarily is in favour of advancement of education, research and science and the author is acknowledged therein, such work having passed the test of originality, will qualify as an authentic work of the new author. What the law should frown at is the mutilation of the authorship of a work.

It is further submitted that any attempt to qualify or limit the author's right to claim authorship of his work, the right to object to the derogatory use of his work by another, and the right to object to the false attribution of such derogatory work to him will be tantamount to a departure from the true concept of Copyright. It is therefore suggested that the elaborate

⁴⁰⁹ U.S.C. Section 106A.

⁴¹⁰ *Ibid.*

⁴¹¹ *Ibid.* Subsection (2).

⁴¹² *Ibid.*

restrictive provisions made in this wise by the English, Indian and the U.S. Acts be deleted through immediate amendment along the line of the Nigerian Act. Thus, these rights will be enforced whether asserted or not; or whether the work is published in a newspaper, periodical or any article.

3.4 Right to Privacy of Certain Photographs and Films

The English Act has a unique provision which protects a person who for private and domestic purposes, commissions the taking of a photograph or the making of a film wherein Copyright subsists.⁴¹³ Such a person has the right not to have copies of the work issued to the public; or the work exhibited or shown in public; or the work communicated to the public.⁴¹⁴ A person who does any of these acts without the authority of the owner of the right in the work shall be deemed to be in violation of Copyright.⁴¹⁵ However, the right so granted by this provision is not infringed by any person who ordinarily would be exempted by the Act, that is to say; incidental inclusion of a work in an artistic work, film or broadcast; parliamentary and judicial proceedings; Royal Commissions and Statutory inquiries; acts done under statutory authority; acts permitted on assumptions as to expiry of Copyright.⁴¹⁶

It is observed that only the English Act provides for this Copyright friendly right to privacy. It is submitted that the right to privacy is so fundamental that virtually all the Constitutions of the nations of the world entrenched its principle in them. It is therefore surprising that such provision is not contained in the Nigerian, Indian and U.S. and Acts. It is suggested that these Acts be urgently amended along the pattern of the aforementioned English Act.

3.5 Right to Share in the Proceeds of Sale/Right to Remuneration

It has been stated in this work that a labourer deserves his wages. Thus, an author who spent precious time, labour and money in creating his work is ordinarily entitled to the economic

⁴¹³ C.D.P.A. Sections 85.

⁴¹⁴ *Ibid.*

⁴¹⁵ *Ibid.*

⁴¹⁶ *Ibid.* Subsection (2).

benefits accruing therefrom by way of remuneration or by sharing in the proceeds of the sale of such works. The Nigerian Act agrees with this principle when it provides that:⁴¹⁷

notwithstanding any assignment or sale of the original work, the author of graphic works, three dimensional works and manuscripts shall have an inalienable right to share in the proceeds of any sale of that work or manuscript by public auction or through a dealer whatever the method used by the latter to carry out the operation.

The works contemplated by this section are some artistic and literary works sold by way of auction or sold through a dealer. Furthermore, the right to share in the proceeds of sale exists in relation to original works only.⁴¹⁸ This right is not available to authors of architectural works or works of applied art.⁴¹⁹ The right is conferred on the author or where the author is not alive, the heir to the author or his successor-in-title.⁴²⁰ Most importantly, the conditions for the exercise of this right shall be determined by regulations to be made by the Nigerian Copyright Commission.⁴²¹ This means that if the Nigerian Copyright Commission fails to make any such regulations contemplated by the Act, the right of the author to share in the proceeds of the sale of his work will be kept in abeyance.

It is observed that while the Nigerian Act guarantees the right of authors to share in the proceeds of sale which is not mentioned by the other Acts under consideration, it does not expressly mention the author's right to remuneration as obtained in the English Act. The latter Act expressly provides that an author who has transferred his rental right concerning sound recording or film to a producer still retains the right to equitable remuneration for the rental.⁴²² Thus, the right to share in the proceeds of sale as contained in the Nigerian Act is synonymous with the right to remuneration provided by the English Act. However, it cannot be said that the English Act contains a comprehensive provision for the protection of the

⁴¹⁷ C.R.A.N. Section 12 (1).

⁴¹⁸ *Ibid.* Section 13 (2).

⁴¹⁹ *Ibid.* Subsection (4).

⁴²⁰ *Ibid.* Subsection (5).

⁴²¹ *Ibid.* Subsection (1).

⁴²² C.D.P.A. Section 93A & 93B.

authors' right to remuneration as under the Nigeria Act. It is therefore suggested that the Acts be urgently amended to allow authors enjoy this right in all protectable works.

It is noted that even though the Acts of India and United States contain no express provision regarding the protection of authors' right to share in the proceeds of sale/right to remuneration, it is implied in the Acts that these rights are duly protected. This is because the Acts contain provisions for the payment of royalties to authors from the proceeds generated from the sale of their works.⁴²³ This position is further buttressed by the fact that Copyrights Societies operate in the jurisdictions under consideration with the purposes of securing economic benefits accruing to authors, as well as enforcing authors' rights to remuneration.

It is submitted that the failure of the Indian and United States Copyright Acts to expressly provide for the authors' right to remuneration is a grave omission which is capable of leading to confusion and obscurity. It is further submitted that the trusting of the right to economic reward of authors into the hands of the Nigerian Copyrights Commission which is less active and which dispenses its duties with lukewarm attitude, is tantamount to compromising the main aim of Copyright which is the creation of works through the enjoyment of the economic benefits flowing from their works. Again, even though the right to share in the proceeds of sale is a laudable one, the Nigerian Act confers this right only on creators of some named artistic and literary works, thereby excluding authors of musical, broadcasting, and other forms of literary and artistic works not mentioned in the relevant section under consideration, from the enjoyment of this right. It is further submitted that this omission is an injustice aimed at discouraging creation. It is therefore suggested that the Nigerian Act be amended to make the right to share in the proceeds of sale available to authors of protected works under the Act and to make the right to be automatic upon sale without having recourse to any

⁴²³ U.S.C. Section 801; C.D.P.A. Sections 93A & 93C.

regulations made or to be made by the Nigerian Copyright Commission. It further suggested that the other Acts under consideration be amended in accordance with this suggestion.

3.6 Right of Authors to Relinquish Copyright

It was been stated earlier in this work that Copyright is transmissible by assignment, testamentary disposition or operation of the law as personal or movable property.⁴²⁴ Such assignment may be whole or partial.⁴²⁵ In the same vein, where a license has been granted by a Copyright owner, it is binding on any of his successors-in-title to his interest in the Copyright work.⁴²⁶ It is observed that the Indian Copyright Act has a novel provision which is not contained in the other Acts under consideration, to the effect that the author of a work has the right to relinquish all or any of the rights comprised in the Copyright in such work.⁴²⁷ He may do so by giving notice in the prescribed form to the Registrar of Copyrights; or by way of public notice, and such rights shall cease to exist from the date of the receipt of such notice.⁴²⁸ Upon the receipt of such notice, the Registrar of Copyrights shall cause the notice to be published in the official gazette in such manner as he may deem fit.⁴²⁹ Fourteen days from the publication of the notice on the official website of the Copyright Office, such work shall remain in the public domain for a period of not less than three years.⁴³⁰ However, the relinquishment of all or any of the rights in the Copyright in a work shall not affect the rights subsisting in favour of any person on the date of the notice referred to in the Act.⁴³¹

It is opposite to state at this juncture that this laudable provision is made to aid the dissemination of knowledge and information to the public. It is therefore suggested that this

⁴²⁴ C.R.A.N Section 11 (1); C.D.P.A. Sections 90-98; U.S.C. Section 201(d); C.R.A.I. Sections 18-21.

⁴²⁵ C.R.A.N. Section 11 (2).

⁴²⁶ *Ibid.* Subsection (4).

⁴²⁷ C.R.A.I. Section 21 (1).

⁴²⁸ *Ibid.*

⁴²⁹ *Ibid.* Subsection (2).

⁴³⁰ *Ibid.* Subsection (2A).

⁴³¹ *Ibid.* Subsection (3).

gesture be emulated by the other three jurisdictions under consideration by entrenching this Copyright friendly provision in these Acts through amendment.

3.7 Rights of Authors to Bequeath, Assign or License Copyright in their Works

As earlier stated this research work. Copyright, being a tangible right is transmissible by assignment, by testamentary disposition, or by operation of the law as movable property.⁴³²

Thus, authors are allowed to bequeath, assign or license their Copyright in works as of right. Since justice has been done to the subject of this topic in sub paragraph 3.1 of this chapter of this research work, there is no need to revisit same for want of time and space.

3.8 Copyright Infringement

Copyright infringement, also known as piracy, is the use of works protected by Copyright law without permission, thereby violating certain exclusive rights granted to the Copyrights holder, such as the right to reproduce, distribute, display or perform the protected work, or to make derivative therefrom. These rights are automatically conferred on authors upon the creation of works in order to allow them reap the economic benefits accruing from their creation. The law confers Copyrights holders with the power to invoke legal and technological measures to prevent and penalize Copyright infringement, subject to the exceptions to Copyright control discussed in chapter four of this work. The various classes of infringement shall be fully discussed hereunder.

3.8.1 Primary Infringement

Copyright owners are conferred with the exclusive rights to control the use and exploitations of their works in the manner specified by the Nigeria Act. These primary rights granted to Copyright owners include the right reproduction, publication, performance, adaptation, commercial distribution, public performance and broadcasting of works.⁴³³ It therefore

⁴³² C.R.A.N. Section 11(1); U.S.C. Section 201 (d) (i).

⁴³³ *Ibid.* Section 6.

follows that any person who without the license or authorization of the Copyright owner, does or causes any other person to do any of the acts enumerated above will be liable for infringement of Copyright.⁴³⁴ This class of infringement is usually referred to as primary civil or direct infringement. It must be pointed out that primary/direct infringement is strict liability in nature as there is no requirement of any guilty knowledge or adverse motive. It must be pointed out that what constitutes reproduction, publication, performance, adaptation, commercial distribution, public performance and broadcasting of works in relation to exclusive rights of Copyright owners and the acts that violate these rights have been fully discussed earlier in this chapter of this research work. Therefore, only secondary and criminal infringement of Copyright shall be discussed herein.

3.8.2 Secondary Infringement

The Nigerian Copyright Act provides that:⁴³⁵

Copyright is infringed by any person who without the license or authorization of the owner of Copyright:

- (a) imports or causes to be imported into Nigeria any copy of a work which if it had been made in Nigeria would be an infringing copy under this section of the Act;
- (b) exhibits in public any article in respect of which Copyright is infringed under paragraph (a) of this subsection;
- (c) 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;
- (d) makes or has in his possession, plates, master tapes, machines, equipment or contrivances used for the purpose of making infringed copies of the work;
- (e) permits a place of public entertainment or business to be used for a performance in the public of the work, where the performance 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

⁴³⁴ *Ibid.* Section 15 (1) (a); *Nigeria Copyright Commission v Edolo* 6 I.P.L.R. 41; *Musical Copyright Society v Adeokin Records & Anor.* 6 I.P.L.R. 55.

⁴³⁵ *Ibid.* Section 15(1) (a) to (g).

reasonable ground for suspecting that the performance would be an infringement of the Copyright;

- (f) performs or causes to be performed for the purposes of trade or business or as supporting facility to a trade or business, any work in which Copyright subsists.

It must be noted that there is nothing in the Nigerian Act that suggests the requirement of any particular knowledge in the case of secondary infringement, although the Act makes reference to the defendant's state of mind in respect of a person permitting a place of public entertainment or business to be used for a performance in public.⁴³⁶ It has been rightly suggested that what needs to be proved in a case where such knowledge is required, is the notice of facts such as would suggest to a reasonable man that a breach of Copyright was being committed.⁴³⁷ This leaves open the question whether indirect Copyright infringement, like direct infringement, is a strict liability tort. It is however suggested that since reference to the knowledge of the defendant was expressly made in this provision of the Act, the Act should be read to exclude knowledge in the other provisions of the Act relating to secondary civil infringement.

The Nigerian Act's prohibition on the importation of infringing copies of works is limited to importation of such copies into Nigeria.⁴³⁸ Obviously, this provision speaks only of the infringement "under the Act". It does not adequately cover cases where the acts constituting infringement was done outside Nigeria prior to importation. On the other hand, the English Acts provides that Copyright in a work is infringed by a person who, without the license of the Copyright owner, imports into the United kingdom, otherwise than for his private and domestic use, an article which is and which he knows or has reason to believe is, an infringing copy of the work.⁴³⁹ This provision is similar to the position in Nigeria prior to the

⁴³⁶ *Ibid.* Section 15(1) (f).

⁴³⁷ *Albert v. Hoffung* (1922) 22 S.R. (N.S.W.) p.75, at p.81.

⁴³⁸ C.R.A.N. Section 15(1) (b).

⁴³⁹ C.D.P.A. Section 22.

1992 Amendment of the Act. The difference is that the requirement of private and domestic use has been eliminated by the aforesaid amendment. Similarly, both Acts do not require the proof of guilty knowledge and motive of the defendant. Hence, there is no requirement of proof that the defendant had fore-knowledge or had actual knowledge that the copy being imported would have been an infringing copy if it had been made either in Nigeria or United Kingdom.

There is no doubt that the strict application of the provisions of the Nigeria Copyright Act relating to secondary infringement discussed above may create problems for a person who is an importer and who imports the work which is lawfully made in the country of origin but which work would nevertheless have been infringing copy if it had been made in Nigeria. This is because the Act requires that the importer should have the knowledge that the work is an infringing one and that the importation should not be for commercial purpose. In *C.B.S. Ltd. v U.K. Record Distributors Ltd.*,⁴⁴⁰ a United States company who is also the owner of the United States and United Kingdom Copyright in some sound recordings, granted an exclusive license to the plaintiff, a wholly owned United Kingdom subsidiary to manufacture and sell the sound recording in the United Kingdom. The defendants, a record distribution company, lawfully purchased in the United States, copies of the work made by the American company and imported them for sale into the United Kingdom. Upon the plaintiff's motion for injunction, the question before the Court was 'whether the defendants were in breach of the English Copyright Act, 1956'.⁴⁴¹ The Court reasoned that it was the American Company as the owner of the United Kingdom Copyright that is also the owner of the recording rights in the United Kingdom for the purposes of the Act; and that it would not have been an infringement for the American company to manufacture the recordings in the United Kingdom. The Court rightly held that the maker hypothesized in that section of the Act was

⁴⁴⁰ [1986] R.P.C. p.273.

⁴⁴¹ section 16 (2) and (3), which is in tandem with C.R.A.N. Section 15 (1).

the person who actually made the article abroad and for that reason, there was no infringement within that section where records manufactured abroad by the American company were imported into the United Kingdom, provided that the American company either owned the Copyright or had an exclusive license to manufacture both in the United States and the United Kingdom.

It should be noted that it is not easy to determine what constitutes importation under the relevant sections of the Acts under discussion. In *Gramophone Co. of India Ltd. v Pandley*,⁴⁴² the Indian Supreme Court considered the word 'import' in the context of section 53 of the Indian Copyright Act. The Appellant in this case upon getting information from the Customs Authorities that a consignment of pre-recorded cassettes, many of them pirated, had arrived Calcutta Port by sea and was awaiting dispatch to Nepal, approached the Registrar of Copyright to exercise his powers to prohibit their importation and to confiscate the consignment. The Appellant obtained interim order initially but on appeal, the Appellant's writ was dismissed on the ground that what the consignee had done did not amount to 'importation' under the Indian Copyright Act. On a further appeal to the Supreme Court, the Court cautioned that the same word could mean different things in different enactments and in different contexts, implying that the correct approach would be to look at the sense of the Statute. Following this approach, the Court concluded that to 'import' for the purposes of the relevant sections of the Copyright Act, should be understood to mean bringing into India from outside 'India' including importation for transit across the country. The Court reasoned that since the section in question did not expressly limit the prohibition to 'importation for commerce' there is no justification for reading those words into it. In *Penguin Books Ltd. v Indian Book Distributors*,⁴⁴³ the High Court of India held that section 53 of the Indian Act, applied to copies made out of India which if made in India, would infringe Copyright;

⁴⁴² [1985] FRS p.136.

⁴⁴³ [1985] F.R.S. p.120.

arguing that ‘infringing copies’ could not have a different meaning in sections 51 (b) (iv) and 53 of the Act. Considering the fact that the Indian Act makes it an infringement for any person to import, except, for the private and domestic use of the importer, into India,⁴⁴⁴ these precedents cited above represent the correct position of the law.

It is well noted that even though the U.S. and Nigerian Acts do not distinguish between importation for private/domestic use and importation for commercial use, as is the case with the English and Indian Acts.⁴⁴⁵ There are a lot of concerns about innocent importers who may not have known that they could be in breach of Copyright by importing such works in a place like the United Kingdom where the aforementioned distinction is made. Responding to these concerns, Jessel rightly noted in the case of *Cooper v Whittingham* that the English Act simply says ‘import’ and that people who import for sale or hire must carry on business at their own peril.⁴⁴⁶ He reasoned that such persons were not like ordinary people who import for their own private use and reading, but are people engaged in business who are bound to be on the look-out and to see that the book they import for sale are not pirated. This goes to supports the well known principle of law that ignorance of the law is not an excuse.

It must be pointed out that the U.S. Act only mentions the importation of phonorecords into the United States in violation of the Act.⁴⁴⁷ No other form of illegal importation of work is mentioned in the Act. It is suggested that the Act be amended to incorporate the provisions of the Indian Act relating to this arm of secondary infringement.

Another form of secondary infringement is the unauthorized exhibition of work in the public as contained under the Nigerian Act.⁴⁴⁸ The prohibition envisaged under this subsection extends to the infringing copies of the work or any other work or articles which, although not

⁴⁴⁴C.R.A.I. Sections 51 (b) (iv).

⁴⁴⁵C.R.A..I. Section 51 (a) (iv), C.D.P.A. Section 22; U.S.C. Section 506.

⁴⁴⁶(1880) L.R. 15 Ch.D. p.501, at p.504- p.505

⁴⁴⁷U.S.C. Section 501.

⁴⁴⁸C.R.A.N. Section 15 (1) (c).

copies in the strict sense, but nevertheless embody the object of infringement. The Act does not require that such exhibition in public must be by way of trade. In the same vein, the defendant needs not have knowledge that the article being exhibited infringes Copyright in any work. It is submitted that since the Act does not require the actual sale or commercial exposition of the Copyright material in order to prove liability, a mere display or exhibition of the work even for promotional purposes would constitute an infringement.

Under the English Act, it is a prohibited act to exhibit in public or distribute in the course of a business or to distribute otherwise than in the course of a business, a work without the license of the Copyright owner to such an extent as to affect prejudicially the owner of the Copyright.⁴⁴⁹ Therefore, in an infringement action, the defendant must know or has reason to believe that such work is an infringing copy.⁴⁵⁰ This provision is similar to that of the Indian Act except that in the latter, there is no requirement of guilty knowledge or reasonable belief that the article is an infringing one.⁴⁵¹ Similarly, the U.S. Act provides that the exhibition must be for commercial distribution, financial advantage, or private financial gain; and that the infringement must be willful.⁴⁵² Thus, for exhibition to amount to violation, the work must have been exhibited in public by way of trade. For example, the English Act requires that in an infringement action, it must not only be proved that the defendant exhibited the infringing work in the public, it must be shown that such exhibition is in the course of trade; or though not in the course of business, the exhibition was to such an extent as to affect prejudicially the owner of the Copyright. Above all, the defendant must know or has reason to believe that such work or article is an infringing one, contrary to the requirements of the Indian and Nigerian Acts. In *Van Dusen v Krutz*,⁴⁵³ the defendant who is a tailor had made use of drawings and exhibited them at various public places and his shop. The plaintiff

⁴⁴⁹ C.D.P.A. Section 23 (c) & (d).

⁴⁵⁰ *Ibid.* Section 23.

⁴⁵¹ C.R.A.I. Section 51 (iii).

⁴⁵² U.S.C. Section 506 (a) (1).

⁴⁵³ [1936] 2 K.B. p.176.

complained against this and sued the defendant for damages and account. It was in evidence that the defendant withdrew the offending materials within a reasonable time after the plaintiff's solicitors informed him about the infringement. The Court held that in the circumstances of the case, there was no exhibition by way of trade of a work that the defendant knew to be an infringement of the plaintiff's Copyright as required under the Act.

The phrase 'has reason to believe' as used by the English Act⁴⁵⁴ was interpreted in the case of *L.A. Gear Inc. v Ifi-Tec Sports Plc.*⁴⁵⁵ to involve the concept of knowledge of facts from which a reasonable man would arrive at the relevant belief, having been given sufficient time to evaluate the facts. Thus, in *Hoover Plc. v George Hulme (Stock Port) Ltd.*,⁴⁵⁶ the defendant's managing director was held not to have the requisite knowledge under section (3) of the 1956 English Act,⁴⁵⁷ as the defendant had not been afforded reasonable time to access the claims of the plaintiff.

The Copyright law frowns at the unauthorized distribution, offering for sale or hire of work as constituting secondary infringement. Accordingly, the Nigerian Act provides that it is an infringement for a person who does not have the license or authorization of the owner of the Copyright to distribute by way of trade, offering 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 the relevant provisions of the Act.⁴⁵⁸ The English and Indian Acts contain similar provision except that the Indian Act does not contemplate 'injurious' distribution, while the English Act requires proof of reasonable knowledge.⁴⁵⁹ However, the U.S. Act's provision seem to be narrow in that it only talks of the willful infringement of Copyright for purposes of commercial advantage or private financial gain by way of reproduction and

⁴⁵⁴ C.D.P.A. Sections 22.

⁴⁵⁵ [1992] FSR. p.121.

⁴⁵⁶ [1982] F.S.R p.565.

⁴⁵⁷ This provision is in *pari materia* with the current English Act.

⁴⁵⁸ C.R.A.N. Section 15 (1) (d).

⁴⁵⁹ C.D.P.A. Sections 23 (b) & (24) (1) (d); U.S.C. Section 51 (ii).

distribution of such works, without more. It is submitted that this latter lukewarm provision is not Copyright friendly and this will make it impossible for the Act to effectively combat violations of Copyright in this 21st century. It suggested that the U.S. Act be amended along the line of the other three Acts under consideration.

It is very clear from the provisions of the Nigerian Act considered above that the prohibited act of distribution must be 'by way of trade'. It should not be read to simply mean the prohibiting, distribution or any 'injurious' distribution for that matter. The Court has interpreted the phrase 'by way of trade' to mean 'in the course of trade' and not merely '*via trade*'.⁴⁶⁰ The latter would have made the mere purchase of infringing copies from a trader an infringement of Copyright. Thus, the emphasis should always be on the quality of possession and not the source of the offending material. According to the Court, a person who bought any infringing material for his own consumption should not be held liable under the section but the plaintiff has to prove that a person in possession of infringing copies with full knowledge, had them for the purposes of trading with them, either by selling or hiring them in the course of business.

It is observed that the phrase 'or for any purpose prejudicial to the owner of the Copyright' used by the Nigerian Act must be taken to mean activities outside the course of trade. The English Act has somewhat similar provision but it uses the phrase 'distributes otherwise than in the course of business to such an extent as to affect prejudicially the owner of the Copyright'.⁴⁶¹ This prohibits non-commercial or gratuitous distribution which even though not for profit making, but yet are prejudicial to the owner of the Copyright. Thus, under the English Act, it is immaterial that the defendant did not know that the copies were infringing; that harm was not intended, or that the defendant did not intend any benefit. The English Act further prohibits a person who without the license of the Copyright owner transmits the work

⁴⁶⁰ *Reid v Kennet* (1986) 83 Cr. App. p.63.

⁴⁶¹ C.D.P.A. Section 23 (1) (d).

by means of a telecommunications system, otherwise than by communicating to the public, knowing or having reason to believe that infringing copies of the work will be made by means of the reception of the transmission in the United Kingdom or elsewhere.⁴⁶² It is noted that the U.S. and Indian Acts have provisions equivalent to this provision of the English Act.⁴⁶³ It is therefore suggested that the Nigerian Act be amended in line with the more elaborate and Copyright friendly English Act, in order to ensure the effective protection and enforcement of Copyright.

Copyright laws prohibit the unauthorized making or being in possession of contrivances used to commit piracy. According to the Nigerian Act, a person who, without the license or authorization of the Copyright owner, makes or has in his possession, plates, master tapes, machines, equipment or contrivances used for the purpose of making infringing copies of a work is liable for infringement.⁴⁶⁴ The English Act also prohibits the making, importation to the United Kingdom, selling or letting for hire, or offering or exposing for sale or hire an article specifically designed or adapted for making copies of the work, in the course of business, knowing or having reason to believe that it is to be used to make infringing copies.⁴⁶⁵ It seems these provisions of the Acts seek to assist right owners who may not be able to prove actual infringement by pre-empting infringing activities. However, it does appear that in order to succeed under these provisions, the plaintiff must prove that the material found in the defendant's possession have indeed been used to infringe his work. The Nigerian Act does not require that the article or contrivance be specifically designed or adapted for making copies of that work, although that may have been the intention of the infringer. The Act expressly requires that the equipment or contrivances must be used for the purposes of making infringing copies of the work.

⁴⁶² *Ibid.* Section 24 (2).

⁴⁶³ U.S.C. Section 506 (1) (a) & (b); C.R.A.I. Section 51.

⁴⁶⁴ C.D.P.A. Sections 24 (1) & 107.

⁴⁶⁵ C.R.A.N. Section 15 (1) (e).

It is submitted that there is no reason why this provision should be read to mean something that is merely capable of being used for making infringing copies or that they have been used to infringe some other works, other than the work of the Copyright owner. If the plaintiff is allowed to do otherwise, it would mean giving to the plaintiff a remedy beyond the limit of his rights.

It is well noted that under the English Act, it suffices if the defendant is found with any contrivance designed or adapted for making copies of the plaintiff's works so long as he does so in the course of his business; or if he has knowledge or has reason to believe that such contrivance is to be used to make infringing copies.⁴⁶⁶ This is a welcome development worthy of emulation. It is suggested that this provision be incorporated into the Nigerian Act through amendment. It is however surprising that both the India and United State Copyright Acts failed woefully to provide for this form of infringement. It is suggested that these Acts be urgently amended along the line of the English Acts in order to ascribe efficacy to these Acts.

Another form of secondary infringement is illegally permitting the use of a place to be used for a performance to the public of a work. The Nigerian Act provides that Copyright is infringed by any person who without the license or authorization of the owner of Copyright permits a place of public entertainment or of business to be used for a performance to the public of the work, where the performance constitutes an infringement in the work unless the person permitting the place to be used was not aware and has no reasonable ground for suspecting that the performance would be an infringement of the Copyright in such work.⁴⁶⁷

Even though this provision is absent in the U.S. Act, the Indian Act prohibits a person to permit for profit, any place to be used for the communication of the work to the public where

⁴⁶⁶ C.D.P.A. Section 24.

⁴⁶⁷ C.R.A.N. Section 15 (1) (f).

such communication constitutes an infringement of the Copyright in the work, unless he was not aware and had no reasonable ground for believing that, such communication to the public would be an infringement of Copyright.⁴⁶⁸ The position of the English Act is that where the Copyright in a literary, dramatic or musical work is infringed by a performance at a place of public entertainment, any person who gave permission for that place to be used for the performance is also liable for the infringement unless when he gave permission he believed on reasonable grounds that the performance would not infringe Copyright.⁴⁶⁹ These provisions of the two Acts adumbrated above share semblance except that the English Act enumerated only three kinds of works, viz; literary, dramatic and musical works, while the Nigerian Act contemplates all works protected under the Act. Again, for there to be an infringement under the Indian Act, the use of the premises must be for profit making ventures. Thus, under the Nigerian, Indian and English Acts, liability is subject to knowledge. In the wisdom of the Courts, the knowledge contemplated by the Acts has to be actual and not merely constructive.⁴⁷⁰ However, this does not mean that the Court may not infer knowledge on the part of the defendant since by the ordinary rules of evidence, a man may be presumed to be possessed of the ordinary understanding expected of persons in his line of business.⁴⁷¹

Furthermore, it is clear from the express provisions of the Acts that in order to prove infringement under this provision, it must be shown that the place in question is a place of public entertainment or of business, and not a private or domestic premises. The Nigeria Act does not define the term 'a place of public entertainment'. However, under the English Act, the term includes 'premises which are occupied mainly for other purposes but are from time

⁴⁶⁸ C.R.A.I. Section 51 (a) (ii).

⁴⁶⁹ C.D.P.A. Sections 25 (1).

⁴⁷⁰ *Van Dusen v. Krutz* [1938] 2K.B. p.176; *R.C.A. Corp. v Custom Cleared Sales Pty. Ltd.* [1978] F.S.R. p.576.

⁴⁷¹ J Asein, *Nigerian Copyright Law & Practice*, Op. Cit. p.221.

to time made available for hire for purposes of public entertainment'.⁴⁷² This definition is good enough to be made applicable to the other Acts under consideration so that the determinant factor will not be the original character of the place or premises, but the fact that it is being used at the material time for public entertainment. In interpreting the phrase 'place of dramatic entertainment' under the Dramatic Copyright Act, 1833, the Court rightly expressed the view that the public performance of a dramatic entertainment would render a place for, the time being, to fall within the definition.⁴⁷³

It is worthy to note that except in the case of sound recordings, the Nigerian Act exempts from Copyright control any communication to the public of a work, in a place where no admission fee is charged in respect of the communication, by any Club whose aims is not profit making.⁴⁷⁴ It is however submitted that even though this exception is supposed to apply to other categories of works apart from sound recording, the restriction of the exception to Clubs suggests limited application. Thus, other places of public entertainment are not covered by that exception. In *Phonographic performance Ltd. v South Tyneside Metropolitan Borough Council*,⁴⁷⁵ the Court refused to accept a local authority as an 'organization' within the contemplation of the current English Act⁴⁷⁶ which provides for Clubs and Societies. The Court reasoned that the latter groups comprised individuals who were bound together in a common activity or enterprise, while a local authority had a different character as an entity with specific statutory powers and duties including the raising of money and provision of administrative services and functions for a particular area.

It is observed that the Nigerian and India Acts do not clearly spell out who is to be held liable for breach of the Copyright in relation to the exemption under discussion apart from the

⁴⁷² C.D.P.A. Section 25 (2).

⁴⁷³ *Wall v Taylor* [1882] 11 Q.B.D. p.102.

⁴⁷⁴ C.R.A.N. Paragraph (o) of the Second Schedule.

⁴⁷⁵ [2001] E.M.L.R. p.17.

⁴⁷⁶ C.D.P.A. Section 67 (1).

person who permitted the use of the place for the alleged illegal purpose. However, the position is not the same under the English Act which provides that where Copyright in a work is infringed by a public performance of the work, or by the playing or showing of the work in public, by means of apparatus for playing sound recordings, showing films, or receiving visual images or sounds conveyed by electronic means, the following persons shall be held liable for the infringement:⁴⁷⁷

- (i) a person who supplied the apparatus, or any substantial part of it is liable for the infringement if when he supplied the apparatus or part-
 - (a) he knew or had reason to believe that the apparatus was likely to be used as to infringe Copyright; or
 - (b) in the case of an apparatus whose normal use involves a public performance, playing or showing, he did not believe on reasonable grounds that it will not be so used to infringe Copyright;
- (ii) or in the case of an apparatus whose normal use involves a public performance, playing or showing, he did not believe on reasonable grounds that it would not be so used to infringe Copyright;
- (iii) the occupier of the premises who gave permission for the apparatus to be brought into the premises, if when he gave permission, he knows or had reason to believe that the apparatus was likely to be so used to infringe Copyright;
- (iv) a person who supplied a copy of a sound recording or film used to infringe Copyright, if when he supplied it, he knew or had reason to believe that what he had supplied, or a copy made directly or indirectly from it, was likely to be used to infringe Copyright.

This shows that in all cases of infringement contemplated by the provisions of the English Act under consideration, the infringer is to be held liable only if he knew or had reason to believe on reasonable grounds that infringement of the Copyright in the work will occur, or that the copy procured or supplied will be used to infringe Copyright.

It is submitted that the permission herein could be given either expressly or by implication. However, for such permission to be offensive, it must be more than a mere general

⁴⁷⁷ C.D.P.A. Section 26.

authorization to use the place for the public performance of the work.⁴⁷⁸ Thus, once a performance that infringes Copyright in a work is permitted, it is immaterial that no fee was collected from the audience, or that such performance is not for gain. This is the position under the Acts under consideration except the Indian Copyright Act which requires that such performance must be profit oriented. This provision in the latter Act is to say the least, anti Copyright. It is therefore suggested that the Indian Act be urgently amended along the line of the Nigerian and English Acts to delete the requirement of profit for such performance.

It is observed that under the Nigeria Copyright Act, Copyright is infringed by any person who without the license or authorization of the owner of the Copyright, performs or causes to be performed for the purposes of trade or business or as supporting facility to a trade or business, any work in which Copyright subsists.⁴⁷⁹ It is clear that the performance contemplated by this provision needs not be public. The main aim of this provision is to prohibit performances aimed at promoting trade or business; or providing supporting facilities to trade or business which otherwise would not come within the meaning of performance in public earlier discussed in this work. In this context, the activities of business enterprises such as Banks, Service Providers, Microsoft companies and Mobile Phone Dealers etc, which play music to entertain their workers and customers, may be caught up by this provision. Similarly, commercial advertisement jingles with background music may be constructed as supporting facility to trade or business if such supporting music is inserted without the consent of the Copyright owner.

Bearing in mind that the Nigerian Act had dealt with public performances of works as earlier discussed in this work which conveniently covers this and of Copyright violation contemplated under this heading, one wonders the rationale behind the inclusion of this

⁴⁷⁸ *Performing Right Society Ltd. v Cyril Theatrical syndicate Ltd.* [1924] 1K.B.1. p.38; *Wall v Taylor supra.* p.102.

⁴⁷⁹ C.R.A.N. Section 15 (1) (g).

category of infringement under this section of the Act. It is submitted that this inclusion serves no useful purposes. Little wonder no such provision exists in the Copyright Acts of the other jurisdictions under consideration. It is therefore suggested that the Nigerian Act be urgently amended to expunge this provision of the Act.

3.8.3 Criminal Infringement

The first indigenous Copyright Act of Nigeria of 1970 had no provisions for criminal infringement of Copyright. Criminal infringement was then provided for under the general criminal laws of Nigeria.⁴⁸⁰ It was then an offence for any person to knowingly do any of the following Acts:⁴⁸¹

- (a) make for sale or hire any infringing copy of a Copyright work;
- (b) sell or let for hire any infringing copy of a Copyright work;
- (c) distribute infringing copies of a Copyright work for the purposes of trade or to such extent to affect prejudicially the owner of the Copyright; or by way of trade, exhibit in public, any infringing copy of a Copyright work.

The Codes also prohibit any person to make or possess any plate for the purposes of making infringing copies of a Copyright work, or to knowingly cause any such work to be performed in public without the consent of the owner of the Copyright.⁴⁸² The current Copyright Act of Nigeria expressly repealed the provisions of the Criminal Code Act relating to Criminal infringement and incorporated a replica of these provisions into the Copyright Act.⁴⁸³ While doing so, the Act does not make any mention of similar provisions in the Penal Code thereby leaving everyone in doubt as to whether these provisions of the Penal Code are still operating in competition with the Copyright Act.

⁴⁸⁰ Sections 491-493 of the Criminal Code (Cap 77), Laws of the Federation of Nigeria, 1990 & sections 426-427 Penal Code (Cap P3), Laws of the Federation of Nigeria, 2004.

⁴⁸¹ *Ibid*

⁴⁸² *Ibid*.

⁴⁸³ C.R.A.N. Section 52.

It is submitted that this omission cannot by any stretch of imagination be said to be intentional, or that the drafters of the Copyright Act intended to allow the parallel operation of these sections of the Penal Code in Northern Nigeria while prohibiting same in Southern Nigeria. It is further submitted that this omission is an oversight. It is therefore suggested that these provisions of the Panel Code under consideration be expressly repealed *via* immediate amendment of the Copyright Act of Nigeria. This will make for uniformity in the application of the Copyright Act Nationwide.

The Nigerian Act provides that any person who:⁴⁸⁴

- (a) makes or causes to be made for sale, hire, or for the purposes of trade or business any infringing copy of a work in which Copyright subsists, 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 contrivances for the purposes of making any infringing copy of any such work;

shall, 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, or that such plate, master tape, equipment or contrivance was not for the purpose of making infringing copies of any such work, be guilty of an offence under this Act and shall be liable on conviction to a fine of an amount not exceeding N1,000 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.

The Act further provides that⁴⁸⁵ 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
- (c) has in his possession, sells, lets for hire or distribution for the purposes of trade or business or exposes or offers for sale or hire any

⁴⁸⁴ *Ibid.* Section 20 (1) (a)-(c); *N. C. C. v Madu* (Unreported Suit No. FHC/L/40^c/2015, judgment delivered on 14th Feb., 2017, by Oguntoyinbo, J. at Federal High Court, Lagos Division).

⁴⁸⁵ C.R.A.N. Section 20 (2).

copy of a work which if it had been made in Nigeria would be an infringing copy;

(d) has in his possession other than for his private or domestic use, any infringing copy of any such work-

shall 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, be guilty of an offence under this Act and shall be liable on conviction to a fine of N100 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.

The Act also prohibits a person who without the consent of the owner of the Copyright, distributes in public for commercial purposes, copies of the work by way of rental, lease, hire, loan or similar arrangement, and renders him or her liable upon conviction to a fine of N100 for every copy dealt with or imprisonment for six months or to both such fine and imprisonment.⁴⁸⁶ It is a good defence to the offences provided in this section of the Nigerian Act under discussion that the accused person never knew and had no reason to believe that the copy concerned was an infringing copy of any such work, or that such plate master tape, machine, equipment or contrivance was not for the purposes of making infringing copies of such work. In *Ubi Bassey Eno v N.C. C.*⁴⁸⁷ the Appellant who was convicted by the Court of first instance for being in possession of smart cards and other equipment for illegal rebroadcasting of signals argued on appeal that since he lawfully obtained the smart card and equipment, their possession cannot be said to be unlawful. In interpreting the provision of the Act under discussion,⁴⁸⁸ the Court of Appeal held that the section makes it an offence to possess the equipment for the purpose of making infringing copies. The Court went ahead and concluded that the equipment in the present case were in fact used for illegal rebroadcasting, which is a reproduction of a broadcast and since it is illegal, each rebroadcast is an infringing copy.⁴⁸⁹ Similarly, in *Nigerian Copyright Commission v Nwankwo*,⁴⁹⁰ the accused person

⁴⁸⁶ *Ibid.* Subsection (3).

⁴⁸⁷ 6 I.P.L.R. p.93.

⁴⁸⁸ Copyright Act, 1988, section 18 (1) (c), now C.R.A.N. Section 20 (1) (c).

⁴⁸⁹ *Ibid.*

was sentenced to a fine of one hundred naira for each copy of the five hundred and four infringed copies of DVD/CD possessed and presented.

It is worthy of note that as with the other criminal trials, each of the elements of the offences provided under this section must be proved beyond reasonable doubt.⁴⁹¹ It is not sufficient to show that the accused person had done wrong. Infringing actions must be linked with the particular Copyright work and related to a right that is preserved thereto.⁴⁹² For the accused person to succeed on the plea that he did not know and had no reason to believe that the copy he dealt with was an infringing one, it is not enough for him to merely assert this plea, rather, the facts must line up with the plea. The facts of the case may also compel the Court to draw an inference that the accused person did not know or had reason to believe that the work found on him was infringing. In *Federal Republic of Nigeria v Asika*,⁴⁹³ the accused person who was a bookseller in the city of Kano was charged with the offence of unlawfully offering for sale infringing copies of Copyright work contrary to and punishable under the Copyright Act.⁴⁹⁴ The publisher's representative discovered pirated copies of his principal in the accused person's shop and then purchased a copy. He came back a month later and purchased six more copies of the work and was issued with receipt by the accused person which was admitted by the latter under cross examination. He however told the police that he bought the pirated copies from Kenneth and gave his address, though Kenneth was never found. He maintained in his defence that if he knew that the books were pirated books; he would not have sold them to a representative of the publisher whom he foreknew in that capacity before the transaction. The Court found that the physical elements of the offence were proved. It however held that it was not proved beyond reasonable doubt as required in criminal cases

⁴⁹⁰ Unreported Suit No. FHC/ABJ/CR/14/2010 quoted by J. Asein, *Nigerian Copyright Law & Practice, Op.Cit.* p.227.

⁴⁹¹ *Eno v Nigeria Copyright Commission* 6 I.P.L.R. p.93; *Compact Disc Technologies Ltd. & 2 Ors. v Musical Copyright Society of Nigeria* G.T.E. 6 I.P.L.R. p.199.

⁴⁹² *Musa v Le Maitre* [1987] F.S.R. p.272.

⁴⁹³ Suit No. FHC/K/2CR/92, quoted by J. Asein, *Nigerian Copyright Law & Practice, Op. Cit.* p.230.

⁴⁹⁴ Nigerian Copyright Act, 1988, section 18 (2) now C.R.AN. Section 20 (2) (g).

that the accused person knew that the books he was selling or had in possession were pirated books or had been printed by unauthorized persons. It has also held in a similar case that:⁴⁹⁵

there is need for the prosecution to prove against an accused person charged under section 20 of the Act that (i) Copyright subsisted in the work; (ii) the article in respect of which the charge was brought was in the possession of the accused person by way of trade; (iii) the article was an infringing copy; and (iv) the accused person had reason to believe that the article was an infringing copy.

It is apposite to state at this juncture that criminal infringement of Copyright is provided for by the Indian Act. The Act expressly provides that:⁴⁹⁶

any person who knowingly infringes or abets the infringement of the Copyright in a work; or any other right conferred by this Act except the rights conferred by section 53A shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to three years and with fine which shall not be less than fifty thousand rupees but which may extend to two Lakh rupees; provided that where the infringement has not been made for gain in the course of trade or business, the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term less than six months or a fine less than fifty rupees.

This Act also provides that any person who knowingly makes or has in his possession any plate for the purpose of making infringing copies of any work in which Copyright subsists shall be punishable with imprisonment which may extend to two years and shall also be liable to fine.⁴⁹⁷ The Act enhanced the penalty on second and subsequent convictions.⁴⁹⁸ It thus provides that whoever that has already been convicted of an offence under section 63 and is again convicted of any of such offences shall be punishable for the second and for every subsequent offence, with imprisonment for a term which shall not be less than one year but which may extend to three years and with fine which shall not be less than one Lakh rupees but which may extend to two Lakh rupees.⁴⁹⁹ The Act also prohibits the unauthorized use of

⁴⁹⁵ *Musa v Le Maitre supra.* p.272.

⁴⁹⁶ C.R.A.I. Section 63.

⁴⁹⁷ *Ibid.* Section 63.

⁴⁹⁸ *Ibid.* Section 63A

⁴⁹⁹ *Ibid.*

computer programme in the same manner and circumstances stated under the Act discussed above.⁵⁰⁰

The English Act provides for criminal infringement of Copyright almost in the same manner as the Nigerian Act,⁵⁰¹ save that the English Act punishes a person found with contrivances for making infringing copies of works on summary conviction to imprisonment for a term not exceeding three months or a fine not exceeding fifty thousand pounds or both; or on conviction on indictment to a fine or imprisonment for a term not exceeding two years or both.⁵⁰²

It must be pointed out that one striking similarity between the Nigerian, Indian and English Acts is that knowledge is of essence in the commission of the offences under the sections embodying criminal liability. Moreover, the infringement must have occurred in the course of business, though the English and Indian Acts further provide that the accused is liable even though the breach occurred not in the course of business; or for gain in the course of trade or business, or where the infringement has not been made for gain in the course of trade or business.

