AN APPRAISAL OF CIVIL REMEDIES AVAILABLE TO OWNERS OF COPYRIGHT WORK IN NIGERIA

BY

IMAGBE NKECHI OGOCHUKWU
(PG/LAW/0601647)

FACULTY OF LAW
UNIVERSITY OF BENIN
BENIN CITY.

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CERTIFICATION

I, IMAGBE NKECHI OGOCHUKWU (PG/LAW/0601647) hereby certify that apart from references made to other people's work which are duly acknowledged herein, this entire project is the product of my personal research, and has neither in part nor in whole been presented for another degree elsewhere.

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IMAGBE NKECHI OGOCHUKWU
(PG/LAW/0601647)

APPROVAL

We certify that this project was completed and written by IMAGBE Nkechi Ogochukwu (Mat No. PG/LAW0601647) in partial fulfillment of the requirement for the award of the Master of Laws (LL.M) Degree of the University of Benin.

Dr. (Mrs) O.R. Rita
Project Supervisor **Signature & Date**

Dr. D.U Odigie
Faculty of Law, PG. Representative **Signature & Date**

Prof. B. Bazuaye
Dean, Faculty of Law **Signature & Date**

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All thanks to God Almighty, the Awesome One who made me what I am today and through whose grace this programme is a success.

To my mum and siblings whose unrelenting support are unparalleled despite the challenges, I am ever grateful.

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Lastly, I want to appreciate my friends and families for their support and prayers

DEDICATION

I dedicate this project to God Almighty and to my dear husband and father to our wonderful kids Mr. Wilfred Osasere Imagbe.

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TABLE OF ACRONYMS AND MEANINGS

C.D.P.A	Copyright and Designs and Patents Act
C.M.O	Collective Management Organisation
C.R.A	Copyright Act
CH.D	Chancery Division
I.P.R.S	Intellectual Property Rights
L.F.N	Laws of the Federation of Nigeria
NWLR	Nigeria Weekly Law Report
P.A.D.A	Patent and Design Act
T.R.I.P.S	Trade Related Aspect of Intellectual Property Rights
U.S	United States
U.K	United Kingdom
VARA	Visual Artists Right Act
W.P.P.T	World Performers and Phonogram Treaty

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ABSTRACT

This study appraises the civil remedies available to owners of copyright works in Nigeria, with a view to evaluating their effectiveness in protecting the rights of creators. Despite the existence of the 2022 Copyright laws in Nigeria. copyright infringement remains a pervasive issue, resulting in significant economic losses for creators and owners of copyright works. The effectiveness of civil remedies in protecting the rights of copyright owners in Nigeria is uncertain, and the extent to which these remedies provide adequate redress for infringement is unclear. The aim of this study is to examine works that are protected by copyright and inquire whether the remedies provided by the law in protecting the victims are adequate or whether there is need to seek other avenues beyond the ones provided by law to compensate these victims.

This study will adopt the doctrinal / analytical research method which will include researching into constitutions, statutes, conventions or treaties and other international agreements, case laws (judicial decisions), journals and books. Relevant laws, regulations and judicial decisions related to Copyright Law in Nigeria will be analyzed. This study underscores the imperative for copyright holders and researchers to pursue remedies for copyright infringements through civil litigation, thereby invigorating efforts to safeguard intellectual property rights.

The findings reveal that while various civil remedies, including damages, injunctions and accounts of profits, are available to copyright owners, their effectiveness is hindered by several challenges, including inadequate enforcement mechanism, lack of awareness, and corruption. The research contributes to the literature on Copyright Law and civil remedies in Nigeria, and provides insight for policy makers, legal practitioners, and creators seeking to protect their intellectual property rights.

CHAPTER ONE

1.0 INTRODUCTION

1.1 BACKGROUND OF STUDY

Copyright is one of the many rights that sums up the term; intellectual property.[1] It falls within the realm of incorporeal right in contra-distinction of real property. Interestingly; intellectual property is one of the areas of law in Nigeria experiencing rapid growth. The growth of this area of law has gained accelerated state over the past few years by reason of the unprecedented growth in e-commerce and use of internet.[2] It is therefore not surprising that copyright as an emerging field of intellectual property law is gradually achieving distinction.

Across the world, it is undisputed that what drives economy and social development is innovation and there are people who have the ability to innovate, whose talents and skills are greatly useful for economic development. It is in recognition of this and the need to encourage and protect innovation that the idea of intellectual property was mooted. However, the perennial problem of infringement of copyright work has been intractable as a result of advent in technology. The main aim of intellectual property law therefore is protection of the products of intellectual endeavor of an individual who had expended efforts and time towards the result of his creation on invention from undue exploitation.

Again, the entitlement to copyright protection is regarded internationally as arising from natural justice, in accordance with Article 27 the Universal Declaration of Human right

[1]1J.A Agaba. "Copyright Law: The Right of the owner Vs The Freedom of the User to Copy" Ahmadu *Bello University Journal of Commercial Law (ABUJCL)6* (No1)2013 pg 178

[2]Mordi Mark "Intellectual property in Nigeria" *TheAdvocate, Journal* of *Students' Representative* Council, Nigeria law school, Lagos campus. 2002/2003 session pg 118

of 1948[3] which says that "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

It is the duty of the State to provide necessary legal framework for protection of these works against any form of infringement and breach of the rights of its owners.[4] Under the extant Nigeria Copyright Law 2022, works which are protected as copyright works has been enumerated and they include literary works, artistic works, musical works, audio visual works, sound recording, broadcast and expression of folk laws. The sanctions and remedies available to the owners of these rights has further been set forth in section 2(1)(a-f) of the Copyright Act 2022.

This study therefore examines the concept of what copyright is all about, its historical development and the works protected by the relevant law as works of copyright.

1.2 STATEMENT OF RESEARCH

The current civil remedies available to owners of copyright works under the Copyright Act 2022 in Nigeria maybe inadequate, ineffective, or unclear leading to a lack of confidence in the legal systems ability to protect intellectual property rights. Furthermore the Nigerian copyright system faces challenges such as inadequate enforcement mechanisms, lack of awareness, and corruption, which may hinder the effectiveness of civil remedies.

Specific objective questions are:

[3] Article 27, Universal declaration rights 1948

[4]Y.I Arowosaiye and M.M.Akanbi "An Appraisal of the legal framework regulating infringement of copyright and its remediesinNigeria" *Benue State University Journal Of Private And Public Law* 1No.19(2003)190

i. Examine the current civil remedies available to owners of copyright works in Nigeria and how effective they are in preventing and addressing copyright infringement?
ii. Examine the challenges and limitation faced by owners of copyright works in enforcing their rights and seeking remedies in Nigeria?
iii. Examine what reforms or amendments are necessary to strengthen the civil remedies available to owners of copyright works in Nigeria and improve the overall protection of intellectual property right?

1.3 AIM

The aim of this study is to critically examine the civil remedies available to owners of copyright works in Nigeria, with a view to identifying the strengths, weaknesses and areas for improvement in the current legal frameworks. The objectives of this study are:

i. examine whether adequate remedies and reliefs has been provided under the current Copyright Act.
ii. critically appraise the extent to which these remedies can be explored maximally and with least difficulty by identifying and categorizing the civil remedies available to owners of copyright works in Nigeria.
iii. to analyze the effectiveness of civil remedies available to owners of copyright works available in Nigeria, including their ability to deter infringement, provide adequate compensation, and promote creativity and innovation.
iv. to appraise the judicial attitude construction or interpretation of the provisions of the Copyrights Act 2022.

1.4 SCOPE AND LIMITATION OF THE STUDY

The study aims to provide a comprehensive appraisal of civil remedies available to owners of Copyright works in Nigeria. The scope of the study includes legal frameworks for the examination of the Copyright Act 2022 and relevant laws and regulations governing Copyright protection in Nigeria, an analysis of civil remedies available to owners of Copyright works in Nigeria including damages, injunctions and accounts of profits, a review of relevant case laws and judicial decisions in Nigeria and a comparative analysis of civil remedies available to owners of Copyright works in Nigeria.

This study is subject to the following limitations: Time frame which limits the examination of the current state of copyright laws in Nigeria and may not provide a comprehensive historical analysis, the study relies on secondary sources, academic articles, books and online resources which may have limitations in the terms of time and resource constraints. Methodological constraints and access to information maybe limited by the same availability and accessibility of information, including case law, and judicial decisions.

1.5 SIGNIFICANCE OF THE STUDY

This study is significant because it aims at promoting intellectual property protection, addresses Copyright infringement, supports economic growth, making recommendations that informs policy and legislative reforms, enhances awareness and education, contributes to academic discourse and provides a framework for future research. By exploring the civil remedies available to owners of Copyright works in Nigeria, this study aims to make a meaningful contribution to the promotion of intellectual properties protection, economic growth and academic discourse.

1.6 METHODOLOGY

This study employs a doctrinal research methodology, adopting an analytical approach to achieve its research objectives. The research will be based on a comprehensive review of existing literature including textbooks, academic journals, statutes, and online resources. Additionally the study will examine relevant judicial decisions, comprising local and international case laws, to provide a nuanced understanding of the subject matter. Through this approach, the research aims to contribute meaningfully to the existing body of knowledge.

1.7 CHAPTER ANALYSIS

This research study on the appraisal of the civil remedies available to owners of Copyright works in Nigeria is divided into five chapters; Chapter 1 begins with an introduction to the research problems, aims and objectives and its significance, research methodology and its chapter analysis. Chapter 2 then provides a conceptual, theatrical frameworks and literature review. Chapter 3 goes ahead to show the legal and institutional framework afforded to works by copyright act in Nigeria and how copyright can be infringed upon also its requirement for proving infringement under the Copyright Act. It also analyses relevant case laws and judicial decisions in Nigeria. Chapter 4 examines the civil remedies available to owners of copyright works in Nigeria, including damages, injunctions and accounts of profits etc. Finally chapter 5 of the study concludes with recommendations and conclusion for reforms and amendments to the Copyright Act 2022.

CHAPTER TWO

CONCEPTUAL FRAMEWORKS AND LITERATURE REVIEW

2.1 CONCEPTUAL FRAMEWORK

Copyright is one of the many rights that encapsulate the term; intellectual property[5].' It falls within the realm of incorporeal right in contra-distinction of real property. Interestingly, intellectual property is one of the fastest developing areas of law in Nigeria. The growth of this area of law has gained acceleration over the past few years by reason of the unprecedented growth in e-commerce and use of internet[6]. It is therefore not surprising that copyright as an emerging field of intellectual property law is gradually assuming prominence.

Across the world, it is indisputable that what drives economy and social development is innovation and there are people who have the ability to innovate, whose talents and skills are greatly useful for economic development. It is in recognition of this and the need to encourage and protect innovation that the idea of intellectual property was mooted. However, the perennial problem of infringement of copyright work has been intractable as a result of advent in technology. The primary goal of intellectual property law therefore is protection of the products of intellectual endeavor of an individual who had expended efforts and time towards the result of his creation on invention from undue exploitation.

Again, the right to enjoy copyright protection is regarded internationally as arising from natural justice, in accordance with the Article 27, paragraph 2 of Universal Declaration

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[5] 1J.A Agaba. "Copyright Law: The Right of the owner Vs The Freedom of the User to Copy" Ahmadu *Bello University Journal of Commercial Law (ABUJCL) (2013) 6* (1) 178

[6] Mordi Mark "Intellectual property in Nigeria" *The Advocate, Journal* of *Students' Representative* Council,Nigeria law school,Lagos campus. 2002/2003 session 118

of Human Right of 1948[7] which says that "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'.

It is of course the duty of the State to provide necessary legal framework for protection of these works against any form of infringement and breach of the rights of its owners[8].

2.2 LITERATURE REVIEW

Copyright is a form of intellectual property, which has over the years defied precise definition[9]. Different authors and writers have their own definition and expression of the term. The reason is not far-fetched; copyright is extensive in scope covering works of many kinds. It includes not only literary, artistic works but also includes dramatic works, musical works, sound recordings, cinematographic films, broadcasts, performers rights, expression of folklore, computer software etc.

Sadly, the Nigeria Copyright Act[10] which is the extant law on copyright in Nigeria did not comprehensively define the term copyright but rather described it to mean copyright under the Act[11]. This definition by the Copyright Act is not helpful to a reader or researcher on copyright as it leaves such person in doubt as to precise meaning, definition and scope of

[7] Universal Declaration of Human Rights 1948, article 27 adopted by the United Nations General Assembly on December 10th through General Assembly Resolution 217A

[8] Y.I Aworosaiye and M.M Akanbi "An Appraisal Of The Legal Framework Regulating Infringement Of Copyright And *Its* Remedies In Nigeria" *Benue State University Journal Of Private and Public* Law (2003) 1 (19) 190

[9] 4Y.I Arowosaiye and M.M. Akanbi "An Appraisal Of The Legal Framework Regulating Infringement Of Copyright And *Its* Remedies In Nigeria" *Benue State University Journal Of Private and Public* Law (2003)(1)(19)190

[10] Copyright Act C28 LFN 2022

[11] Ibid section 108

the term. That definition is basically lacking in substance. However, section 108 the 2022 Copy Right Act[12] defines the term copy to mean:

> A reproduction in written form, in the form of a recording or audio visual works, 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.