It must be pointed out that where criminal infringement is committed by a body corporate in the jurisdictions under consideration, the body corporate and every person who is in charge of it at the time of the offence was committed would be held liable for the offence so long as the offence was committed with the knowledge of that person.⁵⁰³ Thus, it must be proved that the offence was committed with the consent or connivance of any of the officers of the body corporate. However, nothing in the English Act shall render any such person or officer of the body corporate liable to any punishment if he proves that the offence was committed without

⁵⁰⁰ *Ibid.* Section 63B.

⁵⁰¹ C.D.P.A. Section 107.

⁵⁰² *Ibid.* subsection (4A).

⁵⁰³ C.R.A.N. Section 22 (1); C.D.P.A. Section 110; C.R.A.I. Section 69.

his knowledge or that he exercised due diligence to prevent the commission of such offence.⁵⁰⁴

It submitted that the provisions of the Acts considered above are adequate and Copyright friendly. It is however disappointing that the U.S. Copyright Act does not contain elaborate provision on criminal infringement of Copyright. It merely provides that:⁵⁰⁵

any person who willfully infringes Copyright shall be punished as provided under the Criminal Code of the United States of America, if the infringement was committed-

- (a) for purposes of commercial advantages or private financial gain;
- (b) 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 retail value of more than \$1,000; or
- (c) by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if the person knew or should have known that the work was intended for commercial distribution.

The Code went ahead to prescribe various terms of imprisonment for such offenders.⁵⁰⁶ It further criminalizes unauthorized fixation and trafficking in sound recordings and music videos of live musical performances; and unauthorized recording of motion pictures in a motion picture exhibition facility.⁵⁰⁷ Thus, the provisions of the U.S. Copyright Act regarding criminal infringement are duplications of the provisions of the U.S. Criminal Code.⁵⁰⁸ This means that criminal infringement of Copyright in the United States is regulated by the two Acts abovementioned.

It is submitted that this situation is bound to generate confusions as it is unclear under which of the two statutes a suspect/infringer should be charged. It is therefore suggested that the

⁵⁰⁴ C.D.P.A. Section 110.

⁵⁰⁵ U.S.C. Section 506.

⁵⁰⁶ Section 2319 (2) Title 18, U.S. Criminal Code.

⁵⁰⁷ *Ibid.* subsection (2).

⁵⁰⁸ *Ibid.* Section 23 19A & Section 2319B.

U.S. Act be urgently amended to expunge from the Criminal Code, the powers and authority to regulate Copyright infringement proceedings of any sort.

3.8.4 Copyright Infringement and the Internet

With the development of the internet in the 1980s and the growth of online services such as the World Wide Web,⁵⁰⁹ electronic mail, and file transfer protocol servers,⁵¹⁰ Copyright Law faced major challenges.⁵¹¹ Internet services, together with other digital technologies enabled very easy reproduction and worldwide dissemination of Copyright protected works in high speed quantities with almost no expenses and loss of quality. Moreover, because of specific and innovative nature of the internet, the process could hardly be controlled by the Copyright holders. One can now obtain a music file, video record, visual or literary work for free and without license given by the right holder. Traditional Copyright enforcement mechanisms failed in the fight against international and widespread online piracy. The implications of the operations which take place on or through the internet on Copyright cannot therefore be over emphasized. According to Olueze, the Copyright consequences of operations on the internet may be tabulated as follows:⁵¹²

- i). the digitization of a Copyright work for the purpose of storage in computer- held databases linked to the internet;
- ii). the actual storage of the Copyright work in the computer- based data bases;
- ii). the act of downloading or uploading of such working computer based databases whether intentionally;
- iv). exploiting or appropriating the work, for example, making copies or reproduction, giving public performance of the work etc, without the consent or authorization of the Copyright owner.

Similarly, software can be transported to a computer user through the interstate telephone lines of the World Wide Web, just as it can travel on the interstate highways in the back of a

⁵⁰⁹ Hereinafter referred to as 'www'.

⁵¹⁰ Hereinafter referred to as 'ftp'.

⁵¹¹ R Matulionyte, 'Copyright on the internet : Does a User Still Have any Rights at All' *Hanse Law Review (Hansel R.)* [Vol. 1 No. 2]. p.177.

⁵¹² M Olueze, *Copyright Law*(Lagos: Maglink International Ltd. 1998) p.11.

truck to a computer store and the eventual end user.⁵¹³ In this manner, the internet and more traditional means of transportation such as highways serve the same purpose of moving goods across state lines.⁵¹⁴ The result is that digitization of information has created more access to copyrightable works, in most cases unauthorized access, to the detriment of the right owners.⁵¹⁵ These critical issues revolve around a number of problems ranging from how to identify or determine what constitutes unauthorized exploitation of works *vide* the internet, to who may be liable therefor;⁵¹⁶ how will liability be determined in the long chain of information transmission ranging from content provider *via* several service providers, network operators and access providers to the end user?⁵¹⁷ Olueze stated that where site operator merely hyperlinks to another website which has obtained the license of the owner of Copyright in respect of a work to post the work on the internet, it poses some difficulties to ascertain who is guilty for Copyright infringement⁵¹⁸ Is it the Site Operator who posted or uploaded that work on the internet; or the Manager of the website, or the internet service provider?⁵¹⁹ Possibly, these acts involve the doing of the acts exclusively reserved to the Copyright owner. It therefore follows that where a site operator makes an unauthorized copy of a drama for instance, and downloads same on his website, he has *prima facie* infringed Copyright in the work, ie, reproducing the work in any material form. Very often however, it is difficult to ascertain which activities or operations amount to such infringement.⁵²⁰ Assafa questioned whether the storage of information in a database placed at the disposal of those with the means of access constitutes publication?⁵²¹ He stated that:⁵²²

⁵¹³ *Ibid.*

⁵¹⁴ *Ibid.*

⁵¹⁵ *Ibid.*

⁵¹⁶ M Ozioko, 'Copyright Provisions Impacting on Access to knowledge: A Comparative Analysis', *UNIZIK Law Journal*, Vol 7 No. 1 2010.p. 65.

⁵¹⁷ *Ibid.*

⁵¹⁸ M Olueze, *Copyright Law, Op. Cit.* p.11.

⁵¹⁹ *Ibid.*

⁵²⁰ *Ibid.*

⁵²¹ Assafa Endeshaw, 'Reconfiguring Intellectual Property for the Information Age: Towards Information Property', <http://iissrn.com/abstract=461180> Access 10/05/10.

Most offering on the internet so far have been free and without any preconditions attached. Most sites are at the stage of practically soliciting and praying for visitors, hence the competition currently being in terms of how many hits any site received each day or hour. Consequently, any suggestion that the offer of any material on the internet amounts to publication will fail even on the basis of traditional Copyright as payment would not have been a precondition. There are ongoing attempts by commentators, Courts and other relevant authorities to grapple with the problems.

Stretching this argument further, Martens and Halpern observed that Courts reach various conclusions when dealing with the liability for the posting and uploading of materials on the internet depending on the facts of the case.⁵²³ While some Courts found liability where a person merely created and managed a bulletin board onto which infringing materials are posted by others without the knowledge of the bulletin board operator, others require something more than mere creation of the forum in order to impose liability. Still other decisions have declined to find liability due to traditional Copyright defences such as fair use.⁵²⁴ In *Marobie-FL Inc. v National Association of Fire Equipment Distributors*,⁵²⁵ the plaintiff sued the defendant for unauthorized copying of its clip art and joined the online service provider, Northwest Nexus Inc. The Court held that the service provider by merely providing the facilities for public use by third parties was not liable to the plaintiff for the Copyright infringement act of the defendant. It was stated in *Aclu v Reno* thus:⁵²⁶

Unlike a 'brick and mortar outlet' with a specific and geographic locate, and unlike the voluntary physical making of material from one geographic location to another... the uncontroverted facts indicate that the web is not geographically constrained. Indeed, and of extreme significance, is the fact... that web publishers are without any means to limit access to their sites based on the geographical location of the particular internet user. As soon as information is published on a website it is accessible to all other web visitors...

⁵²² *Ibid.*

⁵²³ Don Martens & S Halpern, 'Copyright Law in Cyberspace', *International business lawyers*, April 1999 Vol. 27. No. 4. p.152 *quoted by* M Ozioko, 'Emergence of Digital Technology: Implication for Copyright Protection in Nigeria', *Op. Cit.* p.26

⁵²⁴ *Ibid.*

⁵²⁵ 983 F. Supp. p.11167, 45 US PQ 2d. p.1236.

⁵²⁶ 217 F. 3d p.162 (3d circle 2000).

What emerges from the above is that the relative non existence of or difficulty in maintaining direct supervision over Surfers by the owners of the displayed information transforms the internet into a visual no man's land.⁵²⁷ Besides, save for the development of technical devices that restrain or limit the amount of copying and manipulation, any attempt to keep records of illegitimate access in order to pursue potential infringers will be costly and counterproductive in the end.⁵²⁸ O'Connor opined that 'the cyberspace undeniably reflects some form of geography; chat rooms and websites, for example exist at fixed locations on the internet thus making it possible to construct barriers on the cyberspace and use them to screen for identity making cyberspace more like the physical world'⁵²⁹. Accordingly, in *Intel Corp v Hamidi*,⁵³⁰ the Court found the defendants action as amounting to the invasion of the plaintiffs proprietary e-mail system a trespass. Similarly, in *Register Com. Inc. v Veno Inc.*,⁵³¹ the Court held that the defendants scraping of WHOIS data from the plaintiff's public website constitutes an unauthorized access to the website and thus computer trespass.

Another trouble associated with Information technology especially on the internet concerns what has been described as 'multimedia' which is a convergence of technologies from which many information technology products have emerged giving rise to a wide range of possibilities hitherto achievable in the information and technological sector with very vast implications for the Copyright regime.⁵³² The new possibility of amalgamating or combining a diversity of both traditional and entrepreneurial works into one multimedia work seems to confound existing forms and categories of Copyright. For instance, Compton's encyclopedia consisting of 9 million words of text, 15,000 still images, 45 moving image sequences and 60

⁵²⁷ M Ozioko, 'Emergence of Digital Technology: Implication for Copyright Protection in Nigeria', *Op. Cit.* p.261.

⁵²⁸ *Ibid.*

⁵²⁹ *ACLU v RENO supra.* p.354.

⁵³⁰ 114.Col. Rptr. 2d p.244.

⁵³¹ 126. F. Supp. 2d 238. p.251 (S. D. N. Y. 2000).

⁵³² M Ozioko, 'Emergence of Digital Technology: Implication for Copyright Protection in Nigeria', *Op. Cit.* p. 265.

audio minutes has been put on one CD-ROM disk.⁵³³ Under the Nigerian Copyright Act, the 9 million words of text will be protected as literary works; the photographs as artistic works; the 45 moving-image sequences as cinematograph films; the 60 audio minutes will be covered by Copyright in sound recordings, while the underlying computer programs will also enjoy protection as literary works. The duration of protection for each work will however vary with the nature of the work. Furthermore, with modern media technology, works or portions thereof can be altered. It has been reported that a Diet Coke's commercial was made in which actors Humphrey Bogart and James Cagney; and the musician Louis Armstrong joined Elton John and other actors in a bar.⁵³⁴ Bogart was in actual fact not present at the scene because he was dead and buried at that time. It is not in doubt that the ultimate end multimedia product being a derivative work ought to enjoy protection, the form of such protection being dependent on the nature the work substantially takes. However, the right to make an adaptation of any work being one of the exclusive rights granted to the owner of Copyright in such work, it implies that the maker of a multimedia work must necessarily seek the consent of the owner of the Copyright in the work adapted to create the multimedia work.⁵³⁵ Similarly, the protection afforded to the multimedia work extends to only the original contribution of the maker. The parameters for determining the quantum of such original content in order to attract protection for the end product might be difficult to determine because the present Copyright Act of Nigeria does not provide for separate protection of a work made up of a combination of other protectable works as distinct from the protection afforded to constituent works. It is submitted that it is imperative to clarify in the relevant provisions of the Act that a protectable work can consist of the combination or merger of different individual works. This would ensure that the prerequisites for protection are not examined separately but in relation to the multimedia work as a whole.

⁵³³ *Ibid.*

⁵³⁴ *Ibid.*

⁵³⁵ *Ibid.*

Another multimedia type of application is ‘colorization’ which is a process that facilitates the conversion of films initially shot in black and white to be altered such that they seem to have been shot in colour. This obviously involves an alteration of the original work which requires the consent of the owner of the Copyright in the original work. The work so altered will attract protection in favour of the maker so long as sufficient effort was expended in making same to give it an original character.⁵³⁶

It has been observed that one of the main characteristics of digital exploitation of works is that it is not limited to one single national territory but in many cases crosses borders.⁵³⁷ Cate aptly observed that:⁵³⁸

Digital information not only ignores national borders, but also those of states, territories and even individual institutions... governments are finding it increasingly difficult, and in some cases impossible to regulate information effectively, at the very time that the economic power of information is increasing the political pressure for them to do so. The globalization of information may be rendering the traditional concept of sovereignty of the nation states obsolete.

Thus, legally, and economically, cross-frontier distribution of off-line Media is not distinguished from distribution of traditional analogue copies of works such as books, records, etc. This development promptly re-echoes the need for the establishment of National, Regional and International Copyright Courts. It is however submitted that in attempting to resolve the conflicting jurisdictional issues involved in the above scenario, a distinction must be made between making available of a work in digital form off-line and making it available on-line. Besides, the act of reproduction is generally governed by the law of the country in which the reproduction takes place.⁵³⁹ In the case of Cross-border distribution of off-line

⁵³⁶ C.R.A.N. Section 2(1).

⁵³⁷ *ACLU v RENO*, *supra*. p.354.

⁵³⁸ F Cate: "Introduction: Sovereignty and the globalization of intellectual property" *Indiana Journal of Global Legal Studies*. Vol. 6. No. 1 at<<http://ijgls.indiana.edu/archive/06/01/cate.shtml>> Accessed 30/09/2005.

⁵³⁹ M Ozioko, ‘Emergence of Digital Technology: Implication for Copyright Protection in Nigeria’, *Op. Cit.* p.265.

media, for instance, CD-ROM, it is submitted that the laws of each country in which the copies of the protected work are distributed are applicable.

However, during the previous decade, the situation seems to have turned in the opposite direction. Firstly, technological development fostered the development of the Digital Rights Management system⁵⁴⁰ and technological measures which gradually enabled right holders to physically control access and use of a work made available online.⁵⁴¹ Nowadays, remedial concepts have been developed to avert online piracy. These include the use of encryption and watermarking techniques to protect data and other multimedia works stored on digital video. Similarly the use of devices that detect or deter production or use has also gained popularity in the Copyright industries. For instance, in 1997, the Association of American Publishers proposed the use of a digital object identifier system to indicate the origin and ownership of online material, as well as Copyright restrictions those accessing it are subject to'.⁵⁴² A tag is thus placed in the online material such as books or articles, and accepted by users clicking on an icon which would transport them to the relevant publisher's homepage.⁵⁴³ Aside from these mechanisms, certain types of technological enforcement mechanisms have emerged to deal with the problem of sovereignty and jurisdiction, ie, the creation of electronic borders around a state to secure compliance with laws and policies; imposition of electronic blockades; and the imposition of electronic sanctions to punish violators.⁵⁴⁴ Electronic borders entail the blocking of states of outsiders from entering the state online through packet interception or filtering.⁵⁴⁵ A number of countries such as China and Saudi Arabia have established the equivalent of online national borders by requiring service providers to filter

⁵⁴⁰ Hereinafter referred to as 'DRM'.

⁵⁴¹ Committee on Copyright and Other Legal Matters (CLM) 'Limitations and Expectations to Copyright and Neighbouring Rights in the Digital Environment : An Intellectual Library Perspective'.
<http://Hla.org/111/clm/pl/ilp.htm> Accessed 20/09/18.

⁵⁴² Assafa Endeshaw, 'Reconfiguring Intellectual Property for the Information Age: Towards Information Property'. *Op. Cit.* p.20.

⁵⁴³ *Ibid.*

⁵⁴⁴ *Ibid.*

⁵⁴⁵ *Ibid.*

internet traffic⁵⁴⁶ These electronic borders replicate general national boundaries on the internet.⁵⁴⁷ By creating an electronic border, a state prevents communication with prospective offenders and isolates those offenders outside the state.⁵⁴⁸

As a corollary to an electronic internet border, states may initiate police action to stop an offender's transmission from going outside the offender's country.⁵⁴⁹ This type of blockade prohibits an offender from participating on the internet outside the offender's country; and is the equivalent of incarceration and home confinement. In effect, the enforcing state creates an electronic prison that is co-extensive with the host country.⁵⁵⁰ Again, states may electronically sanction offenders by using technologies to penalize or destroy the offender's online resources.⁵⁵¹ Such sanctions may include denial of service or seizure of offender's web pages or indeed crippling of the offender's host server.⁵⁵² As a matter of fact, the role and importance of DRM in the enforcement of Copyright cannot be overemphasized. Apart from the use of Public/Private Keys, technical protective techniques such as encryption and watermarking employed by Digital Management Systems may serve as Digital Certificates which are similar to the physical reality where a person has to identify himself upon payment, a person has to prove his virtual identity in the e-market with the help of a digital certificate.⁵⁵³ The digital certificate is actually the link between the person and his virtual certificate. Digital certificate is created using a cryptographic technique that connects a person's identity with his or her public cryptographic key. Digital signatures are issued by certificate authorities that offer guarantees that the public key belongs to the person whose

⁵⁴⁶ *Ibid.*

⁵⁴⁷ *Ibid.*

⁵⁴⁸ *Ibid.*

⁵⁴⁹ *Ibid.*

⁵⁵⁰ *Ibid.*

⁵⁵¹ Henry, M. Image 'Watermarking Hidden Bits: A Survey of Techniques For Digital Watermarking'
<http://www.vu.union.edu/shoemakc/watermarking/html>. Accessed 12/04/2016.

⁵⁵² *Ibid.*

⁵⁵³ *Ibid.*

name is in the certificate.⁵⁵⁴ Furthermore, technical protection may create Access Control. Copy protection attempts to find ways of limiting the access to Copyrighted materials and/or inhibiting the copy process itself.⁵⁵⁵ Examples of copy protection include encrypted digital television broadcast, access controls to Copyrighted software through the use of license servers and technical copy protection mechanism on the media.⁵⁵⁶ In protecting intellectual property, Digital Rights Management Systems not only have to provide prevention from copying, but also access control.⁵⁵⁷ Secure Sockets Layer and Transport Layer Security are cryptographic protocols that provide secure communications on the internet.⁵⁵⁸ The Protocols allow client/server applications to communicate in a way designed to prevent eavesdropping tampering and message forgery. Intellectual Property Security is a standard for sealing internet protocol communications by encrypting and/or authenticating all Intellectual Property Packets. It also provides security at the network layer.⁵⁵⁹

Another method employed by DRM Systems to protect digital media is through the process of Finger Printing. This involves the fingerprinting of each copy with the purchaser's information.⁵⁶⁰ Fingerprints present an extension to watermarking and can be both visible and invisible.⁵⁶¹ Similarly, the Rights specification language presents the Mechanism for describing the author or publisher's rights.⁵⁶² This data dictionary of rights terms gives a standard vocabulary to describe the Digital Rights Management and other relevant issues. In the same vein, the Trust Infrastructure refers to the technologies that support transport market all the way to the consumer. On the other hand, upon purchasing a digital content on the WEB, in presence of a doubt, a consumer should be able to check if the content is authentic

⁵⁵⁴ *Ibid.*

⁵⁵⁵ *Ibid.*

⁵⁵⁶ *Ibid.*

⁵⁵⁷ *Ibid.*

⁵⁵⁸ *Ibid.*

⁵⁵⁹ *Ibid.*

⁵⁶⁰ *Ibid.*

⁵⁶¹ *Ibid.*

⁵⁶² *Ibid.*

by performing the one-way hash function and comparing his result with the message digest provided to him from the content provider. If both outputs are the same, the consumer can be sure that the obtained content has not been tampered with and is authentic. This process is called Hashing.⁵⁶³

However, concerns have been raised about the danger of over legitimizing the protective systems as they are seen as expanding the protectability of works at the expense of research and education.⁵⁶⁴ It is feared that the strengthening of Copyright protection in the digital field will increasingly exclude users from the enjoyment of works and the role of libraries as information agents in the digital age will seriously be endangered.⁵⁶⁵ This will likely disturb the fundamental balance in Copyright law between the scope of exclusive rights and public domain, as well as between the restriction and promotion of competition.⁵⁶⁶ The result of that above analysis indicates a compelling need for an improvement in the existing legal rules relating to Copyright protection. This has been echoed by the Nigerian Minister of Science and Technology, Professor Turner Soun thus:⁵⁶⁷

I dare say that the legal framework is still inadequate to cope with the fast paced development and challenges in the ICT sector particularly the internet.

In line with this development, the United States Congress has responded to the internet related challenges by enacting an Act⁵⁶⁸ which now gives internet service providers protection from liability against claims of Copyright infringement concerning material residing at the direction of a user or subscriber on their systems or networks; or arising from infringing materials that a third party routes through their servers in return for making it

⁵⁶³ M Ozioko, 'Emergence of Digital Technology: Implication for Copyright Protection in Nigeria', *Op. Cit* p. 262

⁵⁶⁴ *Ibid.*

⁵⁶⁵ *Ibid.*

⁵⁶⁶ Assafa Endeshaw, 'Reconfiguring Intellectual Property for the Information Age: Towards Information Property', *Op. Cit.* p. 20.

⁵⁶⁷ Nigerian Laws Incapable of Combating Piracy, *Business Times*, December 20th, 2004, p. 31

⁵⁶⁸ Digital Millennium Copyright Act, 1998, hereinafter referred to as 'D.M.C.A'.

easier for an infringement claim to be made and acting expeditiously to remove or disable access to the infringing material.⁵⁶⁹ The infringement liability limitation was achieved by an enactment which is part of the Digital Millennium Copyright Act,⁵⁷⁰ and which amended the current U.S. Copyright Act, by adding section 512 thereto. To qualify for the limitation of liability provided for by the Act, the Internet Service Provider⁵⁷¹ is required to register with the U. S. Copyright Office and fulfill other conditions such as the appointment of an agent to receive notices from persons asserting Copyright infringement.⁵⁷² The agent's name and contact person must be displayed prominently on the ISP's website and be filed with the Copyright Office.⁵⁷³ If the ISP's agent receives a complaint that certain materials contained on a subscriber's site infringes on another's Copyright, the ISP will have statutory protection if it removes or blocks access to the material and promptly notifies the subscriber of its actions.⁵⁷⁴ If the subscriber provides a counter notification, the ISP must promptly provide a copy of same to the original complainant and inform that person that it will replace the removed material or cease disabling access to it in 10 business days.⁵⁷⁵ The ISP must then replace the material or restore access in not less than 10 or more than 14 days unless a Court order blocks it from doing so.⁵⁷⁶

It is obvious that the failure of the Nigerian legislature to enact a law similar to the Online Copyright Infringement Liability Limitation Act has contributed to the upsurge of internet based piracy. It is therefore suggested that an Act of such nature be urgently enacted by the Nigerian Legislature to nip online piracy on the bud.

⁵⁶⁹ Frank Peterson, 'New Protection and New Rules for Internet Service Providers', *Intellectual Property and Technology Law Update*, Vol.2 Issue 1. March, 1999.1.

⁵⁷⁰ Online Copyright Infringement Liability Limitation Act, 1998.

⁵⁷¹ Hereinafter referred to as 'ISP'

⁵⁷² U.S.C. Section 512.

⁵⁷³ *Ibid.*

⁵⁷⁴ *Ibid.*

⁵⁷⁵ *Ibid.*

⁵⁷⁶ *Ibid.*

CHAPTER FOUR

4.0 COPYRIGHT PROTECTION AND ACCESS TO INFORMATION

4.1 Exceptions to Copyright Control

In order to protect the interest of the public, the Copyright system tries to mitigate the absolute protection of the rights granted to creators of works by striking a balance between the interests of the public and those of Copyright owners for purposes of advancing knowledge and information. This balance is achieved through the introduction of the various limitations and exceptions to the statutory rights of Copyright owners. In Nigerian for example, the right conferred in respect of a work by Section 6 of the Nigerian Act does not include the right to control-⁵⁷⁷

- (a) the doing of any of the acts mentioned in the said sections 6 by way of fair dealing for purposes of research, private use, criticism or review or the reporting of current events, subject to the condition that, if the use is public, it shall be accompanied by an acknowledgment of the title of the work, and its authorship except where the work is incidentally included in a broadcast;
- (b) the doing of any of the aforesaid acts by way of parody, pastiche, or caricature;
- (c) the inclusion in a film or a broadcast of an artistic work situated in a place where it can be viewed by the public;
- (d) the reproduction and distribution of copies of any artistic work permanently situated in a place where it can be viewed by the public;
- (e) the incidental inclusion of an artistic work in a film or broadcast;
- (f) the inclusion in a collection of literary or musical work which includes not more than two excerpts from the work, if the collection bears a statement that it is designed for educational use and includes an acknowledgment of the title and authorship of the work;
- (g) the broadcasting of a work if the broadcast is approved by the broadcasting authority as an educational broadcast;
- (h) any use of a work in an approved educational institution for the educational purposes of that institution, subject to the condition

⁵⁷⁷ C.R.A.N. Second Schedule.

that if a reproduction is made for any such purpose it shall be destroyed before the end of the prescribed period, or if there is no prescribed period, before the end of the period of twelve months after it was made;

(i) subject to the Third Schedule to this Act, the making of a second recording of a literary or musical work, and the reproduction of such a sound recording by the maker or under license from him, where the copies thereof are intended for retail sale in Nigeria and the work has already been previously recorded under license from the owner of the relevant part of the Copyright whether in Nigeria or abroad, subject to such conditions and to the payment of such compensation as may be prescribed;

(j) 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 acknowledgment:

Provided that such reading or recitation is not for commercial purpose;

(k) any use made of a work or under the direction or control of the Government, or by such public libraries, non-commercial documentation centres and scientific or other institutions as may be prescribed, where the use is in the public interest, no revenue is derived therefrom and no admission fee is charged for the communication, if any, to the public of the work so used;

(l) the reproduction of a work by or under the direction or control of a broadcasting authority where the reproduction or any copies thereof are intended exclusively for a lawful broadcast and are destroyed before the end of the period of six months immediately following the making of the reproduction or such longer period as may be agreed between the broadcasting authority and the owner of the relevant part of the Copyright in the work, so however that any reproduction of a work made under this paragraph-

(i) may if it is of an exceptional documentary character be preserved in the archive of the broadcasting authority (which shall for the purpose of this paragraph be deemed to be part of the National Archives) established under the Public Archives Act;

(ii) subject to this Act, shall not be used for broadcasting or for any other purpose without the consent of the owner of the relevant part of the Copyright in the work;

(iii) the broadcasting of a work already lawfully made accessible to the public and subject (without prejudice to the other provisions of this Schedule) to the condition that the owner of the broadcasting

right in the work shall receive a fair compensation determined, in the absence of agreement, by the Court;

- (m) news of the day publicly broadcast or publicly communicated by any other means;
- (n) the communication to the public of a work, in a place where no admission fee is charged in respect of the communication, by any club whose aim is not profit making;
- (o) any use made of a work for the purpose of judicial proceeding or of any report of any such proceeding;
- (p) the making of not more than three copies of a book (including a pamphlet, sheet music, map, chart or plan) by or under the direction of the person in charge of a public library for the use of the library if such a book is not available for sale in Nigeria;
- (q) the reproduction for the purpose of research or private study of an unpublished literary or musical work kept in a library, museum or other institutions to which the public has access;
- (r) reproduction of published work in Braille for the exclusive use of the blind and sound recordings made by institutions or other establishment approved by the Government for the promotion of the welfare of other disabled persons for the exclusive use of such blind or disabled persons.

These exceptions are known as fair use provisions. These exceptions shall be conveniently broken down and discussed below.

4.2 Fair Dealings

Fair dealing, most often referred to as 'fair use' provisions have been described variously as perhaps the most significant, and the most venerable limitation on the Copyright holders prerogatives.⁵⁷⁸ This may be as a result of the potentially wide application of this exception and its high dependence on the opinion of the judge. Fair use is a codification of a long standing common law principle permitting the 'fair use' of a work either for purposes of illustration, review or criticism, purely on the understanding that the portion taken would not unreasonably prejudice the interest of the Copyright owner.⁵⁷⁹ In developing this particular exception, the Courts permit unauthorized but excusable uses which they considered to be in

⁵⁷⁸ A Latman *et al*, *Copyright in the Nineties* (3rd edn, Virginia: Charlottesville Michie Co., 1989) p.628.

⁵⁷⁹ Asein, *Nigerian Copyright Law & Practice* (2nd edn, Abuja: Books and Gravel Ltd. 2012) p.250.

the interest of the society at large. The fair dealing exception applies to all works protected under the Nigerian Act.⁵⁸⁰ The determination of whether the act complained of was done by way of fair dealing has to be in the context of at least one of the four activities specifically mentioned in the Act, ie, (i) research, (ii) private use, (iii) criticism or review, and (iv) the reporting of current events.⁵⁸¹

It must be pointed out that the term ‘fair dealing’ has no clear definition or any consensus on the rules to be adopted in determining fair dealings under the Copyright Act of Nigeria. This is worsened by the fact that the defence of fair dealings has rarely been raised in the Nigeria Courts. The only known Nigerian case where it was raised is the case of *Obe v Grapevine Communications Ltd.*⁵⁸² The defendant in this case had published one of the pictures from the plaintiff’s photo documentary of the Nigerian Civil War. In raising the defence of fair dealings, the defendant argued that the photographs were used ‘to depict a story of a historical matter of importance and of high public interest’ and should be exempted from Copyright control as fair dealings under the 1970 Act of Nigeria which has similar provision as the current Act. No further elaboration was offered to justify the claim but the defendant drew the attention of the Court to the fact that sufficient acknowledgment was included describing the work as; ‘the Biafra photos, Courtesy Daily Times of Nigeria’. In response to this defence, the Court merely considered the text of the acknowledgment and came to the conclusion that it fell short of what was required. The Court went ahead to hold that since the photographs were authored by the plaintiff and not Daily Times, the professional Courtesy should have been given to the former. The Court also made an issue that the title of the work was not acknowledged.⁵⁸³

⁵⁸⁰ C.R.A.N. Sections 6, 7 and 8.

⁵⁸¹ C.R.A.N. Second Schedule.

⁵⁸² (2003-2007) 5 I.P.L.R. p.354.

⁵⁸³ *Ibid.*

It is submitted with due respect that this case should not be regarded as an authority in relation to the establishment of the defence of fair dealings. This is because the Court ought to have considered the fundamental issue in this matter which is ‘whether the defendant’s use of the work qualified as fair dealings in the first place’. The Court derailed into considering the question of adequate acknowledgment which is a secondary issue. It is suggested that a Nigerian Courts should rely on the decisions of the much experienced English Courts in interpreting and in deciding cases of fair dealings.

In examining the concept of fair dealings, lord Denning rightly observed that it is impossible to define in precise terms what would constitute ‘fair dealing’ so that the facts of each case would have to be approached separately and with caution.⁵⁸⁴ He went on to suggest a general approach in cases of fair dealings for purposes of criticism or review thus:⁵⁸⁵

you must consider first the number and extent of the quotations and extracts. Are they altogether too many or too long to be fair? Then, you must consider the use made of them. If they are used as a basis for comments, criticism or review, that may be fair dealing. If they are used to convey same information as the author, for rival purpose, that may be unfair. Next, you must consider the proportions. To make long extracts and attach short comments may be unfair. Other considerations may come to mind also, but, after all is set and done, it may be a matter of impression.

Suffice it to say that one cannot lay down any hard and fast rule definition of what is fair dealing, for it is a matter of impression, degree and impression. However, in the case of *Ashdown v Telegraph Group Ltd.*,⁵⁸⁶ the Court while refusing the plea of fair dealings on grounds that the use complained of was neither for the purpose of criticism and review, nor the reporting of ‘current events’ endorsed the three factors to be considered in determining if there was indeed a fair dealing, thus:

⁵⁸⁴ *Hubbard v Vosper* [1972] 2 Q.B. p.84.

⁵⁸⁵ *Ibid.*

⁵⁸⁶ [2002] Ch. p.149.

- (i) whether the alleged fair dealing is in commercial competition with the owner's exploitation of the work;
- (ii) whether the work has already been published or otherwise exposed to the public; and
- (iii) the amount and importance of the work which has been taken.

Another way of determining whether a dealing is fair is by asking whether the defendant's work would be seen by the purchasers as a substitute for the plaintiff's work? If the answer is in the affirmative, it will defeat a plea of fair dealing. In *Bradbury v Hotten*, the Court rightly held that although a defendant was free to use materials from another's work and even copy from it, he was not permitted to do so if his use of the material taken was for the same purpose as that for which the Copyright owner intended to use it.⁵⁸⁷ However, if the activity of the defendant has minimal commercial impact, then the plea of fair dealing stands a better chance of succeeding.

In determining whether a plea of fair dealing will avail the defendant, there is need to determine the amount that had been taken from the work and the importance of the amount so taken.⁵⁸⁸ It is not enough to establish that the amount taken from the work is substantial alone in order to defeat a plea of fair dealings. It may still be considered to be substantial if the amount of the work taken represents the most important portion of the work protected by Copyright.⁵⁸⁹ Again, it is necessary that every action taken by the defendant who relies on a defence or plea of fair dealings must have been done within the ambit of the law regarding the permitted use to which the work is put. In *Beloff v Pressdram Ltd.*,⁵⁹⁰ the Court stated that apart from the requirement that the use to which a work is put by the defendant must constitute fair dealing, it must also be for the purpose of research, private use, criticism, review, or for reporting of current events. A plea of fair dealing must therefore pertain to one or more of the approved purposes.

⁵⁸⁷ (1872) L.R. 8 Ex. p.1.

⁵⁸⁸ See the dictum of Lord Denning in *Hubberd v Vosper Supra*. p.84.

⁵⁸⁹ J Asein, *Nigerian Copyright Law & Practice Op. Cit.* p.253.

⁵⁹⁰ [1973] 1 All ER. p.262.

It is submitted that in cases involving the permitted use in relation to fair dealings, Courts should embrace a very strict interpretation of the provisions relating thereto. This is because it is an international norm that exceptions should apply in special cases which do not conflict with a normal exploitation of the work and which do not unreasonably prejudice the legitimate interests of the right holders. This falls in tandem with the contemplation of the TRIPS Agreement to which Nigeria is a party. The Agreement provides that member states shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.⁵⁹¹ The Court has lent credence to this provision when it held in the case of *Associated Newspapers Group Plc. v News Group Newspapers Ltd.*,⁵⁹² that the defence of fair dealing for the reporting of current events would not avail a defendant where the event in question is purely historical.

4.2.1 Criticism or Review

The exception to the use of copyrightable works allowed under this sub heading is designed to protect critics and reviewers who use the work in good faith to illustrate their views or criticisms. This is because the objective of a party using a Copyright work is of prime importance and where it is shown that it is for purposes of criticism or review, then this would touch the more fundamental constitutional guarantee of free speech.⁵⁹³ For example, in a case where the defendant claims that its objective of copying a work without authorization was essentially to provide a listening service, the Court rejected the claim by the defendant that it was to illustrate review or comment.⁵⁹⁴ This clearly shows that it is not every claim of review or criticism that will be upheld as lawful enough to authorize copying of a work without the license and permission of the maker. In the case of *Banier v News Group*

⁵⁹¹ Article 13 of TRIPS Agreement, 1995.

⁵⁹² [1986] R.P.C. p.515.

⁵⁹³ J Asein, *Nigerian Copyright Law & Practice Op. Cit.* p. 256.

⁵⁹⁴ *Independent Television Publications Ltd. v Time Out Ltd.* [1984] F.S.R. p.64.

Newspapers Ltd.,⁵⁹⁵ the plaintiff took a photograph which was published in a Newspaper. The defendant made efforts to obtain a license for the use of the photograph but was unable to do so before its publication deadline. It went ahead and published the photograph without permission. Plaintiff brought an action for infringement of the Copyright in the work, whereupon the defendant argued among other things that the publication of the photograph and the accompanying article amounted to fair dealings for the purpose of criticism or review and therefore excusable. In rejecting this claim, the Court held that it was totally unreal to suggest that the objective of the publication of the photograph was to illustrate any review or criticism of the Copyright work. In *Associated Newspapers Group Plc. v News Group Newspapers Ltd.*,⁵⁹⁶ the Court took time to consider the motive with which the material in question was copied. In the instant case, the plaintiff had obtained the exclusive rights in an exchange of letters between the Duke and Duchess of Windsor and printed a series of these in Newspaper. The defendant printed one of the letters in its own newspaper without any authorization. The defendant claimed in its defence that the publication was fair dealing for the purpose of criticism, review and reporting of current events. The Court rightly held that the motive behind the defendant's publication was to attract readers and that the correspondence in question was only presented to the public without any criticism or review; that the defendant's publication was not for reporting current events as it was not the publication of the letters that represented the current event but the death of the Duchess. The Court has held that in many cases, the object of the criticism or review is also important.⁵⁹⁷ The facts of this case is that the plaintiff who was the leader of a major political party had, in strict confidence, shown some materials including minutes of a particular important political meeting which were from entries in his diaries to representatives of the press and publishing houses. The defendant's newspaper published articles about the minutes, quoting verbatim

⁵⁹⁵ [1997] F.S.R. p.812.

⁵⁹⁶ [1986] R.P.C. p.515.

⁵⁹⁷ *Ashdown v Telegraph Group Ltd.*, *supra*. p.251.

from a substantial part of it. The plaintiff sued the defendant for breach of confidence and for Copyright infringement. The Court held that the copying of the plaintiff's exact words did not come within the fair dealing exceptions since they were not copied to criticize or review the confidential minutes as a work, but merely to criticize or review the actions described in it.

With respect to unpublished works, it was held in *British Oxygen Co. Ltd. v Liquid Air Ltd.*⁵⁹⁸ that any criticism of an unpublished work without the consent of the author would not be fair dealing. With greatest respect, this view is too narrow. Lord Denning also criticized the narrow view of the Court as having gone too far.⁵⁹⁹ He rightly expressed the opinion that it would be fair dealing to publicly criticize a literary work which although not published to the world at large, had been circulated to a wide circle. The work which was the subject matter of this case was a letter written by manufacturers to a customer offering goods at a lower price on certain conditions. The letter was published by a rival manufacturer, together with a covering letter of criticism. The Court was of the view that the word 'criticism' meant a criticism of a work as such and that it would be manifestly unfair that an unpublished literary work should without the consent of the author, be the subject of public criticism or review.

4.2.2 Reporting of Current Event

Copying of a Copyright work without due authorization may be ordinarily allowed in the course of reporting current events. In *British Broadcasting Corporation v British Satellite Broadcasting Ltd.*,⁶⁰⁰ the Court considered the scope of this limitation under the current English Copyright Act and concluded that the use of extracts from broadcasts of football matches in a sports news programme came within the fair dealing provision as use for the purpose of reporting current events. The Court was of the opinion that there was no justification for limiting the defence of fair dealing under the section to the reporting of

⁵⁹⁸ [1925] Ch. p.383.

⁵⁹⁹ *Hubbard v Vosper Op. Cit.* p.84.

⁶⁰⁰ [1992] Ch. p.141.

current events in general news programmes only. The defendant's programmes were considered to be genuine news reports, albeit confined to News of a sporting character, and at the time the excerpts were broadcast, the matches were current events for purposes of the Act. It was further held that the use of the material was short, pertinent to the news reporting character of the programme, and accompanied by an attribution to the owners.⁶⁰¹ In *PCR Ltd v Dow Jones Jelerate Ltd.*,⁶⁰² the plaintiff's report in the defendant's news services was challenged as an infringement of the Copyright of the plaintiff. The Court held that the defendant's articles were written for the purpose of reporting current events.⁶⁰³ However, in *Hyde Park Residence Ltd. v Yelland*,⁶⁰⁴ the plaintiff's company was in charge of security at a Villa which was visited by the famous lady Diana, Princess of Wales and Dodi fayed the day before their deaths in a car accident. The security cameras had recorded their arrival and departure from the Villa. One of the plaintiff's employees took a set of the unauthorized prints which were handed over to a newspaper in return for payment. Some of the photographs were published with an article under the headline: 'Video that shames [F's father]'. The plaintiff sued the newspaper publishers, printers, as well as the employee in question. The defendants pleaded fair dealing for the purpose of reporting current events and that the publication was in public interest since the stills refuted alleged lies told by Fayed's father and earlier published in another newspaper. In denying the defence of fair dealing, the English Court of Appeal held that fairness had to be judged by the objective standard of whether a fair minded and honest person would have dealt with the Copyright work, in the manner that the infringer did for the purpose of reporting the relevant current events. The Court went ahead and listed some of the issues that should weigh in the mind of a judge thus:

- a. the motives of the alleged infringer;
- b. the extent and purpose of the use;

⁶⁰¹ *Ibid.*

⁶⁰² [1998] F.S.R. p.170.

⁶⁰³ *Ibid.*

⁶⁰⁴ [2001] Ch. p.143.

- c. whether that extent was necessary for the purpose of reporting the current events in question; and
- d. if the work had not been published or circulated to the public.

It is submitted that this judicial precedence is a welcomed development in relation to the subject matter at hand. It is suggested that it should be adopted by Nigerian Courts when faced with similar cases.

4.2.3 Acknowledgement

The Nigerian Copyright Act expressly provides that:⁶⁰⁵

the right conferred in respect of Section 6 of the Act does not include the right to control-

the doing of any of the acts mentioned in the said section 6 by way of fair dealing for purposes of research, private use, criticism or review, or the reporting of current events, subject to the condition that if the use is public, it shall be accompanied by an acknowledgment of the title of the work and its authorship except where the work is incidentally included in a broadcast.

Thus, where a work is copied without acknowledging the title of the work and its authorship, it will not amount to a violation of the author's Copyright so long as the work will be used privately and outside public domain. But where the use sought to be excused is in public, there is a condition precedent that such work must be accompanied by an acknowledgment of both the title of the work and its authorship.⁶⁰⁶ It is unclear whether this condition is a mandatory requirement for the enjoyment of the exception in every case of public usage. However, to believe so would be unduly burdensome and may occasion hardship in infringement proceedings. It is submitted that since there is a dearth of judicial precedent in this regard in Nigeria, Nigeria Courts and indeed other Courts of the other two jurisdictions under consideration should align themselves with the current trend in England where the Courts are of the view that the omission of the author's name does not on itself, defeat a plea

⁶⁰⁵ C.R.A.N. Second Schedule.

⁶⁰⁶ *Johnstone v Bernerd Jones Publications Ltd.* [1938] Ch. pp.599- 606.

of fair dealing if part of the work is reproduced and criticisms are offered upon that part; and that it is not necessary in order to bring the case within the proviso, that the name of the author should be referred to.⁶⁰⁷ The English Court of Appeal has also held that identification did not mean there had to be a precisely or virtually, contemporaneous act of identification.⁶⁰⁸ The Court noted that in a particular instance where the pictures in question were part of a broadcast, it was sufficient that identification had been provided which was capable of operating in relation to a later appearance of the Copyright material. It then went ahead to hold that the identification of the author by the voice over while the pictures were on the screen was sufficient acknowledgement.

4.3 Parody, Pastiche and Caricature

Fair dealing with a work for the purpose of caricature, parody or pastiche does not infringe Copyright in the work.⁶⁰⁹ A parody is a comic imitation of a speech, writing or music that imitates the style of an author, composer, etc. in an amusing and often exaggerated way.⁶¹⁰ A caricature is a picture, description or imitation of somebody or something that exaggerates certain characters in order to amuse or ridicule.⁶¹¹ A pastiche is a literary, musical or artistic work in the style of another author, composer, etc.⁶¹² These exceptions apply to literary works, musical works, artistic works and cinematograph films. They do not apply to sound recordings and broadcasts.⁶¹³ The general justification for the exclusion of these categories of dealings from Copyright infringement is that the light-hearted use of a work is not presented to the audience as a totally new original but as deriving from another work which is often

⁶⁰⁷ *Fraser-Woodward Ltd. v. B.B.C.* [2005] F.S.R. p.36.

⁶⁰⁸ *Ibid.*

⁶⁰⁹ C.D.P.A. Section *Ibid.* 30A (i); C.R.AN. Paragraph (b) to the Second Schedule.

⁶¹⁰ A.S. Hornby, *Oxford Advanced Learners Dictionary of Current English* (8th ed. Oxford: Oxford University Press) 2010, p.11068.

⁶¹¹ *Ibid.* p.213.

⁶¹² *Ibid.* p.1074.

⁶¹³ J Asein, *Nigerian Copyright Law & Practice Op. Cit.* p. 263.

identified or well known to the audience of the parody or caricature.⁶¹⁴ Secondly, there is very slim chance that the light-hearted work would compete in the market with the work on which it is based.⁶¹⁵ Both works would have widely different stylistic appeals.⁶¹⁶

It is not surprising that in balancing the satirical value of the light-hearted work against the Copyright interest of the owner of the original work, the Court would be mindful of any threat that strict enforcement of Copyright claims may pose to the art of creation.⁶¹⁷ Although the Court has held in *Joy Music Ltd v Sunday Pictorial Newspapers (1920) Ltd.*⁶¹⁸ that Copyright was not infringed where a musical work was copied with intent to satiarise,⁶¹⁹ the Court may disallow a parody, pastiche or caricature where the defendant engages in complete or almost verbatim copying, It has also been held to be infringement of Copyright where the defendant has borrowed more than is necessary to conjure the object of a parody.⁶²⁰ Similarly, the Court has disallowed this exception where the defendant has the intent and effect of fulfilling the demand for the original work.⁶²¹

It is noteworthy that the determination of what constitutes excessive copying of works under this exception is not stated by the Nigerian Act. However, in determining whether a parody of a literary work constitutes an infringement of the Copyright in the original work, the Court will consider whether the writer had bestowed such mental labour upon the material he had taken and had subjected it to such revision and alterations so as to produce an original work; and whether the parody made use of a substantial part of the expression of the original work.⁶²² In *Joy Music Ltd v Sunday Pictorial Newspapers (1920) Ltd.*,⁶²³ a special newspaper

⁶¹⁴ *Ibid.*

⁶¹⁵ *Ibid.* p.264.

⁶¹⁶ *Ibid.*

⁶¹⁷ *Ibid.*

⁶¹⁸ (1960) Q.B. p.6.

⁶¹⁹ *Benny v Loew's Inc.* 356 U.S. 43 (1958).

⁶²⁰ *Walt Disney Productions v Air Pirates* 581 F. 2d p.751 (9th Cir. 1978).

⁶²¹ *Berlin v E.C. Publications Inc.*, 379 U.S. p.82 2 (1964).

⁶²² *Williamson Music Ltd. v The Pearson Partnership Ltd.* [1987] F.S.R. p.97.

⁶²³ *Supra* . p.6.

featured article contained a parody of a popular song titled 'Rock-a-Billy'. The Plaintiff's version had 'Rock-a-Billy, Rock-a-Billy, Rock' while, the parody was 'Rock-a-Philip, Rock-a-Philip, Rock-a-Philip, Rock!' repeated the same way as the original chorus. The parody was accompanied by an acknowledgement of the plaintiff as the owner of the Copyright. The Court held that although the parody had its origin in the song 'Rock-a-Billy', it had been produced by sufficient independent new work to be in itself not a reproduction of the words of the original song but an original work that derived therefrom. In the United States case of *Fisher v Dees*,⁶²⁴ the plaintiff's musical work was parodied by the defendant who copied the first six of the song's thirty-eight bars which was considered to be the main theme of the music. The Court rightly agreed with the defence that the defendant's action was excusable under the United States Copyright Act as fair use for the purpose of parody. Contrary to the plaintiff's argument that the parody was not targeted at their work and therefore, not excusable, the Court found that the defendant's version was intended to poke fun at the plaintiffs' and not merely a vehicle for achieving a comedic objective related to the song. The Court 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 otherwise be bought.⁶²⁵ It went further to admit that even a destructive parody may still play an important role in social and literary criticism and so merit protection.⁶²⁶

In *Williamson Music Ltd. v The Pearson Partnership Ltd.*,⁶²⁷ the plaintiff's complaint was against the use by the defendant of the words and music of the plaintiff claiming that they infringed the Copyright in the song 'There is nothing like a Dame'. The defendant admitted that the lyrics and music had been created as parodies of the song and denied Copyright infringement. While granting the interlocutory relief sought by the plaintiff, the Court held

⁶²⁴ P.794 F.2d (9th Cir. 1986).

⁶²⁵ *Ibid.*

⁶²⁶ *Ibid.*

⁶²⁷ [1987] F.R.S. p.525.

that the test in assessing whether a parody amounted to an infringement was whether it made use of a substantial part of the expression of the original work. Applying this test, the Court held that there was a crucial question pertaining to the lyrics but that this could not be said about the musical Copyright.

4.4 Inclusion in Films or Broadcasts of Works Viewable by the Public

It is noted that the Nigerian Act exempts the inclusion in a film or broadcast of a work that is viewable by the public from Copyright control.⁶²⁸ This exception strictly applies to inclusions in films or broadcast only. It does not apply to reproductions or distributions of copies; the latter being protected in a different section of the Act.⁶²⁹ This exemption may be justified on the ground that such artistic works that are already in public view should be treated as forming part of the scenery or background and it would be difficult and actually impracticable to exclude them in the course of making the film or broadcast. It may be suggested that the use of the phrase ‘situated’ envisages some fixed presence. However, this does not in any way mean, that such work must be fixed in a particular place either temporality or permanently.

4.5 Incidental Inclusion of an Artistic Work in a Film or Broadcast

The Nigerian Act legalizes the incidental inclusion of an artistic work in a film or broadcast.⁶³⁰ This exception closely resembles the exception immediately discussed above.⁶³¹ The only striking difference is that the defendant in the instant exception must show in his defence that the inclusion of the artistic work was incidental and does not form the primary object of the film or broadcast. It is not a requirement under this paragraph that such an artistic work be situated either temporarily or permanently in a public place. In *IPC*

⁶²⁸ C.R.A.N. Paragraph (c) of the Second Schedule.

⁶²⁹ *Ibid.* Paragraph (d).

⁶³⁰ *Ibid.* Paragraph (e).

⁶³¹ *Ibid.* Paragraph (d).

Magazines Ltd. v MGN Ltd.,⁶³² the defendant who is the publisher of a Sunday Newspaper which included a magazine supplement had placed a television advertisement for the supplement. The television broadcast featured an issue of the plaintiff's magazine with the price tag 57p showed in a manner that compared it with the defendant's own supplement which was available free with its newspaper. A black band had been superimposed across the middle of the cover of the plaintiff's magazine, with the price printed on it; while the defendant's was shown as free. The plaintiff sued for the infringement of its artistic Copyright in the three elements of its cover; the logo or masthead, the layout and the photographs. The defendant contended *intra alia*, that the inclusion of the plaintiff's magazine was merely 'Incidental' to the broadcast within the meaning of the current English Act, which is equivalent to the paragraph of the Nigerian Act under discussion.⁶³³ On this very issue, the Court stated that the question to be answered in considering this defence was whether the inclusion in dispute was 'incidental' in the sense of being casual, inessential, subordinate or merely background. The Court rightly rejected the defence of incidental inclusion and held that the inclusion of the cover of the plaintiff's magazine in the instant case was an essential and important features of the advertisement without which its impact would have been lost. However, in *Fraser Woodward Ltd.v BBC*,⁶³⁴ the defendant's broadcast of a programme showing images of newspaper pages containing the plaintiff's celebrity photograph was held not to be incidental inclusion since the juxtaposition of the photograph in question had been deliberate and was part of the criticism and review carried out in the programme. It was also held that there was no infringement of the Copyright in the work of the plaintiff as the use complained of otherwise qualified as fair dealing for purposes of criticism and review. It is submitted that these decisions are correct precedents that should be resorted to when dealing with Copyright infringement cases in relation to this defence.

⁶³² [1998] F.S.R. p.431.

⁶³³ C.D.P.A. Section 31.

⁶³⁴ *Supra*. p.36.

4.6 Use of Work for Educational Purposes

The Nigerian Act contains special exceptions for certain uses of works for educational and instructional in purposes. These exceptions are put in place to ensure the dissemination of information to the benefit of the public. This confirms the fact the Copyright is not monopolistic in nature. The law thus excuses the collection of short excerpts of works, use of work for approved educational broadcasts, and the use of work in Educational Institutions. These exceptions shall be treated hereunder.

4.6.1 Collection of Short Excerpts of Works

A right owner in a literary, artistic or cinematograph film is exempted from controlling the inclusion of not more than two excerpts from his work, in a collection of literary or musical work provided that the aforesaid collection bears a statement that it is designed for educational use, coupled with an acknowledgement of the title and authorship of the work.⁶³⁵

It should also be noted that while the Nigerian Act requires for the proper acknowledgement of the authorship and a statement that the work created is for educational use, the English Act requires that such work must be for educational use and must be for a non-commercial purposes.

4.6.2 Use of Work in Educational Institutions

The Nigerian Act exempts the use made of a work in an approved Educational Institution for educational purposes of that institution, subject to the condition that if a reproduction is made for any such purpose, it shall be destroyed before the end of the prescribed period, or if there is no prescribed period, before the end of the period of twelve months after it was made.⁶³⁶

There is nothing in the Acts that suggests that the approved use must be by the Institution itself. It is also apparent that this exception applies to all categories of works. It may well be that the provision on the destruction of the work within twelve months made by the Nigerian

⁶³⁵C.R.A.N. Paragraph (f) of the Second Schedule.

⁶³⁶*Ibid.* Paragraph (h) of the Second Schedule.

Act was included by the drafters of the Act because the Act does not require the inclusion of any form of acknowledgment as expressly required under the English Act.⁶³⁷ Apart from the fact that such destruction may be cumbersome and difficult to enforce, it may work hardship in enforcement cases. Moreover, the Act does not set up or mandate any institution that will monitor such destruction. It is therefore suggested that the Nigerian Act be amended to eliminate the process of destruction of the aforementioned work after twelve months of the making of same.

The Act does not make mention of Educational Institutions without enumerating or prescribing these Institutions contemplated by them. It does not also stipulate who approves such contemplated Institutions. It is submitted that the Educational Establishments contemplated must be approved by the appropriate Authorities empowered by Law to approve Educational Institutions. These authorities may include National Universities Commission- for University, Board of Technical Education- for Polytechnics, the National Commission for Colleges of Educations- for Colleges of Education, Primary and Secondary Education Boards- for Primary and Secondary Schools respectively. It is therefore suggested that in order to eliminate any confusion that may arise from the abovementioned omission, the Nigerian Act should be urgently amended to name the Educational Institutions so contemplated.

4.6.3 Approved Educational Broadcast

The Nigerian Copyright Act allows the broadcast of a work if the broadcast is approved by the Broadcasting Authority as an educational broadcast.⁶³⁸ Under the first indigenous Copyright Act of Nigerian, the phrase ‘Broadcasting Authority’ had a wider meaning as it

⁶³⁷ C.D.P.A. Section 33 (1) (b) .

⁶³⁸ C.R.A N. Paragraph (g) of the Second Schedule.

was defined to include ‘a broadcasting contractor operating in Nigeria’;⁶³⁹ although the Act did not state who broadcasting contractor is. It is submitted that the phrase ‘Broadcasting Authority’ in the present Act should be read as synonymous with the ‘Broadcasting Organization’ under the former Act. This is because the phrase is used in the Act to refer to the entity that undertakes the actual broadcast. It is further submitted that the requirement of the express approval by a broadcasting authority be thrown to the dust bin because such requirement came into existence at a time when the business of broadcasting in Nigeria was undertaken by the Government as a social service. For quit sometime now, the Broadcasting Industry has been deregulated and this led to the proliferation of private commercial broadcasting stations. The requirement of such approval may work hardship and will amount to a clog in wheel of creativity.

4. 7 Use for Literary Enjoyment and Documentation

The exceptions under this heading are obviously aimed at the normal non-prejudicial enjoyment of Copyright works by members of the society.⁶⁴⁰ These exceptions include reading or recitation of reasonable extracts from a literary work, use by Government public Libraries and Non-Commercial Documentation Centres, reproduction of archival materials, copying by libraries and reproduction of unpublished works for purposes of research or private study, as well as the reproduction of published works on Braille for the use of the blind. These forms of exception will be considered below.

4.7.1 Public Reading or Recitation of Work

The Nigerian Act permits the reading or recitation in public or in a broadcast by any person of any reasonable extract from a published literary work if it accompanied by sufficient acknowledgement, provided that such reading or recitation is not for commercial purpose.⁶⁴¹

⁶³⁹ Copyright Act of Nigeria, 1970, section 19 (1).

⁶⁴⁰ J Asein, *Nigerian Copyright Law & Practice, Op. Cit.* p. 270.

⁶⁴¹ C.R.A.N. Paragraph (J) of the Second Schedule.

This exception applies only to literary works which have been legitimately published. However, the Act does not define the degree of extract that is reasonable. In the absence of this, it is suggested that the degree of extract that is reasonable depends on the circumstances of each case. A Court faced with such question would take into consideration the quality and quantity of the extract made. In the same vein, the sufficiency of the acknowledgement required by the Act would also depend on the peculiar circumstance of each case.

4.7.2 Use by Government Public Libraries and Non-Documentation Centres.

The Nigerian Act exempts any use made of a work by or under the direction or control of the Government or by such Public Libraries, Non Commercial Documentation Centers and Scientific or other institutions as may be prescribed, where the use is in the public interest; no revenue is derived therefrom and no admission fee is charged for the communication, if any, to the public of the work so used.⁶⁴² It is noteworthy that since the promulgation of this Act, no Public Libraries Documentation Centers or any other institutions of such nature have so far been prescribed as required under this paragraph. This obviously renders this provision dormant and useless. In order to make such prescription feasible and real, it is therefore suggested that the Act be amendment to name the authority contemplated to prescribe such bodies.

4.7.3 Archival use/ Library Copying

The Nigerian Act exempts from Copyright control the making or supplying of a reproduction of a copyrighted work or reproduction of any such work which is in the National Archives or the storage or custody of which provision is made by Law pursuant to this Act or Law.⁶⁴³ Obviously, this exception is limited to the making or supply or reproductions of such works contemplated pursuant to the relevant Statutes. Therefore, the thing done must be in the course of statutory function and the exception does not apply to any other type of

⁶⁴² *Ibid.* Paragraph (k) of the Second Schedule.

⁶⁴³ *Ibid.* Section 15 (2).

infringement outside making reproductions. Asein rightly suggested that since ‘supplying’ as used by the Act, is not one of the rights conferred by Copyright; it is most likely that the Court will interpret this to mean ‘publishing’ or ‘distribution’.⁶⁴⁴

The Nigerian Act also allows the making of not more than three copies of a book including as pamphlet, sheet music, map, chart or plan, by or under the direction of the person in charge of Public Library for the use of the Library, if such book is not available for sale in Nigeria.⁶⁴⁵ It can be said that this exception is put in place to safeguard public interest by making available copies of works unavailable by the reproduction of not more than three copies of such works by or under the direction of the person in charge of a Public Library for the use of the library and not for commercial purposes. It is submitted that the non inclusion of Private Libraries in the category of libraries contemplated by the Act will constitute a clog on access to information, especially now that private schools have taken over the Educational Sector in Nigeria. It is therefore suggested that the Act be urgently amended to include Private Libraries in the list of libraries contemplated.

4.7.4 Reproduction of Unpublished Works

The Nigerian Act permits the reproduction for the purpose of research or private study of an unpublished literary or musical work kept in a library, museum or other institutions to which the public has access.⁶⁴⁶ This exception is limited to those unpublished works that are kept in library, museum or other such institutions, for purpose of research or private use. It may be argued that the phrase ‘private study’ as used in the Act has restrictive meaning and is limited to use by the student. It does not in any way include the circulation of the same materials to other students. However, this would be a question of fact to be determined by the Court since the Act left everyone in doubt as to the exact meaning of the phrase.

⁶⁴⁴ J Asein, *Nigerian Copyright Law & Practice, Op. Cit.* p. 271.

⁶⁴⁵ C.R.A.N. Paragraph (q) of the Second Schedule.

⁶⁴⁶ *Ibid.* Paragraph (r) of the Second Schedule.

4.7.5 Reproduction on Braille

The Nigerian Act allows the reproduction of published works in Braille for the exclusive use of the blind and sound recordings made by the institutions or other establishments approved by the Government for the promotion of the welfare of other disabled persons for the exclusive use of such blind persons.⁶⁴⁷ This exception obviously relates to published works in two categories, that is, the reproduction in Braille for the blind; and reproduction of sound recordings for other disabled persons. It is submitted that there ought to have been some nexus between the particular disability and the use of the sound recording as a means of gaining access to such works. This is because a handicap in the limb for example, would not justify the use of a sound recording of a literary work. Moreover, the Act does not consider whether these works are available in the market before allowing this exemption. It is submitted that this provision may lead to confusion and conflict of interest. It is suggested that the Act be amended to stipulate the disabled persons contemplated in relation to specific works, and to state that this exemption is only allowed if the original work is out of stock.

4.8 News and Public Interest Broadcasts

The exceptions contemplated under this sub-heading concern the broadcasting of works that have already been made available to the public, news of the day and the communication to the public of a work in places where no admission fees are charged. These exceptions shall be discussed hereunder.

4.8.1 Broadcasting of Works Already Lawfully Available to the Public

The Nigeria Copyright Act permits the broadcasting of a work already lawfully made accessible to the public subject to the condition that the owner of the broadcasting right in the work will receive a fair compensation determined in the absence of agreement, by the

⁶⁴⁷ *Ibid.* Paragraph (s) of the Second Schedule.

Court.⁶⁴⁸ Asein stated that this exception relates to the underlying work, e.g. a film or sound recording, that is being broadcast and not the broadcast itself.⁶⁴⁹ This view seems to be correct in that the exemption is more like a statutory license allowing any work that has already been made lawfully accessible to the public to be broadcast subject to payment of compensation.

It is arguable that if a Broadcasting Organization is alleged to have infringed Copyright in a work by broadcasting a music or cinematograph film which has already been made lawfully available to the public, the best the owner of the Copyright can do is to bring an action for the payment of fair compensation and not for infringement of the Copyright in the work; since the only condition precedent for the applicability of this exception is that the work must have been lawfully made accessible to the public prior to such broadcasting.

It is submitted that the inability of the Nigerian Act to define both the targeted ‘audience’ contemplated by the drafters of the Act, as well as what constitutes ‘payment’ by such audience gives Copyright violators a wide margin to expand their illicit trade of infringement of Copyright. It is therefore suggested that the Act be amended to include the said definitions.

4.8.2 Reproduction by a Broadcasting Authority

The Nigerian Act permits the reproduction of a work by or under the direction or control of a broadcasting authority where the reproduction or any copies thereof are intended exclusively for a lawful purpose and are destroyed before the end of the period of six months immediately following the making of the reproduction or much longer period as may be agreed between the broadcasting authority and the owner of the relevant part of the Copyright in the work, so however that any reproduction of a work made under this paragraph:⁶⁵⁰

⁶⁴⁸ *Ibid.* Paragraph (m) of the Second Schedule.

⁶⁴⁹ J Asein, *Nigerian Copyright Law & Practice, Op. Cit.* p. 273.

⁶⁵⁰ C.R.A.N. Paragraph (i) of the second schedule.

- (a) may if it is of an exceptional documentary character, be preserved in the archives of the broadcasting authority (which shall for the purpose of this paragraph be deemed to be part of the National Archives) established under the Public Archives Act;
- (b) subject to this Act, shall not be used for broadcasting or for any other purpose without the consent of the owner of the relevant part of the Copyright in the work.

Though the Act does not specify what will happen if the work is not destroyed as specified in this section, it is a welcome development that the Act prescribes that the work may, if it of exceptional documentary character be preserved in the Archives; and that the owner of the work may be approached to authorize that the work be kept for such longer period as may be agreed by the parties. This Copyright friendly provision will curb the hassles that may be encountered in creating or recreating such a nice work upon the destruction of the original work. However, problem may arise where the destruction contemplated is not carried out; and without the Copyright owner being aware of this development. This is worsened by the fact that the Act does not create or mandate any institution that will supervise such destruction. These dangers far outweigh the importance and relevance of this exemption. It is therefore suggested that the Act be amended to mandate an institution to monitor the aforementioned destruction.

4.8.3 News of the Day

This exemption created by the Law relates to the broadcasting of works which have already been publicly broadcast or publicly communicated by any other means.⁶⁵¹ This exemption seems to be distinct from the provision of fair dealing for the purpose of reporting current events.⁶⁵² It seems to concern current events, which is news of the day.

⁶⁵¹ *Ibid.* Paragraph (11) of the Second Schedule.

⁶⁵² J Asein, *Nigerian Copyright Law & Practice, Op. Cit.* p. 273.

4.8.4 Communication by Clubs Free of Charge

The Nigerian Act exempts the communication to the public of a work in a place where no admission fee is charged in respect of the communication, by any club whose aim is not profit making.⁶⁵³ It is submitted that this exemption is Copyright friendly since its object is to advance the dissemination of information. This may be the reason for the incorporation of this exemption into the Nigerian Act.

4.9 Official Use /Use of Judicial Proceedings

The Nigerian Act exempts any use made of a work for the purpose of judicial proceeding or of any report of any such proceeding.⁶⁵⁴ Asein rightly submitted that the use in question must be *bona fide* for the purpose of judicial proceedings and that it will extend to use before the commencement of actual proceedings, eg, it is foreseen that judicial proceedings were likely and would or might provide evidence on a point which might be in issue in such proceedings.⁶⁵⁵ In *A v B*, the applicant and respondent were married and the husband made photocopies of the wife's personal diary after she informed him that she wanted a divorce.⁶⁵⁶ Copies of the two pages were subsequently attached to an affidavit sworn to by the husband in divorce proceedings. In his defence to a case of Copyright infringement, he pleaded that the copies were made for the purposes of judicial proceedings. The Court noted on this point that the defence was not limited to copies made after the issuance of the originating process. In its view, there was a realistic prospect of establishing the defence given that copying was done after the applicant had told the respondent that she wanted a divorce; so that it could be foreseen that proceedings were likely, and the documents would or might provide evidence on a point which might be in issue in such proceedings. It is however surprising that the Nigerian Act protects only the use of works in judicial proceedings even in this computer

⁶⁵³ C.R.A.N. Paragraph (o) of the Second Schedule.

⁶⁵⁴ *Ibid.* Paragraph (p) of the Second Schedule.

⁶⁵⁵ J Asein, *Nigerian Copyright Law & Practice, Op. Cit.* p. 275.

⁶⁵⁶ [2000] E.M.L.R. p.1007 9 Ch,D.

generation where access to information is of utmost importance. It is therefore suggested that the Act be amended to include the use of works of parliamentary and executive proceedings as works falling under this exemption.

4.10 Making of Sound Recordings against Payment of Compensation

The Nigerian Copyright Act exempts subject to the Third Schedule to the Act, the making of a sound recording of a literary or musical work, and the reproduction of such a sound recording by the maker or under license from him where the copies thereof are intended for retail sale in Nigeria and the work has already been previously recorded under license from the owner of the relevant part of the Copyright whether in Nigeria or abroad, subject to such conditions and to the payment of such compensation as may be prescribed.⁶⁵⁷

It is submitted that this exemption is superfluous and unnecessary in that it is made subject to the elaborate provisions contained in the Third Schedule to the Act. Again, the exemption is subject to conditions and payment of any prescribed compensation; though the Act does not prescribe anybody or institution that will carry out these duties. Till date, no conditions or scales of compensation have been prescribed under the Act in that respect. Moreso, this exemption would have been conveniently treated under assignments and licenses. Better still, this exemption should have been incorporated under the Third Schedule. It is therefore suggested that the Nigerian Act be amended to expunge this exemption from the Act.

4.11 Special Exceptions in Respect of Sound Recording of Musical Works

The Third Schedule to the Nigerian Copyright Act contains elaborate provisions on special exemptions in respect of sound recordings of musical works which by the provisions of the Act, are to apply to musical works in addition to other exception generally available in the

⁶⁵⁷ C.R.A.N. Paragraph (i) of the Second Schedule.

Second Schedule. The Act provides that Copyright in a musical work is not infringed by a record producer who makes a recording or an adaptation of a work in Nigeria if:⁶⁵⁸

- (a) record of the work, or, as the case may be, of a similar adaptation of the work, have previously been made in or imported into Nigeria for the purpose of retail sale and where so made or imported by, or with the license of the owner of the Copyright in the work;
- (b) before making the recording, the record producer gave to the owner of the Copyright the prescribed notice of his intention to make it;
- (c) the record producer intends to sell the record by retail, or to supply it for the purpose of its being sold by retail by another person, or intends to use it for making other records which are to be sold or supplied; and
- (d) in the case of a record which is sold by retail, the record producer pays the owner of the Copyright in the prescribed manner and in the prescribed time, a royalty of an amount ascertained in accordance with the provisions of the Schedule.

It is clear that subject to the provisions contained in this Schedule, the royalty is an amount equal to a percentage of the ordinary retail selling price of the record calculated in the prescribed manner.⁶⁵⁹ Till date, no such regulations have been made. It may well mean that the absence of the regulations is because neither the procedure for giving the required notice, nor the royalties payable have been prescribed by the appropriate authority. It is submitted that the absence of the aforementioned regulations may mislead people into believing that this exemption is not applicable in Nigeria, at least for now. Therefore, it is suggested that this dormant provision be expunged from the Act through amendment.

It should be noted that this Third Schedule to the Act generally contains very detailed provisions in relation to the calculation of the royalties by the Commission; apportionment of royalties in the case of use of multiple works belonging to different owners or from diverse

⁶⁵⁸ *Ibid.* Paragraph (1) (a) – (d) of the Third Schedule .

⁶⁵⁹ *Ibid.* Paragraph (2).

sources, as well as the making of inquiries.⁶⁶⁰ One other important fact to note is that the exceptions provided in the Third Schedule to the Nigerian Act do not authorize the importation of records which could otherwise not have been lawfully imported apart from this Schedule.⁶⁶¹ The Act also provides that:⁶⁶²

for purposes of any provisions of this Act relating to imported articles, where the question arises whether the making of a record outside Nigeria would have constituted an infringement of Copyright if the record had been made in Nigeria, that question should be determined as if paragraph (1) of this schedule had not been enacted.

It is submitted that the exceptions in this Third Schedule would have been more conveniently treated under licenses or at best under assignment. It is therefore suggested that the Act be amended to expunge the Third Schedule exceptions from the Act and incorporate same under the Forth Schedule to the Act, which deals with licenses.

4.12 Compulsory Licensing

As a way of preventing the abuse of monopoly powers granted to authors by Copyright law in with respect to licenses, Copyright systems provide for the grant of compulsory licenses enabling others to do certain acts and exercise certain rights ordinarily reserved for Copyright owners. In essence, under a compulsory license, an individual or company seeking to use another person's intellectual property can do so without seeking the right holder's consent, and pays the right holder a set of fee for the license. Through compulsory licensing, the Copyright system seeks to balance the interests of right owners for increased protection in order to give the society greater access to information and knowledge materials.⁶⁶³ However, there are still instances where the law permits the grant of licenses where the owner of

⁶⁶⁰ *Ibid.* Paragraphs (2)-(9).

⁶⁶¹ *Ibid.* Paragraph (9).

⁶⁶² *Ibid.*

⁶⁶³ J Asein, *Nigerian Copyright Law & Practice (supra)*, p.156.

Copyright cannot be reached or is not willing to grant a voluntary license on reasonable grounds.⁶⁶⁴ All things being equal, the grant of compulsory licenses is a legislative safeguard to check abuse of monopoly.⁶⁶⁵

The Nigerian Act contains elaborate provisions for three broad categories of compulsory licenses that can be granted for the translation and reproduction of certain works. It confers the Copyright Licensing Panel with the power to grant compulsory licenses, such as the license to produce and publish translation; license to reproduce and publish works for certain purposes; and license for domestic broadcasting organization.⁶⁶⁶ It must be pointed out that the grant of these licenses are limited to purposes of teaching, research or scholarship. According to the Nigerian Act, the phrase ‘the purpose of teaching, research and scholarship’ includes: purposes of instructional activities at all levels in educational institutions; and purposes of all types of organized educational activity.⁶⁶⁷ Reference to research does not include industrial research or research carried out by body corporates including bodies corporate owned or controlled by the Government, companies; associations or bodies of persons carrying on any business.⁶⁶⁸ Secondly, unlike the liberal provisions of the Third Schedule to the Nigerian Act which is not limited by the status of the record producer, the applicant under the Fourth Schedule must be a qualified person within the meaning of the Act. A qualified person means ‘either a citizen of Nigeria or an individual domiciled in Nigeria; or a body corporate incorporated under any written law in Nigeria’.⁶⁶⁹ As detailed discussion on compulsory licensing is as stated hereunder.

⁶⁶⁴ *Ibid.*

⁶⁶⁵ *British Leyland Motor Corporation Ltd. v Armstrong Patents Ltd.* (1986) A.C. p.577; Choate *et. al. Cases and Materials on Patent Law including Trade Secrets-Copyright-Trademarks*, (Minnesota, West Publishing Co. St. Paul, 1987) p.80.

⁶⁶⁶ C.R.A.N. Paragraph 1 of the Fourth Schedule.

⁶⁶⁷ *Ibid.*

⁶⁶⁸ *Ibid.*

⁶⁶⁹ *Ibid.*

4.12. 1 License to Produce and Publish Translations

According to the Nigerian Act, any qualified person may apply to the Commission for a license to produce and publish a translation of a literary or dramatic work which has been published in printed or analogous forms of reproduction for the purposes of teaching, scholarship or research.⁶⁷⁰ An application under this paragraph shall be made in such form as may be prescribed, and shall state the proposed retail price of a copy of the translation of the work.⁶⁷¹ An applicant shall along with his application; deposit with the Commission such fee as may be prescribed.⁶⁷² The Commission may after holding such inquiry as may be prescribed, grant to the applicant a license, not being an exclusive license, to produce and publish a translation of the work in the language mentioned in the application on the conditions that the applicant shall pay to the Copyright owner appropriate royalties consistent with the standards normally operating for licenses freely negotiated between persons in Nigeria and owners of translation rights in the country of the owner of the right of translation.⁶⁷³ The license shall not extend to the export of the copies of the translation of the work outside Nigeria, and every copy of the work shall contain a notice in the language of the translation that the copy is available for distribution only in Nigeria.⁶⁷⁴ However, no license may be granted for the translation of work into any language spoken in Nigeria other than English until after the expiration of one year from the date of first publication of the work.⁶⁷⁵ In the case of a license for a translation of a work into English language, a license may only be granted after a period of three years from the date of first publication.⁶⁷⁶ The government is expressly excluded from the prohibition against the export of copies of translations in a language other than English, insofar as such copies are sent to citizens or association of

⁶⁷⁰ *Ibid.* Para 2.

⁶⁷¹ *Ibid.* Para 2 (2).

⁶⁷² *Ibid.* Para 2 (3).

⁶⁷³ *Ibid.*

⁶⁷⁴ *Ibid.* Para 3 (4).

⁶⁷⁵ *Ibid.*

⁶⁷⁶ *Ibid.* Paragraph 2 (6).

citizens outside the country; or meant to be used for teaching, research or scholarship and not for any commercial purpose.⁶⁷⁷ It must be pointed out that even though the current Nigerian Act does not expressly define the term ‘government’. The term is understood to mean ‘Federal Government’.⁶⁷⁸

Apart from the above requirements, the Nigerian Copyright Commission will not grant a license to an applicant unless it is satisfied that:⁶⁷⁹

- (a) no translation of the work into the language in question has been published in printed or analogous forms of reproduction, by or with the authorization of the owner of the right of translation or that all previous editions in that language are out of print;
- (b) the applicant had requested and been denied authorization by the owner of the Copyright to produce and publish such translation, or that he was, after due diligence on his part, unable to find the owner;
- (c) where the applicant was unable to find the owner, that not less than two months before the application, he had sent a copy of his request for such authorization by registered air-mail post to the publisher whose name appears in the work;
- (d) the applicant had at the time he submitted an application informed any national or international centre designated for this purpose by the government of the country in which the publisher of the work to be translated is believed to have his principal place of business;
- (e) that the applicant is competent to produce and publish a correct translation of the work and possesses the means to pay to the owner of the Copyright the royalties due to him under the Copyright Act;
- (f) a period of six months in the case of an application for a license for a translation into English or nine months in the case of an application for a license for translations into any other language spoken in Nigeria other than sub-paragraph (7) (b) of this paragraph, or where a copy of the request has been sent under paragraph (7) (c) of the said paragraph from the date of the sending of such copy; and the translation of the work in the language mentioned in the application has not been published by the owner of the Copyright in the work or any person authorized by him within the said period of six months or nine months, as the case may be;
- (g) the name of the author and the title of the particular edition of the work proposed to be translated are printed on all the copies of the translation;

⁶⁷⁷ *Ibid.* Paragraph 2 (5).

⁶⁷⁸ Copyright Act of Nigerian, 1970, Section 19 (1).

⁶⁷⁹ C.R.A.N. Paragraph 2 (7) to the Fourth Schedule.

- (h) if the work composed mainly of illustrations, the provisions of paragraph 3 (dealing with reproduction and publication of works) are complied with;
- (i) the author has not withdrawn from circulation copies of the work; and
- (j) an opportunity to being heard is given, wherever practicable, to the owner of the Copyright.

4.12.2 Reproduction and Publication for Instructional Activities

Similar provisions duplicated above are also made by the Nigerian Act for the grant of compulsory license to reproduce and publish an edition of a literary or artistic work for the purposes of systematic instructional activities.⁶⁸⁰ Generally speaking, an application for compulsory license shall be made by any qualified person where copies of such edition are not made available in Nigeria; or such copies have not been put on sale in Nigeria for a period of six months by the owner of the Copyright or by any person authorized by him in that behalf to the general public; or in connection with systematic instructional activities at a price reasonably related to that normally charged in Nigeria for comparable works.⁶⁸¹ The Commission may grant an application for the production and publication of such works in printed or analogous forms at the price at which such edition is sold or at a lower price for the purpose of systematic instructional activities.⁶⁸² Such an application can only be made in the case of works relating to fiction, poetry, drama, music or arts, after a period of seven years; and in the case of natural science, physical science, mathematics or technology, after a period of three years from the date of first publication.⁶⁸³ As in the case of translations, the Commission may, after holding due inquiry, grant the applicant a non-exclusive license to produce and publish a reproduction of the work subject to the conditions as those stipulated for the reproduction and publication of a translation.⁶⁸⁴ However, no licence to reproduce and

⁶⁸⁰ *Ibid.* Paragraph 3.

⁶⁸¹ *Ibid.*

⁶⁸² *Ibid.*

⁶⁸³ *Ibid.* Sub paragraph (8).

⁶⁸⁴ *Ibid.* Paragraph 3. (4).

publish the translation of a work may be granted under this heading unless such translation had previously been published by the owner of the right of translation in a language spoken in Nigeria.⁶⁸⁵ Moreover, license is not available for the reproduction and publication, or translation into a language spoken in Nigeria, of any text incorporated in audio-visual fixations prepared and published solely for the purposes of systematic instructions.⁶⁸⁶

It must be pointed out that the conditions for the grant of a license under this sub heading are very much similar to those discussed in the last preceding sub-paragraph. It will therefore amount to a waste of time and space to discuss them all over again.

4.12.3 Production and Publication by Broadcasting Organization

The Nigerian Act makes provision for the grant of compulsory license for a television or broadcasting station that apply for such, to produce and publish the translation of literary or dramatic work which has been published in printed or analogous forms of reproduction; or any text incorporated in audio-visual fixation prepared and published solely for the purpose of systematic instructional activity, for broadcasting the translation for the purpose of teaching or for the dissemination of the results of specialized technical or scientific research to experts in any particular field.⁶⁸⁷

It is obvious that the various circumstances under which compulsory licenses may be granted as shown above; all tend to promote access by the public to the relevant works and, invariably increase access to knowledge.⁶⁸⁸ This is a step in the right direction.

⁶⁸⁵ *Ibid.* Paragraph 3.

⁶⁸⁶ *Ibid.* Paragraph 3.

⁶⁸⁷ *Ibid.* Paragraph 4.

⁶⁸⁸ M Ozioko, 'Copyright Provisions Impacting on Access to knowledge: A Comparative Analysis', *UNIZIK Law Journal*, Vol 7 No. 1 2010.p. 61.

4.13 Copyright Terms

Copyright does not rest in perpetuity but ceases to subsist in a work by effluxion of time. The duration of Copyright depends on the type of work and whether the authorship is ascertained, anonymous or pseudonymous. Under the Nigerian Act, the duration of Copyright granted to works is as set out in the Nigerian Copyright Act.⁶⁸⁹ Copyright in a literary, musical or artistic work, excluding photographs, is from the time of creation, for the life time of the author and Seventy year thereafter.⁶⁹⁰ In the case of a body corporate or where the work is made by or under the direction or control of the government, state authority or a prescribed international body, Copyright subsists for seventy years after the end of the year in which the work was first published.⁶⁹¹ Similarly, where an author of a literary, musical or artistic work is anonymous or pseudonymous, the Copyright in such work would subsist for seventy years calculated from the beginning of the year immediately following the year in which the work was first published.⁶⁹²

In an action for infringement under the Nigerian Act, there is a presumption of law to the effect that if no evidence is led to the contrary, the Court will presume that the name appearing on a work purporting to be the name of the author is the name of such author.⁶⁹³ Again, the singular fact that an author is not known does not make his work pseudonymous.⁶⁹⁴ A work may not be considered to be pseudonymous or anonymous unless no name appears on the work or the name on it is obviously a pseudonym.⁶⁹⁵ Mere initials or pen names may be treated as pseudonymous unless they are generally understood to refer to a known author.⁶⁹⁶ In the same vein, Copyright in cinematograph films and phonographs ceases

⁶⁸⁹ C.R.A.N. First Schedule.

⁶⁹⁰ *Ibid.*

⁶⁹¹ *Ibid.* Paragraph (1).

⁶⁹² *Ibid.*

⁶⁹³ *Ibid.* Section 43.

⁶⁹⁴ J Asein, *Nigerian Copyright Law & Practice, Op. Cit.* p.108.

⁶⁹⁵ *Ibid.*

⁶⁹⁶ *Ibid.*

to subsist after the expiration of fifty years after the end of the year in which the work was first published.⁶⁹⁷ Furthermore, Copyright in sound recordings ceases to subsist fifty years from the beginning of the year in which it was first made.⁶⁹⁸ In the case of broadcasts, the term of Copyright is fifty years after the end of the year in which the broadcast first took place.⁶⁹⁹

It is very clear that Copyright terms under the Nigerian Act are above those prescribed in the International Instrument which Nigeria is a party to. For example, the Berne Convention provides that the term of Copyright in literary and artistic works is a term of life plus fifty years after the death of the creators.⁷⁰⁰ The Rome Convention stipulates that the term of Copyright in phonographs and broadcasts is twenty years from the date of production or publication.⁷⁰¹ Although the Copyright terms granted by the Nigerian Act will give authors and their heirs a fairly long period to enjoy the proceeds of their labour, these terms are anti Copyright in that they are too long to inhibit access to works for purposes of advancement of knowledge and information. It is therefore suggested that the Act be amended to limit the terms to fifty years from the publication of such works.

It must be pointed out that the Act does provide for Copyright terms in relation to unpublished works. This should not be understood to mean that unpublished works are not neither recognized nor protected under the Act. However, in order to eliminate any controversy associated with the aforementioned omission, it is suggested that the Act be amended to expressly provide for Copyright terms of unpublished works.

⁶⁹⁷ C.R.A.N. Paragraph (2) of the First Schedule.

⁶⁹⁸ *Ibid.* Paragraph (2).

⁶⁹⁹ *Ibid.* Paragraph (4).

⁷⁰⁰ Article 7 of Berne Convention for the Protection of Literary and Artistic Works, 1886.

⁷⁰¹ Article 14 Of Rome Convention For the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961.

As a general rule, upon the expiration of Copyright by effluxion of time, the work formerly copyrighted goes into public domain. The legal effect therefore is that such work can be copied, published, produced and reproduced by any person without much ado. The acts which ordinarily would have amounted to infringement would not constitute violation of Copyright enforceable by law.⁷⁰²

4.14 Copyright Enforcement

Enforcement of Copyright is the act or process of compelling compliance with the Copyright law. There is no gain saying that without enforcement, the law would have been as good as not existing at all, and the rights so granted by the law would also be as good as not being protected. To achieve enforcement, effective and efficient infrastructures have to be on ground. In line with this, the Copyright Laws of the jurisdictions under consideration put in place proper legal institutional and regulatory mechanisms and frameworks for the effective implementation and administration of Copyright in their respective jurisdictions. For purposes of this research work, these enforcement mechanisms shall be divided into legal and technical enforcement, as shall be discussed hereunder.

4.14.1 Legal Enforcement

All over the world, Copyright laws attempt to institutionalize various enforcement bodies/mechanisms to ensure a holistic enforcement of Copyright. These bodies which are manned by human beings quite unlike what is obtained under technical enforcement, are vested with various powers ranging from dictating the steps to be taken to implement the Copyright Laws relating to the assertion of Copyright, to the arrest and prosecution of Copyright violators. As a matter of fact, the efficacy of these enforcement mechanisms cannot be overemphasized. Hence, they are provided for by the Copyright laws of the nations of the world.

⁷⁰² *Atlas MFG & Ors. v Street & Smith* 204 Fed. R. p.398.

4.14.2 Nigerian Copyright Commission

The Nigerian Act established the Nigeria Copyright Commission which shall:⁷⁰³

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

The Commission also has the following responsibilities:

- a. the certification of countries that are parties to treaty obligations for the purposes of determining whether a Copyright work may enjoy Copyright by virtue of such International Obligations;⁷⁰⁴
- b. the regulation of conditions for the exercise of the right of an author of graphic works, three dimensional works and manuscripts to share in the proceed of any sale of that work or manuscript by public auction or through a dealer;⁷⁰⁵
- c. the issuance of exemption certificate for the purpose of enabling an otherwise unapproved Collecting Society to commence action for the infringement of Copyright or any right under the Copyright Act;⁷⁰⁶
- d. the prescription of anti-piracy devices for use on, in or in connection with any work in which Copyright subsists;⁷⁰⁷
- e. the authorization of the reproduction, communication to the public and adaptations of expressions of folklore for commercial purposes outside their traditional customary contexts;⁷⁰⁸

⁷⁰³ C.R.A.N. Section 34.