Due to this in-comprehensiveness in definition of the term copyright in the law, robust inquiry into various books and works on copyright on the meaning and scope of the term shall be called in aid.

Oxford Dictionary of Law[13] which defines copyright thus:

> The exclusive right to reproduce or authorize others to reproduce artistic, dramatic, literary or musical works.... which also extends to sound broadcasting, audio visual works and television broadcasts (including cable television)

Black's Law dictionary[14] "provides us with more advanced and extensive definition. It reads:

> 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.

These dictionary definition and descriptions has been supported differently by the works of scholars and authors. Akanbi and Arowosaiye[15] expressed their views as

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[12] Copyrights Act, section 108 Cap C28 LFN 2002

[13] Elizabeth A. Martin and Jonathan Law "Oxford Dictionary of Law" 6th Ed,(London,Oxford University Press) 129

[14] A. Garner "Black's Law Dictionary"(10th Ed.) 411

[15] Y.I Arowosaiye and M.M. Akanbi "An Appraisal Of The Legal Framework Regulating Infringement Of Copyright And Its Remedies In Nigeria" *Benue State University Journal Of Private And Public Law*

follows *"Copyright is a form of intellectual property which has over the years defiled precise definition. It is the exclusive right to copy or authorize the reproduction and circulation of* it". They further viewed copyright as a negative right that prevents the appropriation of the work of one man by another but which however does not protect ideas. According to Skones and Copinger,[16] copyright law is in essence concerned with the negative right of preventing the copyright of physical material existing in the field of literature and the art. Its object is to protect the writer and artist from the unlawful reproduction of his material. It is concerned only with the copying of physical material and not with the reproduction of ideas and it does not give a monopoly to any particular form of words or design. Convendish[17] added that copyright simply means *"the right* of an *author, artist* or *composer to prevent another person copying an original work which he himself has created."* According to W.R. Cornish, Copyright is a right given against the copying of defined types of cultural, informational and entertainment productions[18]. Agaba[19] quoting Waziri K.M. in his book defined copyright as the exclusionary right that the owner of an intellectual creation has to make copies of his work, the right in use, production and exploitation. He concluded that the main purpose of copyright law just like in the case of other intellectual property law across the world is to protect works that are protected by copyright from copying by others without authorization. Adeyi[20] in his work stated that:

(2003)(1)(19)190

[16] E.P.Skones James and Copinger, Copinger *and Skones James* on *Copyright* 11th Ed.(London,Sweet and Maxwell) 19

[17] J.M.Canvendish and *K.Pool,Handbook of Copyright in British Publishing Practices 3rd* Ed.,(London,Cassel publishers).2

[18] W.R Cornish, "Laws of *Intellectual Property",* 7h Ed.(London, Butterworths & Co,(1995),94

[19] J.A. Agaba "Copyright Law. The Right of The Owner Vs The Freedom of the User to Copy"*(ABUJCL)* (2003) 6(1) 179

[20] Adeyi Omengala Kingsley"Effective Protection Of Intellectual Property Rights As Key To National *Growth"(Commercial and Industrial Law Journal)* (2002)13(1), 31

> Copyright is the right given to artists, literary men, musicians and performers to exclude others from substantial copying of the material form of their works and that what is protected is not the idea in the work but the form in which the ideas are expressed.

Similar views was expressed by Latraka[21] who describes same as statutory protection available to authors or subsequent owners of original works such as literary artists and dramatic works, films and sound recordings. Aboki in his book opined that, 'it is the exclusive right of an owner of a work to control the reproduction of his intellectual creation. They are those intangible, negative and incorporeal rights an owner of a work possess and which the law of copyright seeks to protect'[22].

In the words of Odion[23] in his book on intellectual property, 'it is the right to prepare and distribute copies of an intellectual works without let or hindrance from others'. According to him copyright consists of the exclusive right to the production, printing and multiplication of copies of literary works which is aimed at preventing others from the unauthorized reproduction of an existing work. Therefore the philosophy behind copyright work he maintained is in the reward of industrial diligence and talent coupled with the discouragement of laziness manifested it copying and production of existing works unlawfully.

Lord Atkinson in *Macmillan* vs Cooper[24] describing the scope of copyright penned thus:

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[21] Laltaika Eliamani Isaya "An Intellectual Property Prospective On The Southern African Development Community Protocol On Science Technology And Innovation" *Nigeria Institute* of *Advanced Legal Studies* (Lagos,2013)233

[22] *Y.Aboki,Economic and Cultural Basis for Copyright Protection in Nigeria* (2000) In:Asien *J.O* and E.S Nwabuche "A Decade of Copyright Law in Nigeria. Nigeria Copyright Commission",Nigeria,76

[23] J.O. Odion and N.E.O Ogba,Essay On *Intellectual Property* Law (Benin) Ambik Press, (2010) 15

[24] (1923)40 TLT 186

> 'It will be observed that it is the product of the labor, skill and capital of one man which must not be appropriated by another, not the elements or the raw material....upon which the labor and skill and capital of the first have been expended'.

The Court in *Adenuga Vs Ilesanmi Press and Sons (Nig) Ltd*[25] held that 'copyright is exclusive right to control to do or authorized the doing of any of the acts restricted by copyright'.

The yearning of all Nigerians is for sustainable development in every facet of the national life and all copyrighted works are potential economic enhancer, if properly protected and channeled particularly for the benefit of the copy right owners and the public. Thus, the effect of right enjoyment is that the public which enjoy it do so for monetary consideration in favor of the copy right owner while the right owner on his part also parts with a portion of the price he is paid by those enjoying his ingenuity to the general public by way of tax. So goes the chain that culminates in economic growth and development[26]. Hence it is criminal, fraudulent and cheating to do any acts or omission which deprives an owner of copyright the benefit of his labor. To this effect, Section 36 of the 2022 Nigeria Copyright Act[27] defines infringed by any person who without the license or authorization of the owner of the Copyright does any of those things which the Act prohibits.

One important fact that is deducible from the foregoing is that the importance and place of copyright law in the society cannot be over emphasized. The potency of piracy among other criminal actions against owners of intellectual property works especially in this computer age has further propped the call for increased awareness creation and enacting

[25] (1991)5 NWLR(Pt 189)82

[26] Olaolu S. Opadere,"Copyright Protection as Catalyst to Economic Growth" *University* Of *Benin Journal of Private and Property Law,* Vol 2, No.1 (2011)25.

[27] Copyrights Act, section 36 C28 LFN 2022

stricter laws that will be more deterring to prospective infringers. One cannot imagine the condition owners of copyright works are thrown into if there is no form of regulatory control for the exploitation of their work. It is submitted therefore that there is no better way of protecting works of intellectual property except through legislations like copyright law which confer copyright protection on such works and its enforcement.

However despite the need for protection of owners of copyright work, copyright law should not be so unnecessarily strict or too rigid that it inflames monopoly and kills competition. That is to say that copyright law tries to strike a balance between the need to protect owners of intellectual property works against undue exploitation misuse and abuse and the need to open the work for fair exploitation and usage by the members of public.

The 2022 Nigeria Copyright Act has tried to balance and cover the fears of these different schools of thought by providing for the protection of the moral and economic rights of copyright work owners and the right of the public to equally exploit such works. The limitation as to time within which these rights are exclusive to the owners of such works as well providing several exceptions or circumstances where these rights can be exploited by third parties or members of the public like fair use, educational purposes, non economic purposes amongst others serves as limitation and check to the exclusive rights of owners under the copyright act.

2.3 Works protected by Copyright

Works eligible for copyright world over are generally similar but there exist little differences depending on the jurisdiction. Eligible works simply means "works" that enjoy statutory protection. Under the Nigerian Copyright Act, these works has been copiously been captured. Section 2 (1) *(* a-f) of the Act provides:

1. Subject to this section, the following shall be eligible for copyright

a. Literary works;

b. Musical works;

c. Artistic works;

d. Audio visual works;

e. Sound recordings, and

f. Broadcast[28]

It must be noted that literary, musical and artistic works must meet up with certain legal requirement for it to be recognized and protected by the copyright law. This requirement is provided in Section 2 (2)(a & b) of the copyright Act thus:

(2) a literary, musical or artistic work shall not be eligible for copyright unless;

a. sufficient effort has been expended on making the work to give it an original character.
b. the work has been fixed in any definite medium of expression it can be perceive if reproduced or otherwise communicated either directly or with the aid of any machine or device[29]

The Act did not attempt to define the term literary work rather it provides a descriptive, non exclusive list of works falling within the scope of literary work. According to Section 108 of the 2022 Copy Right Act, 'literary work includes irrespective of literary quality, any of the following work or works similar thereto novels, stories and poetical works plays, stage directions, films scenarios and broadcasting scripts. Choreographic works Computer programmers, Textbooks, treaties histories, biographies, essays and article, Encyclopedias, dictionaries, directories, and anthologies; Letters, reprint and memoranda

[28] Copyright Act Cap C28 LFN 2022

[29] Section 2 (a-b)

Lecturers, addresses and sermons, Law reports, excluding decisions of the courts, Written tables or compilations This list is by no means in exhaustive. However this definition section of the Act is neither rigid nor foreclose any further additions to the list hence the word "includes" means that in as much as these works satisfy the requirement of originality and fixation they are protected. In *Ladbroke (football) Ltd V's William Hill (football) Ltd"*[30]*, the* courts stated that a football coupon as a literary work so also were the rules game rules as was also held in Caley *(A.J.) & Son Ltd V's Garnett (G) & Sons Ltd*[31]

In *Express Newspapers I's Liverpool Daily Post and Echo ple*[32] *the* court held that *a* webbing and set of five letter series (as appearing on a scratch card) qualifies as a literary work, being a collection. A significant factor was the skill and labor that had been expended in bringing these works to life. Peterson J in *University* Of *London Press Ltd Vs University Tutorial Press Ltd*[33] *the court* stated as follows*:*

> In my view the words "literary work" covers works which is expressed in print or writing, irrespective of the question whether the quality or style is high. The word literary seems to be used in the sense somewhat similar to the use of the word “literature" in political or electioneering literature, and refers to written or printed matters[34]

In *Hollinrake* v *Truswell*[35] Davey J. defined a literary work as an attempt to proffer information, instruction or pleasure for literary benefit. This means that literary work must impact any of these for it to satisfy the test as literary work. Using this measuring therefore the courts are not in anyway ready to give copyright protection to single words as shown in Exxon *Corporation &ors Vs Exxon Insurance Consultants International Ltd*[36] or to titles of films or books as was the case in *Francis, Day* & *Hunter Ltd Vs Twentieth Century Fox*

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[30] (1964)1 WLR 273
[31] (1936-45)Mac CC
[32](1983)FSR 306
[33] (1916)2 Ch.D 601
[34] Ibid 608
[35] (1894)3 Ch. D 420 at 427
[36] (1982) RPC 69

Corp Ltd[37] *or* in a title of a novel. Though in Ladbroke (supra), the court found sufficient skill, judgment and labor in the selection and presentation of bets in the form of a football-betting coupon, including the heading to attract copyright protection. Protection should not be hinged on the quality of work as the courts have been willing to accept low threshold in considering whether a work gives an intelligible meaning. For instance it was accepted that consequences of letters set out in sequence published in a newspaper provided information as to whether a reader had won or lost a bingo game and, as such were literary work[38].

The Act defines musical work to mean any musical composition irrespective of the musical quality and includes works composed for musical accompaniment[39]. The South African and English laws defined musical works to exclude words or actions intended to be sung, spoken or performed with music as these are protected or covered under literary works[40].

The Nigerian definition is a combination of sounds that make up the music as well as the works, such as the lyrics of a song which follow the musical composition. Furthermore just as it applies in literary work, musical work is guaranteed protection irrespective of music quality. In Lawson Vs Dundas[41] the four bar of a song were held to be protectable as *a* musical work. In *Hawkes & Sons (London) Ltd Vs Paramount Film Service* Ltd[42], the court held that copying of twenty second portion of a four minute music is deemed an infringement of the plaintiff's copyright in their musical work and that constitutes

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[37] (1940) A.C 112

[38] *Adelusi* & *Anor* Vs *Aromolaran &Anor* (1917-1976)1I.P.L.R 379, Dick Vs Yates (1881) 18 Ch 76 *Express newspapers Plc Vs News* (U.K) *Ltd* (1990) FSR 359

[39] Copy Right Act, section 108 Cap C28 2022

[40] Oyewunmi O.Adejoke,Nigerian *Law* of *Intellectual* property, University of Lagos Press and Bookshop Ltd(2015) 28,DCPA 1988,Section 1,(1)(a),2(10)

[41] (1985) Ch. D,Tina Hart et al "intellectual property Law" 5th edition,(Palgrave Macmillan Law Masters (2009)161

[42] (1934) Ch.D 593

substantial copying of the work. Likewise, in *Okiro* Vs Dick *Francis* &Anor[43], the court stated that the defendant infringed on the plaintiff's copyright in his musical work "Happiness is the Answer".