⁷⁰⁴ *Ibid.* Section 5.

⁷⁰⁵ *Ibid.* Section 3

⁷⁰⁶ *Ibid.* Section 17.

⁷⁰⁷ *Ibid.* Section 21.

⁷⁰⁸ *Ibid.* Section 31.

- f. the granting of compulsory licenses in accordance with the provisions of the Fourth Schedule to the Act, as well as the establishment and regulation of the Copyright Licensing Panel;⁷⁰⁹
- g. the appointment of Copyright Inspectors as it may deem fit;⁷¹⁰
- h. the approval and regulation of Collecting Societies for the purposes of the Copyright Act;⁷¹¹
- i. the receipt and disbursement of funds arising from the imposition of compulsory levy on Copyright materials;⁷¹²
- j. the regulation of the conditions necessary for the operation of a business involving the production, public exhibition, hiring or rental of any work in which Copyright subsists under the Act;⁷¹³
- k. The carrying out of such directives of a general or special character with respect to its functions as the Minister may give.⁷¹⁴

The Commission being a body corporate with perpetual succession, may sue or be sued in its corporate name.⁷¹⁵ In spite of these express provision of the Act, there is a statutory limitation barring any suit against the Commission, a member, or any of its staff for an act done in pursuance or in execution of his duties under the Act or any other enactment or law; or in respect of any alleged neglect or default in the execution of the Act or any other enactment, unless the suit is commenced within twelve months after the act, neglect or default complained of, or where the damage or injury continues within twelve months after the damage or injury arose.⁷¹⁶ Furthermore, a pre-action notice of three months is required before the commencement of any suit against the Commission or any member of its staff.⁷¹⁷ The notice referred to shall clearly state the cause of action, the particulars of the claim, the name and place of abode of the intending plaintiff, and the relief which he claims.⁷¹⁸ Moreover, no execution, attachment, or process in the nature thereof shall be issued against the

⁷⁰⁹ *Ibid.* Section 37.

⁷¹⁰ *Ibid.* Section 38.

⁷¹¹ *Ibid.* Section 39.

⁷¹² *Ibid.* Section 40.

⁷¹³ *Ibid.* Section 45 (4).

⁷¹⁴ *Ibid.* Section 50.

⁷¹⁵ *Ibid.* Section 34 (2).

⁷¹⁶ *Ibid.* Section 47(2).

⁷¹⁷ *Performing & Mechanical Rights Society Ltd./G.T.E. v N. C. C. & 3 Ors.* 6 I.P.L.R. p.131.

⁷¹⁸ C.R.A.N. Section 47 (3).

Commission.⁷¹⁹ This obviously confers the powers of an emperor on the Commission. It is interesting to note that the Federal High Court of Nigeria has held that the provision of the Nigerian Act bordering on the limitation of actions against the Commission,⁷²⁰ do not apply to the enforcement of fundamental rights; basing its reasoning on the language of the section and the need to preserve the constitutional provision relating to rights to personal liberty.⁷²¹ However, the same Court in another case declined the plaintiff's invitation for it to declare this provision a legislative misnomer, noting that the plaintiff's action was not for the enforcement of fundamental rights.⁷²² It then held that this is not the type of case which did not require compliance with the pre-action provision. It is equally important to note that the three months period for pre-action notice can be abridged by the Court pursuant to its inherent powers. In *Musical Copyright Society of Nigeria Ltd/Gte. v Nigerian Copyright Commission*,⁷²³ the Court abridged the three months period to 'not less than seven days' on the ground that waiting for three months before the applicant can approach the Court may engender serious repercussion to his business. It is submitted that this decision of Court is a commendable improvement on the Nigerian jurisprudence which must be emulated by the jurisdictions countries under consideration.

The Nigerian Copyright Commission is supervised by a Governing Board established under the Act and constituted as follows:⁷²⁴

- (a) a chairman, who shall be a person knowledgeable in Copyright matters and who shall not be below the rank of Director, to be appointed by the President on the recommendation of the Minister;
- (b) the Director-General of the Commission, one representative of the Federal Ministry of Justice, one representative of the Federal Ministry of Education;

⁷¹⁹ *Ibid.* Section 49.

⁷²⁰ *Ibid.* Section 47 (2)..

⁷²¹ *Musical Society of Nigeria Ltd/Gte v Nigerian Copyright Commission, Unreported Suit No. FHC/L/CS/35/2008* quote by J Asein, *Nigerian Copyright Law & Practice, Op. Cit.* p.355.

⁷²² *Metro-Digital Nig. Ltd. v Nigerian, Copyright Commission, Unreported Suit No. FHC/PHC/CS/225/2008* quote by J Asein, *Nigerian Copyright Law & Practice, Op. Cit.* p.355.

⁷²³ Suit No. FHC/L/678/10 quoted by J Asein, *Nigerian Copyright Law & Practice, Op. Cit.* p.355.

⁷²⁴ C.R.A.N. *Ibid.*Section 36 (1).

- (c) one representative of the Nigerian Police force, not below the rank of a Commissioner of Police, one representative of the Nigerian Customs Service, not below the rank of a comptroller of Customs;
- (d) Six other persons to be appointed by the Minister who shall represent as far as possible the authors of literary works; artistic works, musical work, cinematograph films, sound recordings, and broadcasts.

The representatives of the ministries shall be officers not below the rank of Director.⁷²⁵ The Board shall adopt rules governing its procedures and method of operation.⁷²⁶ The Director-General of the Commission shall be the chief executive of the Commission and shall be so appointed by the President on the recommendation of the Minister.⁷²⁷ The Director-General shall be liable for the day-to-day administration of the Commission.⁷²⁸ Thus, the Commission is made up of government appointees who may not have the interests of right owners at heart but are bent on protecting the interests of their godfathers. It is not in doubt that the Nigerian Copyright Commission is better positioned to combat piracy. It has equally made impact in the area of enforcement of Copyright by creating awareness, seminars, symposiums, monitoring etc. However, these efforts of the Commission have proved inadequate as a result of corruption that has eaten deep into the Commission, as well as the manner of appointment of its staff by the Government as. It is therefore suggested that the Nigerian Act be Amended to bring professionalism into the Commission and to eradicate the arbitrary appointment of its staff by the government.

4.14.3 Copyright Inspectors

The Nigerian Copyright Commission discharges its enforcement role primarily through the Copyrights Inspectors, which the Nigerian Act empowers it to appoint.⁷²⁹ A Copyright

Inspector has the following powers:⁷³⁰

⁷²⁵ *Ibid.* Subsection (2).

⁷²⁶ *Ibid.* Subsection (3).

⁷²⁷ *Ibid.* Section 37.

⁷²⁸ *Ibid.* Subsection (2).

⁷²⁹ *Ibid.* Section 38(1).

⁷³⁰ *Ibid.* Subsection (2).

- (a) to enter, inspect and examine at any reasonable time, any building or premises which he reasonably suspects is being used for any activity which is an infringement of the Copyright under the Act;
- (b) to arrest any person who he reasonably believes to have committed an offence under the Act;
- (c) to make such examination and inquiry as may be necessary to ascertain whether the provisions of the Act are complied with;
- (d) to require the production of the register required to be kept under section 13 of the Act and to inspect, examine and copy it;
- (e) to require any person who, he finds in such buildings or premises to give such information as it is in his power to give in relation to any purposes specified in the Act;
- (f) to carry out such examination, test or analysis within or outside the premises as is required to give effect to any provision of the 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. 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; and
- (g) to exercise such other powers as the Commission may delegate to him to give effect to the provisions of the Act.

The Act further empowers Copyright Inspectors to prosecute, conduct or defend before a Court any charge, information, complaint or other proceedings arising under the Act.⁷³¹ In *Nigerian Copyright Council v Musical Copyright Society of Nigeria*,⁷³² the accused persons brought a preliminary objection challenging the institution of the criminal proceeding against them by a Copyright Inspector who according to the applicants, lacked the capacity to do so in view of the provisions of the 1999 Constitution of Nigeria.⁷³³ In dismissing the application, the Court held that in as much as the said provision gives the Attorney-General power to institute and take over criminal proceedings that were ‘instituted by any other authority or person’, it presupposes that any authority or person authorized by law may institute or undertake criminal proceedings. The Court was persuaded by the decision of the

⁷³¹ *Ibid.* Subsection (3).

⁷³² Suit No. FHC/L/43^C/99 quoted by J Asein, *Nigerian Copyright Law & Practice, Op. Cit.* p.357.

⁷³³ Suit No. FHC/L/43^C/99 quoted by J Asein, *Nigerian Copyright Law & Practice, Op. Cit.* p.357.

Court of Appeal in *Olusemo v Commissioner of Police*⁷³⁴ where it was held that the Police had powers to institute criminal proceedings notwithstanding the powers of the Federal and State Attorneys-General under the Constitution. This position is in line with the Supreme Court decision in *Federal Republic of Nigeria v Osabon*⁷³⁵ wherein the Court upheld the power of police officers under Section 23 of the Police Act to prosecute in superior Courts so long as they had the right of audience in such Courts, for instance, as legal practitioners by virtue of being called to the Nigerian Bar Association. There is no doubt that the same principle would be applicable to Copyright Inspectors especially considering the provisions of the current Nigerian Copyright Act.⁷³⁶

The Nigerian Act also makes it an offence to obstruct a Copyright Inspector in the performance of his duties.⁷³⁷ A Copyright Inspector is conferred with all the powers, right and privileges of a police officer as defined under the Police Act and under any other relevant enactment pertaining to the investigation, prosecution or defence of a civil or criminal matter under the Copyright Act.⁷³⁸ It should be noted that the powers conferred on a Copyright Inspector under the Copyright Act including the powers of investigation; arrest and prosecution are all limited to offences arising from the Copyright Act itself. In line with this, the Court held in *Ayika v Nigerian Copyright Commission*⁷³⁹ that the Commission has no power to arrest, detain or prosecute any person or persons for any offence not covered by the Act.

It is noted that the powers conferred on Copyright Inspectors are similar to those exercised by the police; meaning that both exercise concurrent powers in the enforcement of Copyright. This is a welcome development worthy of emulation. The Inspectors have been prepared

⁷³⁴ [1998] 11 N.W.L.R. (Pt. 575). p.547.

⁷³⁵ Section 174 of the 1999 Constitution of Nigeria.

⁷³⁶ C.R.A.N. Section 38 (3).

⁷³⁷ *Ibid.* Subsection (4).

⁷³⁸ *Ibid.* Subsection (5).

⁷³⁹ Suit No: FCT/HC/M/5222/2011, quoted by J. Asein, *Nigerian Copyright Law & Practice, Op. Cit.* p.360.

optimally in the area of Copyright enforcement since they came into being, even though their efficiency is being hampered by the non availability of intelligence equipment. Besides, the Inspectors' efficiency/efficacy is battling with a very corrupt system inherent in the Nigerian system.

4.14.4 Copyright Licensing Panel

In its bid to achieve a holistic enforcement of Copyright in Nigeria, the Nigerian Act empowers the Nigerian Copyright Commission to grant compulsory licenses in accordance with the provisions of the Act.⁷⁴⁰ In exercising its powers under the Act, the Commission shall in any case, in which an application is made to it, constitute a Copyright Licensing Panel.⁷⁴¹ The panel shall consist of five persons at least three of whom shall be members of the Governing Board of the Commission, and one of whom shall be designated as the Chairman of the Panel.⁷⁴² The Commission may make regulations providing for the procedure of the Panel under the Fourth Schedule to the Act, and providing generally for the execution of the functions of the Panel.⁷⁴³ The Act further mandates any qualified person to apply to the Commission for license to produce and publish a translation of a literary or dramatic work which has been published in printed or analogous forms of reproduction for the purpose of teaching, scholarship or research.⁷⁴⁴ Such an applicant shall along with the application made in the prescribed manner and stating the proposed retail price or a copy of the translation of the work, deposit with the Commission such fee as may be prescribed.⁷⁴⁵ After holding such inquiry as may be prescribed, the Commission shall grant to the applicant a license, not being an exclusive license to produce and publish a translation of the work in the language mentioned in the application on the condition that the applicant shall pay

⁷⁴⁰ C.R.A.N. Section 35 (a).

⁷⁴¹ *Ibid.* Paragraph (b).

⁷⁴² *Ibid.* Paragraph (c).

⁷⁴³ *Ibid.* Paragraph (b).

⁷⁴⁴ *Ibid.* Paragraph (c).

⁷⁴⁵ *Ibid.* Paragraph (e).

royalties to the Copyright owner for copies of the work sold to the public, calculated at such rate as the Commission may in the circumstances of each case, determine in the prescribed manner.⁷⁴⁶ However, no license shall be granted by the Commission under this paragraph until the expiration of one year from the date of first publication of the work where the application is for a license for a translation into any language spoken in Nigeria other than English; or three years from the date of first publication of the work where the application is for a license for translation into English.⁷⁴⁷ The Commission cannot grant such license where the owner of the Copyright had granted such license in the same manner as the one sought by the applicant; or where the applicant failed to prove to the Commission that he had made such request to the Copyright owner but he refused same; or he was unable to find such owner after due diligence on his part; and that he sent a copy of such request by air mail to the author whose name appears on the work, at least two months before the date of the application for license.⁷⁴⁸

The Act also empowers the Commission to grant license to produce and publish works for certain purposes if the copies of such editions are not made available in Nigeria, or such copies have not been put on sale in Nigeria for a period of six months by the Copyright owner or a person authorized by him.⁷⁴⁹ Similarly, the Act provides:⁷⁵⁰

any Broadcasting organization in Nigeria or any qualified person who is a holder of a license for a television or broadcasting station may apply to the Commission for a license to produce and publish the translation of the following works:

- (a) a work referred to in paragraph 2 of the Fourth Schedule to the Copyright Act published in printed or analogous forms of reproduction; or
- (b) any text incorporated in audio-visual fixations prepared and published solely for the purpose of systematic institutional activities, for

⁷⁴⁶ *Ibid.* Paragraph 2 (1) of the Fourth Schedule.

⁷⁴⁷ *Ibid.* Paragraph 2 (2) & (3).

⁷⁴⁸ *Ibid.* Paragraph 2 (4).

⁷⁴⁹ *Ibid.* Paragraph 2 (6).

⁷⁵⁰ *Ibid.* Paragraph 2 (7).

broadcasting such translation for purpose of teaching or for the dissemination of the results of specialized, technical or scientific research to the experts in any particular filed.

4.14.5 Collecting Societies

There is no gain repeating the fact that authors and creators of works are the primary owners of the Copyrights in the works so created, as well as the first beneficiaries of such rights. It is expected that the Copyright owners should be responsible for ensuring that their rights are effectively administered and enforced. That notwithstanding, it is becoming near impossible for these owners to effectively administer and protect all their rights individually. This is because some of the right owners may either not be able to monitor the numerous points where their works are being exploited, or the exploitation may be one they may find economically disadvantageous to stop. This necessitated the idea of collective management of Copyright which was first propounded by a French playwright, Pierre-Augustin Caron de Beaumarchais in the 1700s.⁷⁵¹ Thereafter, he created the General Statutes of Drama in Paris, France in 1777 which started as a meeting of twenty-two famous writers of the comedic *Français*, and later laid down the foundation for the French Society of Drama Authors otherwise called *Socete des Auteurs Dramatiques*.⁷⁵² In 1838, Honore de Balzac and Victor Hugo established the society of writers.⁷⁵³ This development of Collective Societies spread to other nations and in 1926, the International Confederation of Societies of Authors was born on the international plane.⁷⁵⁴ This body which now has about two hundred and twenty-five member societies in one hundred and eighteen countries established uniform principles and methods in each country for the collection of royalties and the protection of works.⁷⁵⁵ Thus, the Copyright system provides for the collective administration of the rights of Copyright

⁷⁵¹ Daniel Gervais, *Collective Management of Copyright and Related Rights* (2nd edition, Netherlands: Kluwer Law International, 2010) p.1.

⁷⁵² *Ibid.* p.4.

⁷⁵³ *Ibid.*

⁷⁵⁴ *Ibid.*

⁷⁵⁵ *Ibid.*

owners as an alternative to non-voluntary licensing of the rights concerned. Under this arrangement, Copyright owners surrender their rights to an association of right owners with a mandate to the association to act on their behalves in the negotiation of grant of licenses, tariffs and the collection of agreed royalties which the association will subsequently distribute to the right owners. The mechanism is termed ‘Collecting Society’.

The Nigerian Act provides that a collecting society may be formed in respect of any one or more rights of Copyright owners for the benefit of such owners, and the society may apply to the Commission for approval to operate as a Collecting Society for the purpose of the Act.⁷⁵⁶

The law having given the Copyright owners the exclusive power to do or authorize the doing of certain acts in relation to their works, Copyright owners reserve the right to grant licenses on their own terms and conditions including the right to demand payment of fees in return for such licenses. Right Owners reserve the right to refuse to grant such licenses. In *Phonographic Performance Ltd. v Saibal Maitra*,⁷⁵⁷ the Court held that it was not an abuse for the plaintiff to refuse to license its Copyright without an appropriate payment for past use and agreement for future use. Collective administration of rights also recognizes the personal nature of the exclusive rights of authors coupled with the fact that an author may choose to administer such rights directly or through an agent. One of the most effective ways of safeguarding these rights is by assigning them to a Collecting Society which in turn gives blanket authorization to users. This group of persons also include a bodies corporate.⁷⁵⁸ However, for a body to be granted approval by the Nigerian Copyright Commission to operate as a Collecting Society, such body must satisfy the Commission that:⁷⁵⁹

- (a) it is incorporated as a body limited by guarantee;

⁷⁵⁶ CRA.N. Section 39 (1).

⁷⁵⁷ [1998] F.S.R. p.749.

⁷⁵⁸ *Ibid.*

⁷⁵⁹ C.R.A.N. Section 39 (2).

- (b) its objects are to carry out the general duty of negotiating and granting Copyright license and collecting royalties on behalf of Copyright owners, and distributing same to them;
- (c) it represents a substantial number of owners of Copyright in any category of works protected by this Act (including owners of performer's rights);
- (d) it complies with the terms and conditions prescribed by regulations made by the Commission.

It is crystal clear that a Collecting Society which is not registered as a company limited by guarantee cannot be approved by the Commission to act as a Collecting Society, and thus, cannot bring an action for infringement of Copyright before any Court of law. This is more buttressed by the provisions of the Act which states that notwithstanding the provisions of the Act or any other law, no action for the infringement of Copyright or any right under this Act shall be commenced or maintained by any person carrying on the business of negotiating and granting license; collecting and distributing royalties in respect of Copyright works, or representing more than fifty owners of Copyright in any category of works protected by the Act; unless it is approved under the Act to operate as a Collecting Society or is otherwise issued with a certificate of exemption by the Commission.⁷⁶⁰ The Nigerian Copyright Commission has in the exercise of the powers conferred on it by the Act, made a Regulation for the management of Collecting Societies.⁷⁶¹ The Regulation provides that subject to the conditions specified in the Copyright Act, a company seeking approval to operate as a Collecting Society is required to make a formal application in the prescribed form in the Schedule to these Regulations and upon payment of the prescribed fee, for grant of license to operate as a Collective Management Organization.⁷⁶² The company is also required to furnish the Commission with the following documents:⁷⁶³

- a. certificate of registration in respect of the company, issued under the Companies and Allied Matters Act;

⁷⁶⁰ *Ibid.* Section 17.

⁷⁶¹ Copyright (Collective Management Organizations) Regulations, 2007.

⁷⁶² *Ibid.* Section (1).

⁷⁶³ *Ibid.* Subsection (2).

- b. the Memorandum of Association of the company;
- c. Articles of Association of the company;
- d. a statement indicating the cases of rights or category of right owners in which the Collecting Society owns rights, or intends to represent or act for;
- e. membership list of not less than 100 right owners representing the class(es) of right for which the company is seeking a license to operate as a Collecting Society. The list should indicate the signed consent of such persons to belong to the organization or where the organization has been in existence, that they are members of the organization;
- f. an undertaking by at least five directors including the chairman of the company, that the company will comply with the provisions of the Copyright Act and the Regulations;
- g. a copy of the membership agreement used by the Organization;
- h. evidence of payment of the prescribed fee(s); and
- i. such other documents as may be required by the Commission.

Upon approval, the Collecting Society is issued a certificate as evidence of its license to operate as a Collective Management Organization.⁷⁶⁴ However, the Commission may refuse to grant a license if it is not satisfied with the application of a company.⁷⁶⁵ Again, where the applicant does not meet the requirements but the Commission considers that it may be able to do so before a final decision is made on the application, the Commission may accept the application subject to such modifications, conditions or limitations as may be appropriate.⁷⁶⁶

The license granted to a society is valid for three years and may be renewed every two years in accordance with the conditions stipulated by the Act.⁷⁶⁷ The Commission may refuse to renew such application if the society no longer meets the requirement for grant of license.⁷⁶⁸

The Governing Board of a Collecting Society should as far as possible, be representative of the different classes of the right owners in the Society.⁷⁶⁹ The rights and privileges granted

⁷⁶⁴ *Ibid.* Section 1 (7).

⁷⁶⁵ *Ibid.* Subsection (6).

⁷⁶⁶ *Ibid.* Subsection (7).

⁷⁶⁷ *Ibid.* Subsection (9).

⁷⁶⁸ *Ibid.* Subsection (3).

under the Regulations are without prejudice to any privileges, reliefs or remedies available to them under their membership agreement or any applicable legislation.⁷⁷⁰ Similarly, a member of a Collecting Society may withdraw his membership of the society or the rights assigned to the Organization in respect of any of his works upon giving reasonable notice to that effect to the Commission.⁷⁷¹

The Regulation provides that a Collecting Society shall distribute collected royalties to its members in a manner that reflects as nearly as possible, the actual usage of the work in its repertoire. Thus, Collecting Societies are to establish a distribution plan that is fair and equitable based on a procedure acceptable to its members and information furnished by users.⁷⁷² It is understood that the relationship between a Collecting Society and the users of its works is a matter of contractual agreement. Accordingly, where there is an existing contract, the user is bound to honour the terms of the agreement.⁷⁷³ There are also additional provisions to safeguard both the interest of users and members against the excesses of the Society. Thus, a Collecting Society must make available to users, on non-discrimination terms, the complete repertoire of works with respect to which it is representing right owners.⁷⁷⁴ The Society is also required to draw up tariffs in respect of the royalties that it demands for the usage of Copyright works in its repertoire.⁷⁷⁵ The Regulations also permit a Collecting Society to enter into agreement with Trade Associations concerning the use of their repertoire by members of such Trade Associations.⁷⁷⁶ Where there is such agreement, the Collecting Society is required to notify the Commission of any tariff scale accepted under

⁷⁶⁹ *Ibid.* Section 5 (3).

⁷⁷⁰ *Ibid.* Subsection (4).

⁷⁷¹ *Ibid.* Subsection 6.

⁷⁷² *Ibid.* Subsection 15.

⁷⁷³ *Musical Copyright Society of Nig. Ltd. v Nigeria Hotels Ltd.* Unreported Suit No.FHC/L/43/89,quoted by J Asein, *Nigerian Copyright Law & Practice, Op. Cit.* p.186.

⁷⁷⁴ C.R.A.N. Section 13 (1).

⁷⁷⁵ *Ibid.*

⁷⁷⁶ *Ibid.* Subsection (4).

such agreement.⁷⁷⁷ However, a dispute arising from any matter under the Regulations shall be referred to the Commission which may set up a Dispute Resolution Panel to resolve the dispute.⁷⁷⁸ The Regulations further provide that where there is dispute between a Collecting Society and a user over the tariffs payable by the user, such dispute is to be referred to the Commission which may set up a Tariffs Arbitration Panel for the purpose of resolving the dispute.⁷⁷⁹

4.14.6 Custom and Excise

According to the Nigerian Act, the owner of Copyright in any unpublished literary, artistic or musical work or sound recording, may give notice in writing to the Department of Customs and Excise that he is the owner of the Copyright in the work; and that he requests the Department during the period specified in the notice, to treat as prohibited goods, copies of the work to which the relevant provisions of the Nigerian Copyright Act apply.⁷⁸⁰ The period specified in such notice shall not exceed five years and shall not extend beyond the end of the period for which the Copyright subsist.⁷⁸¹ This section applies in the case of a work, to any printed copy made outside Nigerian which if it had been made in Nigeria, would be an infringing copy of the work.⁷⁸² Where a notice has been given under this section of the Act in respect of a work and has not been withdrawn, the importation into Nigeria at a time before the end of the period specified in the notice of any copy of the work to which this section applies shall be prohibited.⁷⁸³ This section does not apply to the importation of any article by a person for his private and domestic use.⁷⁸⁴ However, where any such notice is given to the Commission in respect of a work, neither the Department of Customs and Exercise nor any

⁷⁷⁷ *Ibid.* Subsection (5).

⁷⁷⁸ *Ibid.* Section 14.

⁷⁷⁹ *Ibid.*

⁷⁸⁰ C.R.A.N. Section 44 (1).

⁷⁸¹ *Ibid.* Proviso to Section 44 (1).

⁷⁸² *Ibid.* Subsection (2).

⁷⁸³ *Ibid.* Subsection (3).

⁷⁸⁴ *Ibid.* Proviso to Subsection (3).

member, officer, servant or agent of the Department of Customs and Exercise shall be liable to the owner of the work or to any other person for any act or omission by the Department of Customs and Exercise or its servants or agents in relation to the notice.⁷⁸⁵ However, where the owner has suffered loss as a result of any such act or omission and a fee has been paid or is payable to the Department of Customs and Exercise in respect of the notice, any amount equal to the loss or the amount of the fee for one year, which is less, shall be repaid by the Department of customs and Exercise to the owner, or if the fee has not been paid, shall be waived.⁷⁸⁶

It is the duty of the Minister of Internal Affairs to make regulations prescribing the form in which the notices are to be given under the Act, and requiring a person giving such a notice, either at the time of giving the notice or at the time when the goods in question are imported; or at both of those times to furnish the Department of Customs and Exercise with such evidence and to comply with such other conditions if any, as may be specified in the regulations.⁷⁸⁷ Any such regulation may include such incidental and supplementary provisions as the Minister of Internal Affairs considers expedient for the purposes of this section of the Act.⁷⁸⁸

4.14.7 Enforcement through the Police

Notwithstanding the fact that the Nigerian Act confers on a Copyright Inspector, the powers of a police officer with respect to Copyright enforcement, it is obvious that the police are usually involved in the enforcement of Copyright in Nigeria. This is because there are aspects of infringement of Copyright that are criminal in nature.⁷⁸⁹ However, the Act does not prescribe any steps to be taken to initiate criminal proceedings in infringement cases. In the

⁷⁸⁵ *Ibid.* Subsection (4).

⁷⁸⁶ *Ibid.* Proviso to Subsection (4).

⁷⁸⁷ *Ibid.* Section 44 (5).

⁷⁸⁸ *Ibid.*

⁷⁸⁹ C.R.A.N. Section 20.

face of the lacuna, the provisions of the Criminal Procedure Act of the Southern State of Nigeria and its equivalent in the Northern States of Nigeria, which is the Criminal Procedure Code⁷⁹⁰ regarding Criminal Proceedings shall be adhered to. In instituting criminal proceedings, the complainant is empowered to report any case of breach of the law to the police for necessary actions. The police will then conduct the necessary investigations regarding the complainant and may invite the suspect for questioning. After duly investigating the matter, the suspect shall be arraigned in Court to face trial if there is a *prima facie* case against him. The Nigerian Act authorizes the police to seize infringing articles in connection with a suspected offence.⁷⁹¹ Similarly, the Court may issue an order upon such terms as it deems just, authorizing an applicant in a case of alleged infringement to enter the house or premises where there are infringing copies or materials, at any reasonable time by day or night accompanied by a police officer not below the rank of an Assistant Superintendent of Police, and may seize, detain and preserve any such infringing copy or contrivance; or inspect all or any documents in the custody or under the control of the defendant relating to the action.⁷⁹²

4.14.8 Enforcement through the Courts.

Copyright is an incorporeal right which can only be realized and protected through legal actions, depending largely on the facts of each case. Even though it is more cost effective and business friendly to embrace alternative dispute resolution mechanisms such as mediation and arbitration in the settlement of disputes arising from infringement of Copyright, enforcement of Copyright through the Courts is the most effective form of protection of Copyright. In Nigeria however, it is not every Court that can entertain Copyright matters. Jurisdiction to entertain Copyright matters is expressly conferred by law. The jurisdiction to

⁷⁹⁰ Cap. C41. Laws of the Federation of Nigeria, 2004.

⁷⁹¹ C.R.A.N. Section 20 (5).

⁷⁹² *Ibid.* Section 25 (2).

entertain Copyright matters is exclusively conferred on the Federal High Court;⁷⁹³ which also has the exclusive jurisdiction to entertain trials of offences or disputes under the Copyright Act.⁷⁹⁴ This is so even though the aforementioned section of the Constitution speaks of civil cases, while the Act speaks of offences which imply criminal infringement of Copyright. It has been rightly held that there is nothing in the above mentioned paragraphs to suggest that both the Federal High Court and State High Court have concurrent jurisdiction to entertain matters specified in the aforementioned section of the Nigerian Constitution.⁷⁹⁵ It is also true that the commencement of a Copyright action in the wrong venue does not necessarily defeat the plaintiff's case. This is because by the express provisions of the Rules of the Court, all suits and actions relating to Copyright are to be commenced by and determined in the Judicial Division in which the defendant resides; or where the alleged passing off or infringement took place.⁷⁹⁶ Similarly, the expression 'in the Federal High Court exercising jurisdiction in the place where the infringement occurred' may not pose any serious danger to litigants regarding the correct interpretation of the provision. This is because there is one Federal High Court in Nigeria even though it is divided into judicial divisions for administrative convenience. Besides, an action commenced in a wrong judicial division may be entertained so long as the defendant raises no objection to the venue, or if the Court otherwise directs.⁷⁹⁷ The Court has the power to order that the case be transferred to the Judicial Division to which it is proved to its satisfaction that it belongs; or failing such proof order that it be retained and proceeded with in the Court in which it had been commenced.⁷⁹⁸

⁷⁹³ Sections 251 (1) (f) & 251 (3) 1999 Constitution of Nigeria (as amended).

⁷⁹⁴ C.R.A.N. Section 46.

⁷⁹⁵ *Ali v Central Bank of Nigeria* [1997] 4 N.W.L.R. (pt. 498) p.192.

⁷⁹⁶ Order 2 (1) Rule 1 (8) of the Federal High Court (Civil Procedure Rules), 2009.

⁷⁹⁷ *Ibid.* Order 2 Rule 9 (3).

⁷⁹⁸ *Ibid.* Order 2 Rule 9 (4).

The Federal High Court is also empowered to transfer a case pending before it to any judge or Court at any stage of the proceedings before final judgment.⁷⁹⁹ The inter-divisional principle above stated also applies *mutatis mutandis* to criminal proceeding. This is because the Federal High Court Act makes the provisions of the Criminal Procedure Act generally applicable nationwide in Criminal Proceedings before the Court.⁸⁰⁰ This fact is supported by the express provisions of the Criminal Procedure Act which states that a judge may assume jurisdiction over an offence which was committed in another Judicial Division if he considers that the ends of Justice would be better served by hearing the charge against such persons.⁸⁰¹

It should be noted that in Copyright infringement matters, there is room for the joinder of a party or striking out of a party who ought not to have been joined.⁸⁰² In the same vein, Copyright infringement is actionable at the suit of the Copyright owner in the work, his assignee or an exclusive Licensee.⁸⁰³ Plaintiff can only sue for infringement if he is of the view that an infringement of his work has occurred. However, he must establish that the work involved is one for which Copyright subsists under the Act; that the alleged infringer, without his prior consent and authorization, does at least one of those acts reserved for the Copyright owner; and that the use made of that portion of the work that was taken is not otherwise excused under the law.⁸⁰⁴ Such Plaintiff must also satisfy the rules of *locus standi* by showing that he has sufficient interest in the work to justify his right standing to maintain the action. Moreso, in a case of infringement of Copyright in which both the owner of the right and his licensee have concurrent rights of action, each of them can only bring an action to the exclusion of the other with the leave of Court, or better still, the other must be joined as co-

⁷⁹⁹ Federal High Court Act, (Cap. F12), Laws of the Federation of Nigeria, 2004, Section 22 (1).

⁸⁰⁰ *Ibid.* Section 33 (1).

⁸⁰¹ Criminal Procedure Act, sections 70 & 71, *Op. Cit.*

⁸⁰² *PRS v London Theaters Varieties Ltd.* (1924) A.C. p.1.

⁸⁰³ C.R.A.N. Section 16 (1).

⁸⁰⁴ J Asein, *Nigerian Copyright Law & Practice, Op. Cit.* p.280.

plaintiff or as a defendant.⁸⁰⁵ Where the plaintiff's interest is merely an equitable title, he would be required to join the legal owner of the right, although he may maintain actions for Interlocutory reliefs on his own.⁸⁰⁶ A plaintiff who had no title to Copyright cannot successfully sue for infringement even if he acquires the right after the suit.⁸⁰⁷ So is an ordinary licensee or a non-exclusive Licensee not entitled to maintain an action for infringement in his own name.⁸⁰⁸ But an assignee or exclusive licensee is in a superior position to a non exclusive licensee; and can maintain an action for infringement in his own name. Furthermore, a plaintiff can sue any person who infringes his Copyright by doing or causing any other person to do an act, the doing of which is controlled by Copyright.⁸⁰⁹

It is necessary to note the difference between criminal actions for infringement as against civil suits; even though Copyright infringement may give rise to either or both civil and criminal proceedings.⁸¹⁰ Thus, both criminal and civil actions may be taken simultaneously in respect of the same infringement even though the two procedures are not alternatives but cumulative. For while the state may prosecute the infringer over the criminal aspect of the infringement, the right owner may sue the infringer claiming other reliefs for injuries suffered as a result of the infringement. It should be born in mind that even though monetary compensation to the right owner is often preferred by right owners, the threat of punishment in cases of criminal infringement is a more effective deterrence. In the latter situation, Copyright Inspectors and the police are involved in the investigations of the alleged infringement.⁸¹¹ If found wanting, the infringer will be arraigned, and if the Court finds him guilty, he will face imprisonment, fine, or both imprisonment and fine.⁸¹²

⁸⁰⁵ C.R.A.N. Section 16 (2).

⁸⁰⁶ *Performing Rights Society Ltd. v London Theatre of Varieties Ltd.* [1924] A.C. p.1.

⁸⁰⁷ *Belegging-en Exploitiensatschaping Lavender B. v Witten Industrial Diamonds Ltd.* [1979] F.S.R. p.59.

⁸⁰⁸ *Nicol v Barranger* [1917-23] Mac. C.C. p.219.

⁸⁰⁹ C.R.A.N. Section 15 (1).

⁸¹⁰ *Ibid.* Section 24.

⁸¹¹ *Ibid.* Section 20.

⁸¹² *N. C. C. v Okechukwu* (Unreported Suit No. ABJ/CR/56/2012, judgment delivered on 23rd Oct., 2012,

In civil cases, the right owner reserves the right to sue the infringer. There are usually available remedies in any corresponding proceedings in respect of an infringement of other proprietary rights.⁸¹³ These include: damages, injunctions, accounts for profit, order for inspection and seizure, as well as delivery up of infringing materials.⁸¹⁴ The Act further states that all the infringing copies of a Copyright work and all plates, master tapes, equipment, contrivances and machines used or intended to be used for the production of such infringing copies are deemed to be the property of the owner, assignee or exclusive licensee of the Copyright as the case may be.⁸¹⁵

It must be pointed out at this juncture that the law empowers the Courts to grant a good number of reliefs in cases of Copyright violations in order to check piracy. One of these reliefs is called Damages which is a term of art applying where one person does a wrongful act for which the person whose right is infringed may obtain compensation in an action.⁸¹⁶ It has also been said that as a matter of principle, the award of damages is intended to restore the injured party, as much as is possible, to the same position as he was or would have been had the infringement not occurred.⁸¹⁷ However, because the Court is not given to arbitrariness, the amount of damages awarded to a plaintiff would not be in excess of the amount by which the defendant's infringement had depreciated the Copyright. Therefore, while the Court will take into account any loss suffered by the plaintiff as a result of the infringement of his Copyright as is the case in other tortious actions, such as consequential

by Kafarati, J. at Federal High Court, Abuja Division); *N.C. C. v Kalu* (Unreported Suit No. FHC/ABJ/CR/12/2012, judgment delivered on 28th March, 2012, by Adamu Bello, J. at Federal High Court, Abuja Division).

⁸¹³ C.R.A.N. Section 16 (1).

⁸¹⁴ *Ibid.* Section 25.

⁸¹⁵ *Ibid.* Section 16; *N. C. C. v Anayo* (Unreported Suit No. FHC/ABJ/CR/10/2012, judgment delivered on 12th March, 2012, by Kafarati, J. at Federal High Court, Abuja Division); *N. C. C. v Obasi* (Unreported Suit No. FHC/ABJ/CR/16/2012, judgment delivered on 30th May, 2012, by Gladys K. Olotu, J. at Federal High Court, Abuja Division); *N. C. C. v Igwe* (Unreported Suit No. FHC/ABJ/CR/93/2012, judgment delivered on 30th Jan., 2013, by Chukwu, J. at Federal High Court, Abuja Division).

⁸¹⁶ *Island Records Ltd. v John Holts Shipping Services* (1985) F.H.L.R. p.264.

⁸¹⁷ *General Tire & Rubber Co. v Firestone Tyre & Rubber Co. Ltd.* [1975] 1 WLR p.819.

loss due to reduction of sales and direct loss of profit, such loss must have arisen directly and naturally from the act of the defendant's infringement of the Copyright.⁸¹⁸ It has also been held that if it is proved that the parties could not have foreseen a cash flow crisis that beset the plaintiff's business as a likely result of the defendant's infringement, the Court would not grant damages for such secondary losses.⁸¹⁹ This is known as the principle of remoteness which is applicable in the field of tort.

The Nigerian Act further makes provisions for the award of additional damages in appropriate cases. It provides that where in an action under this section, an infringement of Copyright is proved or admitted, and the Court in which the action is brought, having regard to the flagrancy of the infringement; and any benefit shown to have accrued to the defendant by reason of the infringement, is satisfied that the effective relief would not otherwise be available to the plaintiff, the Court, in assessing damages for the infringement, shall have power to award such additional damages by virtue of this subsection as the Court may consider appropriate in the circumstances.⁸²⁰

It is submitted that even though the phrase 'additional damages' may resemble aggravated and exemplary or punitive damages available in the other fields of law of tort, the difference is that the remedies require that the Court should consider the aggravation emanating from the flagrancy of the defendant's infringement and the excessive profits that may have accrued to him.

It is important to note that in awarding damages, the Court must first of all assess the damages suffered by the plaintiff before making an award of damages. The House of Lords had noted that the computing of the damages due to the plaintiff as compensation for the

⁸¹⁸ *BIM Bros. Ltd. v Keene & Co. Ltd.* [1918] 2 Ch. p.281; *Sutherland Publishing Co. Ltd. v. Caxton Publishing Co. Ltd.* [1936] Ch. p.336.

⁸¹⁹ *Claydon Architectural Metal Work Ltd. v. D.J. Higgins & Sons Ltd.* [1977] F.S.R. p. 475.

⁸²⁰ C.R.A.N. Section 16 (4).

infringement of his Copyright could be daunting as a result of the obvious difficulty in assessing the monetary value of a Copyright work and loss incurred by the plaintiff as a result of the infringement⁸²¹ This difficulty notwithstanding, a Court faced with such challenges is required to do its best to reach a fair assessment.⁸²² In doing so, the Court will take into account, the nature of the work; the status of the author's evidence of any previous transactions, loss of business goodwill, and other circumstances surrounding the case.⁸²³ Thus, the fact that the plaintiff might not be able to prove the application of one measure of damages, namely loss of sales, does not mean that he had suffered no damages at all, but rather that some other measures by which to assess the compensation for that interference with the property right had to be sought.⁸²⁴ The Court would compute the damages by reference to profits foregone in respect of lost sales and by way of royalty for other infringing sales as for instance, in patent infringement cases.⁸²⁵ In *Yemitan v Daily Times Ltd.*,⁸²⁶ the plaintiffs claim was that the defendant's infringed his Copyright in an article titled 'The Day the Lagon Caught Fire' which was first published in Nigerian Magazine of December, 1963. It was alleged that the defendant produced verbatim in their own Headline Magazine without the plaintiffs' consents with the title 'The Day the Lagos Lagoon Caught Fire'. Evidence placed before the Court showed that the defendant's work was similar to that of the plaintiffs' except that the first three paragraphs of the defendant's work were re-arranged with minor omissions. In all, the plaintiffs' work had 26 paragraphs while the defendant's work had 24 paragraphs, 23 of which were verbatim reproductions from plaintiffs' work. In the opinion of the Court, the defendants' work was too close to the Plaintiffs' work to be a mere coincidence. The Court found that there was substantial copying of the plaintiffs' article without their consent which was enough to render the defendant liable for infringement. In

⁸²¹ *Redrow Homes Ltd. v Betts Brother Plc.* [1998] F.S.R. p. 345 (H.L).

⁸²² *Koroye v West African Examination Council* [1974] 12 CCACJ, p.1853 at p.1857.

⁸²³ J Asein *Nigerian Copyright Law & Practice, Op. Cit.* p. 303.

⁸²⁴ *Ibid.*

⁸²⁵ *Blayne v Clogau St David's Gold Mines Ltd.* [2003] F.S.R. p.19 (C.A.).

⁸²⁶ [1980] F.H.C.L.R. p.186.

awarding damages for the breach of Copyright against the defendant, the Court considered the provisions of the Copyright Nigeria Act of 1970⁸²⁷ and awarded additional damages to the plaintiffs. While doing so, the Court adopted the dictum of lord Esther in *Exchange Telegraph Co. v Gregory & Co.* that ‘in an action for infringement of Copyright, it is not necessary to give further proof of actual damages, the damage is at large’.⁸²⁸ In Yemitan’s case, the Court remarked that it is not the standing or wealth of the infringer that mattered but what he gained from the infringement.⁸²⁹ In the wordings of the Court, ‘a poor man is equally liable for a breach of Copyright as a rich man but a bigger profit should pay more tax than a small one’. On the basis of this, the Court awarded Ten Thousand Naira to the plaintiffs as general damages for the defendant’s infringement of their Copyright. The Court further took into account the flagrancy of the infringement and awarded fifteen thousand Naira to the plaintiffs as additional damages.⁸³⁰

It should be noted that additional damages will be most appropriate where the continuous nature of the infringement cannot be stopped by a mere injunction, or where the defendants treacherous conduct actually humiliated the plaintiff,⁸³¹ or where the defendant fetched an excessive pecuniary gain as in *Yemitan’s* case,⁸³² or where the plaintiff’s feeling is seriously injured due to the defendant’s recklessness or ill motive,⁸³³ or the commitment of an infringement in breach of an injunction.⁸³⁴ In *Nottinghamshire Healthcare National Health Service Trust v News Group Newspapers Ltd.*,⁸³⁵ the defendant had published a photograph that had been stolen from the Medical notes of a patient at a hospital. The Court was of the opinion that there was no public interest in the publication of the photograph and that the

⁸²⁷ Copyright Act of Nigeria, 1970, section 12 (3), which is equivalent to C.R.A.N. Section 16(4).

⁸²⁸ [1986]1 Q.B. p.147.

⁸²⁹ *Supra.* p.186.

⁸³⁰ *Ibid.*

⁸³¹ *Nichols Advanced Vehide Systems Inc. v Rees* [1979] R.P.C. p.1270.

⁸³² *Ravenscroft v Herbert* [1980] R.P.C. p. 193, at p.208.

⁸³³ *Williams v settle* [1960] 2 All E.R. p.806.

⁸³⁴ *Phonographic Performance Ltd. v Reader* [2005] F.S.R. p.42.

⁸³⁵ [2002] E.M.L.R. p.33.

defendant used that photograph either knowing that the hospital could and would object to its use, or without caring whether it objected or not. The Court then held that a case of infringement was established and then awarded Four Hundred and Fifty (£450.00) Pounds damages and additional damages of Ten Thousand (£10,000) Pound to the plaintiff.

It is observed that it is not only general damages and additional damages that are available to the plaintiff in a case of Copyright infringement. The Nigerian Act expressly gives such plaintiff or the defendant in a counter claim, the right to other reliefs by way of damages, injunction, accounts and all such reliefs available to the plaintiff in any corresponding proceedings in respect of infringement of other proprietary rights⁸³⁶ as shall be discussed hereunder.

Again, an order of injunction is available restraining an infringer of Copyright from continuing to carry out Copyright infringement actions. The party against whom an order of injunction is made shall be liable in contempt if he deliberately disobeys the order of Court.⁸³⁷ Injunction may be interlocutory or perpetual. An applicant may bring an application for interim injunction restraining the defendant from further committing the infringement pending the determination of the case. Furthermore the Court may at the end of the case and during judgment issue a perpetual injunction against the defendant. In all cases of injunction, the plaintiff must have a legal or equitable right which the Court is capable of enforcing. Thus, the applicant must not only have a ground for complaining for the breach of his rights, the Court where the action is instituted must have jurisdiction to entertain same.⁸³⁸ An injunction being an equitable remedy, is discretionary and cannot be granted as a matter of course. It is only granted judicially and judiciously.⁸³⁹ However, the plaintiff's unnecessarily

⁸³⁶ C.R.A.N. Section 16 (1).

⁸³⁷ *Seaward v Paterson* [1897] 1 Ch. p.545.

⁸³⁸ *Sislinas v Distos Compania Naviera S.A.* [1979] A.C. p.210.

⁸³⁹ *Mother Care Ltd. v Robson Books Ltd.* [1979] F.S.R. p.466; *Alfred Mimhill Ltd. v Sunoptic S.A.* [1979] F.S.R. p.337.

delay in bringing an application for injunction where there is need to do so may be construed as acquiescence and in any event, the defendant must not be misled or deceived to assume a particular prejudicial position as a result of such delay.⁸⁴⁰ In determining whether to grant or refuse an application for injunction, the Court may be influenced by other factors such as the conduct of the defendant in the particular circumstances of the case, or the likely effect of a grant on his business.⁸⁴¹ In all cases of injunction, the Court must satisfy itself that the plaintiff has an arguable case and not even a strong case that has a real prospect of being upheld by the Court.⁸⁴² The Court must also assess the adequacy of damages as alternative remedy for any eventual injury that may be suffered by the plaintiff in the event of the failure of the Court to grant injunction. Thus, if the injury to be suffered by plaintiff for the failure to grant the injunction cannot be compensated monetarily, injunction shall be granted.⁸⁴³

It is worthy to note that even though the sole purpose of injunction is to preserve the *res* pending the determination of the case and to enable the winning party to reap the fruits of his judgment, the Courts are reluctant to grant injunction due to the inherent dangers attendant to it. The Act expressly prohibits the granting of an injunction in any proceedings for Copyright infringement so as to require a completed or partly completed building to be demolished or to prevent the completion of a partly completed building.⁸⁴⁴ It should further be noted that injunction being an equitable remedy, he who prays the Court to grant it must come to the Court with clean hands. Moreover, where in an action for infringement, it is proved or admitted that an infringement was committed but that at the time of the infringement, the defendant was not aware and had no reasonable grounds for suspecting that Copyright subsisted in the work to which the action relates, the plaintiff shall not be entitled under this section to any damages against the defendant in respect of the infringement, but shall be

⁸⁴⁰ *The Great American success Co. Ltd. v Katteinch* [1976] F.S.R. p.554.

⁸⁴¹ *Hymac v Priestman Bros. Ltd.* [1978] R.P.C. 495 *Netlon v. Bridport* {1979} F.S.R. p.530.

⁸⁴² *Saraki v Kotoye* [1989] 1 N.W.L.R. (pt.98), p.419.

⁸⁴³ *Ibid.*

⁸⁴⁴ C.R.A.N. Section 16(5).

entitled to an account of profit in respect of the infringement, whether or not any other relief is granted under the Act.⁸⁴⁵ This clearly shows that injunction does not lie against innocent infringers.

On the other hand, in a situation where an infringer is caught with infringing copies of the plaintiff's works, he will be compelled by the Court to account for the profit he made of those infringing copies of the work to the original author of such work. This applies when there is an action for infringement of Copyright and it is proved or admitted that an infringement was committed but at the time of the infringement, the defendant was not aware and had no reasonable grounds for suggesting that Copyright subsisted in the work to which the action relates. In such a situation, the plaintiff shall not be entitled to damages against the defendant for such infringement but shall be entitled to account of profit or profits in respect of the infringement, whether or not any other relief is granted.⁸⁴⁶ The primary purpose of this remedy is to prevent unjust enrichment.⁸⁴⁷ However, this remedy cannot avail any plaintiff who has been adequately compensated in damages for the infringement complained of, or for conversion, the general principle being that an account of profit is a condonation of the alleged infringement.⁸⁴⁸

In dealing with an application for account, the Court will not only concern itself with the profit made and will not make such an order if it is clearly shown that there was indeed no profit.⁸⁴⁹ But where the defendant made more profit out of the infringement, this remedy will give a better recompense to the plaintiff. It may well be that the Court being a temple of justice which is required do justice at all times, uses the remedy of account to do justice by

⁸⁴⁵ *Ibid.* Section 16 (3).

⁸⁴⁶ C.R.A.N. Section 16 (3).

⁸⁴⁷ *Potten Ltd. v Yorkdose Ltd.* [1990] F.S.R. p.11.

⁸⁴⁸ *Caxton publishing Co. Ltd. v Sutherland Publishing Co. Ltd.* [1939] A.C. p.178.

⁸⁴⁹ *Copinger and Skone James on Copyright*, quoted by J Asein, *Nigerian Copyright Law & Practice Opt. Cit.* p.315.

depriving the guilty party of the benefits of his illicit enterprise and to restore to the plaintiff, such profit and benefits which could have been his if not for the defendant's illicit enterprise. In doing so, the Court must make some apportionment to ascertain what part of the total profit made by the defendant is attributable to the infringement. Even though the Court may not arrive at the actual figure so made, the assessment will help in restoring the parties, as must as possible, to the situation they were before the infringement occurred. In justification of this argument, Wigram observed in *Colburn v Simms* that:⁸⁵⁰

it is true that the Court does not, by account, accurately measure the damages sustained by the proprietor of an expensive work from the invasion of his Copyright by the publication of a cheaper book. It is impossible to know how many copies of the dearer book are excluded from sale by the interposition of the cheaper one. The Court, by the account, as the nearest approximation which it can make to justice, takes from the wrongdoer all the benefits he has made by his piracy, and gives them to the party who has been wronged. In doing this, the Court may often give the injured party more, in fact, than he is entitled to, for *non constat* that a single additional copy of the more expensive book would have been sold, if injury by the sale of the cheaper book had not been committed. The Court of equity, however does not give anything beyond the account.

As a way of discouraging the infringement of Copyright, the Courts have been exercising their discretionary powers to order the defendant to deliver up the possession of infringing articles found in his possession. This common law jurisdiction is preserved by the Nigerian Act.⁸⁵¹ In doing so, the Court should bear in mind that the Act does not prohibit the order of delivery up being made against a person in whose possession infringing copies were found, even though he is not the infringer, such as a distributor of the articles or a shop keeper who

⁸⁵⁰ (1843) 2 Hare, p.543.

⁸⁵¹ C.R.A.N. Section 16 (1); *N. C. C. v Nwankwo* (Unreported Suit No. FHC/ABJ/CR/14/2012 judgment delivered on 27th Feb., 2012, by B. B. Aliyu, J. at Federal High Court, Abuja Division); *Raconteur Productions Ltd. v Dioni Visions Entertainment Ltd. & 2 Ors.* (Unreported Suit No. FHC/ABJ/CR/40/2017 judgment delivered on 2nd May, 2019, by Ibrahim Buba, J. at Federal High Court, Abuja Division).

has infringing copies in his possession in the course of his business, whether or not he is aware that the copies are infringing ones⁸⁵².

According to the Nigerian Act, all infringing copies of any work in which Copyright subsists, or any substantial part thereof, and all plates, master tapes, machines, equipment or contrivances used, or intended to be used for production of such infringing copies shall be deemed to be the property of the owner, assignee or exclusive licensee, as the case may be, of the Copyright who accordingly may take proceedings for the recovery of the possession thereof or in respect of conversion thereof.⁸⁵³ Thus, the two remedies contemplated under this provision are: recovery of possession which is similar to delivery up of possession or the common action of ditnue;⁸⁵⁴ and action in respect of conversion, which in essence is an action for damages.⁸⁵⁵ The Court has stated that:⁸⁵⁶

Conversion is all about dealing with goods in a manner inconsistent with the right of the owner... provided that it is established that there is also an intention on the part of the defendant in doing so to deny the owner's right or to assert a right which is inconsistent with the owner's right.

The Court further stated that intention becomes irrelevant where the act done is necessarily a denial of the right of the owner or an assertion of a right inconsistent therewith. This denial or assertion may be proved by establishing the doing of any of the acts which would constitute an infringement under the Copyright Act.⁸⁵⁷ It has also been opined that conversion consists in an act intentionally done inconsistent with the owner's right that though the doer may not know of or intend to challenge the proprietary or possessory right of the true owner.⁸⁵⁸

⁸⁵² *Lagenes Ltd. v It's At U.K. Ltd* [1991] F.S.R.492.

⁸⁵³ C.R.A.N. Section 18; *N. C. C. v. Okojie* (Unreported Suit No. FHC/1/429^c/2013, judgment delivered on 29th Jan., 2018, by Musa Haruna Kurya, J. at Federal High Court, Abuja Division); *N. C. C. v. Chekwesiri Chukwuemeka Josephat* (Unreported Suit No. FHC/L/409^c/2015, judgment delivered on 31st March, 2017, by Buba, J. at Federal High Court, Lagos Division).

⁸⁵⁴ *J. Whitaker & Sons Ltd. v Publishers Circular Ltd.* [1946-47] Mac. C.C. p.10.

⁸⁵⁵ *Bim Bros. Ltd. v Keene & Co. Ltd.* [1918] 2 Ch. p. p.281.

⁸⁵⁶ Per Justice Atkins, in *Lancashire Yorkshire Railway v MasNicoll* (1919) 88 L.J.K.B. p.601.

⁸⁵⁷ *Ibid.*

⁸⁵⁸ Per lord Porter in *Caxton Publishing Co. Ltd. v Sutherland Publishing C. Ltd.* [1939] A.C. p.178, at p.201.

Cleasby also opined that the rule of conversion in the law of tort is intended to protect the property of the plaintiff and assumes that persons deal with the property in chattels or exercise acts of ownership over them at their peril.⁸⁵⁹ Thus, the tort of conversion requires that the defendant's action be intentional, that is to say, to deal with the plaintiff's goods by exercising dominion over them on his own behalf or on behalf of someone other than the plaintiff.⁸⁶⁰ In determining the damages to be awarded for conversion, the Court will be guided by the value of the article in question to the owner. Lord Justice Roche rightly stated that 'the value is not necessarily the price for which the owner could sell the article. It may have to be ascertained by finding out what price the public or some individuals are prepared to pay for the infringing matter in the form in which it is offered'.⁸⁶¹

Another effective relief granted in cases where it alleged that Copyright has been, is being or is about to be infringed is the order for Inspection and Seizure, also known as 'Anton Pillar Order'. This order is conceptualized because an infringer who is alerted that the right owner is proceeding against him in a Court of law may decide to conceal his infringing activities by disposing any incriminating material that could point to the alleged infringement or the level of such infringement. Instead of the infringer to be allowed to conceal such evidence without which he cannot be linked with the alleged infringement, the law gives the Copyright owner the right to apply *ex-parte* for an order of inspection and seizure of the infringing materials. This order of Court will permit the applicant or any person aiding him, to enter the defendant's house or premises and remove any infringing copies, contrivances or materials used to commit infringement. Accordingly, the Nigerian Act provides that:⁸⁶²

where an *ex-parte* application is made to the Court, supported by affidavit that there is reasonable cause for suspecting that there is in any house or premises, any infringing copy or any plate, film or contrivance used or

⁸⁵⁹ *Fowler v. Hollins* [1872] L.R. p.7 ; or Q.B. p.616 at p.639.

⁸⁶⁰ G Kodilinye, *The Nigerian Law of Torts*, (London: Sweet & Maxwell, 1982), p. 194.

⁸⁶¹ *Ibid.*

⁸⁶² C.R.A.N. Section 25.

intended to be used for making infringing copies, or capable of being used for the purpose of making copies or any other article, book or document by means of, or in relation 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 to seize, detain and preserve any such infringing copy or contrivance; or to inspect all or any documents in the custody or under the control of the defendant relating to the action.

The Act also states that any person who knowingly gives false information under this section shall be guilty of an offence and liable on conviction to a fine of One Thousand Naira.⁸⁶³

It is seems the provision of the Nigerian Act relating to inspection and seizures is a codification of the common Law remedy of Anton Pillar injunction as enunciated in the *Locus classicus* of *Anton Pillar K.G. v Manufacturing Processes Ltd. & Ors.*⁸⁶⁴ In this case, the plaintiff through an *ex-parte* application, sought *inter alia*, for the permission to enter the defendant's premises to inspect all such documents in its possession relating to the machine or machines and remove them into the plaintiff's solicitor's custody. By way of judicial activism, the English Court of Appeal held that the order should be granted if by putting the defendant on notice; there is grave danger that vital evidence will be destroyed. The first Anton Pillar order granted in Nigeria was made in *Ferado Ltd. v West Germany and Nigeria Trading Co. Ltd.*⁸⁶⁵ The Anton Pillar order made by the Court was for the following terms:⁸⁶⁶

- (a) for the defendants to permit up to six persons (including a police officer) to enter into the defendants' premises for the detention, preservation and inspection of any movable property or thing that would constitute a breach of the injunction prayed for in the suit;
- (b) for the defendants to allow the plaintiffs' solicitor to inspect all or any documents in the custody or under the control of the defendants relating to the suit;

⁸⁶³ *Ibid.* Subsection (2).

⁸⁶⁴ [1976] F.S.R. 129; [1976] Ch. p.55.

⁸⁶⁵ [1980] F.H.C.L.R. p.116.

⁸⁶⁶ *Ibid.*

(c) for the defendants to produce, upon oath, any documents in their possession or power relating to the matters in question in the suit.

In this suit, the plaintiffs are the sole distributors in Nigeria of Ferado products said to be Ferado brake lining which were being sold by the defendants who were not customers of the plaintiffs.⁸⁶⁷ The plaintiffs filed this application alongside the action for infringement. The motion was heard in chambers with the applicants showing that if the respondents became aware of the proposed action or of the motion, the infringing goods and documents might disappear from their premises, hence the need for the *ex-parte* application. The Court granted the application adopting the principles in the Anton Pillar's case.

It should be stated at this juncture that the remedies discussed above are not the only remedies/reliefs granted by the Courts in cases of Copyright infringement. There are other interlocutory remedies awarded by Courts which are useful in dealing with intellectual property cases including Copyright which shall not be discussed in this work for want of time and space. As a matter of fact, Copyright owners are entitled to all remedies which are usually available in any corresponding proceedings in respect of infringement of other proprietary rights.⁸⁶⁸ These include, Order for Retention, Discoveries, Stoppage in *Transitu*, Discoveries and Interrogatories. It is also clear that since Copyright infringement is essentially a tort, nothing bars a plaintiff from maintaining any of the traditional actions in tort, in addition to the statutory remedies expressly provided for by the Acts aforesaid.

It is equally important to state at this juncture that there are defences open to a defendant or an accused person in cases of Copyright infringement. The two major defences contemplated by the Act are the public interest defence of fair dealings, and innocent infringement. Thus, where in an action for infringement of Copyright, it is proved or admitted that an infringement was committed but that at the time of the infringement, the defendant was not

⁸⁶⁷ *Supra*. p.116.

⁸⁶⁸ C.R.A.N. Section 16 (1).

aware and had no reasonable grounds for suspecting that Copyright subsisted in the work to which the action relates, the plaintiff shall not be entitled under this section to any damages against the defendants in respect of the infringement, though the Copyright owner shall be entitled to an account of profits in respect of the infringement, whether or not any other relief is granted.⁸⁶⁹ However, an infringer cannot avail himself of the defence of innocent infringement by merely showing that he was not aware or had no reasonable grounds to suspect the existence of Copyright in the work. It is immaterial that he in fact believed or had reasonable grounds for believing that his conduct in relation to the work was not an infringement. He will also not be entitled to the defence by showing that he assumed or supposed the Copyright in the work to be in another person other than the real Copyright owner; or that he made a mistake as to the actual owner of the Copyright in the work.⁸⁷⁰ In *Byrne v Satatist Co.*,⁸⁷¹ the plaintiff was the translator from Portuguese to English, of an advertisement by the Governor of Balia, which was published in the Financial Times. The defendants published the English version of the advertisement in its own Newspaper without the permission of the plaintiff. In their defence to an action for infringement of Copyright in the work, the defendants argued that they were not aware of the existence of the Copyright in the work and had no reasonable ground for suspecting that Copyright subsisted in the work. They further adduced evidence before the Court to show that it was common practice in the newspaper business for a previously published advertisement to be published by other newspapers with the consent of the advertiser or his agent. In dismissing this defence of innocent infringement, the Court noted that the position of the defendants was not so much that they did not suspect the transaction is Copyright as they supposed that the Copyright was in the Governor of Balia, whose instructions for its reproduction they had obtained. This merely showed they had supposed themselves to have the authority of the Copyright owner as

⁸⁶⁹ C.R.A.N. Section 16(3).

⁸⁷⁰ *Ibid.*

⁸⁷¹ [1914] K.B. p.622.

against not suspecting that any Copyright existed, the latter being the basis of innocent infringement. Similarly, in *John Lane the Bodley Head Ltd. v Associated Newspapers Ltd.*,⁸⁷² the defendants published a short story in their newspaper which was submitted to them by one S. It turned out that the story was as a matter of fact, a colourable imitation of the plaintiff's short story. However, the defendants were not aware of the existence of the plaintiff's short story; or that it was the subject of Copyright, and thus, sought to rely on the defence of innocent infringement. In denying this defence, the Court stated that the defendants did not prove that they were not aware and had no reasonable ground for suspecting that Copyright subsisted in the work, but only that they had the authority of S, who they believed to be the owner of the Copyright.

In the Nigerian case of *Plateau Publishing Co. Ltd. v Adophy*,⁸⁷³ the original plaintiff sued the defendants alleging that he had authored the work, subject matter of the suit, and sent it to the defendants who are the publishers of the 'Standard Newspaper' for publication. The defendants actually published the article in their Newspaper bearing another author's name and under a different title. In dismissing the defence of innocent infringement relied upon by the defendants, the Supreme Court of Nigeria held that innocence is no defence to an action for infringement of Copyright; or for the conversion or detention of an infringing copy or a plate. It further restated that for the defendants to succeed in the plea, they must prove that at the time of the infringement, they were not aware and had no reasonable grounds for suspecting that Copyright subsisted in the work in question.

There is no gain saying that ignorance of the law is not an excuse. Therefore, Copyright protection cannot be violated by anyone whether he is educated or not, or whether he has

⁸⁷² [1936] 1 K.B. p.715.

⁸⁷³ [1986] 4 NWLR. (Pt.34) p.295.

reasonable knowledge or not.⁸⁷⁴ This is because, infringement is grossly perpetrated by publishers and publishing companies who are vast in the business of publishing and who know what infringement is all about. Before publishing a work, they ought to make reasonable enquires. Thus, the plea of innocent infringement ought not to be available to them, as they are likely to abuse it by deceit, fraudulent, and misrepresentation. These defences are unreasonable and constitute escape routes for infringers. It is therefore suggested that the defence of innocent infringement be expunged from the Act through immediate amendment.

4.15 Technical Enforcement

As a result of the emergence of advanced digital technologies in the 20th and 21st centuries, there emerged enhanced modes of easy Copyright violation through the process of Digitization which connotes the conversion of works to a format in which they can be read by a machine.⁸⁷⁵ This digitalization is basically the ability to record works in a binary format in which they are stored and transmitted.⁸⁷⁶ Digitization has impact not only on the format of work, but also on their use and distribution.⁸⁷⁷ In the analogue world, works are created and distributed in material forms, such as books or paintings. These works were scriptable to the human senses.⁸⁷⁸ In contrast, digital works have been dematerialized into electric or digital format which are no longer contained in the traditional material formats.⁸⁷⁹ Although the digital format of works can be read or understood only by technologies such as computers, it can be readily translated into impulses susceptible by human eyes, ear and mind.⁸⁸⁰

⁸⁷⁴ *Nigeria Copyright Commission v Vitalis Ikukuoha* 6 I.P.L.R. p.59.

⁸⁷⁵ B Iftikhar, 'Technological Protection Measures Under Copyright Law', *International Journal of Emerging Trends & Technology in Computer Science (ITETICS)*, Volume 2, Issue 2, March-April 2013, p.319.

⁸⁷⁶ *Ibid.*

⁸⁷⁷ *Ibid.*

⁸⁷⁸ *Ibid.*

⁸⁷⁹ *Ibid.*

⁸⁸⁰ *Ibid.*

Moreover, an existing analogue work can be converted into a digital data object.⁸⁸¹ It is also very popular to create new works in the digital format because doing so is convenient and inexpensive.⁸⁸² The conversion from analogue to digital not only revolutionized the ways in which works are created but also the ways in which works can be used. This development poses challenges to the management of Copyright in the digital environment as a result of which

right owners have developed, and are still developing technological measures aimed at protecting their materials/works against unauthorized use. Since digital technology can be used to trace/monitor and control the production and dissemination of works, it can also be successfully employed to protect Copyright works.⁸⁸³ It is true that whilst Copyright Law can be applied only after infringement had occurred, as it does not work prospectively, technological protective measures work prospectively so as to effectively prevent infringement. Also, while Copyright law provides authors merely with the rights to control the use of their Copyright works, technological protection measures enable authors to exercise factual control over what users can do with their works.⁸⁸⁴ These technological measures can be intergraded in softwares or built into the hardware.⁸⁸⁵ Such technological measures may for instance, involve the insertion of identification signals in digital recordings; or technical devices which prevent copying or recording, either at all, or on more than a specified number of occasions.⁸⁸⁶ The underlying factor of these measures is to exercise copy control to the use of the copyrighted work. This development gave rise to the emergence of Digital Rights Management⁸⁸⁷ through which publishers and right owners

⁸⁸¹ *Ibid.*

⁸⁸² *Ibid.*

⁸⁸³ *Ibid.*

⁸⁸⁴ *Ibid.*

⁸⁸⁵ *Ibid.*

⁸⁸⁶ *Ibid.*

⁸⁸⁷ Hereinafter referred to as 'DRM'.

check violations by the use of technological devices such as encryption and digital watermarking. These techniques shall be fully discussed below.

4.15.1 Digital Watermarking

Digital watermarking is a promising technology employed by various digital right management systems to achieve rights management.⁸⁸⁸ It supports Copyright information such as the owners identity transaction dates, and serial numbers to be embedded as unperceivable signals into digital contents.⁸⁸⁹ The signals embedded can be perceivable or insignificant to humans.⁸⁹⁰ The concept of visible watermarking is very simple; it is analogous to stamping a mark on paper.⁸⁹¹ An example of visible watermarking is as seen in television channels when their logos are visibly superimposed in the corner of the television screen. On the other hand, invisible watermarking is a more complex concept⁸⁹² which is most often used to identify Copyright data such as author, distributor, etc.⁸⁹³ Invisible Watermarking is imperceptible under normal viewing conditions. It is a branch of the growing discipline of ‘data hiding’ or stereography multimedia objects.⁸⁹⁴ Sounds and images inevitably contain bits which may be altered unnoticed, and this can be exploited in different ways to encode external information.⁸⁹⁵

Watermarking systems generally involves two processes, that is to say, watermarking embedding, and watermarking decoding. With the help of an encoder, the watermark is

⁸⁸⁸ Kuma et al, ‘Staffing Scheme for Copyright Protection in Multimedia’, *International Journal of Network Security & Its Applications (IJNSA)*, Vol. 3. No.2, March 2011, p.135.

⁸⁸⁹ *Ibid.*

⁸⁹⁰ *Ibid.*

⁸⁹¹ *Ibid.*

⁸⁹² *Ibid.*

⁸⁹³ *Ibid.*

⁸⁹⁴ Emilija Arsenora, ‘A Guide to Digital Right Management’, <http://www.dcita.gov.au/drm/1976/html>. accessed 15/06/2016.

⁸⁹⁵ P Tang, ‘The Use of Copyright as a Major Innovation: Software Applications in the Digital Age’ in Adams, J, ed. *Intellectual Property Quarterly*, Vol. 1. (1197), p.22.

applied to the original media signal.⁸⁹⁶ First, a list of data elements is selected from the original media signal that will be modified during the encoding of the watermark. The watermark consist of noise-like signals, which are generated by pseudo-randomly based secret keys.⁸⁹⁷ The same key is required for the watermark decoding process where a decoder checks the possibly attacked content from the presence of the watermark.⁸⁹⁸ To achieve these results, there are some techniques employed by Watermarking.. For instance, in Spatial Domain Technique, watermarks are constructed in the image spatial domain, and embedded directly in an image pixel data.⁸⁹⁹ Many Spatial Techniques are based on adding fixed amplitudes pseudo noise sequences to an image.⁹⁰⁰ One of the techniques used in the spatial domain is the LSB modification. This method encodes a signal in the list significant bits.⁹⁰¹ This technique can easily be applied to allow an image to be broken up into different frequency bands, making it much easier to embed watermarking information into the middle frequency bands of the image.⁹⁰² Similarly, in Fractal Domain Technique, similar patterns are identified in an image and only a limited amount of binary code can be embedded using this method.⁹⁰³

Again, to embed a watermark Transform Domain Technique, a mathematical transformation is first applied to the lost data.⁹⁰⁴ Then modifications are made to the transform coefficients by the watermark.⁹⁰⁵ The inverse transform is finally applied to obtain watermarked image.⁹⁰⁶ The wavelet domain provides good space-frequently localization for analyzing image features

⁸⁹⁶ *Ibid.*

⁸⁹⁷ *Ibid.*

⁸⁹⁸ *Ibid.*

⁸⁹⁹ *Ibid.*

⁹⁰⁰ Taskovskis.*et al*, 'Digital Watermarking in WaveletDomain', <http://www.firstmonday.org/issues/issue811/may/#m4>. accessed10/10/17.

⁹⁰¹ *Ibid.*

⁹⁰² *Ibid.*

⁹⁰³ *Ibid.*

⁹⁰⁴ *Ibid.*

⁹⁰⁵ *Ibid.*

⁹⁰⁶ *Ibid.*

such as edges or textured areas.⁹⁰⁷ To a large extent, these features are represented by the large coefficients in the detail sub bands at various resolutions.⁹⁰⁸ With respect to DCT-Based Watermarking Technique, the Discrete Cosine Transform allows an image to be broken up into different frequency bands, making it much easier to embed watermarking information in the middle frequency bands of the image.⁹⁰⁹ The middle frequency bands are chosen such that they avoid the most visual important parts of the image without over exposing themselves to removal through compression and noise attacks.⁹¹⁰ On the other hand, the Feature Domain Technique involves the application of watermarking on the entire image domain.⁹¹¹

Apart from the above discussed watermarking techniques, there are other species of watermarks such as Stir Mark. This form of watermark is a generic tool for basic robustness testing image watermarking algorithms.⁹¹² It applies a minor unnoticeable generic distortion; the image is lightly stretched, sheared, shifted, bent and rotated by an unnoticeable random amount; then, a slight random low frequency deviation, which is greatest at the centre of the picture, is applied to each pixel.⁹¹³ However, these techniques will not form part of this work for want of time and space.

4.15.2 Functions of Digital Watermarking

It has been firmly established that Digital Watermarking Techniques are widely used to curb Copyright infringement in industries in the following ways discussed below.

⁹⁰⁷ *Ibid.*

⁹⁰⁸ *Ibid.*

⁹⁰⁹ *Ibid.*

⁹¹⁰ *Ibid.*

⁹¹¹ L Chun-shien, 'Multimedia security; Steganography and Digital Watermarking Techniques for Protection of Intellectual Property: Computer Forensics, Cybercrime and Steganography Resources'. <http://www.forensics.nl/digital-water-marking.htm>. accessed on 10/10/2017.

⁹¹² Taskovskis *et al*, 'Digital Watermarking in WaveletDomain' *Op.Cit.*

⁹¹³ *Ibid.*

(a) Proof of Ownership: Multimedia owners often use watermarking techniques to identify Copyright ownership.⁹¹⁴ If a person creates an image and puts same on website with a Copyright notice, such work can be stolen or the Copyright notice replaced by infringers with the help of an image processing program.⁹¹⁵ Infringers may claim ownership of the work in their own names. Such theft will not be possible if the Copyright owner used watermark on the work. In the absence of the watermark, the creator may not prove ownership of the work if he has no negative to present.

(b) Broadcast Monitoring: Authors of works, such as musicians, actors, broadcasting firms, advertisers and other Copyright Owners who are anxious to protect their works from ferocious infringers. They make use of watermarks for broadcast monitoring. This is achieved by putting a unique watermark in sound or video clip prior to broadcast.⁹¹⁶ Automated monitoring stations can then be used to recover broadcasts and search for these watermarks and identify where and when each clip appears.⁹¹⁷

(c) Transactional Watermarks: Right owners place watermark in all copies of protected works.⁹¹⁸ However, electronic distribution of content allows each copy distributed to be customized for each recipient. This is achieved by the embedding of a unique watermark in each individual copy. Transactional watermarks also called fingerprints allow a content owner or content distributor to identify a source of an illegal copy. This technique serves to prevent illegal use and as a technological aid to investigation.⁹¹⁹ It is mostly applied in the movie industries due to the fact that in the process of movie making and dailies, the result of each day's photography is usually distributed to a good number of people who

⁹¹⁴ M Kutter, *et al.* 'Towards Second Generation Watermarking Scheme'. <http://www.dashes.com/anvil/stuff/docforow-drm-ms.html.A> accessed 01/04/, 2017.

⁹¹⁵ *Ibid.*

⁹¹⁶ *Ibid.*

⁹¹⁷ *Ibid.*

⁹¹⁸ *Ibid.*

⁹¹⁹ *Ibid.*

are involved in the movie production. These dailies are highly confidential, yet occasionally leaked to press. Immediately such leakage occurs, studios would quickly try to identify the source of the leakage if each copy of the daily contains a unique Transactional Watermark that identifies the recipient.⁹²⁰

(d) Owner Identification:

It was stated earlier in this work that although Copyright Notice is no longer necessary to guarantee Copyright, yet it is recommended. Copyright Notice on books is usually exhibited in a work by putting the symbol ‘c’, dates, and the name of the Copyright owner placed in plain sight. In movies, it is appended at the end of the credits, while in pre-recorded music, it is placed on the packaging. This process of Copyright notice can be easily removed by infringers from protected material, or the packaging lost. Movies can have credits cut off, and images can be spatially cropped. A digital watermark can be used to provide complimentary Copyright making functionality because it becomes an integral part of the content.⁹²¹ That is to say, the Copyright information is embedded in the music to supplement the text notice printed on the packaging such that when the detector finds a watermark, it contacts a central database to identify the watermarks owner.⁹²²

(e) Filtering/Classification: Digital watermarks enable contents to be identified, classified and filtered. Therefore, systems are enabled to selectively filter potentially inappropriate contents such as corporations and parents restricting viewing of pornographic or other objectionable materials.⁹²³ The digital watermark carries the classification codes, or identifies the content and links to a remote database with the classification code.⁹²⁴ This technique is applicable to images, audios and videos.

⁹²⁰ *Ibid.*

⁹²¹ *Ibid.*

⁹²² *Ibid.*

⁹²³ *Ibid.*

⁹²⁴ *Ibid.*

(f)Authentication: As both still and video cameras increasingly embrace digital technology, the ability for undetectable tampering also increases.⁹²⁵ The content of digital photographs can easily be altered in such a way that it is very difficult to detect what has been changed, especially in cases where there is no original negative to examine as required in legal cases and medical imaging.⁹²⁶ But if digital watermarks are used on the image, it eliminates the problem of ensuring that the signatures stay with the image. It also opens up the possibility to learn more about what tampering had occurred, since any changes made to the image will also be made to the watermark.⁹²⁷

4.15.3 Encryption

Encryption is the technology that supports the Electronic Document Management and Control. Digital Rights Management uses a cryptographic algorithm to encrypt content that needs a secret key, a particular phrase, or string of numbers.⁹²⁸ It is only the holder of this key that can unlock the content and read it. Decryption is the process of decoding data that has been encrypted into a secret format.⁹²⁹ This process requires a secret key or password. However, encrypting the content is merely one of the important aspects of securing the data.⁹³⁰ Another most, important aspect is managing the description key. The creation of the ‘key’, its transfer to customers, ways of enforcing time limitations, e.g. making the software license valid for only three months, and preventing theft or transfer of a key, are the properties of the encryption that have to be considered at all times.⁹³¹ As shall be discussed

⁹²⁵ Henry, M. Image ‘Watermarking Hidden Bits: A Survey of Techniques For Digital Watermarking’, <http://www.vu.union.edu/shoemakc/watermarking/html>. accessed 12/04/2016.

⁹²⁶ *Ibid.*

⁹²⁷ *Ibid.*

⁹²⁸ *Ibid.*

⁹²⁹ *Ibid.*

⁹³⁰ *Ibid.*

⁹³¹ *Ibid.*

below, there are two major types of encryption namely; asymmetric encryption, also known as public-key encryption, and symmetric encryption also known as secret-key encryption .⁹³²

(a). Asymmetric Encryption: This type of encryption gives each person a pair of keys, ie, a public and a private key.⁹³³ Each person's public key is kept secret. Messages are encrypted using the intended recipient's public key and can any be decrypted using his private key.⁹³⁴ This method eliminates the need for the sender and receiver to share secret information, ie, keys with a secure channel.⁹³⁵ All communications use only public keys, and no private keys is ever transmitted or shared. To implement public-key encryption on a large scale, a digital certificate is required.⁹³⁶ A digital certificate is basically a bit of information that says that the web server is trusted by an independent source known as a digital authority.⁹³⁷ The certificate authority acts as a middleman that computers trust, and confirms that each computer is in fact who it says it is; and then provides the public keys of each computer to the other.⁹³⁸

(b). Symmetric Encryption: One of the simplest forms of encryption uses a symmetrical key and is essential for protecting data.⁹³⁹ Generally, it uses the same key for password to encrypt and decrypt data and is sometimes referred to as secret-key encryption. This type of technology is used to encrypt everything, ie, from an entire hard drive to an individual file.⁹⁴⁰ Once a file is encrypted, it can be sent or stored in the cloud; but a cloud provider would not have access to the data without having access to the original key.⁹⁴¹ The advantage of this form of encryption is that it is fast and can be used to encrypt large volumes of static data.

⁹³² *Ibid.*

⁹³³ *Ibid.*

⁹³⁴ *Ibid.*

⁹³⁵ *Ibid.*

⁹³⁶ *Ibid.*

⁹³⁷ *Ibid.*

⁹³⁸ *Ibid.*

⁹³⁹ *Ibid.*

⁹⁴⁰ *Ibid.*

⁹⁴¹ *Ibid.*

4.15.4 Other Enforcement Measures

Apart from the above discussed technical protection measures, there are other protection measures employed in the enforcement of Copyright. For instance, the Hologram Stamps are used to enforce the protection of Copyright especially as it relates to sound recordings and cinematograph films intended or offered for sale, rental, hiring, lending or otherwise distributed to the public for commercial purposes.⁹⁴² In Nigeria for instance, the law requires that holograms, which shall be a tamper sticker designed by the Nigerian Copyright Commission, shall be affixed on works produced in Nigeria at the point of production; and in the case of works imported into Nigeria, except where such works are for domestic use, before they are released into the channel of commerce.⁹⁴³ It is also required that the hologram shall be affixed to every cassette, disc or other medium in which the sound recording or film is embodied, in such a manner as to make the hologram visible to prospective purchasers.⁹⁴⁴

It is submitted that the use of holograms in the enforcement of Copyright has not yielded much fruits. This is because its use is restricted to sound recordings and cinematograph films. Besides, adulterated holograms are as rampant as infringing copies of works without any effort on the part of the Nigerian Commission to combat same or at least, educating the masses, who are predominantly illiterates and semi-illiterates; and who may not even know anything about holograms, on the concept of Copyright enforcement through the use of holograms. It is therefore suggested that the Nigerian Copyright Commission should handover the enforcement of Copyright through the use of holograms to the Nigerian Police who are closer to the grass roots, to commence investigations and prosecution of offenders under the law.

⁹⁴² Section 1 Copyright (Security Devices) Regulations, 1999.

⁹⁴³ *Ibid.* Section 2 (1).

⁹⁴⁴ *Ibid.* Subsection (2).

It must be pointed out that these technical enforcement mechanisms discussed above can only be validly applied with the requisite legal backing and of course the technological know-how. It is unfortunate that the Nigerian situation is bereft of both. It cannot therefore be gainsaid that there is a serious need for positive efforts for Nigeria to join the legion of developed countries in making use of the above discussed mechanisms.

4.16 Impact of Copyright Enforcement on Access to Information

There is no gain saying that the enforcement of Copyright has become one of the most important imperatives for developed and developing nations alike. This is because the primary purpose of Copyright is to promote public welfare by the advancement of knowledge with the specific intent of encouraging the production and distribution of new works for public use. It provides incentives for creators by granting them the exclusive rights to produce and distribute their works, and in so doing, reap the fruits of their labour. It has been held in *Gero v Seven-Up Company* that the goal of Copyright protection is to encourage dissemination of ideas by protecting the embodiment of expression of an idea in a creative work and reserving the right in it to the creator of the work.⁹⁴⁵ Thus, without Copyright laws, there will be no creativity and dissemination of knowledge and information. This fact was vividly illustrated by Larson thus:⁹⁴⁶

Just a few years ago, India was losing a battle to retain the best and brightest of its engineers and computer scientists. The lack of an effective Copyright law forced those scientists and technicians to emigrate to countries where their hard work could be protected and kept safe from unfair exploitation by competitors seeking easy advantages. The Indian Parliament finally passed a Copyright law to protect the hard work and creativity of its computer scientists. The result: a burgeoning high tech industry producing some of the world's most advanced software and employing thousands of workers who might otherwise have left India for greener pastures in other parts of the world.

⁹⁴⁵ 215 USPQ, p.512.

⁹⁴⁶ P Larson, quoted by M Ozioko, 'Copyright Provisions Impacting on Access to knowledge: A Comparative Analysis', *UNIZIK Law Journal*, Vol. 7 No. 1 2010. p.61.

However, the digitization of information in the 20th and 21st centuries has created more access to Copyrightable works to the detriment of the right owners. The application of this technology gives rise to a wide range of possibilities hitherto achievable in the information and technological sector with very vast implications for the Copyright regime.⁹⁴⁷ It has been observed that one of the main characteristics of digital exploitation of works is that it is not limited to one single national territory but in many cases crosses borders.⁹⁴⁸ Cate aptly observed that:⁹⁴⁹

Digital information not only ignores national borders, but also those of states, territories and even individual institutions... governments are finding it increasingly difficult, and in some cases impossible to regulate information effectively, at the very time that the economic power of information is increasing the political pressure for them to do so. The globalization of information may be rendering the traditional concept of sovereignty of the nation states obsolete.

The above development indicated a compelling need for an improvement on the existing legal rules relating to Copyright enforcement. This fostered the development of the Digital Rights Management system and technological measures which gradually enabled right holders to physically control access and use of their works within the legal framework of Copyright laws. This is mainly through the use of encryption and watermarking techniques to protect data and other digital multimedia as discussed in this chapter of this work.⁹⁵⁰ This is backed up by the provisions prohibiting the circumvention of anti piracy devices contained in the Copyright laws of the jurisdictions under consideration. Nonetheless, whilst the rationale for effective Copyright enforcement cannot be debated, the damage of legitimating over restrictive Copyrights management systems and criminalizing those who circumvent them has triggered criticism of expanding the protectability of works at the expense of research and

⁹⁴⁷ M Ozioko, 'Emergence of Digital Technology: Implication for Copyright Protection' *UNIZIK Law Journal*, Vol 5 No. 1 2005. p.265.

⁹⁴⁸ *ACLU v RENO* 354. 217 F. 3d p.162 (3d circle 2000).

⁹⁴⁹ F Cate: "Introduction: Sovereignty and the globalization of intellectual property" *Indiana Journal of Global Legal Studies*. Vol. 6. No. 1 at<<http://ijgls.indiana.edu/archive/06/01/cate.shtml>> accessed 30/09/2005.

⁹⁵⁰ M Ozioko, 'Emergence of Digital Technology: Implication for Copyright Protection' *Op.Cit.* p.265.

education.⁹⁵¹ Finding the right balance between sufficient incentives for creativity on the one hand, and the promotion of knowledge and information on the other hand, will go a long way in promoting creativity.

It is submitted that the enforcement of Copyright in Nigeria is restrictive of public interest of access to work. This is as a result of the over restrictive nature of the enforcement mechanisms operating in Nigeria, especially in relation to technological protective measures in this digital era where education and science are internet/based. Unfortunately, the passage of the Cybercrimes Act in 2015 did not solve this problem.⁹⁵² It is therefore suggested that the Copyright Act of Nigeria be urgently amended to allow for fair use of digital media/works. This will go a long way in balancing interests of authors and those of the general public; and at the same time, promote creativity.

In line with the Berne Convention and other Treaties/Instruments on copyright, most states of the world have domesticated the provisions prohibiting circumvention of technological protection measures. For instance, the Nigerian Act confers on the Nigerian Copyright Commission, the authority 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. The Commission shall exercise these powers with the consent of the Minister charged with the responsibility for Culture. The Act also prohibits the selling, renting or offering for sale, rent or hire, any work in contravention of the prescription made under the Act. It makes such acts offences punishable on conviction with an imprisonment for a term not exceeding twelve months, or both fine and imprisonment. The Act further prohibits the importation into Nigeria, or being in possession of any anti-piracy device, or any machine, instrument or other contrivance intended for use in the production of the anti-piracy device. The Act renders such

⁹⁵¹ *Ibid.*

⁹⁵² Cybercrimes [Prohibition, Prevention, etc] Act, 2015.

a liable upon conviction to a fine not exceeding Five Hundred Thousand Naira or imprisonment for a term not exceeding five years, or to both such fine or imprisonment. The Act also bars any person from being in possession of, or reproducing or counterfeiting any anti-piracy device without the consent of the Nigerian Copyright Commission and renders such an offender upon the consent of the Nigerian Copyright Commission and renders such an offender upon conviction to a fine of Fifty Thousand Naira or a term of imprisonment not exceeding five years, or to both such fine and imprisonment.