2.4 Artistic Work

The copyright Act defines artistic works to include:

a. Paintings, drawings, etchings, lithographs, woodcuts, engravings and prints
b. Maps, plans and diagrams
c. Work of sculpture
d. Plato graphs not comprised in a cinematographic film;
e. Works of architecture in the form of buildings models and
f. Works of artistic craftsmanship and also (subject to section 10 of this Act) pictorial woven tissues and articles of applied handicraft and industrial art[44].

Before an artistic work is guaranteed protection by copyright law, it must meet certain requirements under of section 1(2)(a-b) which is the requirement of originality and fixation. The Act put additional condition under section 1(3) where it 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 any industrial process. The provision above is inserted because such works fall within the category of works protected by the law of industrial design[45]. In *Hensher Ltd V's Restawile Upholstery (Lancs) Ltds*[46] lord Reid suggested that artistic work should be something of practicable utility or which adds value to its owner because of the artistic character In *Merchandizing*

[43] (1934) Ch.D 593
[44] Copy Right Act, section 10 Cap C28 LFN 2002
[45] Patents And Designs Act, Section 12, Cap P12 LFN 2004,
[46] (1976) AC 64

Vs *Harpbond*[47], the facial make up of the Pop Star Adam Ant was argued to be a painting and thus protected by copyright. The English court of Appeal rejected the submission. Lawton LJ remarked that it is fantastic to suggest that make up on anyone's face could possibly be a painting. He held that a painting required a surface and that Adam Ant's face did not meet the qualification. In *Kenrick Vs Lawrence,*[48]" the court was to determine whether copyright subsisted in a simple drawing consisting of a hand pointed to a square on a voting paper to be used by illiterate voter during election. It was stated that there is no copyright in such work as such minimal amount of skill and labor was insufficient to qualify a work as an original work.

2.5 Audio visual works

This is targeted as fixation of visuals. The copyright protection covers the entire package referred to as the film, which encapsulates the entire production; including all the moving images and the accompanying audio production[49].

Motile pictures were initially produced towards the end of 19th century. Initially films were only given protection in the UK as series of photographs or as dramatic works. The English law recognized cinematic films as a distinct category of copyright subject matter in the 1956 Act and conferred prior ownership on the "maker" thereof. Under the English copyright Act of 1988, films was stated to mean a recording or any medium from which a moving image maybe produced by any means. This broad definition encompasses celluloid films and video recordings or dish so far they produce moving

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[47] (1983)FSR 32

[48] (1890)25 QBD 99

[49] J.O. Odion and N.E.O *Ogba,Essay On Intellectual Property* Law, 15

image[50]. On the international plane, films were gradually recognized as the subject matter of authors' rights protection. According to Nigeria Copyright Act, audio visual works includes the first fixation of a sequence of visual images capable of being the subject of reproduction and includes the recording of a sound track associated with audio visual works. This definition of audio visual works under the 2002 Nigeria copyright Act encompasses a wide scope of visual images fixed in different media such as video tapes, as well as CDs, DVD and other media provided that such images are capable of being shown as moving picture and of being reproduced[51].

As noted, sound recording are protected as a separate category of works, where the recording of a sound track is associated with audio visual works, it is protected as part of and under the category of audio visual works and not sound recording. Thus a sound tracking in a film is taken as part of the film. Section 108[52] clears any doubt as to whether a sound track in a film is part of the film thus under audio word "and includes the recording of a sounds track associated with audio visual works".

Copyright in audio visual works is given to the person who is responsible for its production. Either the producer, director or financier and it covers videos, movies and television.

2.6 Sound Recording

Sound recordings were originally protected under the 1911 Copyright Act of England Which applied to Nigeria where they were protected as musical work[53]. However with time, sound

[50] 63Lionel Bently and *Brad.Sherman Intellectual property law* 2nd Edition,(Oxford University Press, (2004) 80

[51] J.O. Odion and N.E.O *Ogba. Essay On Intellectual Property Lav,* 16

[52] Copyright Act, section 108, Cap C28 LFN 2022

[53] section 1()1 Copy right act of England

recordings became distinct from musical works. The change in attitude was summed up in the dictum of Maugham J in *Gramophone Company vs Stephen Cawardine*[54]" thus:

> It is not in dispute that skill, both of a technical and of a musical kind is needed for the making of such record as the one in question. The arrangement of the recording instruments in the building where the record is to be made, the building itself, the timing to fit the record, the production of the artistic effects.... Combine together to make an artistic record which is very far from the mere production of a piece of music.

The English copyright Act of 1988, a sound recording is defined to mean:

(a) A recording of sounds, from which the sounds may be reproduced or

(b) A recording of the whole or any part of a literary dramatic or musical work from which sounds reproducing the work or part may be reproduced regardless of the medium on which the recording is made or the method by which the sounds were reproduced or produced[55].

In the same vein, the 2022 Nigeria copyright Act defines sound recording this way "Sound *recording means the first fixation of a sequence of sound capable of being perceived aurally and of being reproduced but does not include a sound track associated with cinematograph film*[56]*."*

On this, the case of *CBS Incorporated Vs Ames Records & Tapes Ltd*[57]*' is* apt. There, the court found that a person who provided the copying machinery or the material for home taping will verily be found to have necessary control over what is then done, and such scenario cannot be deemed an authorization of copying. Same position was adopted by the

[54] (1934)1 Ch. D 450 at 455

[55] CDPA Sec 5 B(1)

[56] Copyright Act, section 108, Cap C28 LFN 2022

[57] (1982)Ch.D 91

court in *CBS Songs Ltd Vs Armstrad Consumer Electronics Plc*[58]" where the court held that a producer of twin deck cassette recorders did not infringe a particular copyright, irrespective of the fact that the company advertised the capabilities of its product, because buyers attention were drawn by the company of the product to copyright obligations associated with the use of such electronic device.

Originality is required for sound recordings, the 1988 CDPA Act of England specifically stated that sound recording, of which a copy is taken from a previous sound recording, its guaranteed copyright protection. Where sound recording is played separately from film, it will be protected as sound recording otherwise it is protected and treated as part of the film. Interestingly in the recent case of Norowzian Vs Arks Ltd[59], the English appeal court stated that a film could constitute a dramatic work under section 3 of Act. This would be in addition to the separate copyright which protected the film itself as a film under section 5B of the law.

2.7 Broadcast

In the Nigeria Copyright[60] the term broadcast means sound or television broadcasting by wireless telegraphy or wire or both, or by satellite or cable programmers and includes re-broadcast. Thus sounds (radio) and audio visual (television) broadcast using different technological media such as wires or wireless telegraphy are covered. The term equally includes the reproduction of an existing broadcast. It includes the broadcast right, the

[58] (1988) A.C 1013
[59] (1988) 2 WLR 1191
[60] Copyright Act, section 108, Cap C28 LFN 2022

journalists right and the media house right. In contemplating the protection of broadcast the usual persons to be protected include the script writer, producers, directors, media houses etc[61]

In the 2013 Amended Copyright, Designs, Patents Act (CDPA) of England 1988[62], a broadcast is taken to mean an electronic transmission of visual images, sounds or the information which

(a) is transmitted for simultaneous reception by members of the public and is capable of being lawfully received by them or
(b) is transmitted at a time determined solely by the person making the transmission for presentation to the public.

2.8 Neighboring Rights

Some types of indigenous creativity, though distinct fall short of compliance with fixation requirements and do not in essence qualify for copyright protection. Such outputs are however protected by the Act under the neighboring rights. The first of this category of right is the performer's right while the second is expression of folk lore. These works are protected against unauthorized or illegal reproduction, adaptation, communication to the public and any other form of unauthorized exploitation. The protection of this right is anchored on the need to protection and safeguarding of cultural rights from unauthorized or abusive usage[63]. These rights are briefly examined.

2.9 Performer's Right

[61] Adegoke(n53) 29
[62] Section 61
[63] Odion and Ogba (n34) 17

This is the first right protected under the neighboring right. The copy right Act 2022[64] stated three meaning of performance in this regard to include

(a) a dramatic performance (which includes mime and dance);

(b) a musical performance; and

(c) a reading or recitation or literary act or any similar presentation which is or as far as it is a live performance given by one or more individuals.

The Rome Convention for the Protection of Performance, Producers of Phonograms and Broadcasting Organization[65] describes performers to include actors, singers, musicians, dancers and other persons who act, sing, deliver, declaim, play in or otherwise perform literary or artistic works. The importance is that performance is a live one because the object of the law is to protect works which might not otherwise qualify for protection as copyright on the basic of non fixation[66].

Section 64 of the Copyright Act 2022 protects performers against doing any of these acts by the members of the public in relation to their; Performing, recording, broadcast live; reproducing in any material form and adaptation of their performance. By section 70 of the Act 2002, performers right subsist in their performance until the end of the period of fifty (50) years from the end of the year in which the performance originally took place.

2.10 Expressions of folklore

This is the second right protected by the copyright Act under neighboring right. In Long Dictionary of Contemporary folklore was expressed to mean *"the traditional stories, customs, etc of a particular area or country[67]."*

The Copyright Act defines folklore to mean:

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[64] Copyright Act, section 63, Cap 28 LFN 2022
[65] Rome Conmvention, Article 3(a)
[66] Rome convention(1961)
[67] Langenscheidt Dictionary of Contemporary English, 40h Ed. (England) 621

> **A** group oriented and tradition-based creation of groups or individuals reflecting the expectation of its culture and social identify, its standards and values as transmitted orally by imitation or by other means including folklore, folk poetry and folk riddles, folk songs and instrumental folk music, folk dances and folk plays, production of folk arts in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, wood-works, metal ware, jewelry, handicrafts, costumes and indigenous textiles.[68]

The definition above encompasses the different cultural and traditional practices of societies. In particular is the fact that there is no requirement of fixation attached to it before its protection. There has been a call to change the "name expression of folklore" with some other names or terms like "expression of culture or traditional expression". This is because an author argued the term expressions of folklore "appears or gives the impression that these cultural expressions are souvenirs of the past with the negative connotations of being associated with the creation of the past or superseded civilization, rather than living dynamic and functional tradition[69]

It is submitted here that the above argument though appears attractive; the proposed change does not add any additional value to the substance; which is the right the law protects. The term folklore even though may sound archaic poses no challenge in its constituent. Therefore the argument for change in the nomenclature of folklore in copyright law may be described as differentiation without a difference. It is worth stating here that the Act fixed copyright in expression of folklore not on the society but on the copyright commission who exercise these rights on behalf of the states.

[68] Copy Right Act, section 74,75,76 Cap C28 LFN 2022
[69] Unilag press (2015) 126

CHAPTER THREE

LEGAL AND INSTITUTIONAL FRAMEWORKS FOR THE PROTECTION AFFORDED TO WORK BY COPYRIGHT ACT IN NIGERIA

3.1 Introduction

This chapter examines the requirement or standard set by the 2022 Nigerian Copyright Act law which a work must satisfy or reach for it to enjoy the copyright protection. A work of an author or producer etc, does not automatically wear the amour of protection upon its being produced. It must pass the legal test laid down by the relevant statute. It is these hurdles or requirements imposed by law that will be discussed here[70].

3.2 Criteria for Protection

Before any work can be guaranteed copyright protection, it must first of all pass through the statutory legal test before it can command and enjoy copyright protection and privileges respectively. In essence the requirement that the work be qualified helps to balance the protection offered to authors both of Nigerian origin and abroad. Therefore eligible works simply put connotes 'works" of copyright which is protect-able[71].

The Copy Right Act described "work" to mean translations, adaptation, new versions, or arrangements of pre existing works and anthologies or collection of works which by reason of the selection and arrangement of their content, is an original character[72]. By this provision, the Copy Right Act posit that an author of a work must have used the lowest level of effort in making the work. A closer principle is attached to the requirement of originality and it is

[70] L.A ATSEGBUA Copyright Law
[71] L.A Atsegbua Copyright Act (CapC28)LFN 2022
[72] Copyright Act, section 108 (CapC28)LFN 2022

often concluded that there is nothing substantive enough to be protected as a work or there is no originality.

In respect to literary, musical and artistic works, the Copy Right Act connotes that the tests of originality and fixation must be met before such work is accorded copyright protection.

Section2 (1) a-b of the Act[73] provides for this requirement thus:

(2) A literary, musical or artistic work shall not be eligible for copyright unless:

(a) Sufficient effort has been expended on making the work to give it an original character;

(b) 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.

In addition to the above requirement, all categories of works must satisfy requirements of the requisite connecting factors and works that satisfy these requirements enjoy automatic protection under copyright. That is to say that the criteria for the protection of copyright work can be mirrored from two distinct perspectives viz:

(a) By Reference to the Work

(b) By Reference to the Author

[73] Copyright Act section 2(1) (a -b) Cap C28 LFN 2022

3.3 Criteria by Reference to the Work

3.4 Originality

The concept of originality would only be understood by thorough reading of the provision of Section 2(1)(a) of the Act[74]. The Act provides that literary, musical and artistic work shall not enjoy copyright protection unless sufficient effort has been spent in its originality. The Act did not provide or furnish us with the definition and meaning of the term *"sufficient effort"* and *"original character"* which are key words of that section. In exploring the meaning of these terms, three tests have been propounded each with its distinct feature and peculiarity. These tests are:

i. The Sweat of the Brow otherwise called the English test
ii. The Modicum of Creativity otherwise called the American test
iii. The Skill and Judgment test (Originating from Australian and Canadian jurisprudence)

3.5 The Sweat of the Brow (The English Test)

This test requires the author to provide minimum evidence to show that he has expended sufficient effort in making the work. What the author must show here is evidence of industry and effort. The leading case here is that of Petersen J in University of *London Press* Vs *University Tutorial* Press[75]. Here, the House of Lords in determining if exam questions were copyright original literary stated that:

> The word original does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned

[74]Copyright Act, section 2(1)(a) Cap C28 LFN 2022

[75] (1983)7R.R 46

> with the originality of ideas, but with the expression of thought...the work must not be copied from another work. It should originate from the author.

"Originality" in the copyright law context does not mean the standard of quality of the Work rather it requires the evidence of some level of industry or creativity of the person claiming copyright in the work. Unlike patent, copyright is not about novelty, inventions and discoveries but rather the innovative and descriptive manner in which an idea has been expressed. Thus in *Macmillan* Vs *Cooper* Lord Atkinson observed:

> it will be observed that it is the product of the labor, skill and capital of one man which must not be appropriated by another, not the elements, the raw materials if we may use [76]
> the expression upon which the labor and skill of the first had been expended. To secure copyright for the products, it is necessary that labor, skill and capital should be expended sufficiently to impact to the product some quality or character which the raw material did not possess and which differentiates the product from the raw material

This aspect of requirement of originality has four consequences to wit:

1. There is no evaluation of merit needed before a work can be protected in copyright which would not be practical without a regime of application and examination
2. That protection is given for author's effort as much as creativity which has the effect of protection against unfair competition in some circumstances, and extends protection to the non aesthetics
3. There is no definite extension of copyright in a work and
4. over lapping of copyright is possible where copyright sources are reworked by an author rather than merely copied[77]

[76] 20 (1900)AC 539

[77] Catherine Colston and Jonathan Galloway,Modern *intellectual property* law,3rd Edition (Canada,Cavendish Publishing Ltd (2010) 291.

A relevant poser here however is the level or degree of effort, skill and judgment that is required to have been spent on a work to qualify a work as an original work which makes it protectable under copyright. That is to say what is the yardstick for measuring originality under the copyright law? It is in answering this that the dictum of Earl of *Hasbury* L.C.in *Walter* Vs *Lane*[78] will be called in aid thus:

> My lords, if I have not insisted upon the skill and accuracy of those who produce in writing or print spoken words, it is not because I think less of these qualities but because as I have endeavored to point out, neither the one nor the other are condition precedent to the right created by statute. That right in my view is given by the statute to the first producer of a book whether that book is wise or foolish, accurate or inaccurate, of literary merit or of no literary merit whatever.

In determining the concept of originality reference must be made as to whether the work is

a. A new Work

b. Derivable Work

c. Tables and Compilation

d. Computer Generated Works

3.6 New works

There is unlikelihood to be problem in showing the originality where the work originates from the author. In the words of Peterson J in *University* of *London Press (Supra)*[79], such works are original because its the author's original work.

However, under this principle, the labor must not be trivial or insignificant and the result must not also be minimal . A clear scenario is that of *Merchandizing Corporation*

[78] Ibid 549
[79] 2CH 601 (1916)

Vs *Hapbond*[80]*, here a* face painting was held unprotected by copyright. Similar decision was also reached by the court *in Rose Vs Information Services*[81]*. In Exxon Corporation Vs Exxon Insurance international* Ltd(Supra)[82], where it was held that "Exocon" is not protected by copyright as the result is not original. The court held that the word Exxon though invented and therefore original was of no purpose . In Dick v Yates'[83], the plaintiff, publisher of weekly periodicals, owned copyright in a novel titled *"splendid misery"* which he published in a weekly newspaper. The defendant, who was also a publisher of a weekly newspaper, published a story titled "splendid misery", in his own newspaper. The court held that as a general rule, there cannot be copyright cannot subsist in a book as copyright can only exist in something that is original.

3.7 Derivative work

This involves works that are derived or produced from an already existing literature whether they are or are not protected by copyright. Originality in derivative works falls under the principle of originality, namely that in order for a work to be protected, it must 'originate' from the respective author as its source[84]. Courts in England have however over recent years removes such strictness and set the requirement low, probably due to changes in society and technological innovation that has ultimately caused an up rise in derivative works. These consist for example of varied works of translations from one language to another, or updated new editions of certain books, and so on. They have been deemed to be protected as a result of a moral obligation more than anything else, which is that authors should be rewarded for building upon pre-existing works. The interesting thing about this is that copyright can subsist in a 'copied' work yet still infringe

[80] (1971) 2 ALL E.R 657
[81] (1987) FSR 254
[82] 3 All E.R 241
[83] (1880) 18 Ch. D 76
[84] Section 9 Copy Right Act 2022

copyright in an existing work and therefore a derivative work can be both original and infringing. Obvious examples of these works include translations, abridgments and new editions. For derivative work to be treated as original, copyright law seems to impose hurdles which any derivative work has to pass to gain recognition of originality. They include:

i. The labor must be of the right kind
ii. The effort must bring about a material change in the work
iii. The change must be of the right kind.

The issue that commonly arises in derivable works is the level of effort or amount of industry that is needed for a work to command copyright protection. And what level of industry will make a derivable work an original work? Giving a definite answer to this poser is not a mild one as the judicial approach to it has not been definitive. It seems as though in the UK now, relevance is places on quality rather than quantity. In Walter vs Lane"[85], a case decided under the 1842 copyright Act of England which did not contain requirements of originality as precondition for protection as copyright work, the court held that a newspaper report of an oral speech given by Lord of Rosebery, transcribed by a reporter from the talk was protected by copyright. This was because the reporter spent considerable labor, skill and judgment in producing an exact transcript of the speech. Subsequent English cases that follows which were decided on the repealed copyright Act of England, contrast with this position.

In *Macmillan V's Cooper (Supra),* the Privy Council held that reducing Plutarch's life of Alexander from 40,000 to 20,000 words so that it can be used in schools was not original It was held that the labor must portray some sort of "individuality' and 'independency'. This

[85] (1900)AC 539

seems to set an increasingly high standard for the types of labor, skill and judgment. University *of London Press Ltd v University Tutorial Press', it* was held that what is worth copying is prima facie worth protecting that is if a person copies an existing work and he or she has demonstrated that the work incorporated skill/labor it will be protected otherwise it would not be worth copying thus not worth protecting. The problem with this is that if the statement is to be taken at face value, it will prevent defendants from asserting that they are entitled to copy the claimant's work on the basis that it was not original. In *Lesile* Vs *Young"*[86]*,* the time schedule of local trains was copied from a general time table. Copyright protection was refused on the basis of lack of originality. However, in *Express Newspaper* Plc Vs News *(UK)* Ltd[87] a work consisting of selections of quotations from an interview was stated to be original copyright work involving the exercise of judgment and discretion in the selection and arrangement of the quotation. In *Ladbroke Football Ltd Vs William Hill Football Ltd*[88] it was stated that football coupon containing possible odds in football matches was original in character. These cases showcase lack of exactitude or precision as to what amounts to sufficient skill and effort however as Bently and Sherman state[89], the labor must be of the right kind.

Note that mere copying and 'competent draftsmanship' doesn't equate originality, as can be seen in the case of *Interlego* AG *Vs Tyco*[90] neither will adding and correcting existing work be sufficient to attract copyright protection' nor mere reprints of earlier works. Therefore, it was submitted that the pre-existing work must be developed or embellished in some way for copyright can be given to the new work. Thus *Interlego* Vs Tycol, the Privy Council determined if there was copyright in drawings of children's building blocks known as

[86] (1894)AC 335
[87] 1 WLR 1320
[88] (1964)1 WLR 273
[89] Lionel bently and (1989) AC 217 , intellectual property law (ibid) 94 Brad Sherman
[90] 3 All E.R 949

Lego bricks. After Lego's patents and designs in the bricks expired in 1975, Lego tried to retain monopoly on the bricks by claiming that copyright existed in drawings produced in 1973. As these drawings were based on earlier drawings, the question that arose was if the alteration made in 1973 was sufficient for it to be protected as an original artistic work. While the Privy Council recognized that these changes were significant and the result of considerable labor and expertise, they refused copyright in the later drawing. The mere fact that the drawing took skill and labor yet it wasnt original. Lord Oliver explained that there must in addition be same element of material alteration or embellishment which suffices to make the totality of the work an original.

Spending of effort or labor has sometimes been said to suffice for conferment of originality, but in practice some minimum skill or judgment is usually necessary. As Lord Oliver, *put it* in *Interlego, "only certain kinds of skill, labor and judgment confer originality.*

Again in *Cramp* & Sons Vs *Frank Smythson* Ltd[91] the selection of some common tables for inclusion in a diary devoid of any unique arrangement was held not to satisfy the original. The tables include such common information as postal rates, a percentage table and a calendar for the year. This same position has been followed by the Nigeria court.

In the first category it seems that the requisite labor may be employed either in the way the information to be included in the compilation is selected, or the way that the information is arranged. However it would appear that table or compilation would not be original where the selection and arrangement is directly or slavishly copied from another work or where the resulting work is a consequence of a mechanical, automatic or formulaic process. In Cramp v *Symthson'*[92], Viscount Simon suggested that the making of a chronological list which is automatic and only requires painstaking accuracy would not of

[91] (1944) AC 329
[92] (1944)AC 329,at 336

itself be original. The reason for this is that the making of a chronological list requires no element of taste or selection, judgment or ingenuity.

On the quantity of the labor, the courts in certain situations have accepted that mere exercise of substantial amount of routine labor[93] may give rise to an original work.

The Nigeria case of *Offery* Vs *Chief* S.O. Ola & *Sons Ors*[94] is apt on this. There the court held that copyright existed in a given product if that product is a result of some sustained exercise of minimal or physical energy of the producer, and the labor and the skill is not negligible or of common place. It finally concluded that a record book which was the subject matter of the suit which was a graph book consisting of only a layout of vertical and horizontal columns of straight lines were not original.

3.8 Computer generated works

Prior to the passage of 1988 copyright Act of England there was uncertainty as to the status of computer generated work. However the English Act of 1998 resolved this uncertainty by providing that a literary, dramatic, musical or artistic work attracts copyright protection even where it has been generated by computer in circumstances where there was no human author[95]. While these changes were useful in as much as they clarified that creations generated by a computer are protectable, yet it is mute on how the originality of such work generated by computer could be determined. This issue will further be looked at deeply in the course of this work.

3.9 The Modicum of Creativity (The American Test)

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[93] Unreported High Court Judgment of Osogbo High Court Suit No HOS/23/1968

[94] (1997) SC report 557

[95] Copyright, Design and Patent Act,1988 Section 9(3)

This test set a very high threshold for a work to be ascribed copyright protection. This test requires that an author must not only have exercised sufficient effort in making the work but however the work must be creative. For one to sue for a copyright here, his or her work must be a product of creative articulation. The author need not only to have sweated but the product of his effort must be creative. This school of thought became pronounced in the American case of *Feist Publications Ltd Vs Rural Telephone Company*[96]. Here, the "white pages" of *a* telephone directory were at issue. It was held that the minimal arrangement that such subscriber Information needs did not reach the level required of originality; that is to say that at least a minimal degree of creativity is needed which it found lacking in the work. The Nigeria case of *I.C.I.C. Directory Ltd Vs Eko Delta Nig Ltd'*[97] and *Offery Vs Chief S.O Ola&* Ors[98] applies in all falls to this point. *Feist's* approach has been explicitly rejected in Australia in *Desktop Marketing Systems Pty Ltd Vs Nelstra Corporation Ltd*[99] with the Federal Court of Australia affirming that laborious collection of data was sufficient to render the telephone directory an original copyright work. Again Feist approach has equally been rejected in Canada with the Canadian Supreme Court decision in *CCH Canadian Ltd Vs Law Society of Upper Canadall*[100] where the Court held that copyright subsisted in head notes of judicial decisions and stating that imagination or creative spark was not a necessary element of originality but that skill and judgment was.