CHAPTER FIVE

5.0 A SURVEY OF COPYRIGHT PROTECTION AND ACCESS TO INFORMATION IN SELECTED COUNTRIES

5.1 Exceptions to Copyright Control

In order to protect the interest of the public, the Copyright Acts of England, India and the United States provide for exceptions to Copyright control relatively similar to those provided by the Nigerian Act discussed in this last chapter. A comparative analysis of these exceptions, together with the other provisions on the exceptions to Copyright control earlier discussed under the last preceding chapter shall be broken down and discussed below for purposes of convenience in relation to the English, Indian and U.S. Copyright Acts.

5.2 Fair Dealings

The Indian,⁹⁵³ United States⁹⁵⁴ and English Acts⁹⁵⁵ provide for fair use exemptions substantially in the same form and manner discussed in the last chapter. However, the United States and the English Acts contain more elaborate guiding provisions on fair use exemptions.⁹⁵⁶ The United States Act provides that in determining whether the use made of a work in any particular case amounts to fair use, the factors to be considered shall include:⁹⁵⁷

- (a) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (b) the nature of the copyrighted work;
- (c) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (d) the effect of the use upon the potential market for, or value of the Copyright work.

⁹⁵³ C.R.A.I. Section 52.

⁹⁵⁴ U.S.C. Section 107.

⁹⁵⁵ C.D.P.A. sections 28-30.

⁹⁵⁶ U.S.C. Section 107; C.D.P.A. Section 30.

⁹⁵⁷ U.S.C. Section 107.

On the other hand, the English Act provides that:⁹⁵⁸

fair dealing with a work for the purpose of criticism or review of that or another work or of a performance of a work, does not infringe any Copyright in the work provided that it is accompanied by a sufficient acknowledgment (unless this would be impossible for reasons of practicality or otherwise) and provided that the work has been made available to the public.

The Act further provides that:⁹⁵⁹

Copyright is not infringed by the use of a quotation from the work (whether for criticism or review or otherwise) provided that:-

- (a) the work has been made available to the public;
- (b) the use of the quotation is fair dealing with the work;
- (c) the extent of the quotation is no more than is required by the specific purpose for which it is used; and
- (d) the quotation is accompanied by a sufficient acknowledgement (unless this would be impossible for reason of practicality or otherwise).

It is submitted that the Nigerian and English Acts share common similarities except that the later is more elaborate and precise. For while the Nigerian Act provides that copying of a work on grounds of fair dealing is only allowed if the work is to be used for research, private use, criticism or review, or for the reporting of current events, on the condition that if the use is public, it shall be accompanied by an acknowledgement of the title of the work and its authorship; except where the work is incidentally included in a broadcast.⁹⁶⁰ The Act requires for the inclusion of acknowledgement only when the work is for public use which is not a requirement under the English Act. On the other hand, the English Act allows for the use of work on grounds of fair dealing for purposes other than the purposes of criticism or review of not only the work copied, but for another work or a performance of a work.⁹⁶¹ Again, even though the English Act mandates that acknowledgement of the author be made, it does not specify the nature of the acknowledgement quite unlike the Nigerian Act which expressly

⁹⁵⁸ C.D.P.A. Section 30.

⁹⁵⁹ *Ibid.* Subsection (1ZA).

⁹⁶⁰ C.R.A.N. Paragraph (a) of the Second Schedule.

⁹⁶¹ C.D.P.A. Section 30 (1).

requires for both the acknowledgement of the title of the work and its authorship. The English Act only requires that such original work should have been made available to public quite unlike the Nigerian Act which has no such requirement. It should be noted that under the English Act, a work is made available to the public if it has been made available by any means, including the issuance of copies to the public; making the work available by means of an electronic retrieval system; the rental or lending of copies of the work to the public; the performance, exhibition, playing or showing of the work in public; the communication to the public of the work.⁹⁶² Thus, if the work is already published, it is substantially known to the public and requires no strict form of acknowledgement as required under the Nigerian Act. In determining generally whether a work has been made available to the public, no account shall be taken of any unauthorized act.⁹⁶³ So, where a work is stolen by any means and made available to the public, it does not fall within the section of the Act under consideration. Thus, the criticism and review of a work already in public domain which would otherwise constitute fair dealing would seldom, if ever, be rendered unfair because of the method by which the Copyright material was obtained.⁹⁶⁴

Another striking discrepancy between the two Acts is the fact that unlike the English Act, the Nigeria Act requires for acknowledgement only when the work is to be used in public. It does not require that the work be made public before copying as is required by the former Act. Thus, in Nigeria, one is free to copy unpublished works unlike the requirement under the English Act where such copying would otherwise amount to an infringement of Copyright. Again, under the Nigerian Act, once there is an acknowledgement in works copied for purposes of research, private use, criticism or review or the reporting of current events, plea

⁹⁶² C.R.A.N. Paragraph (a) of the Second Schedule.

⁹⁶³ C.D.P.A. Section 30 (1).

⁹⁶⁴ *Ibid.* Section 30 (IA).

of fair dealing will be upheld.⁹⁶⁵ Under the English Act, no acknowledgement is required in connection with the reporting of current events by means of a sound recording, film or broadcast where this would be impossible for reason of practicality or otherwise.⁹⁶⁶

It is submitted that while the relevant section of the English Act⁹⁶⁷ is commendable on the grounds that no form of contract should be allowed to overtake any law validly made by a competent Legislature of a Nation, the other arm of this section is criticized as encouraging violation of Copyright and as destroying the whole essence of creativity.⁹⁶⁸ Once a work is copied without any form of acknowledgement, no matter the reason adduced for such failure, the creator is robbed of his hard earned creativity. In the light of this, it is suggested that the English Act should be urgently amended to streamline the wide latitude granted to lazy copiers in the name of fair dealings.

It is noted that since the Indian Act's provisions on this exemptions to Copyright control are virtually in the same manner they are captured in the Nigerian and English Acts.⁹⁶⁹ Hence, there is no need to further consider this Act.

5.3 Parody, Pastiche and Caricature.

Fair dealing with a work for the purpose of caricature, parody or pastiche does not infringe Copyright in the work.⁹⁷⁰ It is observed that the requirements of the Nigerian and English Acts are the same except that while the Nigerian Act does not expressly make provision for the nullification of any term of contract made by parties to exclude the application of this exception, the English Act does, as it provides that no form of contractual/agreement can oust

⁹⁶⁵ *Ibid.* Proviso to subsection (IA) of section 30.

⁹⁶⁶ *Ibid.* Subsection (3).

⁹⁶⁷ *Ibid.* Subsection (3).

⁹⁶⁸ *Ibid.* Subsection (2).

⁹⁶⁹ C.R.A.I. Sections 52 & 52A.

⁹⁷⁰ C.D.P.A. Section 30A (i); C.R.A.N. Paragraph (b) to the Second Schedule.

the use of a work on grounds of fair dealing in the form of caricature, parody or pastiche.⁹⁷¹ In the same vein, both Acts made provisions for the acknowledgement of the original authorship under fair dealing provisions.⁹⁷² It is submitted that these provisions of the English Act are good enough not to be distributed. Any such disturbance may lead to a distortion of meanings and rights of Copyrights owners. It is rather disappointing that both the Indian and U.S. Acts contain no express provision relating to the exception under discussion; though the Courts of these countries recognize and enforce this exception.⁹⁷³ It is therefore suggested that the Indian and U.S. Copyright Acts be amended along the line of the English Act discussed above. It is also suggested that the Nigerian Act be amended to incorporate the aforesaid noble provisions of the English Act.

5.4 Inclusion in Films or Broadcasts of Works Viewable by the Public

It is noted that the Indian Act contains provisions similar to those of the Nigerian Act relating to the exemption on the inclusion in a film or broadcast of a work that is viewable by the public from Copyright control.⁹⁷⁴ It is however observed that while the Nigerian and Indian Acts talk about the inclusion in a film or a broadcast of an artistic work situated in a public place, while the English Act talks about the incidental inclusion in an artistic work, sound recording, film and broadcast. This makes the provisions of the English Act broader in scope and application. The English Act does not contemplate any condition of permanency of such artistic work unlike the requirement of permanency under the Nigerian Act. Moreover, there is no express provision requiring that such works be kept in a place to be viewed by the public. It is therefore suggested that Nigerian and Indian Acts be amended to the effect that the works under consideration be placed permanently in a place where it can be viewed by the

⁹⁷¹ C.D.P.A. Section 30A.

⁹⁷² C.R.A.N. Paragraph (a) of the Second Schedule ; C.D.P.A. Section 30 (1).

⁹⁷³ *Original Appalachian Artworks Inc. v Topps Chewing Gum Inc.* 642 F. Supp. p.1031 (U.S. Dist.1986).

⁹⁷⁴ C.R.A.N. Paragraph (a) of the Second Schedule ;

public for at least, a reasonable period of about one calendar year prior to the use of such scenery.

It is most surprising that the U.S. Act does not provide for the exemption under discussion. This omission will obviously work hardship against Copyright enforcement. It is therefore suggested that the U.S. Act be amended to incorporate the suggestions preferred above in relation to the Nigerian and English Acts.

5.5 Incidental Inclusion of an Artistic Work in a Film or Broadcast

As discussed in chapter four of this research work, the Nigerian Act legalizes the incidental inclusion of an artistic work in a film or broadcast similar to such provision made by the Indian and English Acts.⁹⁷⁵ It is however observed that the U.S. Act does not contain the exemption under discussion. It is submitted that this omission is anti Copyright. It is suggested that this Act be amended along the line of the Nigerian Act.

5.6 Use of Work for Educational Purposes

The Acts under consideration contain special exceptions for certain uses of works for educational and instructional in purposes. For instance, the English Act provides that fair dealing with a work for the sole purpose of illustration for instruction does not infringe Copyright in the work provided that the dealing is:⁹⁷⁶

- (a) for a non-commercial purpose;
- (b) by a person giving or receiving instruction (or preparing for giving or receiving instruction); and
- (c) accompanied by a sufficient acknowledgment (unless this would be impossible for reasons of practicability or otherwise).

The Acts under consideration contain provisions similar to those of the English Acts duplicated above. However, while the Indian Act allows this exemption only if the use of

⁹⁷⁵ C.R.A.N. Paragraph (e), C.R.A.I. Section 52 (u), C.D.P.A.I. Section 31 (1).

⁹⁷⁶ C.D.P.A. Section 33 (1) (a) & (b).

such work is private, the U.S. Act does not contain such condition precedent.⁹⁷⁷ Again, while the Nigerian Act requires for the proper acknowledgement of the authorship and a statement that the work created is for educational use, the English Act requires that such work must be for educational use and must be for non-commercial purposes. However, unlike the Nigerian Act, the requirement of authorship acknowledgement by the English Act is permissive. Thus, acknowledgement can be dispensed with where it will not be possible to do so by reason of practicability. This Act does not mandate the quantity or length of excerpts to be taken from the work quite unlike the Nigerian Acts. On the other hand, the Nigerian Act does not state whether the work for educational purpose can be for non-commercial purpose as expressly required by the English Act. It does not also state what will amount to educational purpose/use. Furthermore, the English Act protects a work on grounds of fair use by a person giving or receiving instruction, or preparing for giving or receiving instruction and defines this to include 'setting examination questions, communicating the questions to pupils and answering the questions'.⁹⁷⁸ It went ahead to state that no contractual term which purports to prevent or restrict the doing of any act which, by virtue of this section would not infringe Copyright, that term is unenforceable.⁹⁷⁹ This clearly shows that any copying of a work such as examination questions from another question paper for purpose of answering question is exempted for purposes of fair use if such copying is not verbatim and if the work is not for a commercial purpose. It is noted that while the Indian Act allows this exception only if the use is private; the U.S. Act does not require so.⁹⁸⁰ It is suggested that Nigerian U.S. and the Indian Acts be amended urgently to fall in tandem with the more elaborate and explicit English Act.

⁹⁷⁷ U.S.C. Section 107; C.R.A.I. Section 52 (1).

⁹⁷⁸ C.D.P.A. Section 33 (2).

⁹⁷⁹ *Ibid.* subsection (3).

⁹⁸⁰ U.S.C. Section 107; C.R.A.I. Proviso to section 52 (i).

⁹⁸⁰ C.R.A.N. Paragraph (f) of the Second Schedule.

It is noted that the English Act also provides for the protection of anthologies for educational use similar to the laudable provisions made in the Nigerian Act.⁹⁸¹ According to the English Act, the inclusion of a short passage from a published literary or dramatic work in a collection which is intended for use in educational establishments and is so described in its title and in any advertisements issued by or on behalf of the publisher and consists mainly of materials which no Copyright subsists, does not infringe the Copyright in the work if the work itself is intended for use in such establishment and the inclusion is accompanied by sufficient acknowledgement.⁹⁸² However, the Act does not authorize the inclusion of more than two excerpts from Copyright works by the same publisher over a period of five years.⁹⁸³ The only difference between the two Acts is that while the Nigerian Act requires a statement that the work is designed for educational use, the English Act requires that such work must be intended for use in educational establishments; and that the work must be so described in its title; and in any advertisements issued by or on behalf of the publisher.⁹⁸⁴ What this means is that for the use of such work to fall under fair dealings, it must be used in an educational establishment like schools approved by the appropriate Ministry of Education. Again, such work must not be used in an establishment where the original works is used. This is also the position of the Indian and U.S. Acts.⁹⁸⁵

With respect to the exemption on the use of work in Educational Institutions for educational purposes as contained under the Nigerian Act,⁹⁸⁶ the position of the Indian and English Acts are the same except that the provision for the destruction of such work contained in the Nigerian Act is absent in the former Acts.⁹⁸⁷ There is nothing in these latter Acts that suggests that the approved use must be by the Institution itself. It is also apparent that this

⁹⁸¹ U.S.C. Section 107; C.R.A.I. Proviso to section 52 (i).

⁹⁸² C.D.P.A. Section 33 (1) (a) and (b).

⁹⁸³ *Ibid.* Section (2).

⁹⁸⁴ *Ibid.* Subsection (1) (a).

⁹⁸⁵ C.R.A.I. Section 52 (i); U.S.C. Section 107

⁹⁸⁶ C.R.A.N. Paragraph (h) of the Second Schedule.

⁹⁸⁷ C.D.P.A. Section 33 (1).

exception applies to all categories of works. It is however suggested that the U.S and the Indian Acts be amended to include the requirement of proper acknowledgement as provided by the English Act.

It must be pointed out that the English Act contains a specific provision for the protection of certain performances that forms part of the activities of educational establishments which the other Acts do not provide. It provides that:⁹⁸⁸

the performance of a literary, dramatic or musical work before an audience consisting of teachers and pupils at an Educational Establishment and other persons directly connected with the activities of the establishment; by a teacher or pupil, in the course of the activities of establishment by any person for the purpose of instruction, is not a public performance for the purposes of infringement of Copyright.

The Act further stated that the playing or showing of a sound recording, film or broadcast before such an audience at an educational establishment for the purposes of instruction is not a playing or showing of the work in public for the purposes of infringement of Copyright.⁹⁸⁹

The problem now is, who and who are contemplated to constitute the audience within the meaning of this section? This answer is not farfetched for the Act provides that ‘a person is not for this purpose directly connected with the activities of the educational establishment simply because he is the parent of a pupil at the establishment’⁹⁹⁰ This simply means that any showing of a sound recording, film or broadcast to an audience made up of more than the pupils and staff of the educational institution for purposes of instruction and teaching is a breach of the Copyright in the work. Such work must therefore be shown for instruction to the audience contemplated by the Act. It is suggested that this particular provision which is absent in the other Acts under consideration be incorporated therein through immediate amendment.

⁹⁸⁸ *Ibid.* Section 34 (1) (a) & (b).

⁹⁸⁹ *Ibid.* Subsection (2).

⁹⁹⁰ *Ibid.* Section 34 (2).

With respect to the exemption on the use of approved educational broadcast as contained under the Nigerian Act,⁹⁹¹ the English Act provides that a recording of a broadcast, or a copy of such a recording, may be made by or on behalf of an educational establishment for the educational purposes of that establishment without infringing Copyright in the broadcast, or in any work included in it, provided that:⁹⁹²

- (a) the educational purposes are non-commercial; and
- (b) The recording or copy is accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise).

Thus, the recording of a broadcast or a copy of such a recording made by anybody on behalf of an Educational Institution with sufficient acknowledgement unless acknowledgement would be impossible by reason of practicability, would not amount to infringement of the work as long as such copy is made for non-commercial educational purposes. Such a copy can then be communicated by or on behalf of the educational establishment to its pupils or staff for non-commercial educational purposes of that establishment.⁹⁹³ This applies to a communication received outside the premises of the educational establishment if that communication is made by means of a secure electronic network accessible only by the establishment's pupils and staff.⁹⁹⁴ However, such use will not be permitted if or to the extent that, licenses are available authorizing the acts in question and the educational establishment responsible for the acts knew or ought to have been aware of that fact.⁹⁹⁵ If a copy made under this section is subsequently dealt with, it is to be treated as an infringing copy for the purpose of that dealing and if that dealing infringes Copyright, it is to be treated as infringing copy for all subsequent purposes.⁹⁹⁶ It must be noted that the phrase "dealt with" as used

⁹⁹¹ C.R.A N. Paragraph (g) of the Second Schedule.

⁹⁹² C.D.P.A. Section 35.

⁹⁹³ *Ibid.* Subsection (2).

⁹⁹⁴ *Ibid.* Subsection (3).

⁹⁹⁵ *Ibid.* Subsection (4).

⁹⁹⁶ *Ibid.* Subsection (5).

herein means sold or let for hire, offered or exposed for sale or hire, or communicated otherwise than as permitted by the Act.⁹⁹⁷

Similarly, the copying and using of extracts of works by educational establishments or on their behalves does not infringe Copyright in the work provided that the copies are made for purposes of instruction for a non commercial purpose and the copies are accompanied by sufficient acknowledgement unless this would be impossible for reasons of practicality or otherwise.⁹⁹⁸ The conditions required for the enforcement of Copyright under this section are similar to those in section 35 already discussed except that it provides that not more than five percent of the work may be copied by or on behalf of an Educational Establishment in any period of 12 months; and for these purposes, a work which incorporates another work is to be treated as a single work.⁹⁹⁹ Where licenses are available, the terms of a license granted to an Educational Establishment authorizing acts permitted by this section are of no effect so far as they purported to restrict the proportion of a work which may be copied, whether on payment or free of charge, to less than that which would be permitted by this section.¹⁰⁰⁰

It is obvious that the provisions of the English Act on this exemption are far more elaborated and vastly Explicit than the Nigerian Act. However, the Indian and U.S. Acts do not contain this exemption. It is suggested that the Nigerian, Indian and U.S. Acts be urgently amended to incorporate the aforementioned Copyright friendly provisions of the English Act. This will make for clarity, precision, improved enforcement of Copyright and at the same time, facilitate access to works.

⁹⁹⁷ *Ibid.* Section 36 (1).

⁹⁹⁸ *Ibid.* Subsection (6).

⁹⁹⁹ *Ibid.* Subsection (5).

¹⁰⁰⁰ *Ibid.* Subsection (7).

5.7 Use for Literary Enjoyment and Documentation

The Nigerian Act's provision of the exemption on public reading or recitation of work¹⁰⁰¹ is a replica of the English Act's provision except that the latter includes published grammatical work in the category of this exception.¹⁰⁰² The English Act further protects the making of a second recording or the communication to the public of a reading or recitation which by virtue of the Act does not infringe Copyright in the work, provided that the recording or communication to the public consists mainly of material in relation to which it is not necessary to rely on the subsection.¹⁰⁰³ Again, where an article on a scientific or technical subject is published in a periodical accompanied by an abstract, indicating the contents of the article, it is not an infringement of Copyright in the abstract, or in the article to copy the abstract or issue copies of it to the public.¹⁰⁰⁴ However, this does not apply if or to the extent that there is a licensing scheme certified for the purpose of the Act relating to the grant of licenses.¹⁰⁰⁵ This simply means that one can copy an article or its abstract published in a periodical if the article is of a scientific or technical nature at a time where there is no licensing scheme providing for the grant of license. There is no requirement for acknowledgement under this section.¹⁰⁰⁶

It is submitted that the provisions of the English Act in this provisions of public reading and recitation of protected works are wider in scope and more elaborated than the Nigerian Act; the Indian Act which is virtually the same with the provisions of the latter Act; and the provisions of the U.S. Act (which scanty provides for this exception).¹⁰⁰⁷ It is therefore suggested that the Nigerian, Indian, and U.S. Acts be amended along the line of the English Act.

¹⁰⁰¹ C.R.A.N. Paragraph (J) of the Second Schedule.

¹⁰⁰² C.D.P.A. Section 59 (1).

¹⁰⁰³ *Ibid.* Subsection (2).

¹⁰⁰⁴ *Ibid.* Section 60 (1).

¹⁰⁰⁵ *Ibid.* Subsection (2).

¹⁰⁰⁶ *Ibid.*

¹⁰⁰⁷ U.S.C. Section 52 (g); C.R.A.I. Section 107.

With respect to the exemption on the use by Government Public Libraries and Non-Documentation Centres as contained under the Nigerian Act,¹⁰⁰⁸ the English Act contains more elaborate provisions regarding this exception than the Nigerian Act. According to the English

Act, Copyright in a work of any description is not infringed by the lending, by a public library in relation to a book within the Public Lending Right Scheme, that is, the lending of books, audio-books and e-books.¹⁰⁰⁹ Again, the lending of copies of such work by a library or archives other than public library which is not conducted for profit is allowed.¹⁰¹⁰ Thus, the Act allows libraries, achieve, museums, and educational establishments to communicate such works to the public or to make it available to the public by means of a dedicated terminal on its premises, upon the fulfillment of the conditions that the work or a copy of the work:¹⁰¹¹

- (a) has been lawfully acquired by the institution;
- (b) is communicated or made available to individual members of the public for the purpose of research or private study; and
- (c) is communicated or made available in compliance with any purchase or licensing terms to which the work is subject.

It is observed that unlike the English Act, the provisions of the Nigerian, Indian and U.S. Acts on this exception are narrow and unclear as to the extent and scope of this exception. For example, the Indian Act states that this exception will have effect if the use is made sixty years from the death of the author, or the last author in the case of joint authorship; such use must be made by a Non-Commercial Public Library for the use of the Library if such book is not available for sale in India.¹⁰¹² On the hand, the U.S. Act allows the reproduction by Libraries and Archives of works made without any direct or indirect commercial advantages,

¹⁰⁰⁸ C.R.A N. Paragraph (k) of the Second Schedule.

¹⁰⁰⁹ C.D.P.A. Section 40A (1) & (A1).

¹⁰¹⁰ *Ibid.* Subsection (2).

¹⁰¹¹ *Ibid.* Section 40B (1)(3).

¹⁰¹² C.R.A.I. Section 52 (o).

so long as such Institution is open to researchers.¹⁰¹³ All other requirement under this latter Act is similar to those of the English Act. It is therefore suggested that the Nigerian, Indian and U.S. Acts be amended along the line of the aforementioned Copyright friendly provisions of the English Act.

With respect to the exemption on Archival use/ Library Copying as contained under the Nigerian Act,¹⁰¹⁴ the English Act has a provision similar to the aforementioned provisions of the Nigerian Act. According to the latter Act, a librarian of any of the institutions mentioned in the Act¹⁰¹⁵ may make a single copy of the whole or part of a published work and supply it to another library without infringing Copyright in the work; if such copy is supplied in response to a request from a library which is not conducted for profit, and at the time of making the copy, the librarian does not know or could not reasonably find out the name and address of a person entitled to authorize the making of a copy of the work.¹⁰¹⁶ The provisions regarding the name and address of the Copyright owner do not apply where the request is for a copy of an article in a periodical.¹⁰¹⁷ Similarly, a librarian, archivist, or curator of a literary, archive or museum may, without infringing Copyright, make a copy of an item of the institution's permanent collection in order to preserve or replace the item in that collection; or, where an item in the permanent collection of another library, archive or museum has been lost, destroyed or damaged, in order to replace the item in the collection of that other library, archive or museum.¹⁰¹⁸ Such copying will be exempted only if the item is included in the part of the collection kept wholly or mainly for the purpose of reference on the institution's premises; or included in a part of the collection not accessible to the public; or the item is

¹⁰¹³ U.S.C. Section 108 (a).

¹⁰¹⁴ C.R.A.N. Section 15 (2)

¹⁰¹⁵ C.D.P.A. Section 40B (1).

¹⁰¹⁶ *Ibid.* Section 41 (1) & (2); section (2).

¹⁰¹⁷ *Ibid.* Subsection (3).

¹⁰¹⁸ *Ibid.* Section 42 (1) (a) & (b).

available on loan only to other libraries, archives or museum.¹⁰¹⁹ It should be born in mind that the ultimate condition to be met under this exception is that it is not reasonably practicable to purchase a copy of the item to achieve either of the purposes mentioned in the Act.¹⁰²⁰ The Act further empowers a librarian of a library which is not conducted for profit to supply a single copy of one article in any one issue of a periodical; or a reasonable proportion of any other published work, without infringing Copyright in the work.¹⁰²¹ Such supply must be in response to a request from a person who has provided the Librarian with a declaration in writing, the information set out in the Act¹⁰²², to *wit*:¹⁰²³

- (a) the name of the person who requires the copy and the material which that person requires;
- (b) a statement that the person has not previously been supplied with a copy of that material by any library;
- (c) a statement that the person requires the copy for the purposes of research for a non commercial purpose or private study, will use it only for those purposes and will not supply the copy to any other person; and
- (d) a statement that to the best of the person's knowledge, no other person with whom the person works or studies has made, or intends to make, at or about the same time as the person's request, a request for substantially the same purpose.

The English Act also empowers Librarians or Archivists to make and supply a single copy of the whole or part of a work without infringing Copyright in the work to the same class of person and under the same conditions stipulated under the Act.¹⁰²⁴ Furthermore, in all the sections of the English Act considered, there are conditions that the sum charged by the Librarian must be calculated by reference to the costs attributable to the production of the

¹⁰¹⁹ *Ibid.* Subsection (2) (a) - (c)

¹⁰²⁰ *Ibid.* Subsection (3).

¹⁰²¹ *Ibid.* Section 42A (1).

¹⁰²² *Ibid.* Section 42 A (3).

¹⁰²³ *Ibid.*

¹⁰²⁴ *Ibid.* Section 43 (4).

copy.¹⁰²⁵ The Act invalidates any contractual terms in the contract that purports to prevent or restrict the doing of any act which would not ordinarily infringe Copyright.¹⁰²⁶

Another striking difference between the English and Nigerian Acts is that while the Nigerian Act requires for the making of the work by a person in charge of a public library for the use of that library, the English Act empowers not only a Librarian, whether of a public or private library, but an archivist or museum to make copies of such work not only for the use of that particular library but for other libraries or for individuals. It is therefore submitted that the scope of this exception under the English Act is too wide to accommodate abuses and violations of Copyright. It is suggested that the English Act be amended to incorporate these laudable provisions of the Nigerian Act. It is also suggested that the Indian and U.S. Acts which do not contain this exception be amended along the line of the Nigerian Act.

It must be pointed out that the English Act has novel provisions which are not contained in the other three Acts under consideration to the effect that Copyright is not infringed by the copying of a work from the internet by a deposit library or person acting on its behalf if:¹⁰²⁷

- (a) the work is of a description prescribed by regulations under section 10 (5) of the 2003 Act;
- (b) its publication on the internet, or a person publishing it there, is connected with the United Kingdom in a manner so prescribed; and
- (c) the copying is done in accordance with any conditions so prescribed.

The regulations mentioned in this section are as made by statutory instrument by the Secretary of State pursuant to the Legal Deposit Libraries Act.¹⁰²⁸ The Act further provides that if an article of cultural or historical importance or interest cannot lawfully be exported

¹⁰²⁵ *Ibid.*

¹⁰²⁶ *Ibid.* Sections 41 (5); Sections 42A (6).

¹⁰²⁷ *Ibid.* Section 44A (1) (a) –(c).

¹⁰²⁸ *Ibid.* Subsection (3).

from the United Kingdom unless a copy of it is made and deposited in an appropriate library or archive, it is not an infringement of Copyright to make that copy.

It is submitted that this provision is public interest friendly. It is most surprising that the other Acts under consideration have no equivalent of this provision of the English Act. It is therefore suggested that these Acts be amended to incorporate these provisions of the English Act. The proposed amendment will help improve the efficiency and efficacy of these Acts in this digital millennium and to keep pace with the other technologically advanced countries of the world.

With respect to the exemption on the reproduction of unpublished works as provided under the Nigerian Act,¹⁰²⁹ the provisions of the English and Indian Acts are similar to this exception under the Nigerian Act.¹⁰³⁰ Even though the English Act does not discuss unpublished works in that section, it is boldly captioned ‘copying by librarians or archivists: single copies of unpublished works’ in the Act.¹⁰³¹ However, the U.S. Act does not expressly provide for this exception except that the Act exempts the use of works for teaching, scholarship and research.¹⁰³² This provision is however in line with the provisions of the other Acts regarding this exception.

5.8 Reproduction on Braille

As the Nigerian Act, allows the reproduction of published works in Braille for the exclusive use of the blind and sound recordings made by the institutions or other establishments approved by the Government for the promotion of the welfare of other disabled persons for the exclusive use of such blind persons,¹⁰³³ the English Act allows this exception if a disabled person has lawful possession or lawful use of a copy or part of a work; and the person’s disability prevents the person from enjoying the work to the same degree as a person who

¹⁰²⁹ C.R.A.N. Paragraph (r) of the Second Schedule.

¹⁰³⁰ C.D.P.A. Sections 41-43; C.R.A.I. Section 52 (p).

¹⁰³¹ C.D.P.A. Section 43;

¹⁰³² U.S.C. Section 123.

¹⁰³³ C.R.A.N. Paragraph (s) of the Second Schedule.

does not have that disability.¹⁰³⁴ Again, the making of an accessible copy of the work referred to in the Act does not infringe Copyright if the copy is made by the disabled person or by a person acting on his behalf; or the copy is made for the disabled person's personal use; and the same kind of accessible copies of the work are not commercially available on reasonable terms by or with the authority of the Copyright owner.¹⁰³⁵ Copyright is also not infringed by the transfer of an accessible copy of a work made under the section by any person other than a person by or for whom an accessible copy of the work may be under this section; or a person who intends to transfer a copy to a person falling within the contemplation of the Act.¹⁰³⁶ Such transfer will also not amount to infringement of Copyright in the work where the transfer is authorized by the Copyright owner.¹⁰³⁷ The term 'deal with' as used under the Act means 'sold or let for hire or offered or exposed for sale or hire'.¹⁰³⁸

The Act further provides that if an authorized body has lawful possession of a copy of the whole or part of a published work, the body may, without infringing Copyright, make and supply accessible copies of the work for the personal use of disabled persons.¹⁰³⁹ However, it will amount to infringement of the Copyright on the work if the same kind of accessible copies of the work are commercially available on reasonable terms by or with the authority of the Copyright owner.¹⁰⁴⁰ In the same vein, the Act provides that if an authorized body has lawful possession of the whole or part of a broadcast or a copy of a broadcast, the body may without infringing Copyright:

- (a) in the case of a broadcast, make a recording of the broadcast, and make and supply accessible copies of the recording or any work included in the broadcast; and

¹⁰³⁴ C.D.P.A. Section 31A (1).

¹⁰³⁵ *Ibid.*

¹⁰³⁶ *Ibid.*

¹⁰³⁷ *Ibid.* Proviso Subsection (4).

¹⁰³⁸ *Ibid.* Proviso to subsection (7).

¹⁰³⁹ *Ibid.* Section 31B (1).

¹⁰⁴⁰ *Ibid.* subsection (2).

(b) in the case of a copy of a broadcast, make and supply accessible copies of the work or of any work included in the broadcast.¹⁰⁴¹

It will however amount to infringement if the same kind of accessible copies of the broadcast, or of any work included in it, are commercially available on reasonable terms by or with the authority of the Copyright owner.¹⁰⁴²

The Act further mandates an authorized body which is an educational establishment conducted for profit to ensure that any accessible copies which it makes under this section are used only for its educational purposes.¹⁰⁴³ Such an authorized body which has made an accessible copy of a work under the English Act¹⁰⁴⁴ may supply it to another authorized body which is entitled to make accessible copies of the work under this section for the purposes of enabling that other body to make accessible copies of the work.¹⁰⁴⁵ However, if an accessible copy made under this section is subsequently dealt with, it is to be treated as an infringing copy for the purposes of that dealing; and if that dealing infringes Copyright, it is to be treated as an infringing copy for all subsequent purposes.¹⁰⁴⁶ Furthermore, if an accessible copy is made of a work which is in copy-protected electronic form, the accessible copy must, so far as it is reasonably practicable, incorporate the same or equally effective copy protection, unless the Copyright owner agrees otherwise.¹⁰⁴⁷ The Act further permits an authorized body entitled to make accessible copy of the work under the Act,¹⁰⁴⁸ to without infringing Copyright, make a copy of the work ie, ‘an intermediate copy’, if it is necessary in order to make the accessible copy.¹⁰⁴⁹ Such authorized body that has made such intermediate copy of a work under this section may supply it to another authorized body qualified to make such work under the Act for purposes of enabling the latter to make accessible copies of the

¹⁰⁴¹ *Ibid.* subsection (3).

¹⁰⁴² *Ibid.* Subsection (4).

¹⁰⁴³ *Ibid* Subsection (6).

¹⁰⁴⁴ *Ibid.* Section 31B.

¹⁰⁴⁵ *Ibid.* Subsection (9).

¹⁰⁴⁶ *Ibid* Subsection (11).

¹⁰⁴⁷ *Ibid* Subsection (8).

¹⁰⁴⁸ *Ibid.* Section 31BA (1).

¹⁰⁴⁹ *Ibid.*

work¹⁰⁵⁰ The conditions relating to infringement and the sum charged for the production and supply of such copies are the same as required under the Act earlier discussed in this work.

¹⁰⁵¹ The English Act also mandates the authorized body approved for the reproduction of the copies of the work to keep record of accessible copies it makes under the Act; intermediate copies it makes under the Act;¹⁰⁵² and the persons to whom such copies are supplied.¹⁰⁵³ An authorized body must allow the Copyright owner or a person acting for the Copyright owner on giving reasonable notice, to inspect at any reasonable time, the records kept under the Act; and the records of copies made under the Act.¹⁰⁵⁴ However, the Act provides that within a reasonable time of making an accessible copy, an authorized body must:¹⁰⁵⁵

- a). notify anybody which-
 - (i) represents particular Copyright owners in the type of work concerned; and
 - (ii) has given notice to Secretary of the State of the Copyright owners, or the classes of Copyright owner, represented by it; or
- b). if there is no such body, notify the Copyright owner (unless it is not reasonably possible to ascertain the name and address of the Copyright owner).

For purposes of clarity, the term ‘disabled person’ as used in the English Act is broader in scope than that contemplated under the Nigerian Act. Under the former Act, it means ‘a person who has a physical or mental impairment’.¹⁰⁵⁶ ‘Authorized Body’ as used in the Act means ‘an educational establishment or a body that is not conducted for profit’.¹⁰⁵⁷ Thus, there exists some discrepancies between the English Act and the Nigerian Act, for while the latter Act provides for protection of the reproduction on Braille for the exclusive use of the blind; or the sound recordings made by institutions or other establishments approved by the

¹⁰⁵⁰ *Ibid.* Subsection (2).

¹⁰⁵¹ Section 31B.

¹⁰⁵² *Ibid.*

¹⁰⁵³ *Ibid.* Section 31BB (1).

¹⁰⁵⁴ *Ibid.* Subsection (2).

¹⁰⁵⁵ *Ibid.* Subsection (3).

¹⁰⁵⁶ *Ibid.* Section 31F (2).

¹⁰⁵⁷ *Ibid.* Subsection (6).

Government for the promotion of the welfare of other disabled persons for the exclusive use of such blind or disabled persons, the English Act makes an all encompassing provision for the protection of all disabled persons and for the production of copies of accessible copies for that purpose by the authorized bodies.

It is a welcome development that the provisions of the U.S. Act relating to this exception are similar to those of the English Act.¹⁰⁵⁸ Unfortunately, the Indian Act does not expressly provide for this exception, although it is implied in the Act's fair use provisions.¹⁰⁵⁹ It is therefore suggested that the Nigerian and Indian Acts be amended along the line of the English Act. This will adequately address and redress the predicament faced by all disabled persons not only the blind, but the deaf, dumb, mentally deranged, paralyzed persons, etc.

5.9 News and Public Interest Broadcasts

The Acts under consideration contain elaborate provisions on the exemptions of works relating to news and public interest broadcasts. These shall be considered hereunder.

5.9.1 Broadcasting of Works Already Lawfully Available to the Public

The exemption relating to the broadcasting of a work already lawfully made accessible to the public as entrenched in the Nigeria Act is recognized by the other Acts under consideration.¹⁰⁶⁰ The English Act provides that the showing or playing in public of a broadcast to an audience who have not paid for admission to the place where the broadcast is to be seen or heard does not infringe Copyright in the broadcast; any sound recording, except so far as it is an excepted sound recording, included in it; or any film included in it¹⁰⁶¹. However, where by virtue of the provisions of the Act, the Copyright in a broadcast shown or played in the public is not infringed, Copyright in any excepted sound recording included it is

¹⁰⁵⁸ U.S.C. Section 121.

¹⁰⁵⁹ C.R.A.I. Section 52 (a).

¹⁰⁶⁰ C.R.A.N. Paragraph (m) of the Second Schedule.

¹⁰⁶¹ C.D.P.A. Section 72 (1) (a), (b), & (c).

not infringed if the playing or showing of that broadcast in public is necessary for the purposes of:¹⁰⁶²

- (a) repairing equipment for the reception of broadcasts;
- (b) demonstrating that a repair to such equipment has been carried out; or
- (b) demonstrating such equipment which is being sold or let for hire or offered or exposed for sale or hire.

Thus, under the English Act, it is immaterial that the broadcast has been lawfully made accessible to the public contrary to the requirement under the Nigerian Act. Unlike the Nigerian Act, the English Act does not also make any provision for fair compensation for the use of such work. Conversely, the Nigerian Act does not require that the audience should not pay for such reception quite unlike the requirement under the English Act which requires that the audience should not pay for the reception of such broadcast. The English Act considers the kind of audience contemplated by the Act and what kind of payment will not be allowed under the Act.¹⁰⁶³

It is submitted that the inability of the Nigerian Act to define both the targeted audience contemplated by the drafters of the Act, as well as what constitutes payment by such audience gives Copyright violators a wide margin to expand their illicit trade of infringement of Copyright. It is therefore recommended that the Act be amended along the line of the more explicit and precise English Act. This will make for effective combating of Copyright violations in Nigeria.

It is noted that the U.S. Act provides this exception similar to that provided by the Nigerian Act.¹⁰⁶⁴ Thus, the suggestion proffered in the proposed Nigerian Act should be incorporated in the U.S. Act through the immediate amendment of the latter. It is also suggested that the

¹⁰⁶² *Ibid.* Subsection (IB).

¹⁰⁶³ *Ibid* Subsection (2) & (3).

¹⁰⁶⁴ U.S.C. Section 110.

Indian Act, which does not expressly provide for this exception be urgently amended along the line of the English Act.

5.9.2 Reproduction by a Broadcasting Authority

The English Act provides for Copyright exemption in a situation where a wireless broadcast made from a place in the United Kingdom is received and immediately re-transmitted by cable.¹⁰⁶⁵ Copyright in the broadcast is not infringed if the re-transmission by cable is in pursuance of a relevant requirement; or if and to the extent that the broadcast is made for reception in the area in which it is re-transmitted by cable and forms part of a qualifying service.¹⁰⁶⁶ The Copyright in any work included in the broadcast is not infringed if and to the extent that the broadcast is made for reception in the area in which it is re-transmitted by cable; but where the making of the broadcast was an infringement of the Copyright in the work, the fact that the broadcast was re-transmitted by cable shall be taken into account in assessing the damages for that infringement.¹⁰⁶⁷ The re-transmission by cable of any work included in the broadcast outside the broadcast area shall be treated as licensed by the Copyright owner if he is paid by the person making the re-broadcast as may be agreed or determined in default of agreement by the Copyright Tribunal.¹⁰⁶⁸ The English Act also provides that recording of a broadcast or a copy of such a recording may be made for the purpose of being placed in an archive maintained by a body which is not established or conducted for profit without infringing any Copyright in the broadcast or in any work included in it.¹⁰⁶⁹ Moreover, no term of contract would operate to prevent or restrict the operation of this section.¹⁰⁷⁰ Similarly, adaptations of such works done without infringing Copyright in literary, dramatic or musical work will not amount to infringement of Copyright

¹⁰⁶⁵ C.D.P.A. Section 73(1).

¹⁰⁶⁶ *Ibid.* subsection (2).

¹⁰⁶⁷ *Ibid.* Subsection (3).

¹⁰⁶⁸ *Ibid.* Subsection (4).

¹⁰⁶⁹ *Ibid.* Section 75(1).

¹⁰⁷⁰ *Ibid.* Subsection (2)

in the original work.¹⁰⁷¹ The Act makes it clear that anything done relating to permitted acts on copyrighted works may be done without infringing Copyright in a literary, dramatic or musical work where the work is an adaptation; and does not infringe any Copyright in the work from which the adaptation was made.¹⁰⁷² This provision is obviously missing in the Nigerian Act, even though its usefulness is in doubt by virtue of the fact that the Copyright Law only protects copyrightable works and not infringing works themselves.

It is however noted that while the Nigerian Act talks of reproduction of work by or under the direction or control of a broadcasting authority, the English Act talks about re-transmission of the work. Moreover, the English Act does not make any provision for the destruction of such work after a prescribed period as is the case under the Nigerian Act. It is therefore submitted that the Nigerian Act is wider in scope and more explicit regarding this exemption, in that it well articulated the exception and at the same time gives no room for infringement. It is therefore suggested that the relevant sections of the English Act embodying this exemption be amended along the line of the Nigerian Act.

It is observed that while the U.S. Act provides for this exception substantially in the same manner the Nigerian Act does, the Indian Act does not expressly provide for same, even though the provisions of fair use covers this exception.¹⁰⁷³ It is therefore suggested that the Indian Act be urgently amended along the line of the Nigerian Act.

On the other hand, the exemption created in relation to news of the day as contained in the Nigerian Act¹⁰⁷⁴ is recognized by the English Act when it allows the use of works for criticism, review, quotation and news reporting, provided that such work is accompanied by

¹⁰⁷¹ *Ibid.* Section 76.

¹⁰⁷² *Ibid.*

¹⁰⁷³ U.S.C. Section 112.