3.10 Skill and Judgment Test (Traceable to the Canadian & Australian Jurisprudence)

Here the emphasis is on whether the author used his skill and judgment in doing the work. It is a mixture of the English and the American test. This test posit that a work is original in character if there is evidence that the author had used some measure of skill and

[96] U.S. Vol 340 1991 499
[97] (1977)1 FHLR 346
[98] (unreported) Suit No. HOS/23/68. Decided on June 1969
[99] (2002) FCAFC 112
[100] (2002)119 FCR 491

judgment in creating the work. This school of thought best describes the standard expected of derivative work of copyright where raw talent or knowledge may not easily be identified. Accordingly, works of compilations, tables, and computer generated works are acceptable as original if there is evidence that the author use some skill and judgment in the arrangement of the table or compilation of the work[101]. In *CCH Canada Ltd (Supra),* the Canadian Supreme Court was presented with an opportunity of reviewing the concept of originality. There, it appeared to set a Standard mid-way between the United Kingdom's skill, labor and judgment and the European or American requirement of an element of creativity in a work. It is significant to note that this judgment sought to secure a fair balance of rights between the power conveyed to authors by on copyrights and the public interest in the generation of and access to copyright work[102]. The Chief Justice opined that a "sweat of *the* brow" approach would over protect authors industry but to require an element of creativity, a nebulous enough concept at the best of time, would under protect authors' interest. Consequently, skill and judgment were to be required: skill in the use of knowledge, aptitude or ability; judgment in the capacity for discernment or to form an opinion or evaluation of comprise of different options. Thus case head notes were held to be original works, as were case summaries and topical indexes[103]

3.11 Nigeria Test

The Nigeria position as is encapsulated in section 1, 2 (a & b) of the Nigerian Copyright Act 2022 appears to be a harmony or a combination of the three above examined

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[101] (2004)SCC 13 (4 March 2004)Desktop Marketing System ply,CCH Canadian Ltd

[102] Catherine Colstoen and Jonathan Galloway. Mlodern *Intellectual Property* Law,3rd Edition,(London Cavendish Publishing Ltd,2005) 293.

[103] (2004)SCC 13 (4 march 2004)

tests. This is because the words *"Sufficient Effort"* as used in section 1(2) appears to accommodate the Sweat of the Brow test and Skill and Judgment test i.e. effort is acceptable however, it must be sufficient in nature. On the other hand, the section also accommodates the Modicum of Creativity test. This is because the words *"original character"* suggests that a work must be creative in nature before it can be adjudged to be original character. Thus in the case of I.C.I.C. *Directory Ltd* Vs *Ekko Delta Nig Ltd (Supra),* the same principle applied in the Feist was applied too. Here the plaintiffs who were publishers of the directory of incorporated companies in Nigeria instituted action against the defendants alleging infringement of copyright in their work, the 1st and 2nd editions of the National telephone Directory of Nigeria. The alleged infringement by the 1st defendant consisted in the unauthorized reproduction of the directory. The court found that the plaintiffs were not responsible for the contents of the said directories having copied from the documents of the Federal Ministry of Trade and the P & T and then turned round to claim authorship of what they had copied. Their claim was dismissed.

3.12 Fixation

Under the English Copyright, Design and Patent Act, it is required that literary, dramatic and musical works must have been recorded (or fixed) in a tangible form before copyright can subsist[104]. This ensures that there is an entity capable of being regarded substantively as a work in situation where creation without producing anything external is possible as for example, in the composition of music, or a poem or improvised dramatic action. It provides no protection for spoken words. In *Merchandising Corp of American Vs Harpbond (Supra), it was* held that facial make-up used by the pop star Adam Ant was not a painting because a painting is not an idea; it is an object, and paint without a permanent surface is not a painting. This decision and the requirement of fixation are reflection of the

[104] Sec 3(2)CDPA 1988A. *Christie, Spoken Words and Copyright Substance in Anglo-American* Law.(IPQ(2000)309

principle that copyright does not protect idea but the expression of it. Accordingly the work must be recorded in writing or otherwise. CDPA defines writing to include any form of notation or code, whether by hand or otherwise, regardless of the medium in or on which the recording is made. This provision was later amended in 1988 to accommodate new techniques so that a work is recorded as soon as it is stored on a computer.

The amendment further allowed creation of greater number of works than was earlier covered. It accommodates video, tapes as fixation for literary, dramatic and musical works[105]'.

In Nigeria the requirement of fixation was expressly captured by the Copyright Act precisely at section (2) (b) thereof. This legal requirement is only restricted to the three creative works of copyright. This requirement is particularly important because unlike some other categories of intellectual property, such as patents and designs, copyright protection is not dependent on registration or other governmental authority rather it comes into existence the moment it is fixed. In the case *of Yeni Anikulapo Kuti & Ors Vs T.M. Iseli & Ors'*[106] the question of eligibility of certain work of Fela Anikulapo Kuti (late) for copyright protection was raised before the court. The defendant therein, argued vigorously that the work did not meet-up with the requirement for copyright protection thus unprotectable having failed to satisfy the requirement of fixation. This he argued is based on the fact that the work is yet to be published. The court was not persuaded by such argument but held that the work is protectable since it has been written down. It has been fixed in a permanent form.

Following the rise in computer and internet or digital development, concern has been raised as to whether works on such landscape is covered by the Act; that is to say whether fixation is transient vis-a-viz the language of the Act which uses the term "definite medium".

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[105] 126Catherine Colston and Jonathan Galloway,Modern *Intellectual Property Law (Supra)* pg 287

[106] (2003-2007) 5 1.P.L.R 53

This issue has pass through judicial test. However it has been submitted that such works on those platforms should be deemed to be fixed provided there is some record which serves as proof of what has been created[107]

3.13 The Requirement of Domicile or that of a citizenship.

Here a work qualifies for protection in Nigeria if the author of the work or in the case of joint authors, any of the authors is at time when the work is made, a qualified person that is to say if the person is a citizen of, or is domiciled in Nigeria or a body corporate incorporated by or under the Nigeria law[108]. Citizenship in Nigeria may be by birth, naturalization or registration as conferred by the constitution[109] while domicile means the place at which a person had been physically present and that the person regards as home, a person's true fixed, principle, and permanent home to which that person intends to return and remain even though currently residing elsewhere. In *Ifeanyi Okoye & Anor Vs Spompt & Quality Services & Anor*[110] *the* plaintiff filed on action for infringement of their copyright in their architectural drawings. The defendant objected to the suit on the ground that the plaintiffs are not registered architects thus cannot maintain the suit. The objection was dismissed as the plaintiffs are Nigerians thus satisfying the requirement of the copyright law to seek copyright protection of their work. It is worthy to note that corporate persons must have their registered office in Nigeria before they can maintain an action.

3.14 Internet and Computer Generated Works

[107] Oyewunmi O.Adejoke.Nigeria *law* of *intellectual* property.(Lagos, University of Lagos press and Bookshop Ltd)(2015) .43.

[108] Section 2(1)A-B 1999 constitution

[109] 1999 Constitution as Amended,Section 25-27

[110] (2003-2007) 5 I.P.L.R 117

The 1988 Act, resolved this uncertainty by providing that literary, musical and artistic works attracts copyright protection even though they are generated by computer.

Also storage of original works in electronic format does not alter their status as works in England[111]. The definition of electronic as actuated by electric, electro-magnetic, electron-chemical or electro-mechanical energy under the English Act is wide. This same position can be maintained to works incorporated into website. They retain their characters copyright work.

One of the most contentious copyright issues which has arisen in relation to internet is whether an intermediary service provider (such as website host) can be liable for storing and making available infringing content provided by the users. In England such intermediate service provider can be liable and can equally be jointly liable with the user as was held in *CBS* Songs *Ltd* Vs *Amstrad Consumer Electronics Plc and Anor*[112], however the electronic commerce (EC Directive) Regulation 2002 provided immunity from any financial and criminal liability (but not liability from infringement itself) for intermediary services providers engaged in certain specified acts namely acting at a mere conduit, cashing and hosting. Furthermore, the Copyright and Related Rights Regulation 2003 (S.I. 2003 No. 2498) (the Copyright Regulation was enacted by the English Parliament to take care of emerging technological growth especially as regards works on internet) implements the directive of the European Parliament and the Council of the European Union 2001/29/EE on the harmonization of certain aspects of copyright and related rights in the information society. This regulation came in force in U.K. on October 2003.

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[111] 133Catherine Colston (Supra)289

[112] (1988)2 AER 484135Tina Hart,Linda Fazzani and Simon *Clark,Intellectual Property* Law, 5th Edition,(U.K,Paygrave Macmillan Law Masters,(2009)295.

The application of Nigeria law in areas of internet has remained undetermined. There might be a challenge incorporating such works on the internet. This is because the copyright Act set the two basic conditions for protection as originality and fixation. With the wave of copying, and downloading and uploading going on the internet, sometimes, it may be difficult to find out which of those works are the original.

Again people download works online (from the internet) edit such works, make their contributions on additions and upload them online again. While some upload a work and later delete them. Where such work before it is deleted has been downloaded and later shared by users online, it becomes more difficult to trace the originality in those works.

On the other hand, the second ambit for protection is the fixation requirement. The nagging poser is whether the internet is a "definite medium".

It is submitted here that the Nigeria Copyright Act seems to have accommodated the challenges of the present computer or internet age. As the internet can be held as a definite medium of expression as used in the Act. Where the challenge will be faced is on such works' passage of test of originality.

3.15 Rights conferred by Copyright Act

One of the most consistent themes in the history of copyright law is that the types of activities that have fallen within the copyright owners control have steadily expanded. For example the 1710 statute of Anne conferred on authors and proprietors of books the limited right to print and reprint those books in the early 19th century the copyright owners monopoly as regards musical and dramatic works are extended to cover not only the reprinting of the work but also the public representation of the work. In 1911, the reproduction was expanded with advent of broad casting, the copyright owners right was

interpreted as covering broadcasting etc. Therefore other rights to distribute rent and tend copies were added.

For the most past, the right was expanded in a piecemeal manner in response to external pressure notably to technological change[113]. In Nigeria, works that come under the umbrella of copyright protection enjoy a wide range of rights both economic and moral. This is because copyright is a monopoly right and is largely defined in terms of the exclusive rights it confers on authors or other copyright owners.

The economic right protection afforded by law consists essentially of the exclusive right to control the exploitation in Nigeria of the work. These bundles of rights are provided under Section 6, 7, 8 and 9 of the Copy Right Act 2022. These rights basically are the rights to copy, reproduce, publish, translate, distribute, adapt, communicate or broadcast and perform the work in public[114]. The Act further provides for moral rights which are exclusive to authors of copyright work.

It must be noted that these rights subsist on the owner or author of a work so long as the duration of copyright on the work has not elapsed. Once it is established that the statutory period conferred on the author or owner over such work has expired, the member of the public has the freedom to exploit hitherto the exclusive right conferred on the author.

3.16 Moral Right

The term "moral right" is a translation of the French term "droit moral", and refers not to "morals" as advocated by the religious right, but rather to the ability of authors to control the eventual fate of their works[115]. When we speak of moral rights in the context of

[113] Lionel Bently and Brad Sherman. *Intellectual property Law* (supra) 130.

[114] These are provided for under Sections 5-9 of the Copy Right Act 2004

[115] Betsy Rosenblatt,"Moral Rights Basics",Harvard *Law School.* March 1998.

intellectual property protection, it is referred to as the personal rights of a creator to control, protect and enforce the artistic integrity that subsists in all manner of produced intellectual property works.

Moral rights protect the personal and reputational, rather than purely monetary, value of a work to its creator. The concept of moral rights therefore lies on the connection between an author and her creation. Moral rights are based on the belief that artistic creation is something more than an attempt to earn a living but a representative of social values concerning authorship, creativity and artistic works. They flow from the fact that a literary or artistic work reflects the personality of the creator just as much as the economic rights reflect the author's need to keep the body and soul together[116].