¹⁰⁷⁴ C.R.A.N. Paragraph (11) of the Second Schedule.

sufficient acknowledgement.¹⁰⁷⁵ This Act empowers the British Broadcasting Corporation to make or use any work for the purpose of making supervision and control over programmes broadcast by them or included in any on demand programme service provided by them, of the recordings of those programmes.¹⁰⁷⁶ The Act also provides that the making in domestic premises for private and domestic use of a recording of a broadcast solely for the purpose of enabling it to be viewed or listened to at a more convenient time does not infringe any Copyright in the broadcast or in any work included in it.¹⁰⁷⁷ The last two preceding provisions of the English Act are not captured in the Nigerian Act. It is submitted with due respect that these provisions are inconsequential as they are dangerous instruments in the hands of Copyright violators. It is suggested that these provisions be expunged from the English Act through immediate amendment.

It is however observed that the English Act has no equivalent of the paragraph (n) exception of the Nigerian Act. It is suggested that the English Act be amended to include this exception in the Act. On the other hand, both the U.S. and Indian Acts provide for this exception in the manner the Nigerian Act contain them.¹⁰⁷⁸ Therefore, the arguments proffered in the latter Act's provisions are applicable to the U.S. Act.

The exemption on the communication to the public of a work in a place where no admission fee is charged in respect of the communication, by any club whose aim is not profit making under the Nigerian Act¹⁰⁷⁹ is also contained in the English Act in the same manner as it is provided for under the Nigerian Act, except that the English Act talks about club, society, and the general public.¹⁰⁸⁰ It specifically protects such broadcast to persons who have not paid for

¹⁰⁷⁵ C.D.P.A. Section 30.

¹⁰⁷⁶ *Ibid.* Section 69.

¹⁰⁷⁷ Section 72(1).

¹⁰⁷⁸ C.R.A.I; Section 52 (a); U.S.C. Section 107.

¹⁰⁷⁹ C.R.A.N. Paragraph (0) of the Second Schedule.

¹⁰⁸⁰ C.D.P.A. Section 72.

admission to a place as persons admitted as resident or inmates of the place and members of a club or society.¹⁰⁸¹ Thus, the provisions of the English Act is wider in scope than the Nigerian Act in that while it targets audience which includes inmates of hostels, prisons, members of recreation clubs, age grade, dance groups, bands, members in camps, as well as members of societies such as churches, mosque, confraternities etc; the Nigerian Act contemplates members of a club only. Even though the Acts do not define the word ‘club’, it is proper that it be given its ordinary dictionary meaning which is ‘an association of people united by a common interest or purpose’. Whatever be the case, the most important fact in this exception is that no admission fee should be charged and such club should not be for profit making. Thus, when faced with a case of alleged infringement, the Court will only be concerned with the particular aim of the club and not necessarily its overall ‘objects’ as stipulated in its memorandum of association or articles. It will suffice if the aim of the club is benevolent or non-profit making. Hence, it will not amount to an infringement of a musical work if the Red Cross or any similar organization performs such musical work in public without collecting any admission fee from the audience.

It is submitted that this exemption is Copyright friendly since its object is to advance the dissemination of information. This may be the reason for the incorporation of this exemption in the Acts under consideration. For instance, the Indian Act permits this exemption if the work is heard in an enclosed room or hall meant for the common use of the residents in a residential premises, club or similar organization which is not established or conducted for profit, as part of the activities of such organization.¹⁰⁸² Similarly, the U.S. Act allows this exemption if use of the work is made by managements of hotels, house apartments for the benefits of the lodging guests and residents of such establishments, so long as no fee is

¹⁰⁸¹ *Ibid.* Subsection (3).

¹⁰⁸² C.R.A.I. Section 52 (k).

charged for such services.¹⁰⁸³ It is submitted that the provisions of the Indian Act on this exception are more elaborate, precise and Copyright friendly than the other Acts under consideration. It is therefore suggested that these Acts be amended along the line of the Indian Act.

5.10 Official Use /Use of Judicial Proceedings

The exemption on the use made of a work for the purpose of judicial proceeding or of any report of any such proceeding as contained in the Nigerian Act¹⁰⁸⁴ is recognized by the English Act. However, while the Nigerian Act only protects the use made of a work for the purpose of judicial proceeding, the English Act protects acts done for the purpose parliamentary or judicial proceedings and the recording of any such proceedings held in public, but it does not authorize the copying of a work which is itself a published report of the proceedings.¹⁰⁸⁵ It also protects the copying in a literary work of a material open to public inspection pursuant to a statutory requirement or where such work is on a statutory register.¹⁰⁸⁶ The Act further permits the government to copy a work, issue copies of it to the public, and or make the copy available to the public by electronic transmission in such a way that the members of the public may access it from a place and at a time individually chosen by them.¹⁰⁸⁷ This applies where a literary, dramatic, musical or artistic work has in the course of public business, been communicated to the Crown for any purpose.¹⁰⁸⁸ It is also clear from the wordings of the English Act that once the doing of any act relating to the copying of a work, is specifically authorized by an Act of British Parliament, whenever passed, then, unless the Act provides otherwise, the doing of that act does not infringe Copyright.¹⁰⁸⁹

¹⁰⁸³ U.S.C. Section 107.

¹⁰⁸⁴ C.R.A.N. Paragraph (p) of the Second Schedule.

¹⁰⁸⁵ C.D.P.A. Section 45 (1) & (2).

¹⁰⁸⁶ *Ibid.* Section 47.

¹⁰⁸⁷ *Ibid.* section 48 (1) & (3).

¹⁰⁸⁸ *Ibid.* Subsection(1).

¹⁰⁸⁹ *Ibid.* Section 50 (1).

It is observed that the Indian Act protects the use of works for purposes of judicial proceedings, the reproduction of works prepared by Legislature, the reproduction of works in a certified copy or supplied in accordance with any law for the time being in force.¹⁰⁹⁰ It also protects the reproduction or publication of works published in the Official Gazette; the report of any Committee, Commission, Council, Board or other bodies appointed by the Indian Government; the judicial or order of Courts, Tribunals or other judicial Authority.¹⁰⁹¹ Obviously, this Act contains more elaborate and Copyright friendly provisions embodying this exemption than the other Acts under consideration. It is however disappointing that the U.S. Act does not expressly provide for this exception. It may well be that this omission is intentional as the works contemplated under this exemption are works which are not accorded Copyright protection by this Act, ie, works of United States Government.¹⁰⁹² It is suggested that the laudable provisions relating to this exemption as contained in the Indian Act be incorporated in the other Acts under consideration through the immediate amendment of these Acts.

5.11 Making of Sound Recordings against Payment of Compensation

The making of a sound recording of a literary or musical work against payment of such compensation¹⁰⁹³ and the special exceptions in respect of sound recording of musical works¹⁰⁹⁴ as contained under the Nigerian Act is not provided for in the other Acts under consideration, as stated in the last preceding chapter. The continued existence of these exemptions in the Nigerian Act was criticized in that chapter. It is however observed that there are other exceptions to Copyright control under the English Act which the Nigerian Act does not provide for. For example, the English Act protects the copying of materials which is

¹⁰⁹⁰ C.R.A.I. Section 52 (d) & (e)

¹⁰⁹¹ *Ibid.* Paragraph (q).

¹⁰⁹² U.S.C. Section 105.

¹⁰⁹³ C.R.A.N. Paragraph (i) of the Second Schedule.

¹⁰⁹⁴ *Ibid.* Paragraph (i) (a) – (d) of the Third Schedule.

comprised in public documents within the meaning of the relevant law,¹⁰⁹⁵ and under similar enactments contained in the Copyright Act. It provides that copy may be supplied to any person, by or with the authority of an officer appointed under the Act.¹⁰⁹⁶ It also protects copying of a computer program for purposes of making any back up copy by a lawful user.¹⁰⁹⁷ The lawful user of a copy of a computer program expressed in a low level language may convert the work into a version expressed in a higher level language or incidentally in the course of so converting the program to copy it, that is, to ‘decompile it’, so long as the conditions set out in the Act are met.¹⁰⁹⁸ The aforementioned conditions are that the user must show that it is necessary to decompile the program; and to obtain the information necessary to create an independent program which can be operated with the program decompiled or with another program or, that the information so obtained is not used for any purpose other than the permitted objective. The English Act further protects the acts of a lawful user of a copy of a computer programme for the purposes of observing, studying or testing the functioning of the programme in order to determine the ideas and principles which underlie any element of the programme if the user does so while performing any act in relation to loading, displaying, running, transmitting or storing the programme.¹⁰⁹⁹ Such a lawful user may copy or adapt the program provided that such copying or adapting is necessary for his lawful use, and it is not prohibited under any term or condition of an agreement regulating the purpose of correcting errors in it.¹¹⁰⁰ The Act also exempts a person who has lawful right to use the database or any part of the database, whether under a license to do any of the acts restricted by the Copyright in the database or otherwise to do, in the exercise of that right, anything which is necessary for the purposes of access to and use of the contents of the

¹⁰⁹⁵ Public Records Act, 1958,

¹⁰⁹⁶ C.D.P.A. Section 49.

¹⁰⁹⁷ *Ibid.* Section 50A.

¹⁰⁹⁸ *Ibid.* Section 50B.

¹⁰⁹⁹ *Ibid.* Section 50BA (1).

¹¹⁰⁰ *Ibid.* Section 50C (1) & (2).

database or of that part of the database.¹¹⁰¹ Under the sections being considered, no contractual terms or conditions entered into by parties to a contract purporting to restrict their operations will be valid.¹¹⁰²

Similarly, there are some exceptions relating to artistic designs contained in the English Act¹¹⁰³ in the forms of design documents and models, designs derived from artistic works, things done in reliance on registration of designs, use of typeface in ordinary course of printing and articles for producing materials in particular typeface. The English Act allows a lawful user to copy a work in electronic form purchased on terms, or to adapt the work, or make copies of an adaption, in connection with his use.¹¹⁰⁴

It is submitted that the aforementioned exemptions contained in the English Act represent the huge experiences gained overtime by the by English parliament, the judiciary and the law enforcement agencies in the course of combating Copyright violation. Any attempt to negate these experiences will amount to institutionalizing Copyright infringement. It is therefore suggested that the other Acts under consideration be amended to incorporate these laudable provisions of the English Act.

5.12. Compulsory Licensing

The Acts under consideration amply provide for compulsory licenses. Under the English Act, a licensing scheme means a scheme setting out the classes of cases in which the operator of the scheme or the person on whose behalf he acts is willing to grant Copyright licenses and the terms on which licenses would be granted in those classes of cases.¹¹⁰⁵ In other words, it is a scheme that determines the license fees to be charged in respect of specific types of works. In England, a Licensing Tribunal is established to control the licensing schemes and to

¹¹⁰¹ *Ibid.* Section 50D (1).

¹¹⁰² *Ibid.* Subsection (8).

¹¹⁰³ *Ibid.* Section 51-55.

¹¹⁰⁴ *Ibid.* Section 56.

¹¹⁰⁵ C.D.P.A. Section 116 (1).

grant compulsory licenses.¹¹⁰⁶ The advantage of this situation over the position of the Nigerian Act is that the Licensing Tribunal plays the role of a moderator in situations where the conditions prescribed by the right owner or his representative for the grant of the license is too stringent.¹¹⁰⁷ The English Act further provides that the Secretary of State may by order provide that in such cases as may be specified in the order, the lending to public of copies of literary, dramatic, musical or artistic works, sound recordings or films shall be treated as licensed by the Copyright owner subject only to the payment of such reasonable royalty or other payment as may be agreed or determined in default of agreement by the Copyright Tribunal.¹¹⁰⁸ The Tribunal has the power to settle the royalty payable if the parties cannot agree on the royalty. Licenses as of right may however become available if a report is made to that effect by the Monopolies and Merger Commission.¹¹⁰⁹ However, no such order shall apply if, or to the extent that, there is a licensing scheme certified for the purposes of the grant of licenses.¹¹¹⁰ Such order must be made by statutory instrument approved by a resolution of each House of Parliament.¹¹¹¹ Moreso, under the English Act, if the public interest is, or has been, or may be prejudiced because of the conditions in licenses restricting the use of the work; or the right of the Copyright owner to grant further licenses; or because the Copyright owner refuses to grant licenses on reasonable terms, such conditions may be cancelled, modified or shall be available as of right through the instrumentality of the Competition Commission's report.¹¹¹²

The English Act also contains provisions for the compulsory exercise or rights in literary, dramatic, musical or artistic works, sound recordings or films in respect of cable re-

¹¹⁰⁶ *Ibid.*

¹¹⁰⁷ *Ibid.*

¹¹⁰⁸ *Ibid.* Section 66 (1).

¹¹⁰⁹ M Ozioko, 'Copyright Provisions Impacting on Access to knowledge: A Comparative Analysis', *Op. Cit.* p. 67.

¹¹¹⁰ C.D.P.A. Section 66 (23).

¹¹¹¹ *Ibid.* Subsection (4).

¹¹¹² *Ibid.* Section 144 (1).

transmission or broadcasts from another EEA¹¹¹³ member state in which the work is included.¹¹¹⁴ This right is referred to as the ‘cable re-transmission right’. If the Copyright owner has not transferred management of his cable re-transmission right to a licensing body, the licensing body which manages rights of the same category shall be deemed to manage his right.¹¹¹⁵ However, a Copyright owner has the same rights and obligations resulting from any relevant agreement between the cable operator and the licensing body as Copyright owners who have transferred management of their cable re-transmission right to that licensing body have.¹¹¹⁶ However, such right owner must claim his right within three years from the date of the relevant cable re-transmission.¹¹¹⁷ The Act further provides for the right to use certain sound recordings in broadcasts and cable programmes services, being recordings made where the appropriate license could have been granted or procured by a licensing body.¹¹¹⁸ It also provides for the right to certain sound recordings in broadcasts where appropriate license could have been granted or procurable by a licensing body.¹¹¹⁹ The exercise of this right will occur if there is a refusal to grant or procure a license at terms acceptable to the person; or where the person holds a license but the tenure is limited.¹¹²⁰ However, before the person intending to avail himself of this right begins to exercise it, he must give reasonable notice to the Copyright Tribunal of his intention to exercise the right, the date on which he proposes to begin to do so, together with an application to the Tribunal to settle the terms of payment.¹¹²¹

It is submitted that the establishment of the Copyright Tribunal is a proactive step taken by the English Act to facilitate licenses. The Tribunal is an active machine in the dispensation of its duties quite unlike the dormant and inactive Copyright Licensing Panel of Nigeria

¹¹¹³ EEA means ‘European Economic Area’.

¹¹¹⁴ *Ibid.* Section 144A (1).

¹¹¹⁵ *Ibid.* Subsection (3).

¹¹¹⁶ *Ibid.* Subsection (3).

¹¹¹⁷ *Ibid.*

¹¹¹⁸ *Ibid.* Section 135 -135.

¹¹¹⁹ *Ibid.*

¹¹²⁰ *Ibid.* Section 135A.

¹¹²¹ *Ibid.* Section 135B.

established under the Nigerian Act to grant compulsory licenses which was discussed in the last preceding chapter. It is therefore suggested that the Nigerian Act be urgently amended along the line of the English Act relating to the establishment of the Copyright Tribunal.

It is observed that there are several different compulsory licensing provisions contained in the U.S Act. These include the grant of compulsory licenses for non dramatic musical composition;¹¹²² public broadcasting;¹¹²³ transmission by cable systems;¹¹²⁴ subscription digital audio transmission;¹¹²⁵ and non- subscription audio digital transmission, such as internet radio.¹¹²⁶ The compulsory licenses for non-dramatic musical compositions under the Act allows a person to distribute new sound recordings of a musical work if that work had been previously distributed to the public by or under the authority of the owner.¹¹²⁷ There is no requirement that the new recording be identical to the previous work, as the compulsory license includes the privilege of rearranging the work to conform it to the recording artist's intention.¹¹²⁸ However, this does not allow the artist to change the basic melody or fundamental character of the work.¹¹²⁹ In order to take advantage of this compulsory license, the recording artist must provide notice and must also pay royalty for his use of the work. Such notice must have been sent to the Copyright owner, or if unable to determine the Copyright owner, to the Copyright Office, within thirty days of making the recordings, but before distributing physical copies; as failure to provide such notice would constitute infringement.¹¹³⁰ Moreover, although compulsory licensing scheme allows one to make and distribute physical copies of a song for a set of royalty, the owner of the Copyright in the

¹¹²² U.S.C. Section 115.

¹¹²³ *Ibid.* Section 118.

¹¹²⁴ *Ibid.* Section 111 (c).

¹¹²⁵ *Ibid.* Section 114 (d) (2).

¹¹²⁶ *Ibid.* Subsection (2).

¹¹²⁷ *Ibid.* Section 115 (a) (1)

¹¹²⁸ U.S. Copyright Office, 'Copyright Law of the United States' www.copyright.gov/circs/circl/htm. accessed 10/10/17.

¹¹²⁹ *Ibid.*

¹¹³⁰ U.S.C. Section 115 (1) (b).

underlying musical composition can still control public performance of the work or transmission over the radio.¹¹³¹ Compulsory licensing in the United State is granted by the Copyright Royalty Judge who also plays important roles in determination and distribution of royalties relating to compulsory licenses.¹¹³²

Under the Indian Copyright Act, an application can be made to the Copyright Board for compulsory licensing in works withheld from public and unpublished; and compulsory licenses for the benefit of the disabled.¹¹³³ Any person desirous of making a cover version, being a sound recording in respect of any literary, dramatic or musical work where sound recordings of that work have been made by or with the license or consent of the owner, may do so provided that such sound recordings shall be in the same medium as the last recording, unless the medium of the last recording is no longer in current commercial use.¹¹³⁴ Such an applicant must give his prior notice of intention to do so in the prescribed form and provide in advance, copies of all covers or labels with which the sound recordings are to be sold; and then pay royalties in respect of all copies made by him, at the rate fixed by Copyright Board.¹¹³⁵ He must not make any alteration in the literary or musical work which has not been made previously by or with the consent of the owner of the rights, or which is not technically necessary for the purpose of making the sound recordings.¹¹³⁶ He must also maintain such registers and books of account in respect thereof, including full details of existing stock as may be prescribed; and shall allow the owner of the rights or his duly authorized agent or his legal representative to inspect all records and books of account relating to such sound recordings.¹¹³⁷ The Act also permits the grant of statutory licenses for

¹¹³¹ *Ibid.* Section 106(4).

¹¹³² *Ibid.* Section 106 (4).

¹¹³³ C.R.A.I. Section 31,31A &31B .

¹¹³⁴ *Ibid.* Section 31C.

¹¹³⁵ *Ibid.* Paragraphs (1) &(2).

¹¹³⁶ *Ibid.* Subsection (3).

¹¹³⁷ *Ibid.* Subsection (5).

the broadcasting of literary works, musical works and sound recordings.¹¹³⁸ It further authorizes the grant of compulsory licenses to produce and publish translations; and the license to produce and publish works for certain purposes.¹¹³⁹

It is observed that owing to the paramount importance of compulsory licensing in the advancement of knowledge and information, this concept has been recognized at the international plane. The Berne Convention provides the legal basis for compulsory licensing at the international level.¹¹⁴⁰ The Convention states that:¹¹⁴¹

Authors of literary and artistic works shall enjoy the exclusive right of authorizing: (i) the broadcasting of their works or communication thereof to the public by any other means of wireless diffusion of signs, sounds or image; (ii) any communication to the public by wire or by rebroadcasting of the broadcasting of the work, when this communication is made by an organization other than the original one; (iii) the public communication by a loudspeaker or any other analogous instrument transmitting by signs, sound or images, the broadcast of the work.

However, it shall be a matter of legislation in the country which is a member state to the Convention to determine the conditions under which the rights abovementioned may be exercised; but these conditions shall apply only in the countries where they have been prescribed.¹¹⁴² At all times, such licenses shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which in the absence of agreement, shall be fixed by competent authority.¹¹⁴³ The Convention further states that:¹¹⁴⁴

each country of the Union may impose for itself reservations and the conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recordings of which together with the musical work has already been authorized by the later, to authorize the sound recording of that musical work, together with such words, if any;

¹¹³⁸ *Ibid.* Section 31D.

¹¹³⁹ *Ibid.* Sections 32 & 32A.

¹¹⁴⁰ Article 11 bis (2) & 13(1), Berne Convention for the Protection of Literary and Artistic Works, 1886.

¹¹⁴¹ *Ibid.* Article 11 bis (1).

¹¹⁴² *Ibid.* Article 11 bis (2).

¹¹⁴³ *Ibid.*

¹¹⁴⁴ *Ibid.* Article 13(1).

but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which in the absence of agreement, shall be fixed by competent authority.

It is worthy to note that the countries under consideration in this work are all member states to this Convention and have also domesticated the laudable provisions of the Convention.

While acknowledging that the provisions of the Indian Act regarding the conditions precedent for the grant of compulsory licenses are less cumbersome and more ideal for a developing country such as Nigeria, it is clear that the above discussed provisions of the English Act are wider in scope than those of the other Acts under consideration. For instance, while the grant of compulsory license under the Nigerian Act is limited to the production and publication of translations of literary or dramatic works, or of the main work itself, for purposes relating to teaching, research and scholarship, the English Act goes far beyond this scope and allows the grant of compulsory licenses even for commercial purposes and in respect of a wider under range of works.¹¹⁴⁵ However, it is submitted that the concept of compulsory licensing discussed under the English Act is too wide. Given the low development and potentials of abuse, compulsory licensing may be a damaging tool in the hands of Copyright violators. Hence, this wider access to copyrightable works is not advocated for now in order not to sacrifice the opportunity of right owners to reap just benefits from their creations on the altar of promoting public access to knowledge and information. Moreover, care must be taken at all times to balance the competing interests in the context of the peculiarities of a given society, especially developing countries where the enforcement of Copyright is hindered by corruption, poverty and illiteracy. It is submitted that a regime heavily weighted in favour of

¹¹⁴⁵ M Ozioko, 'Copyright Provisions Impacting on Access to knowledge: A Comparative Analysis', *Op. Cit.* p.63.

promoting access to knowledge as against protecting the economic interests of creators will certainly destroy the incentive to create and invent more works.¹¹⁴⁶

5.13 Copyright Terms

Copyright terms as recognized under the Nigerian Act¹¹⁴⁷ are adequately protected in the jurisdictions under consideration. In England for instance, the Duration of Copyright and Rights in Performances Regulation amended the relevant sections of the English Act to bring it in conformity with international standards.¹¹⁴⁸ Under the amended Act, Copyright in literary, dramatic, musical or artistic works expire at the period of Seventy years from the end of the calendar year in which the author dies.¹¹⁴⁹ However, if the work is of unknown authorship, Copyright in it expires at the end of the period of Seventy years from the end of the Calendar year in which the work was made; or if the work is made available to the public, at the end of the period of Seventy years from the end of the calendar year in which it is first so made available.¹¹⁵⁰ Similarly, Copyright in computer generated works expires at the end of the period of Fifty years from the end of the Calendar year in which the work was made.¹¹⁵¹ Copyright in sound recordings subsists until Fifty years from the end of the Calendar years in which the recording is made.¹¹⁵² However, if the recording is published during this period, Copyright in it will last for Seventy years from the end of the calendar year in which it is first publish; or if during the period the recording is not published but is made available to the public by being played in public or communicated to the public, Copyright shall subsist until seventy year in which it is first so made available.¹¹⁵³ However, in determining whether a sound recording has been published, played in public or communicated to the public in the

¹¹⁴⁶ *Ibid.*

¹¹⁴⁷ C.R.A.N. First Schedule.

¹¹⁴⁸ Section 4. Duration of Copyright and Rights in Performances Regulation of England, 1995.

¹¹⁴⁹ C.D.P.A. Section 12.

¹¹⁵⁰ *Ibid.*

¹¹⁵¹ *Ibid.* 12(7).

¹¹⁵² *Ibid.* 13A (2).

¹¹⁵³ *Ibid.* Subsection (2) (b).

manner contemplated under Act, such publication or communication must be authorized by the Copyright owner.¹¹⁵⁴

The duration of Copyright in films expires at the end of the period of Seventy years from the end of the Calendar year in which the death occurs of the last to die of the following persons: (a) the principal director, (b) the author of the screen play, (c) the author of the dialogue, (d) the composer of music specially created for and used in the film.¹¹⁵⁵ The duration of Copyright in such works shall be computed from the death of the last known author; but if the identity of the author is unknown in relation to (a) to (d) above, Copyright in such work shall expire at the end of the period of Seventy years from the end of the calendar year in which the film was made.¹¹⁵⁶ The identity of any person referred to in this section shall be regarded as unknown if it is not possible for a person to ascertain the identity of such person by reasonable inquiry; but if the identity of such person is once known, it shall not subsequently be regarded as unknown.¹¹⁵⁷ However, where there is no person falling within the relevant section of the Act under discussion,¹¹⁵⁸ Copyright in the work expires at the end of the period of Fifty years from the end of the calendar year in which the film was made.¹¹⁵⁹ Similarly, Copyright in a broadcast expires at the end of the period of Fifty years from the end of the Calendar year in which the broadcast was made.¹¹⁶⁰ Copyright in typographical arrangement of a published edition expires at the end of the period of Twenty five years from the end of the calendar year in which the edition was first published.¹¹⁶¹ The Act further provides that the duration of Copyright in literary, dramatic, musical or artistic work made by Her Majesty or by an Officer of the Crown in the course of his duties otherwise known as

¹¹⁵⁴ *Ibid.*

¹¹⁵⁵ *Ibid.* 13B (1) & (2).

¹¹⁵⁶ *Ibid.* Subsection (4).

¹¹⁵⁷ *Ibid.* Subsection (10).

¹¹⁵⁸ *Ibid.* Section 13B (2) (a)-(d).

¹¹⁵⁹ *Ibid.* Subsection (9).

¹¹⁶⁰ *Ibid.* Section 14.

¹¹⁶¹ *Ibid.* Subsection (15).

‘Crown Works’, subsist until the end of the period of one hundred and twenty five years from the end of the calendar year in which the work was first made.¹¹⁶² Fifty years is also the duration of works such as; Acts or a Measure of the General Synod of the Church of England, Measure of the National Assembly of Wales, Acts of Wales, Northern Ireland, Acts and Bills of the Parliament of Scotland.¹¹⁶³ However, if a Crown Work is published commercially before the end of the period of seventy five years from the end of the calendar year in which it was made, Copyright subsists in such works until the end of the period of fifty years in which it was so first published.¹¹⁶⁴

Copyright in literary, dramatic, musical or artistic work of International Organizations so declared by Her Majesty, the Queen of England through an Order-in-Council enjoys Copyright until the end of the period of fifty years from the end of the calendar year in which the work was made, or such longer period as may be specified by Her Majesty by Order in Council for purposes of complying with the International obligations of which the United Kingdom is a party to.¹¹⁶⁵ The English Act also provides that where the country of origin of the work is an EEA State but the author of the work is not a national of an EEA State, the duration of Copyright in the aforementioned class of work is that to which the work is entitled in the country of origin, provided that that does not exceed the period which would apply under the aforementioned section.¹¹⁶⁶ The Act further states that works of authors who are not members of an EEA State shall be for the duration of Copyright of the creator’s country of origin; but if this exceeds the protection accorded to such work by the Act, the duration of Copyright should be that prescribed by the Act.¹¹⁶⁷ Reference to a person being a national of an EEA State as made under this section shall be construed in relation to a body

¹¹⁶² *Ibid.* Section 163 (3).

¹¹⁶³ *Ibid.* Sections 163-165. (4).

¹¹⁶⁴ *Ibid.* Section 163 (3) (b).

¹¹⁶⁵ *Ibid.*

¹¹⁶⁶ C.D.P.A. Section 172A (1).

¹¹⁶⁷ *Ibid.* Subsection (2).

corporate incorporated under the law of an EEA State.¹¹⁶⁸ However, if the application of the Act¹¹⁶⁹ in relation to works of an author who is not a national of an EEA member state aforementioned, would be at variance with an international obligation to which the United Kingdom became subject to prior to 29th October, 1993, the duration of Copyright shall be as specified in the provision of the Act discussed above.¹¹⁷⁰

In the United States, Copyright terms have been reviewed upwards in compliance with international obligations to which the United States is party to. This was done through an Act which amended the current U.S. Copyright Act.¹¹⁷¹ Presently, Copyright in works created on or before January 1, 1978 endures for a term consisting of the life of the author and seventy years after the author's death.¹¹⁷² The term of Copyright in works of joint authorship is the life time of the last serving author, and seventy years after his death.¹¹⁷³ In the case of an anonymous work, a pseudonymous work, or a work made for hire, the Copyright endures for a term of ninety-five years from the year of its first publication; or the term of one hundred and twenty years from the year of its creation, whichever expires first.¹¹⁷⁴ The Act provides that:¹¹⁷⁵

if before the end of such term, the identity of one or more of the authors of an anonymous or pseudonymous work is revealed in the records of registration made for work under paragraphs (a) and (d) of section 408 of the Act (regarding Copyright registration), or in the records provided for by these paragraphs, the Copyright in the work endures for the term specified by subsections (a) or (b) based on the life time of the author or authors whose identity has been revealed.¹¹⁷⁶ With respect to works created but not published or copyrighted before January 1, 1978, such works shall enjoy Copyright as if they are works under section 302 of the Act.

¹¹⁶⁸ *Ibid.*

¹¹⁶⁹ *Ibid.* Subsection (4).

¹¹⁷⁰ *Ibid.* Subsection (12).

¹¹⁷¹ Sonny Bono Copyright Term Extension Act, 1998.

¹¹⁷² U.S.C. Section 302 (a).

¹¹⁷³ *Ibid.* Paragraph (b).

¹¹⁷⁴ *Ibid.* Paragraph (c).

¹¹⁷⁵ *Ibid.* Section 303.

¹¹⁷⁶ *Ibid.*

Furthermore, any Copyright in the first term of which is subsisting on January 1, 1978, shall endure for twenty-eight years from the date it was originally secured.¹¹⁷⁷ The Act also provides that in the case of any posthumous work or any periodical, cyclopedia, or other composite work upon which the Copyright was originally secured by the proprietor; or any work copyrighted by a corporate body otherwise than as assignee or licensee of the individual author, or by an employer for whom such work is made for hire, the proprietor of such work shall be entitled to a renewal and extension of the Copyright in such work for a further term of sixty-seven years.¹¹⁷⁸ The same term applies to other copyrighted works including a contribution by an individual author to a periodical, cyclopedia or other composite works.¹¹⁷⁹

It should be noted that the relevant subsections relating to the application for renewal of Copyright under the Act provides that such application shall be made one year before the expiration of the original Copyright.¹¹⁸⁰ The Act also provides that Copyright still in its renewal term at the time that the Sonny Bono Copyright Term Extension Act becomes effective, shall have a Copyright term of ninety-five years from the date the Copyright was originally secured.¹¹⁸¹ The Act further states that all forms of Copyright created on or before January, 1, 1978 and works created but not published, Copyright created before January, 1, 1978¹¹⁸² run till the end of the Calendar year in which they would otherwise expire.¹¹⁸³

Under the Indian Copyright Act, Copyright in literary, dramatic, and musical and artistic work other than a photograph, published within the life time of the author shall subsist until sixty years from the beginning of the calendar year next following the year in which the author dies.¹¹⁸⁴ Reference to the author herein shall in the case of a work of joint authorship,

¹¹⁷⁷ *Ibid.* Subsection 304 (1) (a).

¹¹⁷⁸ *Ibid.* Subsection (2) (a).

¹¹⁷⁹ *Ibid.* Paragraph (c).

¹¹⁸⁰ *Ibid.* Section 304.

¹¹⁸¹ *Ibid.* Subsection (4) (c).

¹¹⁸² *Ibid.* Sections 302 to 304

¹¹⁸³ *Ibid.* Section 305.

¹¹⁸⁴ C.R.A.I. Section 22

be construed as reference to the author who dies last.¹¹⁸⁵ In the case of works published by anonymous or pseudonymous authors, Copyright shall subsist until sixty years from the beginning of the calendar year next following the year in which the work is first published.¹¹⁸⁶ However, where the identity of the author is disclosed before the expiration of the said period, Copyright shall subsist until sixty years from the beginning of the calendar year next following the year in which the author dies.¹¹⁸⁷ Reference to the author in the case of an anonymous work of joint authorship as made by the Act means, 'where the identity of one of the authors is disclosed, as reference to that author; where the identity of more authors than one is disclosed, a reference to the author who dies last from among such authors.'¹¹⁸⁸ Again, reference to authors made herein is the same in the case of pseudonymous work of joint authorship.¹¹⁸⁹ For purposes of clarity, the identity of the author used in the Act shall be deemed to have been disclosed, if either identity of the author is disclosed publicly by both the author and the publisher; or is otherwise established to the satisfaction of the Copyright Board of India by that author.¹¹⁹⁰

The Act further provides that in the case of any work of joint authorship in the form of literary, dramatic, musical work, an engraving or any adaptation, in which Copyright subsists at the date of the death of the author or, at or immediately before the date of the death of the author who dies last, but which has not been published before the death, Copyright shall subsist until sixty years from the beginning of the calendar year next following the year in which the work is first published; or, where an adaptation of the work is published in any earlier year, from the beginning of the calendar year next following that year.¹¹⁹¹ The works contemplated under this section shall be deemed to have been published if it has been

¹¹⁸⁵ *Ibid.* Proviso to Section 22.

¹¹⁸⁶ *Ibid.* Section 23.

¹¹⁸⁷ *Ibid.* Proviso to Section 23.

¹¹⁸⁸ *Ibid.* Subsections (2) &(3).

¹¹⁸⁹ *Ibid.* Subsection (3).

¹¹⁹⁰ *Ibid.* Paragraph (c).

¹¹⁹¹ *Ibid.* Section 24.

performed in public or if any records made in respect of the work have been sold to the public or have been offered for sale to the public.¹¹⁹² Similarly, Copyright in photographs, cinematograph films, sound recordings, Government works, works of public undertakings, and works of International Organizations, subsist until sixty years from the beginning of the calendar year next following the year in which they are published.¹¹⁹³

It is submitted that unlimited or relatively long duration of Copyright as provided by the Acts under consideration will lead to a dearth of creativity and intellectual duration. A moderate uniform moderate term will go a long way to balance both the interest of authors and those of the general public in relation to access to work. It is therefore suggested that the Acts under consideration be amended to provide for Copyright terms in all classes of works to last till fifty years from the date of publication. It is also suggested that anti Copyright provision in the U.S. Act such as the renewal of Copyright be expunged from this Act through immediate amendment of the Act.

5.14 Copyright Enforcement Mechanisms

The Acts under consideration established Copyright enforcement mechanisms similar to those established and provided for by the Nigerian Act. For instance, the U.S. Copyright Act provides for the establishment of the 'Copyright Office' headed by the Register of Copyrights.¹¹⁹⁴ The Act confers all administrative functions and duties similar to those conferred on the Nigerian Copyright Commission on the Register of Copyright as the Director of the Copyright Office; together with the subordinate officers and employees of the Copyright Office who shall all be appointed by the Library of Congress.¹¹⁹⁵ Unlike in Nigeria, the Director of the Copyright Office and other officers of the Copyright Office are all appointed by the Library of Congress. The Register is authorized to establish regulations

¹¹⁹² *Ibid.* Subsection (2).

¹¹⁹³ *Ibid.* Sections 25-28, 28A & 29.

¹¹⁹⁴ U.S.C. Section 701.

¹¹⁹⁵ *Ibid.*

for the administration of the functions and duties of his office.¹¹⁹⁶ Similarly, the Indian Copyright Act provides that there shall be established for the purposes of this Act, an office to be called the Copyright Office.¹¹⁹⁷ The Copyright Office shall be under the immediate control of the Registrar of Copyright who shall act under the superintendence and direction of the Central Government.¹¹⁹⁸ The Central Government may also appoint one or more Deputy Registrars of Copyright.¹¹⁹⁹ The Act also establishes the Copyright Board which decides matters as to whether a work has been published, or questions as to the date on which a work is published for purposes of Chapter XV of the Act; or whether the terms of Copyright for any work is shorter in any country than provided in respect of that work under the Indian Act.¹²⁰⁰ In fact, the Registrar, the Copyright Board and the Copyright Office exercise similar powers vested on the Nigerian Copyright Commission and Copyright Licensing Panel under the Nigerian jurisdiction.¹²⁰¹ On the other hand, the English Act does not establish an enforcement body equivalent to the Nigerian Copyright Commission. It rather confers wide powers over Copyright matters similar to those conferred on the Nigerian Copyright Commission, the Registrar, and Registrar of Copyright under the Nigerian, Indian and U.S. Acts respectively, on the Secretary of State.¹²⁰²

It is not in doubt that the Copyright Office of the U.S. is better poised to combat piracy as a result of the independence of appointment of their staff than its equivalents in Nigerian and Indian. It is rather disappointing that an advanced nation like England has no such regulatory body. Therefore, while suggesting that the Nigerian and the Indian Acts be Amended to bring professionalism into the Commission and the Copyright Board and to eradicate the

¹¹⁹⁶ *Ibid.* Section 107.

¹¹⁹⁷ C.R.A.I. Section 9 (1).

¹¹⁹⁸ *Ibid.* Subsection (2).

¹¹⁹⁹ *Ibid.* Section 10 (1).

¹²⁰⁰ *Ibid.* Section 74.

¹²⁰¹ *Ibid.* Section 12 (7).

¹²⁰² C.D.P.A. Section 116, 145- 150.

arbitrary appointment of its staff by the government; it is suggested that an enforcement mechanism resembling the U.S. Copyright Office be established in England.

It is observed that the provisions relating to Copyright Inspectors made by the Nigerian Act are novel to Nigeria.¹²⁰³ The jobs of Copyright Inspectors are performed in the other jurisdictions under consideration, by the police. Considering the feat achieved by Copyright Inspectors in the enforcement of Copyright discussed in the last preceding chapter, it is suggested that the other three Acts be amended along the line of the Nigerian Act relating to the establishment of Copyright Inspectors.

It is well noted that the provisions of the Nigeria Act regarding Copyright licensing are similar to those of the Indian Act, although the latter Act's provisions are wider in scope than those of the former Act. The powers exercised in Nigeria by the Copyright Licensing Panel with respect to the issuance of licenses are exercised in India by both the Registrar of Copyright and the Copyright Board.¹²⁰⁴ The Indian Act expressly empowers the Central Government to constitute a Board to be called 'Copyright Board' which shall consist of a chairman and two other members, and not less than two or more than fourteen other members.¹²⁰⁵ The Copyright Board shall, subject to any rules that may be made under this Act, have power to regulate its own procedure, including the fixing of places and times of its sittings. The Copyright Board may exercise and discharge its powers and functions through benches constituted by the Chairman of the Copyright Board from among its members, each bench consisting of not less than three members.¹²⁰⁶ However, if the Chairman is of the opinion that any matter of importance is required to be heard by a larger bench, he may refer

¹²⁰³ *Ibid.* Subsection (3).

¹²⁰⁴ C.R.A.I. Sections 31-32 A.

¹²⁰⁵ *Ibid.* Section 11 (1).

¹²⁰⁶ *Ibid.* Section 12 (1).

the matter to a special bench consisting of five members.¹²⁰⁷ It should be noted that while a Licensing Panel established by the Nigerian Act does not have the powers of a Court, the Copyright Board of India is deemed to be a Civil Court;¹²⁰⁸ and all proceedings before the Board shall be deemed to be judicial proceedings within the meaning of the Indian Penal Code.¹²⁰⁹ The Act also confers on the Registrar of Copyrights and the Copyright Board certain powers of Civil Courts *viz:-*¹²¹⁰

- (a) summoning and enforcing attendance of any person and examining him on oath;
- (b) requiring the discovery and production of any document;
- (c) receiving evidence on affidavits;
- (d) issuing commissions for the examination of witnesses or documents;
- (e) requisitioning any public record or copy thereof from any Court or office;
- (f) any other matter which may be prescribed.

Furthermore, disputes relating to assignment of Copyright are handled by the Board.¹²¹¹

The English Act established the Copyright Tribunal which shall be made up of a chairman and two deputy chairmen appointed by the Lord Chancellor after consultation with the Secretary of State; and not less than two or more than eight ordinary members appointed by the Secretary of State.¹²¹² The Chairman of the Tribunal shall be an advocate and solicitor of at least five years standing in United Kingdom. For purpose of any proceedings, the Copyright Tribunal shall consist of a Chairman, who shall be either the Chairman or a Deputy Chairman of the Tribunal and two or more ordinary members.¹²¹³ According to the Act, the Tribunal shall have the jurisdiction to:¹²¹⁴

¹²⁰⁷ *Ibid.*

¹²⁰⁸ Code of Criminal Procedure, 1973, sections 345 and 346.

¹²⁰⁹ Penal Code of India, sections 193 and 228.

¹²¹⁰ C.R.A.I. Section 12 (7).

¹²¹¹ *Ibid.* Section 19.

¹²¹² C.D.P.A. Section 145 (2).

¹²¹³ *Ibid.* Section 145 (2).

¹²¹⁴ *Ibid.* Subsection 148 (1).

- (a) determine royalty or other remuneration to be paid with respect to retransmission broadcast under section 73 of the Act;
- (b) hear an application to determine amount of equitable remuneration under section 93 of the Act;
- (c) hear matters relating to licensing scheme under sections 18, 119 or 120 of the Act;
- (d) hear applications with respect to entitlement to license under the Licensing Scheme (sections 121 or 122);
- (e) determine matters relating to reference or application with respect to licensing by licensing bodies (sections 125, 126 or 127 of the Act);
- (f) to determine matters referred to it by Secretary of State under section 128A of the Act;
- (g) hear matters referred to it with respect to the use as of right of sound recordings in broadcasts (sections 135D or 135E) of the Act;
- (h) determine appeals against order as to coverage of licensing scheme or license (under section 139 of the Act);
- (i) to determine applications to settle royalty or other sum payable for lending of certain works (section 142); and
- (j) determine application to settle terms of Copyright license available as of right (under section 144 (4) of the Act).

The rules regulating the proceedings of the Tribunal are made by the Lord Chancellor after consultation with the Secretary of State.¹²¹⁵ Appeals from the Tribunal lies to the High Court. It is in fact safe to conclude that even though there may be other licensing bodies as the Secretary of State may by regulation provide, the primary duty of the Tribunal is to administer the licensing scheme over and above any other body or bodies in the United Kingdom.¹²¹⁶

The U.S. Act does not provide for a body like the Copyright Licensing Panel, rather, the rights exercisable by the Panel are exercised in this jurisdiction by the Copyright Collecting Societies.

It is submitted that the powers conferred on the Secretary of State in relation to Copyright licensing tantamount to enslavement of the Tribunal and its staff. It is further submitted that

¹²¹⁵ *Ibid.* Section 149.

¹²¹⁶ *Ibid.* Section 150 (1).

the Secretary of State wields more powers in the appointment of the members of the Tribunal and in the performance of its functions. Thus, no matter how convincing the argument in support of the failure to establish a body like the Copyright Licensing Panel may seem, it is clear that enforcement of Copyright cannot succeed without such body being in existence. It is suggested that the powers of the Secretary of State in relation to the Tribunal be curtailed and vested in the English Copyright Commission to be created through immediate amendment of the Act. It is also suggested that the U.S. Act be urgently amended to provide for the establishment of a body like Copyright Licensing Panel.