Article 27(2) of the Universal Declaration of Human Rights recognizes that the creator of any scientific, literary or artistic production have both moral and material or economic interests in their work which have a right to be protected. The purely economic nature of copyright under the common law systems was long seen as the principal feature distinguishing it from the author's regime of civil law[117]. This was illustrated in the case of *Chaplin* Vs *Frewin*[118]"" here, Charlie Chaplin's minor son copyright was regarded as a commercial interest and the author's moral welfare was seen to be irrelevant despite him being a minor. It was not until the Copyright Designs and Patent 1988 Act of U.K came into force on 1st August 1989, there was no provision of such right in the U.K. law[119]

Moral right originated in French law and the Rome Act of 1928 added moral right to the Berne Convention of 1886. Article 6(1) of the Berne Convention provides thus:

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[116] https://www.lawctopus.comn/academic/moral-rights-author/. Accessed on 25th July 2019.
[117] Paul Mareth, *Intellectual property law* (London) Sweet and Maxwell (1996)p47
[118] (1996)Ch.D 71
[119] Catherine Colston and Jonathan Galloway,Modern *Intellectual Property Law* 450

> Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation[120]

Therefore, in agreeing with article 6(1) of the Berne Convention with the amendment of English copyright Act of 1956 to that of 1988, the White ford Committee which was the committee set up for the purpose of amendment of 1956 copyright law recommended four moral rights. These include:

1. The right to be named as the author or performer of a work (the right of paternity)
2. The right to object to derogatory treatment of one's work or performance. (the right of integrity)
3. The right to object to false attribution of the work of a work (the right against false attribution)
4. The commissioner's right to privacy in relation to commissioned photographs and film, where commissioned for private purpose-(the right of privacy)[121]

Moral rights serve two main functions, namely, the protection of artistic integrity which subsist in a work and the artistic integrity which subsists in the artist as a person[122]. they are the author personal rights and cannot be assigned, transferred, licensed or otherwise dispose of. In *Confetti Record V's Warner Music* UK Ltd[123], it was held that an owner of a copyright work can only object to the distortion, modification or mutilation of the work if such

[120] Nidhi Kumari,"The Moral Rights of an Author"

[121] Ibid 453

[122] Legalvision,"What are Moral Rights?",October 23,2018.Available at https://legalvision.com.au

[123] (2003)EWHC 1274

https://smallbusiness.chron.com/moral-rights-copyright-laws-62659.html.Accessed on 26th July 2019

treatment is prejudicial to the honor or reputation of the author. In Europe, andother places, moral rights are protected by ordinary law. This is unlike what is obtainable in the United States. The Visual Artists Right Act (VARA)of 1990 is the clearest application of moral rights in U.S law. VARA which applies exclusively to visual art, provides moral rights protections to visual creative works such as photographs, paintings, drawings and scriptures. The law protects a work's integrity as well as attribution so that the original artist can decide to be identified as the creator or can even decide on remaining anonymous. However outside VARA, moral rights are not a well established in U.S law as they are in some other countries where they are protected by ordinary copyright law[124]. In fact, under the American Law, beyond VARA which applies to visual art only and not for literary or musical works, moral rights receive protection only through judicial interpretation of several copyight, trademark, privacy and defamation, libel statutes[125].

In India, the statutes and the ruling of the courts indicate that morsl rights includes only integrity right and paternity rights. Though the legislation in this regard has been limited in India Statute[126] on copyright yet the courts are favoring a wider interpretation of these rights. In *Amar Narth Sehgal* Vs *Union* of *India* & *Anor* [127], The plaintiff created a bronze mural for the most prominent international convention hall in the county's capital. This embellishment on a national architecture became a part of the Indian heritage. However problem came up when government removed the sculpture from the wall and dumped it in the store room. His appeal to the government authorities for restoration of the mural failed on deaf ears hence the suit. In the course of proceeding two of the several issues for determination was whether the plaintiff had moral right over the mural even when the copyright is vested with the Union of

[124] https://www.lawctopus.com/academic/moral-rights-author/. Accessed on 25th July 2019

[125] Betsy Rosenblatt, "Moral Rights Basics"

[126] Indian Copyright Act of 1957,Section 57.

[127] 2005) 30 PTC 253

India and whether such right has been breached. The court finding for the plaintiff held as follows:

> Mural whatever be its form today is too precious to be reduced to scrap and languish in the warehouse of the Government of India. It is only Mr. Sehgal who has the right to create his work and therefore has the right to receive the broken down mural. He also has the right to be compensated for the loss of reputation, honor and mental injury due to the offending acts by the UOI[128].

In Nigeria, beyond economic protection of authors, the Copyright Act equally safeguards the integrity of intellectual creation as part of the author's personality. To this end, the Act Confers authors of works in which copyright subsists certain moral rights in the created works[129]. Worldwide, economic rights are of limited duration and are freely assignable and transmissible. This is not so with moral rights which are sacred and cannot be compromised on the altar of pecuniary gain[130].

According to the copyright Act, moral rights are perpetual, inalienable and imperceptible[131]. These rights include:

(a) The right of the author to claim authorship of his work in particular that his authorship be indicated in connection with any of the acts referred to in section 5 of the act except when the work is included incidentally or accidentally when reporting current events by means of broadcasting

[128] https://www.lawctopus.com/academic/moral-rights-author/, Accessed on 25th July 2019.

[129] Copy Right Act , section 14 Cap C28 LFN 2022

[130] Oyewunmi *O.* Adejoke. *Nigeria law of intellectual property.*

[131] Copyright Act, section 14 Cap C28 (LFN)2022

(b) The right to object and to seek relief in connection with any distortion, mutilation or other modification of, and any derogatory action in relation to his work, where such action would be or is prejudicial to his honour or reputation[132].

The Act, extends the authors right to cover authors heirs and successors-in-title[133]. In *Maurice Ukaoha V's Broad-Based Mortgage Finance Ltd & Anor[134],* the plaintiff constructed *a* 17 Storey architectural model during his student days at the University of Lagos and lent it out to the defendants to display temporarily in their conference room. Thereafter, he traveled to Kano where he saw the architectural model in newspapers. The defendants had appended in the newspapers that the model was their proposed headquarters in Abuja. This he did without the plaintiff's permission. They further attributed the model not to the plaintiff but to one Goni and Associates. The court per Jinadu J. held, *inter alia,* that:

> From the totality of evidence adduced by the plaintiff, I find and hold that copyrights exists in the model work Exhibit C which is an artistic work of art made and constructed by the plaintiff, a qualified person under the provisions of section 2(1)(a) of the Copyrights Act, Cap.28, LFN,2022... I hold that copyrights exists in the model... All these actions of the defendants were done without the consent, authorisation or licence of the plaintiff, the owner of the copyrights in Exhibit C. This shows that the defendants have infringed the copyrights of the plaintiff in Exhibit C under the provisions of sections 36 of the Copyrights Act, Cap 28, Laws of the Federation of Nigeria, 2022.

The judge also granted an injunction stopping the defendants from further act of infringement and awarded N250,000 general damages in favor of the plaintiff.

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[132] Copyright Act, section 14(2) Cap C28 (LFN)2022

[133] Copyright Act, section 14(3) Cap C28 (LFN)2022

[134] (1997)FHC 477

From the foregoing, it is clear that the breach of moral right is a breach of statutory duty both in England[135], India[136], U.S[137] (for works of visual art) and in Nigeria[138]. Therefore where there is breach of this right, the copyright owner can get an injunctive order against the infringer as well as damages.

In 2006, further moral rights for performers were granted by the Performers Regulations2006 in England which incorporated section 5 of the World Performers and Phonogram Treaty (WPPT)1996 which Nigeria also is a signatory to. These require that performers have moral rights to be identified as the performer and to object to derogatory treatments of their recorded or broadcasted performances.

3.17 Infringement of Copyright in Nigeria

The law of copyright confers numerous rights to the owner of the copyright work which are exclusive to them and as such the owner right include stopping others from tampering with those exclusive rights by preventing others from performing any of the acts that breaches these rights.' However, the owner can perform those acts himself or grant a license (as permission) to a third party to do same and even sue for breach of these rights. The totality of these unauthorized acts of third parties which owners of copyright works can maintain action for are what constitutes infringement of copyright[139].

The plaintiff must satisfy or fulfill certain requirements or obligations to win an action for infringement. These statutory requirements shall be discussed hereunder.

3.18 Nature of Copyright Infringement

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[135] Section 103(1) and 205N (1) of the CDPA 1998

[136] India Copyright Act 1957, section 57.

[137] Visual Artists Right Act (VARA) of 1990

[138] Copyright Act, section 14 Cap C28 (LFN)2022

[139] Melville B. Nimmer, *Nimmer* on *Copyright,* Volume 2 (New York, Mathew Bender & Co Incorporated,1975)140

Copyright infringement means using or producing of copyright protected material without the permission of the copyright holder[140]. It is described by the U.S Copyright Office in the following way

> As general matter, copyright infringement occurs when a copyrighted work is reproduced, distributed, performed, publicly displayed or made into a derivative work without the permission of the copyright owner[141],

the following elements must be shown to bring a copyright infringement action :

1. That the plaintiff is vested with ownership of copyright in the work or that he is vested with the authority or power to so institute the action either as assignee or exclusive license.
2. That copyright was truly infringed upon and where it is only a part or portion of a work, that copyright subsist in such sections
3. That the defendant has done an act in relation the work which is exclusive to the plaintiff
4. That the defendant, has no right in the act complained of[142].

The different definitions and provisions of the copyright infringement point to one salient act that constitute infringement, the absence of permission or consent of the owner of such work or his authorized user to the alleged infringer. Thus what the law frowns at is not the usage or exploitation of a copyright work by third parties but the unauthorization or lack of consent to such usage especially for economic gain.

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[140] Will Kenton "Copyright Infringement" Investopedia, June 25 2018.Available at https://www.investopedia.com/terms/c/copyright-infringement.asp. Accessed on 26th July 2019.

[141] Ibid
Wikipedia,Copyright infringement,Available at https://en.m.wikipedia.org/wiki/Copyright_infringement.Accessed on 26th, July 2019

[142] Oyewunmi O.Adejoke. *Nigeria law Available* at https://www.minclaw.com/legal-resource-center/what-is-copyright-infringement/. Accessed on 26th July 2019.

The Nigeria Copyright Act provides the acts or actions that are tantamount to infringement or breach of copyright in a work[143]. The Act provides that copyright infringement occurs when a person who without the license or authorization of the copyright owner does or causes any person to do an act, the doing of which is controlled by copyright, imports, distributes, exhibits in public ,reproduces, publishes any work that is protected by copyright. The above provision of the Nigeria Copyright Act is similar to the provision of the law applicable in U.K[144]. Copyright Designs and Patent Act (CDPA) of U.K at Section16 (3) went further to provide that that it is immaterial whether the infringement was in relation to the work as a whole or any substantial part of it and whether it was direct or indirect. From the above provision of the Act, two streams of infringement are therefore created. These are:

(a) Direct or Primary Infringement

(b) Indirect or secondary infringement

3.19 Direct/Primary infringement

Primary infringement involves a direct infringement by the defendant. This according to the Copyright Act is the unauthorized doing of any of the act within the exclusive right of copyright owner which are provided for in sections 6-8 of the Act. The principal acts that fall under primary infringement includes reproduction, copying, communicating to public, adaptation, copying and reproduction.

[143] Section 15 CRA,1988.
[144] CDPA 1988,Section16(2)

According to Black's Law Dictionary," the word 'copy' was simply described as *"limitation* or *reproduction* of an original"[145]. Copying in relation to copyright is described to mean:

> a reproduction in written form, in the form of recording or audio visual works 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 building or mode[146].

Likewise *the* work reproduction also means "the making of one or more copies of a literary, musical or artistic work, audio visual works or sound recording*"[147].* Thus the act of copying and reproduction are like Siamese twins as engaging in one involves engaging in the other whether manually, mechanically and otherwise. Except in cases like photocopying (where it is done outside the permitted exemption like research, review, private use, criticism, reporting current events etc)," establishing copying by direct evidence is not easy and as such it is uncommon that the plaintiff has availability of witness to the act of copying[148]. Apart from the unavailability of witnesses, copying can take place without any object physical manifestation since copying in this regard can be proved through direct evidence (Defendant's admission of committing the act) and circumstantial evidence or inference (through proof of defendant's access to the work and evidence of strong similarity of the work). Of course, if there are no similarities, no amount of evidence of access will sufficiently prove copying. If there is evidence of access and similarities, then the court must determine whether the similarities are sufficient to prove copying. On this, thorough analysis and examination of evidence is relevant, and the testimony of experts may be

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[145] A. Garner "Black's Law Dictionary"(10th Ed) 410

[146] Copy Right Act, section 108 Cap 28 LFN 2022

[147] ibid

[148] Melville B.Nimmer,Nimmer on Copyright, Vol 2 (New York,Mathew Bender & Co Incorporated,1975)pg.Infringement" *Columbia Law Review,* Vol. 90, No. 5 (June, 1990), pp. 1187-1214,at 118. *Novelty Textile*

received to help the court. If evidence of access is absent, the similarities must be so 'striking' as to preclude the possibility that plaintiff and defendant independently arrived at the same result.

If the first test of 'copying' is established, then, there arises the second issue, that of illicit copying (unlawful appropriation). On this issue, the test is the response of the ordinary lay hearer (ordinary observer test); thus dissection (of evidence) and expert testimony are irrelevant[149]. This test generated several analytical controversy and differences in opinion among the justices. Consequently, in the case of *Heim* Vs *Universal Pictures* Co"[150] that followed thereafter, the term 'unlawful appropriation' was jettisoned for the term 'substantial or material similarity'. There, the Court comparing the similarities between two compositions, concluded that where there is little or no evidence of access to the plaintiff's work, 'mere similarity' would not be sufficient[151]. The role of substantial similarity here is probative; the idea is that if the defendant had access to the plaintiff's work and the defendant's work is similar enough to the plaintiff's, the most plausible inference is that the defendant truly copied from the plaintiff[152]. Again this test in itself created several loopholes. According to Larmly, it *should* be *noted that this refinement, "substantial similarity," came with its own problems as courts confusingly started combing the two step test under one umbrella of substantial similarity[153].* Alan submitted that although "improper appropriation" as was used in *Arnstein* is perhaps a little too vague to be helpful, the term "substantial similarity" *perpetuating* risk of *confusion,[154].* He rather proposed that the term be substituted with the phrase *"probative similarity"[155].* Again, this test of Probative

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[149] Alan Latman, "Probative Similarity" As Proof Of Copying: Toward Dispelling Some Myths In Copyright
[150] 154 F.2d 480(2d Cir.1946).
[151] Ibid 487
[152] https://booksc.xyz/book/48201179/6a799. Accessed on 28th July 20 1920

[153] Ibid pg *1198,Murray Hill Pubs. V's Twentieth Century Fox Film Corp.,361F.3d* 312,316-

[154] Alan Latman, 'Probative Similarity' As Proof Of Copying; Toward Dispelling Some Myths in Caopyright
[155] Ibid 1204

similarity Lemley submitted has its own problem[156]. Then later came the test of *ordinary observer* which was propounded in the case of *Sid & Marty Krofft Television Prods, Inc Vs McDonald Corp*[157] which advocates the extrinsic and intrinsic analysis of probative similarity and unlawful appropriation steps respectively. There, the plaintiffs who are owners of a copyrighted children's television show, were awarded damages base on copyright infringement of that show by the defendants. The defendant appealed to the Ninth Circuit arguing that as a matter of law, its copying of the plaintiff's work did not constitute misappropriation because the defendant's work and that of the plaintiff were too dissimilar. It was held that under its "idea/expression" analysis, the defendants had indeed infringed on the plaintiff's copyright. The Court analyzed the extrinsic test by evaluating the level of similarity between the ideas proposed by the two works. Here expert opinion is not necessary because this element depends on identification and comprise of specific criteria for the court to decide if the two works are substantially similar. On the other hand, the court in analyzing the intrinsic test evaluates whether beyond the now established similarity of ideas; there are similarities in the manner in which the two works express the idea. This test relies on observations of ordinary reasonable persons and eschewing the analytic dissection and expert testimony[158]. Adopting this approach propounded by the ninth circuit, the Court *in Twentieth Century-Fox Film Corp V's Stonesifer's*[159] held thus*:*

> The two works involved in this appeal should be considered and tested, not hypercritically or with meticulous scrutiny, but by the observations and impressions of the average reasonable reader and

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[156] Lamley A. Mark,"Our Bizarre System for Proving Copyright Infringement" 29

[157] 562 F.2d 1157,196 U.S.P.Q.(BNA)97(9th Cir.1977)

[158] John R. Autry, "Towards A Definition Of Striking Similarity In Infringement Action For Copyright Musical https://digitalcommons.law.uga.edu/jipl/vol10/iss1/5.Accessed on 28th July 2019.

[159] 140 F.2d 579, 582 (9th Cir.1944)

> spectator.' Because this is an intrinsic test, analytic dissection and expert testimony are not appropriate.

While both in *Arnstein* and *Kroffi,* the Courts seem to share same idea, there is one major difference between the approaches. The former essentially measure substantial similarity reference to the quality of probative and verifiable similarities shared by both works; thus the court arrives at the conclusion that access to work may be gotten where the amount of similarity "strikes". Whereas the later by contrast doesn't actually make mention of access and overlooks the former's formulation of similarity of lesser or higher degree test[160]. These two tests are randomly applied by the court and can aid a plaintiff who has a very strong case.

This same challenge existed equally in England as seen in the English Court of Appeal decision in *Francis* Day *and Hunter* V's Bron[161]. There, P. de A.; the composer of a song called 'Why' was said to have infringed the copyright in another song "In a little Spanish town" byknowingly or unknowingly copying and reproducing the first eight bars of the song. The defendant claimed not to have heard the plaintiff's song but if he had heard it, it was probably when he was small. The trial court found from evidence that the eight bars of the defendants chorus, constituted substantial part of the whole tune and that there was a definite or considerable degree of similarity between these eight bars of the work. He however found that *"there were differences real enough to take into account while considering whether "Why" is an independent creation"*[162]. The trial court accepted the defendant's case and held that there was insufficient evidence to prove subconscious copying and consequently dismissed the case. Dismissing the appeal by the defendant at the Court of Appeal, Willner L.J held;

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[160] John Autry (Ibid)118
[161] (1963)Ch.D 587
[162] Ibid 588

> ... in order to constitute reproduction, within the meaning of the Act, there must be (a) a sufficient degree of objective similarity between the two works and (b) some casual connection between the plaintiff's and the defendant's work

This approach was reaffirmed by the court in *Baigent* & *Leigh Vs Random House* Group[163] where the court summarized the issue which frequently arise in infringement proceeding for literary works while asserting that the checklist is in exhaustive by asking the following questions thus:

1. What are the similarities between the alleged infringing work and the original copyright work? Unless similarities exist, there is no arguable case of copying and an allegation of infringement should never get as far as legal proceeding let alone trial.
2. What access, direct or indirect did the author of the alleged infringing work have to the original copyright work? Unless there was some evidence from which access can be directly or properly inferred, it will not be possible to establish a casual connection between the two works, which is essential if the claimants are to prove that the defendant's work is a copy. If the defendant contends that no such use was made, what is his explanation for the similarities between the alleged infringing work and the original copyright work? Are they for example coincidental? Or are they explained by the use of similar sources? If the latter, what are the common sources which explained the similarities? How were the sources used by the authors of the respective works? If however, use was made of the original copyright work in producing the alleged infringing work; did it amount in all the circumstances to "a substantial part" of the original work? The acts restricted by the copyright in a

[163] (2006) EWHC 719 or (2007)EWCA 247

literary work are to the doing of them in relation to the work as a whole or any substantial part of it.

3. what are the circumstances or factors which justify evaluating the part copied in the alleged infringing work as a 'substantial' part of the original work?[164]

The salient poser is; how has this test been observe applied. Indeed the test as to whether what was copied amounts to substantial copying is not an objective one. Here the principle that what is worth copying is worth protecting can be given full scope. Each case is accessed and tested by the court base on the evidence before it, Once that court is satisfied that there is copyright in a work and the defendant has taught it worthwhile copying out word for word the work or some part of the work, it will be very hard to persuade the court that the part copied was not.

> Did the defendants reproduce a substantial part of it? Whether a part is substantial must be decided by its quality rather than its quantity. The reproduction of a part which by itself has no originality will not normally be a substantial part of the copyright and therefore will not be protected.

This is inferred based on case to case analysis. In fact in *Designers Guild* Ltd Vs *Russell William (Textiles) Ltd*[165] , the House of Lords noted that the first step in inquiry as to whether there is infringement of copyright comprises identifying similarities and differences between the copyright work and the alleged copy by making a visual comparison. Then the court must decide whether the similarities are sufficiently close, numerous or extensive to be more likely to result from copying than coincident. The purpose of this comparison is to

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[164] Catherine Colston&Jonathan Galloway,Modern *Intellectual Property Law,* 361

[165] (2001)FSR 11

identify the source of the defendant's work, not just mere resemblance to the claimant's. The claimant need only establish sufficient or substantial similarity in the features copied, not in the works as a whole. The enquiry is directed to similarity rather than the difference. According to Black's Law[166], the term substantial similarity means *"A strong resemblance between copyrighted work and an alleged* infringement *thereby creating an inference of unauthorized copying"*

Therefore the standard for infringeme*nt,* substantial similarity is whether an ordinary person would conclude that the alleged infringement has appropriated non trivial amount of the copyrighted work's expression. In *Francis Day and Hunter* V's *Bron* (supra) an appeal from the judgment of Wilberforce J. Willmer L.J. of the Court of Appeal explained that where there is a substantial degree of objective similarity, this of itself does not raise any irrefutable presumption of copying but at most afford prima facie evidence to show that there is a casual connection between the plaintiff and the defendant's work; at least, it is a circumstance from which the inference may be drawn. The lack of precision or objectivity as to what amounts to substantial copying can be seen in different judicial opinions and decisions. *In CBS INC & Ors Vs Inter magnetic Co Ltd & Anor[167]* the court held that the casual connection did not have to be between the parties but between their respective works. The court therefore found the defendant liable for infringement on the plaintiff's work which was a replica of what the defendant printed. The court in *King Features Syndicates, Incorporated and Anor Vs O. and* M. *Klessman[168],* as pointed out in *Dicks* Vs *Brooksheld[169] held* that degree of resemblance is all important, and the possibility of the injury to the plaintiff must be regarded in determining whether or not copyright in a work has been

[166] A. Garner "Black's Law Dictionary"(10th Ed) pg 1594

[167] (1977-89)2 1.L.P.L.R 351

[168] (1941)A.C 417 at 129

[169] (1893)15 Ch.D.22

infringed. Showing that the test here is not an objective but subjective one, the court in *Francis* Day & *HunterVs Bron* held that there was no infringement of the plaintiff's work by the defendant. There, the defendant had reproduced the first eight bars of the plaintiff's musical work in its own work. Though some objective similarity was established, yet there was no evidence of casual connection between the works. Diplock L.J stated that *"once the elements the two elements of sufficient objective similarity and causal connection are established, it is no defense that the defendant was unaware that what he was doing infringed on the copyright of the plaintiffs work.* The court found 'structural differences' in the two musical works in issue. Yet in *Universal Pictures* Co. *Inc* Vs *Harold Lloyd* Corp"[170], it was held that similarity with respect to only one sequence of the plaintiff's motion picture (representing 20% of the entire film) was sufficient to constitute substantial copying and similarity. In *Hawkes & Sons (London) Ltd Vs Paramount Film Service* Ltd[171], the court held that twenty second portion of a four-minutes music of the plaintiff which was copied by the defendant amount to substantial copying. In this case, the court reechoed the principle that what is important is not just the quantity or size of the work that was copied but rather the quality more especially where what was copied constitutes the heart or defining element of a work. This same position was arrived by the court in *Warwick* Film *Production* ltd V's Esinger"[172] where the court held that the quantity of copied material was much but did not constitute a major part of the claimant's work because the claimant's work in itself had been copied from a previous work. Furthermore, in King *Features Syndicates, Incorporated and Anor Vs O. and M. Klessman, Ltd"[173], The court* found and held that the defendants' dolls and broaches were reproductions in a material form of the plaintiff's original artistic work and

[170] 162 F.2D 354(9thCir.1947)
[171] (1934)Ch.D 593
[172] (1964)1 WLR 273
[173] (1941)A.C 417

were not the less so because they were copied, not directly from any sketch of the plaintiffs but from a reproduction in material form gotten purely from the original work.

In Nigeria, work is only protected by copyright if sufficient skill and effort has been spent in making the work but not when such work has been copied from another work. The decisions of the Nigerian courts over infringement have essentially been based on or involve unauthorized copying or reproduction of a work. And as such there has not been much room for the development of the principle of substantial taking or casual connection[174]. However, the test of causal connection indicates substantial similarity and access and the similarity relevant here is the literary or artistic originality of the work. Thus in establishing the existence of casual connection between the two works with the one allegedly infringed, inference must be drawn from the fact as to which of the works preceded the other and whether or not the defendant had opportunity of knowledge as to the existence of the original work. In *Masterpiece Inv, Ltd* Vs *Worldwide Business Media* Ltd[175], the plaintiff's article was published in the defendant's magazine of October 1989. Without his consent, it was reproduced in the subsequent edition of the magazine with the words being almost verbatim. The court found and held that "carefully *comparison of both works (sic) or publications shows that they are essentially the same"*[176]. The court found the defendant liable.

Plateau Publishing & Ors Vs *Adophy*[177] is an interesting case where the defendant reproduced nearly verbatim the work or part of the work of the plaintiff". The case was argued from the high to the supreme courts. Interestingly the 3rd defendant to whom the work was accredited and who sent the work to other defendants for publication failed to

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[174] Adejoke *O. Oyewumi, Nigeria law of intellectual property, page* 87

[175] (1997) FHCLR 496,(1990-1997)3 L.P.L.R 345

[176] (1990-1997)3 L.P.L.R 345 361

[177] (1986)4 NWLR(Pt-34)205

appear in the matter. On the strength of overwhelming evidence before the court against the defendants which they failed to disprove, the court found the defendants liable more so that the plaintiff established that there is sufficient similarity between the two works and the plaintiff's work was earlier in time. In *Yemitan* Vs Daily *Times(Nig)Ltd & Anor*[178], the plaintiff's literary work titled "the day the lagoon caught fire" was reproduced and published by the defendants without the plaintiff's consent. The defendant was thus found liable.

It is submitted here that beyond the different tests that has been propounded and the emphasis on substantiality of the copying and the similarity of the two works as well as casual connection in the works, as disclosed in the cases examined above, there is one salient point that must be noted which runs through all the case examined. Upjohn L.J was quick in identifying this issue when he held thus:

> This is really a question of fact and nothing else, which depends on the circumstances of each case; but it is a question of fact which must be taken in two stages. The first stage is objective, and the second question is subjective"[179].