It is apposite to state at this juncture that one of the enforcement mechanisms operating in the jurisdictions under consideration is the Copyright Collecting Society. For instance, the India Act provides that ‘no person or association of persons shall, after the coming into force of the 1994 Amendment of the Indian Act, commence or, carry on the business of issuing or granting license in respect of any work in which Copyright subsists unless through a Copyright Society duly registered under the Act’.¹²¹⁷ Furthermore, the Performing Rights Society functioning in accordance with the provisions of the Act on the date immediately before the coming into force of the said Amended Act,¹²¹⁸ shall be deemed to be a Copyright Society and every such Society shall get itself registered within a period of one year from the date of the Commencement of the said Amended Act.¹²¹⁹ In spite of these laudable provisions, an owner of Copyright shall, in his individual capacity, continue to have the right to grant licenses in respect of his own works consistent with his obligations as a member of the Registered Copyright Society.¹²²⁰ However, the business of issuing or granting licenses in respect of literary, dramatic, musical and artistic works incorporated in cinematograph films or sound recordings shall be carried out only through a Copyright Society duly registered

¹²¹⁷ C.R.A.I. Section 33 (1).

¹²¹⁸ *Ibid.*

¹²¹⁹ *Ibid.*

¹²²⁰ *Ibid.*

under the Act.¹²²¹ Thus, in India, an individual right owner cannot grant a license in respect of his work contrary to the position in Nigeria. The Indian Act further states that any association or persons who fulfils such conditions as may be prescribed may apply for permission to operate as a Collecting Society, to the Registrar of Copyrights who shall submit the application to the central Government.¹²²² The Central Government may, having regard to the interests of authors, Copyright owners, the interest and convenience of the public and in particular, of the groups of persons who are most likely to seek licenses in respect of the relevant rights, and the ability and professional competence of the applicants, register such association of persons as a Copyright Society subject to such conditions as may be prescribed.¹²²³ However, the Central Government shall not ordinarily register more than one Copyright Society to do business in respect of the same class of works.¹²²⁴ Such registration is for a five years period and same is renewable.¹²²⁵ However, the Central Government may refuse an application for renewal if it is satisfied that the Society is being managed in a manner detrimental to the interests of the authors and Copyright owners concerned.¹²²⁶

It is therefore crystal clear that except for the provisions barring the Indian Government not to register more than one Copyright Society that carry out business in the same class of works, the Indian Act's provisions relating to Copyright Society are similar to the provisions of the Nigerian Act on the same subject matter; including the administration of the Copyright Societies.¹²²⁷ Thus, all the duties assigned by the Nigerian Act on the Nigerian Copyright Commission and anybody set up by it for purposes of Copyright administration are performed in India by the Copyright Board alone. This amounts to over labouring the Board.

¹²²¹ *Ibid.* Proviso to Section 33 (1).

¹²²² *Ibid.* Subsection (2).

¹²²³ *Ibid.* Subsection (3).

¹²²⁴ *Ibid.*

¹²²⁵ *Ibid.* Subsection (3A)..

¹²²⁶ *Ibid.* Subsection (4).

¹²²⁷ *Ibid.* Section 34 to 36.

It is therefore suggested that the Indian Act be amended to reduce this burden placed on the Copyright Board along the line of the Nigerian Act.

In England, Copyright Society is called the 'Licensing body' which is charged with the responsibilities similar to those discharged by Copyright Societies under the Nigerian Act.¹²²⁸

The English Act provides that the Secretary of State may by regulation provide for a Licensing Body that applies to the Secretary of State to be authorized to grant Copyright licenses in respect of works in which Copyright is not owned by the body or a person on whose behalf the Body acts.¹²²⁹ The Secretary of State is conferred with wide powers by the Act to make regulations for the proper administration of the licensing scheme.¹²³⁰ However, any dispute arising from the administration of the scheme shall be referred to the Copyrights Tribunal.¹²³¹ It is submitted that the provisions of the English Act relating to Copyright Society are not as elaborate and as proficient as the Nigerian and Indian Acts. The English Act does not provide for a number of specialized bodies for the administration of the licensing scheme as the Nigerian Act does. This will not make for efficient administration of Copyright. It is therefore suggested that the English Act be urgently amended along the line of the Nigerian Act.

It must be pointed out that the U.S. Act does not expressly provide for the concept of Collecting Society, although this omission, this concept is well recognized under the U.S. jurisprudence. The U.S. Act also provides for the appointment of Copyright Royalty Judges whose duties include the determination and the award of reasonable royalties to be paid to Copyright owners in line with the provisions of the Act.¹²³² These judges perform the duties similar to those of the Copyright Board of India.

¹²²⁸ C.D.P.A. Section 116 (2).

¹²²⁹ *Ibid.* Section 116B (1)

¹²³⁰ *Ibid.* Sections 116A-116B.

¹²³¹ *Ibid.* Section 118-120.

¹²³² U.S.C. Sections 114-119; 1004.

It is submitted that the failure to expressly provide for the establishment of Copyright Societies by the U.S. Act is a grave omission which questions the credibility of the drafters of the Act. It is therefore suggested that the Act be immediately amended along the line of the Nigerian Act.

Another effective enforcement mechanism operating in the jurisdictions under consideration is the Custom and Excise. It seems the Indian Act makes more elaborate provisions against the importation of infringing copies of copyrightable works than the Nigerian Act. The Indian Act requires an owner of a Copyright work or his agent to give notice in writing to the Commissioner of Customs or any officer authorized in his behalf by the Central Board of Customs and Excise that he is the owner of the Copyright in the work which is being imported without his authority, with proof thereof and; that he request the Commissioner for Customs for a specified period in the notice, which shall not exceed one year, to treat such infringing copies as prohibited and that the infringing copies of the work are expected to arrive in Indian at a time and a place specified in the notice.¹²³³ Upon scrutinizing the evidence furnished by the right owner and upon being satisfied that the imported copies are actually infringing, the Commissioner for Customs may subject to the relevant provisions of the Act, treat the infringing copies of the work as prohibited goods that have been imported into India.¹²³⁴ This will be done provided that the owner of the work deposits such amount as the Commissioner for Customs may require as security having regard to the likely expenses on demurrage, cost of storage and compensations to the importer in case it is found that the works are not infringing copies.¹²³⁵ When any goods treated as prohibited are detained, the Custom officer detaining them shall inform both the importer and the person who gave such notice to the Customs of the detention of such goods within twenty four hours of such

¹²³³ C.R.A.I. Section 53 (1).

¹²³⁴ *Ibid.* Section 53 (2).

¹²³⁵ *Ibid.*

detention.¹²³⁶ If the person who gave such notice does not produce an order from a Court having jurisdiction relating to the temporary or permanent disposal of such goods within fourteen days from the date of their detention, the Custom Officer detaining the goods shall release them and they shall no longer be treated as prohibited goods.¹²³⁷

It is noted that unlike the Indian Act, the Nigerian Act does not state what happens to the goods if the allegation of infringement is not proved. It does not also make mention of the procurement of any Court Order after the detention of the suspected pirated copies. Above all, the Nigerian Act mentions only unpublished works. This makes the provision of the latter Act very narrow. An immediate amendment of the Nigerian Act is recommended to bring the relevant provisions of this Act in line with the aforementioned sections of the India Act.

On the other hand, the U.S. Act permits seizure and forfeiture of works that violate Copyright on works protected under Act.¹²³⁸ It also provides for the right of action regarding importation of infringing copies of phonorecords and prohibits gray market of enforcement of Copyright.¹²³⁹ In further attempt to fulfill its Statutory, Regulatory and Treaty based obligations of preventing the importation of merchandise which violates certain claims to Copyright which have been registered with the U.S. Copyright Office, the U.S. government empowers the U.S. Customs and Border Protection Service to detain and/or seize pirated copies of protected works.¹²⁴⁰ Thus, the U.S Customs can only act if the work is registered with the U.S. Copyright Office. However, the owner of the work must request that Customs collect and retain information relating to those rights for a specified time, during which the Customs shall either of their own initiative, or with the assistance of the Copyright holder,

¹²³⁶ *Ibid.* Subsection (3).

¹²³⁷ *Ibid.* Subsection (4).

¹²³⁸ U.S.C. Section 506.

¹²³⁹ *Ibid.* Section 602.

¹²⁴⁰ Article 2 of Custom Directive No. 2310-00 5B of December, 12th 2001 of the United States.
<http://www.cbp.gov/files/documents>. accessed 10/10/2017.

actively monitor in order to prevent the importation of pirated articles.¹²⁴¹ Besides these provisions, the Law provides for the recordings of Copyrights with Customs.¹²⁴² It further provides for the seizure of such infringing articles.¹²⁴³ It also provides for the procedural steps to be taken in cases involving possible Copyright violations; and for the demand for the delivery of released merchandise.¹²⁴⁴

Again, the U.S. Copyright Act mandates the Secretary of Treasury and the United States Postal Service to separately and jointly make regulations for the enforcement of the provisions of the Copyright Act prohibiting importation.¹²⁴⁵ Any article imported in violation of the importation prohibition of the Act shall be liable to seizure or forfeiture in the same manner as property imported in violation of Custom Revenue Laws.¹²⁴⁶

It is submitted that there is clearly established evidence that the U.S. Customs are involved in the enforcement of Copyright in the United States as is the case with Nigeria. It is only suggested that these elaborate provisions of the Customs Directive and Regulations be repealed and same provisions be incorporated into the U.S. Copyright Act through the amendment of the latter. This will make for uniformity in the fight against piracy.

On the other hand, the English Act's provisions regarding enforcement of Copyright through the Commissioner for Customs and Excise are similar to the provisions of the Indian Act except that the duration of the notice under the English Act is five years as under the Nigerian Act.¹²⁴⁷ Again, the importer of the infringing copy is liable, not for any other penalty but for

¹²⁴¹ *Ibid.* Article 2.2.

¹²⁴² Articles 133. 3, to 133 37 of Customs Regulations 19 CFR. of the United States, <http://www.cbp.gov/files/documents>. accessed 10/10/2017.

¹²⁴³ *Ibid.* Articles 133.

¹²⁴⁴ U.S.C. Section 603.

¹²⁴⁵ *Ibid.*

¹²⁴⁶ *Ibid.*

¹²⁴⁷ C.D.P.A. Section 111.

forfeiture.¹²⁴⁸ However, a Copyright owner can apply for an order of Court for the delivering up of the infringing copies to him after the end of the period of six years from the date on which the infringing copy was made.¹²⁴⁹ An application can also be made for an Order that an infringing copy or other article be delivered up in pursuance of an Order provided by the Act relating to Order for delivery up; or seized and detained in pursuance of the right conferred under the Act relating to right to seize infringing copies and other articles.¹²⁵⁰ Upon such application, such infringing copy shall be forfeited to either the Copyright owner, or be destroyed, or otherwise dealt with as the Court may think fit.¹²⁵¹

Another enforcement mechanism operating in the jurisdictions under consideration is the Police. Under the Indian Act, a Police officer not below the rank of a sub-inspector, may if he is satisfied that an offence under the Act in respect of infringement of Copyright in any work has been, is being, or is likely to be committed, seize without warrant, all copies of the work, and all plates used for the purpose of making infringing copies of the work, whenever found and all copies and plates so seized shall as soon as practicable, be produced before a magistrate.¹²⁵² There is no doubt that these provisions of the Indian Act are more elaborate and efficient than the Nigeria Act in that it contains Rules of Criminal Procedure for the enforcement of Copyright by both the Police and the Custom Services. It does not require additional recourse to any Penal or Criminal Code as is the case with the Nigerian Act. This is because there is no *lacuna* in the Indian Act regarding Criminal Procedure in the Act.

On the other hand, the English Act empowers Local Weights and Measures Authorities to enforce within their area, the provisions of the Act relating to criminal liability, ie, for making

¹²⁴⁸ *Ibid.* Subsection (4).

¹²⁴⁹ *Ibid.* Section 113 (1).

¹²⁵⁰ *Ibid.* Section 114 (1).

¹²⁵¹ *Ibid.*

¹²⁵² C.R.A.I. Section 64.

or dealing with infringing articles.¹²⁵³ It is however, evident that as is the case with the U.S. Act, the English Act does not contain provisions that expressly involve the police in the enforcement of Copyrights. This is similar to the situation in the United States. This is worsened by the fact that under the Acts Nigerian and Indian Acts, there are no laid down procedures for the institution of criminal proceedings in the Copyright Acts. It is suggested that these Acts be amended to incorporate the aforestated trial procedures, along the line of the more elaborate Indian Act.

It is observed that the most effective enforcement mechanism operating in the jurisdictions under consideration is the Court. The English Act confers jurisdiction on certain Courts to entertain matters relating to infringement of Copyright. In England, Wales and Northern Ireland, a County Court may entertain actions relating to delivery up of infringing copies matters where the right owner and a Licensee have concurrent rights; and Order as to disposal of infringing copies or other copies.¹²⁵⁴ In Northern Ireland, a County Court may entertain such proceedings only where the value of the infringing copies and other articles in question do not exceed the County Court's limit for an action in tort.¹²⁵⁵ In Scotland, proceedings for an order under any of the provisions of the Act may be brought before Sheriff Court.¹²⁵⁶ However, nothing in the English Act shall be construed as affecting the jurisdiction of the High Court or in Scotland, the Court of Session in relation to Copyright actions.¹²⁵⁷ These Courts can award general damages and in appropriate cases, additional damages under the conditions provided under the Act.¹²⁵⁸ In the same vein, criminal offences relating to

¹²⁵³ C.D.P.A. Section 107A.

¹²⁵⁴ *Ibid.* Section 115 (1).

¹²⁵⁵ *Ibid.* Proviso to section 115 (1).

¹²⁵⁶ *Ibid.* Subsection (2).

¹²⁵⁷ *Ibid.* Subsection (3).

¹²⁵⁸ *Ibid.* Section 97.

infringement of Copyright are to be tried under the Criminal Procedure Act of the various nations of the United Kingdom as in other criminal cases.¹²⁵⁹

In India, every suit or other civil proceedings arising under Chapter XII of the Act relating to civil infringement of Copyright in any work or the infringement of any other right conferred by Act shall be instituted in the District Court having jurisdiction where either of the parties resides.¹²⁶⁰ This Court may in cases of infringement of Copyright, grant relief by way of injunction, damages, accounts and otherwise as may be conferred by law for the infringement of right as in other tortuous actions. Similarly, no Court inferior to Metropolitan Magistrate or a judicial Magistrate of the first class shall try any offence under the Indian Act.¹²⁶¹ Appeals from these Courts lie to the High Court of India which shall make rules of procedure consistent with the Indian Copyright Act in respect of such appeals.¹²⁶² Furthermore, each offence under the Act has its punishment prescribed by the Act. In spite of this development, it seems that the Criminal Procedure Act of India applies to criminal infringement cases, while in civil infringement cases, the Court will stick to Civil Procedure Rules operating in India. It must not be forgotten that the Act confers the powers of a Civil Court on both the Registrar of Copyright and the Copyright Board of India when trying cases under the Code of Civil Procedure of India.¹²⁶³

In the United States, the District Courts have exclusive jurisdiction in any civil actions relating to Copyright.¹²⁶⁴ However, where Copyright violation is by the United States or any of its agents; or with the authorization or consent of the U.S. government, the Court with the jurisdiction to entertain the matter is the United States Court of Federal Claims.¹²⁶⁵ Plaintiff

¹²⁵⁹ *Ibid.* Section 108.

¹²⁶⁰ C.R.A.I. Section 62.

¹²⁶¹ *Ibid.* Section 70.

¹²⁶² *Ibid.* Section 73.

¹²⁶³ *Ibid.* Sections 94 & 95.

¹²⁶⁴ Section 1338 and 1400 of Title 28- Judiciary and Judicial Procedure, U.S. Code.

¹²⁶⁵ *Ibid.* Section 1498 (b).

must bring an action for infringement against the United States, or for recovery against the United States within three years of the violation of Copyright.¹²⁶⁶ This limitation is also applicable to all civil action for violation of the Copyright in such work.¹²⁶⁷ Similarly, except as provided in the United States Act, no criminal proceeding shall be maintained against an infringer unless it is commenced within five years after the cause of action arose.¹²⁶⁸ It is however observed that it is only the United States Act that that provides for limitation of time in relation to Copyright infringement actions.

It is submitted that these limitations obviously constitute a clog in the will of justice in Copyright enforcement cases by legitimate Copyright owners. It is therefore suggested that the United States Act be amended to delete this limitation of Action provision. It is further submitted that it will be better to make provisions for the procedures to be followed in civil and criminal cases involving Copyright infringement, as well as creating Copyright Courts that shall entertain such Copyright cases. It is therefore suggested that the Acts be amended to reflect these suggestions and to further provide for the appointment of judicial officers that are well versed in Copyrights matters to man these Courts. This will also make for expeditious disposition of Copyright matter pending before the Courts, thereby avoiding the over congested cases and the attendant delay in regular Courts.

It must be pointed out that as discussed in the last preceding chapter of this research work in relation to Nigerian Courts; the Acts of the jurisdictions under consideration empower the Courts to grant a good number of reliefs in cases of Copyright violations in order to check piracy.¹²⁶⁹ Therefore, there is no need for further considerations of these Acts in relation to award of damages.

¹²⁶⁶ *Ibid.* Proviso to Section 1498 (b).

¹²⁶⁷ U.S.C. Section 508.

¹²⁶⁸ *Ibid.* Section 507.

¹²⁶⁹ C.D.P.A. Sections 96 and 97, U.S.C., Section 504, C.R.A.I. Section 55.

5.15 Copyright Enforcement and Technical Protective Measures

It must be stated at this juncture that the use of technical measures to protect works as fully discussed in the last preceding chapter, are applicable in England, India and the United States of America. Hence, there is no need to reconsider them herein. It must however be pointed out that the development of these technical measures for the protection of Copyright is a huge success. These measures have actually helped a great deal in attaining enhanced protection of Copyright. It is also a fact that the emergence of these new technologies brought not only opportunities, but challenges. This is because, even though protection is achieved through these technological devices, it seems this method of enforcement is in conflict with the express provisions of the Copyright Acts of the jurisdictions under consideration. It should not be forgotten in haste that the basic principle of Copyright is to strike a balance between the interests of creators and that of the society at large. It has been stated that when new interpretations are added to existing Laws of Copyright for protecting the rights of owners of Copyright, it is but fair to consider the effects of such extensions on the interest of the society, and wherever necessary to clarify the permitted acts.¹²⁷⁰ In line with this, the WIPO Copyright Treaty; the WIPO Performance and Phonograms Treaty and its Directive require member States to provide adequate legal protection against the circumvention of any technological measures.¹²⁷¹ Iftikhar observed that while the aforementioned Treaties refer generally to technological measures that are used by right owners to restrict acts which are unauthorized by them or by law, the Directive enters into more detail by referring to ‘adequate legal protection against manufacture, importation, distribution, sale, etc., of the device or the provision of services which facilitate circumvention’.¹²⁷² According to him, a problem in the application of the technical protection measures concerns the position of

¹²⁷⁰ T James, ‘Indian Copyright law and Digital Technologies’, *Journal of Intellectual Property, Rights* Vol. 7, September, 2002, 433.

¹²⁷¹ Article 11 of the WIPO Copyright Treaty; Article 18 of the WIPO Performance and Phonograms Treaty, Article 6 (1) and (2) of the Directive.

¹²⁷² H Iftikhar, ‘Technological Protection Measures under Copyright Law’, *Op. Cit.* 322.

persons who under the law, are by virtue of an exception entitled to reproduce or otherwise use protected material for certain purposes, without the necessity of permission from respective right owner, yet are frustrated in the attempt to benefit from the exception by the presence of the technical protection measure.¹²⁷³

It is noteworthy that by the express provision of the Berne Convention, authors of literary and artistic works protected by the Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.¹²⁷⁴ Such rights are also conferred on authors of dramatic, dramatico-musical and musical works.¹²⁷⁵ However, it shall be a matter for legislation in the countries of the member States of the Berne Convention to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.¹²⁷⁶ This provision actually laid the foundation for fair dealing as codified in the Acts under consideration. This is also supported by the provisions of the Convention which encourages free uses of works.¹²⁷⁷ Thus, it can safely be inferred that not all acts of circumventions that will amount to infringement of Copyright. Member States incur no obligation to prohibit circumventions that allow the user to exploit a work that is already in public domain; or to engage in an act authorized by the right owner; or that allows the user to engage in a non infringing act; or copying a work for purposes endorsed by the relevant provisions of the Convention.¹²⁷⁸ In line with the Berne Convention and other Treaties/Instruments on Copyright, most States of the world have domesticated the provisions prohibiting circumvention of technological protection measures. For instance, the Nigerian Act confers on the Nigerian Copyright Commission, the authority to prescribe any design,

¹²⁷³ *Ibid.*

¹²⁷⁴ Article 9 Berne Convention for the Protection of Literary and Artistic Works, 1896.

¹²⁷⁵ *Ibid.* Article 11.

¹²⁷⁶ *Ibid.* Article 9 (2).

¹²⁷⁷ *Ibid.* Articles 10

¹²⁷⁸ *Ibid.*

label, mark, impression or any other anti-piracy device for use on, in, or in connection with any work in which Copyright subsists.¹²⁷⁹ The Commission shall exercise these powers with the consent of the Minister charged with the responsibility for Culture.¹²⁸⁰ The Act also prohibits the selling, renting or offering for sale, rent or hire, any work in contravention of the prescription made under the Act.¹²⁸¹ It makes such acts offences punishable on conviction with an imprisonment for a term not exceeding twelve months, or both fine and imprisonment.¹²⁸² The Act further prohibits the importation into Nigeria, or being in possession of any anti-piracy device, or any machine, instrument or other contrivance intended for use in the production of the anti-piracy device.¹²⁸³ The Act renders such a person liable upon conviction to a fine not exceeding Five Hundred Thousand Naira or imprisonment for a term not exceeding five years, or to both such fine or imprisonment.¹²⁸⁴ The Act also bars any person from being in possession of, or reproducing or counterfeiting any anti-piracy device without the consent of the Nigerian Copyright Commission and renders such an offender upon conviction to a fine of Fifty Thousand Naira or a term of imprisonment not exceeding five years, or to both such fine and imprisonment.¹²⁸⁵

What can be gleaned from this section is that the Nigerian Copyright Commission is empowered to determine and dictate the kind of anti-piracy devices that can be used in Nigeria with the consent of the Minister charged with the responsibility for culture. Therefore, whether such device chosen by the Commission is ineffective or incapable of ensuring adequate protection of copyrighted works is the sole business of the Commission. The Commission is also empowered by the Act to make regulations specifying the conditions

¹²⁷⁹ C.R.A.N. Section 12 (1).

¹²⁸⁰ *Ibid.*

¹²⁸¹ *Ibid.*

¹²⁸² *Ibid.* Subsection (2).

¹²⁸³ *Ibid.* Subsection (3).

¹²⁸⁴ *Ibid.*

¹²⁸⁵ *Ibid.* Subsection (4).

necessary to give effect to the purpose of the Act.¹²⁸⁶ There is no doubt that the only justifiable reason for the inclusion of this provision in the Nigerian Act is to ensure that anti-piracy devices which are most likely to conflict with the rights to fair use should not be allowed into Nigeria.

It is submitted that the Nigerian Act does not make ample provision outlawing anti-circumvention devices. This encouraged piracy until the Cybercrimes Act was signed into law in 2015. This Act prohibits unlawful access to a computer system; acts hindering the functioning of a computer system by imputing, transmitting, damaging, deleting, deteriorating, altering or suppressing computer data or any form of interference with its intended purpose.¹²⁸⁷ Violators of these provisions face imprisonment ranging from three years to seven years, or fines ranging from Five to Seven Million Naira as the case may be, or both fine and imprisonment.¹²⁸⁸ The Act also criminalizes the unlawful interception of electronic messages; further misdirection of electronic messages; and unlawful interception of transmission of data by technical means.¹²⁸⁹ It bars all manner of computer related forgery, fraud, theft of electronic devices, altering or forgery of electronic signature etc.¹²⁹⁰ The Act mandates the office of the National Securities Adviser to be the coordinating body for all security and enforcement agencies under this Act.¹²⁹¹ It also creates the Cybercrime Advisory Council which formulates and provides general policy guideline for the implementation of the provisions of the Act.¹²⁹² Furthermore, the Act confers the Federal High Courts with the inherent jurisdiction to try all offences under the Act.

¹²⁸⁶ *Ibid.* Subsection (5).

¹²⁸⁷ Cybercrime [Prohibition, Prevention, ETC], Act 2015, Sections 6 (1) & 8.

¹²⁸⁸ *Ibid.*

¹²⁸⁹ *Ibid.* Sections 10-12.

¹²⁹⁰ *Ibid.* Sections 13-17.

¹²⁹¹ *Ibid.* Section 41 (1).

¹²⁹² *Ibid.* Section 43 (1).

It is submitted that the extent to which this Act would apply within a Copyright context is in doubt. Agreed that the provisions of the Act contain fairly robust provisions that make it an offence to use or make available ‘any devices primarily designed to overcome security measures in any computer, computer system or network’.¹²⁹³ It is crystal clear that this Act is not a Copyright Legislation, but a criminal law which operates to curb cybercrime offences flourishing in Nigeria. It will therefore not make much impact as far as Copyright is concerned. It is suggested that a Digital Rights Management Law in the Nature of the Digital Millennium Copyright Act of the United States of America be promulgated in Nigeria if Nigeria is to totally eradicate piracy emanating from anti circumvention of technical devices.

In India, the use of technological measures used by Copyright owners to protect their rights in the works and the possible circumvention of such measures were not addressed by any legislation until the Indian Copyright Act was amended in 2012. This amendment introduced a new section¹²⁹⁴ which provides for the protection of technological measures used by Copyright owners.¹²⁹⁵ Thus, any person who circumvents an effective technological measure applied for the purpose of protecting any of the rights conferred by the Indian Act, with the intention of infringing such rights, shall be punishable with imprisonment which may extend to two years, and shall be liable to fine.¹²⁹⁶ However, such prohibition shall not prevent the doing of anything for a purpose not expressly prohibited by the Act.¹²⁹⁷ The Act provides that any person facilitating circumvention measure for purposes of infringing the Copyright in the work shall maintain a complete record of such other person including his name, address and all relevant particulars necessary to identify him and the purpose for which he has been

¹²⁹³ The U.S. Chamber International IP “Infinite Possibilities”, February 10, 2016. <http://uschamber.com/event/intl...> accessed on 29th August, 2017.

¹²⁹⁴ C.R.A.I. Section 65A.

¹²⁹⁵ C.R.A.I. Section 65.

¹²⁹⁶ *Ibid.*

¹²⁹⁷ *Ibid.* Subsection (2).

facilitated.¹²⁹⁸ The Act exempts a person from liability if he does anything necessary to conduct encryption research; or if he is conducting any lawful investigation; or he is doing anything necessary for the purpose of testing the security of a computer system or a computer network with the authorization of its owner or operator; or he is doing anything necessary to circumvent technological measures intended for identification or surveillance of a user, or taking measures necessary in the interest of national security.¹²⁹⁹ Thus, circumvention of anti-piracy devices is allowed in India for purposes of fair use. However, unlike in Nigeria, there is nobody or institution empowered by the Indian Act to prescribe any anti-piracy device to be used in India. It will therefore work hardship to fair users of the work who may not access the work as a result a sophisticated anti-piracy devices used on the works by rights owners. It should be noted that by the wordings of the Act, it is only the circumvention of an effective technological measure applied for purposes of protecting the work from infringement that will amount to an offence.¹³⁰⁰ It is further noted that the Indian Act does not contain any provision in relation to any person who imports material that is capable of circumventing any anti-piracy device, machines or other contrivances into India, or any person being in possession of any such circumventing device or machine. It does not also provide for the consequences of such acts, or any punishment attached thereto. This may be ‘a grave oversight’ on the part of the Indian legislators. An Immediate amendment is therefore suggested to bring the Act in conformity with International standards.

It is well noted that the Indian Act adequately protects right management information quite unlike the Nigerian Copyright Act. Under the Act, it is an offence punishable upon conviction to a term of imprisonment not exceeding two years.¹³⁰¹ The Act imposes fine on any person who knowingly removes or alters any rights management information without authority, or

¹²⁹⁸ *Ibid.*

¹²⁹⁹ *Ibid.*

¹³⁰⁰ *Ibid.*

¹³⁰¹ *Ibid.* Section 65B.

distributes, imports for distribution, broadcasts or communicates to the public, without authority, copies of any work, or performance knowing that electronic rights management information has been removed or altered without authority.¹³⁰² Any breach of the section entitles the Copyright owner to seek civil reliefs against the infringer as provided under the Indian Act.¹³⁰³ The scope of this provision seems to be very broad because the acts of access control circumvention are also outlawed even if undertaken for control purposes, such as fair use.¹³⁰⁴ The Act requires that the knowledge of the infringer that the work he deals on has been removed or altered without the authority of the owner of the Copyright must be proved by the prosecution.¹³⁰⁵

It is submitted that without the establishment of any regulatory body in relation to the protection of technological measures renders the idea of technical enforcement and the provisions relating thereto useless. It is therefore recommended that the Indian Act be amended along the line of the Nigerian Act to appoint a body that will be charged with the responsibilities of prescribing the anti-piracy devices to be used in India; and also to define what the Act means by the phrase 'in the interest of National security'. This is because if this term remains undefined, there will be an upsurge of illegal circumvention of anti-piracy devices under the guise of national security.

In the United States of America, effect has been given to International Treaties such as WIPO Treaties, by the passing into law of an Act which amended the U.S. Copyright Act by adding section 512 thereto.³⁵⁴ The D.M.C.A. prohibits the acts of circumvention of a technological measure that effectively controls access to a work protected under this Act.³⁵⁵ The Act also prohibits a person from manufacturing, importing, offering to the public, providing or that is

¹³⁰² *Ibid.*

¹³⁰³ *Ibid.* Proviso to Section 65 B.

¹³⁰⁴ *Ibid.*

¹³⁰⁵ *Ibid.*

primarily designed or produced for the purpose of circumventing a technological measure that otherwise trafficking in any technology, product, service, device, component, or part thereof, effectively controls access to a work protected under this title; or markets personally or by proxy or in concert with another, any device used in circumventing a technological protective measure that effectively controls access, knowing that such device has the capacity to circumvent technical protection measure.³⁵⁶ Thus, the D.M.C.A. prohibits tools that can be used for circumvention purposes based on their primary design or production, regardless of whether they can or will be used for non-infringing uses.³⁵⁷ The Act further provides that a technological measure effectively protects a right of a Copyright owner under this Act if the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a right of a Copyright owner under this Act.³⁵⁸ This provision is a welcome development as it clearly shows that it is only the circumvention of workable anti-piracy measure that can ground an action for infringement. However, the D.M.C.A. does not in any way define the term ‘technological measure’ but merely states that ‘circumventing technological measure’ means to descramble scrambled work; to decrypt an encrypted work;

³⁵⁴ Digital Millennium Copyright Act, 1998, hereinafter referred to as ‘D.M.C.A.’

³⁵⁵ *Ibid.* Section 1201(a)(1).

³⁵⁶ *Ibid.* Subsection (2).

³⁵⁷ *Ibid.*

³⁵⁸ *Ibid.* Paragraph (b).

or otherwise to avoid, by pass, remove, deactivate or impair a technological measure without the authority of the Copyright owner.³⁵⁹ The Act does not also define the term ‘effective technological measure’ as used in the Act. It is submitted that this omission will likely lead to miscarriage of justice in infringement cases. It is therefore suggested that the Act be urgently amended to define the relevant terms used in the relevant sections of the Act.

It is observed that the D.M.C.A. also creates a lot of exceptions in relation to circumvention of

anti-piracy devices and affords a person accused of circumventing any anti-piracy device the defence of fair dealings. For instance, it allows Nonprofit Libraries, achieves and educational institutions to circumvent, a technological protection measure solely for the purpose of gaining access to the work in order to determine whether the relevant institution wishes to use it.³⁶⁰ It also provides that Law Enforcement, Intelligence and other Government Agencies, where authorized, are not subject to either the ban on acts of circumvention, nor the prohibition of trafficking in circumvention technologies.³⁶¹ Furthermore, a person engaged in reverse engineering of a computer program, having lawfully obtained a copy of that program, is permitted to carry out acts of circumvention under a series of restrictive conditions.³⁶² Similarly, a person who embarks on encryption research is permitted to circumvent a protective measure if the researcher has lawfully obtained a copy of the work; or the act is necessary to conduct such encryption research and does not constitute Copyright infringement; so long as the researcher had made good effort to obtain authorization before the circumvention.³⁶³ Again, protection of minors can justify an exception to the prohibition on circumvention for a technology that has the sole purpose of preventing minors from accessing materials on the internet.³⁶⁴ The act of circumvention is also permitted where the

³⁵⁹ *Ibid.* Subsection (3) (a).

³⁶⁰ *Ibid.* Section 1201 (d).

³⁶¹ *Ibid.* Subsection 4 (e).

³⁶² *Ibid.* Paragraph (f).

³⁶³ *Ibid.* Subsection (2) (c).

technological protective measure collects or disseminates personally identifying information generated in the course of activities if certain criteria set by the Act are met.³⁶⁵

The English Act expressly prohibits the circumvention of technical devices applied to computer programs; as well as any effective technology of such nature applied to a Copyright work other than a computer program in the same way the Indian and United States Acts prohibit same.³⁶⁶ According to the Act, it is an offence to carry out such circumvention or to

promote, achieve, market, manufacture, distribute, sell, let, hire, expose for sale or hire, any facility that circumvents any such protective technological device.³⁶⁷ The qualification for protection of a protective device is that it must be effective in the sense that the use of the work is controlled by the Copyright owners through an access control or protection process such as encryption, scrambling, or other transformation of the work; or a copy control mechanism, which achieves the intended protection.³⁶⁷ It is a welcomed development that in furtherance of its efforts to ensure technical enforcement of Copyright as advocated by International Treaties and Conventions, the United Kingdom has enacted an Act that makes provisions in relation to online/commercial communications; infringement of Copyright and performers right, internet domain registries, the functions of the Channel Four Television Corporation, the regulation of Television and Radio services, the regulation of the case of electromagnetic spectrum; public lending right in relation to electronic publication, and for connected purposes.³⁶⁸ It is not in doubt that this Act is a Copyright legislation which complements the enforcement of Copyright in other fields not properly covered by the English Copyright Act. However, the Act falls short of D.M.C.A.

³⁶⁴ *Ibid.* Paragraph (h).

³⁶⁵ *Ibid.* Paragraph (j).

³⁶⁵ C.D.P.A. Sections 296 & 296ZA.

³⁶⁶ *Ibid.* Sections 296ZA, 296ZB & 296ZD.

³⁶⁷ *Ibid.* Section 296ZZF.

³⁶⁸ Digital Economy Act, 2010.

Having explored the enforcement of works through technological measures and the legality of the measures under the relevant Acts of the jurisdictions under consideration, it is submitted that once the legal protection of an effective technological protection measure and Digital Rights Management System has been guaranteed by international law, as well as national laws, nothing bars the massive deployment of various technological protection measures in order to place restrictions on the use of copyrighted works by infringers. Over

time, the use of such technologies has considerably varied among individual types of copyrighted works. Although in theory, there are no limits on the varieties of restrictions, at least on the face of the Acts considered in this work. It is quite striking that only a limited number of very similar restrictions are currently empowered for a wide range of copyrighted works. Moreover, they are used only for some types of copyrighted works. The reason is that they very well work with a few exceptions, for instance, in the cases of movies, digital television broadcasts, and video games for video games consoles; but they have failed with regard to music Compact Discs and unauthorized music downloading services so far. This means that if an anti-piracy device is weak or ineffective, there is no need to break it with any form of anti- circumvention device. Thus, if the work is accessed as a result of the porosity of such protective device, it is doubtful if any offence will be deemed to have been committed. It is therefore suggested that the Acts be amended to specifically mention the anti circumvention devices to be used in the jurisdictions under consideration.

It is submitted that the D.M.C.A. is the best articulated legal instrument for the protection and enforcement of Copyright through technological devices. It is suggested that the Acts of the other jurisdictions under consideration be amended along the line of D.M.C.A. in order to ensure effective enforcement of Copyrights. It is also suggested that uniform Copyright Instrument in the forms of Treaties and Conventions should be made at the international plane.

CHAPTER SIX

6.0 CONCLUSIONS AND RECOMMENDATIONS

6.1 Conclusions

Having examined the concept and origin of Copyright, the conflicting interests of Copyright owners and the general public; as well as the protection and enforcement of these interests, it is concluded that the Copyright Instruments operating in the jurisdictions considered in this work have not done enough to protect Copyright and interests attached thereto. These legal instruments also failed to achieve a holistic enforcement of Copyright by affording the defence of innocent infringement to infringers. The U.S. Act also makes it mandatory to use Copyright notices on works, failing which the defence of innocent infringement will avail the alleged infringer. Furthermore, the Copyright Acts of the jurisdictions considered, especially the English Act, contain too wide provisions in relation to the grant of compulsory licenses which render Copyright enforcement very porous. Similarly, the Copyright terms contained in these Acts are too long, thereby inhibiting access to work and in turn, creativity. On the other hand, the U.S. Act provides for limitation of time within which some Copyright infringement cases shall be brought, ie, three years in cases of alleged infringement by the U.S. government; and five years in cases of criminal proceedings against infringers. It is also concluded that the use of technical measures to enforce Copyright protection is restrictive of public access to copyrightable works as the Nigerian and English Acts do not admit of fair use in relation to protected works. Moreover, the Acts considered failed neither prescribed the type of anti piracy devices to be used to protect works, nor mention the circumvention devices that are outlawed by the Acts.

Again, the fact that Copyright is territorial in nature, quite unlike other international laws such as international criminal law, renders it impossible to enforce Copyright protection especially as it relates to digital media which are capable of being downloaded and

reproduced in any part of the world without the authority and knowledge of the right owner. This is worsened by the fact that there are no National, Regional and International Copyright Courts established with the powers to entertain Copyright matters involving nationals of member States to the relevant Copyright Treaties and Conventions quite unlike the International Criminal Court. Worst still, there are no procedural steps provided for by the Nigerian, English and the U.S. Acts in relation to civil or criminal proceedings in cases of alleged Copyright infringement, rather, recourse is had on the Civil and Criminal Codes operating in these jurisdictions. Again, the Copyright laws of these jurisdictions do not make adequate provisions that guard against online piracy which is the most dangerous form of Copyright infringement of the 21st century.

On the other hand, there are no adequate enforcement mechanisms and institutions set up by these Acts to combat Copyright infringement as effective as the Police and other Secret Services in relation to crime. It is also true that the concept of fair use/fair dealings as broad as it exists in the Copyright Acts considered herein militates against the rights of owners of Copyright works in the sense that such wide concepts encroach on the legitimate rights of Copyright owners where there are no checks and balances regarding the use of protected works. For example, while the Nigerian Act allows the fair use of certain scarce works upon the condition that they should be destroyed within a specific timeframe after such use, the Act does not mention or establish any Body/Institution that will monitor the aforementioned destruction. What this means is that while such works may be legally obtained in the name of fair use, its use will fall outside the scope of fair use if such works are not destroyed within the specified period. This may generate serious Copyright violations if such works are used thereafter without the consent and authority of the Copyright owner.

6.2 Recommendations

There are a good number of steps that could be taken to totally eliminate Copyright infringement in the jurisdictions considered. A strict adherence to the recommendations discussed below will help a lot in achieving a holistic enforcement of Copyright by striking a balance between the conflicting interests of authors and those of the general public.

(a) Amendment of the Acts

It is recommended that the Copyrights Acts of the jurisdictions considered be amended to fully implement the provisions of World Intellectual Property Organization Obligations and to create strong enforcement mechanisms as required by the World Trade Organization. Tough anti-piracy provisions should also be introduced into the Act. Most importantly, the Amended Acts should incorporate harsher punishments for Copyright infringement. The Amended Acts should repeal the provisions on limitation of action and the defence of innocent infringement. The wide range of fair use provisions should also be curtailed to only the excusable acts that can be overseen and managed by Copyright Enforcement Agencies to be established by the Acts. Again, model provisions on compulsory licenses similar to those contained by the Nigerian Act should be introduced into the other Acts considered in this research work.

(b) Establishment of Copyright Enforcement Units as a Department in the Law

Enforcement Agencies

There is need to introduce a Copyright Enforcement Units as a department in each of the Law Enforcement Agencies in Nigeria such as the Police, International Police, Civil Defence Corps, the Customs Service, State Security Services, the Army, Navy, Air Force, etc. This will ensure that all hands are on deck in combating Copyright violation.

(c) Establishment of Nigerian Copyright Commission in the Local Government Areas

Nigeria is a very large country and the most populous nation in Africa. It is believed that Copyright violators are in all the nooks and crannies of Nigeria in their numbers. It is therefore necessary to establish branch offices of the Nigerian Copyrights Commission in the Headquarters of all the Local Governments in Nigeria.

(d) Anti-Piracy Legislative Measures

No matter how good a law is, without effective enforcement mechanism, it will be a toothless bulldog. Thus, because the enforcement of Copyright remains the basis of the protection for the various digital technologies, adequate administrative measures should be adopted by the Nigerian Copyrights Commission for the protection of Copyright in digital works. The Federal Government of Nigeria should work with various International Organizations, Market Authorities, Trade Unions, etc, to ensure that any infringing copies of pirated works and other adverse digital innovations are confiscated and all contributors to the act, severely punished. Legislative measures should be adopted to take care of the increasingly new species of digital innovations that aid Copyright violations. In doing so, the legislators should widely consult experts in the fields of Information Technology, Copyright and Computer Technology, in order to acquire the technical knowledge that would expose the intricacies involved in the circumvention of digital technologies that protect works. More regulatory bodies that will be charged with the responsibilities of ensuring the enforcement of the laws so made should be established. The Nigerian Government should enact legislation that every television sold in Nigeria must contain V-Chip which is now used to monitor broadcasts in the United States. This kind of legislation should be made for technological protection of copyrightable works. It is further recommended that in the fields of digital broadcast by cable satellite transmission, Copyright owners should adopt some tough technological measures to check unauthorized use of their transmission, for example, the use of digital signature and

key encryption, such that only legitimate receivers would be given the activation code to decipher the encrypted work.

(e) Social Measures

Adequate Copyright awareness should be created to carry the Nigerian populace along. The social measures to be adopted include the enlightenment and awareness campaigns to the grass root level. This is achievable through commercial ringlets and advertisement in televisions and radios in such a manner that even a layman in the street would be able to understand and appreciate the meaning and purport of Copyright Law, the dangers associated with piracy, as well as the risk of patronizing infringers. The Nigeria Copyright Commission should establish a social helpline that would enable an ordinary Nigerian to report seemingly obvious cases of Copyright infringement to it. Monetary reward should be paid to such whistleblowers if their reports prove to be true at the end of the day. There should also be an improved public education of the concept, nature and protection of Copyright to the citizenry, no matter their levels of education. This should be by way of seminars, workshops, conferences, radio and television broadcasts, and by the introduction of Copyright as a course in the curricula of Primary, Secondary and Tertiary Institutions.

(f) Judicial Measures

Owing to the intricacies associated with Copyright cases, the Federal Government should set up Copyright Court in the country. This Court shall be saddled with the responsibilities of discharging expeditiously cases relating to Copyright in the manner adopted by the Nation Industrial Courts in cases involving labour law. By doing so, only judicial officers who are versed in the field of Intellectual Property, especially Copyright should be appointed judges of the Copyright Courts. Again, the technicalities involved in Copyright cases which tend to militate against expeditious disposition of pending Copyright suits should be abandoned pursuant to the Copyright Enforcement Rules to be made for this purpose. It is also

recommended that, Regional and International Copyright Courts should be established to tackle Copyright infringement at the international plane.

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