Though facts of cases may be similar yet one case cannot be used as an indices for measuring every other. It is not in every case that the Court may be required to navigate these tests to arrive at the justice of the case. From the examined cases, it is clear that there is no unionism in judicial approach in determining the application of these terms and in truism, no test can serve all rounder purposes. The dictum of UpJohn L.J is therefore trite and proper and herein adopted. However, it is submitted that the adoption of reasonable man's test will serve best interest of justice. By this the court is enjoined to look at the surrounding circumstances and determine whether in the eyes of a reasonable man, the defendant's work can be adjudged to be infringing on that the plaintiff. This will involve

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[178] (1980) FHCR 185,(1977-89)2 L.P.L.R 141

[179] *Frances Day & Hunter Vs Bron* 618

proper scrutiny of the evidence of both parties. The reasonable man in this sense does not mean reasonable man in the eyes of the plaintiff or defendant but a reasonable man in the society. Though this approach may create room for differences in judicial decisions, yet it will help to arrive at the justice of the case as thy will be heard and determined not just on precedent but on its own peculiar fact and what in the mind of the court is reasonable in the circumstance.

3.20 Indirect or Secondary Infringement

Beyond the provision of primary infringement under the English law, the Copyright, Design and Patent Act (CDPA) 1988 of England also provides for acts of secondary infringement. These acts incorporates different commercial dealings with infringing copies or the means of making those copies and includes those who might otherwise be regarded as authorizing infringement by facilitating performance of a work[180]. They are acts done by persons dealing in infringing copies. These acts are encapsulated in sections 22,23,24,25 and 26 of CDPA of England 1988.

Indirect or secondary infringement happens basically when a person deals with works that are themselves product of direct infringement of copyright protected works without authorization[181]. Under the Nigeria Copyright Act, these acts are encapsulated under section 36(a)-(g). They include acts of importation, sale and distribution of printed works otherwise than private use, exhibition of copyright work in public, hiring, permitting a place of public entertainment or of business to be used for performance of someone's work. etc. Beyond providing remedies for these acts, the Act equally criminalizes them[182]. For a secondary infringement to occur, there has to be firstly,

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[180] Catherine Colston and Jonathan Galloway,Modern Intellectual Property Law, 386

[181] J.O. Odion and N.E.O Ogba,Essay on Intellectual property law, (Benin City, Ambik Press, 2010) 29

[182] Copy Right act Section 44 C28 LFN 2022

primary infringement. Another precondition is that the infringement should be done in course of business or for profit. Thus where the acts are not for business or profit making purpose, one will not be found liable or guilty of secondary infringement. This is because of the language of the Act which uses the phrase *"for the purpose of trade or business or as supporting facility to a trade or business"*[183]. *It* must not be for private use, criticism or review, research or reporting current events.

However acts of secondary infringement must be done intentionally and with reasons to show that the works dealt in are infringing for one to be liable for such infringement[184]. Similar provision of the Nigeria Copyright Act on this is equally contained in the English Statute[185]. In the English case of *Hutchison Personal Communication Ltd Vs Hook Advertising Ltd*[186], the court held that the element of knowledge which the plaintiff failure to show the defendant infringement is vital and must be sufficient and that for there to be sufficient knowledge for secondary infringement, the defendant believed that there is an infringement rather than just a suspicion. In that case, the knowledge of allegations of infringement the facts of which is yet to be proved, was held insufficient to constitute knowledge of infringement for the purposes of secondary infringement. In *Vermal tand Power* Vs *Boncrest* Ltd[187], the Court expounded on this by stating that the person must have notice of facts with sufficient information identifying the copyright work and such information must be given sufficiently in advance so that he can have time to evaluate the facts and convert them into a reasonable belief. That is to say defendant either knows or have reasons to know that he is dealing on infringing work. These facts were held proved in the case of *Nouveau Fabrics Ltd* Vs *Voyage Decoration*

[183] Copy Right act Section 41 C28 LFN 2022

[184] Copy Right act Section 44(3) C28 LFN 2022

[185] Copyright, Patent and Design Act 1988,Sections 22,23(d),24(1)d,24(2),25(1),26(2-4)

[186] (1995)FSR 365

[187] (2002)FSR 21

Ltd and Dunelm Soft *Furnishing Ltd*[188] where the issue was considered, Voyage an importer and distributor of fabrics was accused of importing and selling an infringing copy of the plaintiff's fabric design which was protected by copyright. The defendant denied that it was aware at the time it began importing the fabrics that it might infringe on the plaintiffs copyright and that it did not have reason to believe until the plaintiff made its complaint that the fabric might be infringing. It also relied upon the evidence of an Italian supplier of the fabric; of an independent creation of the fabric design supplied to the defendant. It was stated that the defendant should have known that the fabric had been copied from the plaintiff's design after pressure from the plaintiff to disclose this information and that the answer or evidence of the Italian supplier is unsatisfactory as to the fabric design origin. Accordingly, the defendant was found to believe that because sufficient steps were not taken to discover the true origins of the allegedly infringing article having been made aware of the potential infringement.

Although primarily an objective test, this includes a subjective element. The belief is defendant belief and is reasonable to him, yet it has to equally be reasonable in eyes of a reasonable man. This should involve consideration of certain factors like knowledge and experience of the defendant. Thus Morrit J stated in L.A *Gear Inc Vs* Hi *Tec Sports plc*[189]:

> It seems to me that 'reason to believe' must involve that the concept of knowledge of facts from which a reasonable man would arrive at the relevant belief. Facts from which a reasonable man might suspect the relevant conclusion cannot be enough. Moreover, as it seems to me the phrase thus connote the allowance of a period of time to enable the reasonable man to evaluate these facts so as to convert the facts into reasonable belief

[188] (2004) EWHC 895, Tina Hart,Linda Fazzani & Simon *Clark,Intellectual property* law, 5th *Edition* (London,Palgrave Macmillian) 180

[189] (1992)FSR 121

It is submitted here that the decisions of the courts in these cases are sound, logical and reasonable. The copyright law has made 'knowledge or reason to believe' a necessity in proof of secondary infringement of copyright. Yet the law is not unmindful that some infringers will claim nincompoops and hide under the cover of ignorance and absence of knowledge of the infringing status of the materials they deal on. The adoption of implied or imputed knowledge it is submitted, is very sound and has played useful role in catching up such opportunist.

In *Sillitoe* Vs *McGraw Hill*[190], requisite knowledge was held to include reasonable inferences that the person should draw from the fact. The Nigeria court has equally toed this path as the case of *Plateau Publishing &Ors Vs Adophy* (Supra) which though premised on primary infringement but buttressed this point. There, the 1st and 2nd defendants/Appellants sought to escape liability on the claim of being an innocent infringers of the plaintiff's literary work *"After Tarka,,* What *Next, Special Tribute.* The court refused to be persuaded by that argument as it found that the work the defendant published was totally different from that which the 3rd defendant usually sends to it coupled with the fact that the 3rd defendant to whom the work was attributed to refused to put up appearance in the case. As regards knowledge or reasons to believe, Kawu JSC held thus:

> Now on the evidence adduced before the learned trial judge, could it be said that the appellants had proved that at the time of infringement, they were not aware, and had no reasonable grounds of suspecting that copyright subsisting in the Respondent's article? I do not think so...It is plain on the record that there was no scrap of evidence adduced at the trail to substantiate the averments

[190] (1983)FSR 545

It is therefore submitted that the decision of the English Court in *Nouveau Fabrics Ltd* Vs *Voyage Decoration Ltd and Dunelm Soft Furnishing Ltd*[191] (Supra) is good, sound and valid and in line with the spirit and letters of the law on copyright protection. It equally falls in line with the earlier statement of Scott J in *Columbia Picture industries* V's *Robinson"* where he said obiter that a defendant ignoring the obvious would infringe.

Again it must be noted that doing of any act referred to in section44 (1) of the Nigeria copyright Act shall be in respect of the whole or substantial part of the work either in its original form or in any form recognizably derived from the original work[192]. The issue as to whether a portion of the work infringed upon as stated under primary infringement is a question of fact not law as every case is determined base on its own peculiar fact.

Flowing from the above decision, it is safe to state that knowledge need not be actual but can be constructive or imputed hence the application of the legal principle of constructive notice[193].

3.21 Nature of Proof of infringement

The Copyright Actmakes provision for both civil and criminal[194] remedies and sanctions respectively for any breach or infraction of such rights. Copyright infringement is not a strict liability offence hence the need for proof of both the actus rea and the mens rea and like in any matter that is not strict liability offence, the burden of proof of any breach or infringement of any of the rights protected by copyright Act is as provided for in the rule of evidence. What this means is that except for the few exceptions provided by law, the burden of proving it lies on the plaintiff who is usually the author, owner, executors, administrators,

[191] (1986)3 WLR 542, (1987) Ch 38,(1986) FSR 367,(1986)3 All ER 338

[192] Copy Right act Section 44 C28 LFN 2022

[193] *Dearle Vs Hall* (1823) *3 Russ.1.*

[194]Copy Right act Section 44 C28 LFN 2022

heirs, license, assignee or trustee of a work or estate of the owner of the work[195].The evidence Act[196] places the first burden of proof on a person who will fail if no evidence at all were given on either side[197]. In *Ibuluya* Vs Dikibo[198], where the Supreme Court stated that the onus of proof is on him who asserts and not him who denies and that by the provision of section 135 of the Evidence Act, it is incumbent on party who asserts the existence of a fact to prove same[199]. However where the plaintiff has discharged this burden of proof[200], the duty shifts to the defendant to establish his innocence. That is to say that this burden of proof is not static. This legal principle, received judicial notice in *Tanarewa (Nig) Ltd Vs Arza*[201]. This duty on the plaintiff to prove his case is faced with so many substantive and procedural difficulties and challenges as the infringer of copyright will naturally seek to cover tracks of his nefarious acts to avoid detection and being found liable. This he does by devising ways of arresting the situation because his pecuniary interest may be jeopardized[202].

What this mean is that not only that obtaining evidence in proof of infringement is germane and a sine qua non for the plaintiff's successful pursuit of his suit against the infringer but doing same is equally tasking. The plaintiff therefore requires prompt and spontaneous action which would not alert the infringer and give him room to move, destroy, confiscate or hide the infringing materials or works.

To overcome this challenge, the plaintiff usually goes to court to obtain an ex-parte order to enable him get these materials. Armed with the court's order, the plaintiff sweeps surprise on the infringer as the infringer will not be able to hide the material which is of high

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[195]Copy Right act Section 41 C28 LFN 2022
[196] Cap E14(LFN)2011
[197] Evidence Act 2011,Sections 131,132,133,136
[198] (2010)18 NWLR(Pt 1225)627
[199] *Olodo* V's *Josiah,* (2010) 18 NWLR (Pt 1225) pg 653,Alade Vs Alic (Nig) *Ltd.* (2010) 19 NWLR (Pt 1226)111.
[200] *Ishola* V's UBN(2005)6 NWLR (Pt 922) 422
[201] (2005) 5 NWLR (Pt 919)598
[202] J.O. Odion and N.E.O Ogba,Essay On *Intellectual Property* Law,33

evidential importance to the plaintiff and the court. The plaintiff seeks for an ex- parte order which is usually in camera for inspection, search of the premises, seizure of infringing material, interrogatories, discovery of names, freezing order and arrest of such infringer or dealer on such infringing material[203],

3.22 Standard of proof

The Nigeria Evidence Act provides evidential template or minimal requirement expected of a party in a case to prove his case. This standard varies on the nature of the case. A party, who desires court's judgment in his side must furnish the court with good evidence to force the judicial pendulum to swing on his side. This burden of proof can be discharge through oral, documentary, material evidence and otherwise.

Section 134 of the Evidence Act provides the standard of proof a claimant requires in a civil suit to get judgment in his favor. In civil matters, the burden of proof is discharged where the claimant has established his case on the balance of probability or preponderance of evidence. The Supreme Court in *Purification Technique (Nig)* Ltd *V's Jubri*[204] stated that civil cases are determined on the preponderance of evidence and balance of probabilities. While under the criminal regime, the standard is prove beyond reasonable doubt[205]. This however does not connote proof beyond all shadows of doubt[206] or proof to a tilt[207]. Therefore, where civil action has been brought against an alleged infringer, the standard of proof required is less tedious. This is unlike criminal matters where the threshold is higher[208].

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[203] Copyright Act,Section 38 C28 2002

[204] (2012) 18 NWLR (Pt 1331)pg 146,Ojomo Vs *Ijeh* (1987) 4 NWLR (Pt 64) 212, *Odulaja* Vs *Haddad* (1973)11 SC 357

[205] Section *139,Borishade* Vs *FRN* (2012) 18 NWLR (Pt 1332) 256 SC

[206] *Osung* Vs *State* (2012) 18 NWLR (Pt 1332) 256 SC

[207] *Miller* Vs *Minister* of *Pensions* (1947) 2 All ER 372 Per Lord Denning J.

[208] *Ishola* Vs *UBN* (2005) 6 NWLR (Pt 922) 422

CHAPTER FOUR

CIVIL REMEDIES AVAILABLE TO OWNERS OF COPYRIGHT WORK

4.1 Introduction

Enforcing Intellectual Property Rights (IPRS) often poses serious problems in Nigeria. Countries that were still developing did not have intellectual property law before the agreement on Trade Related Aspect of Intellectual Property Rights (TRIPS Agreement), while some countries had laws that were not strengthened or simply adopted that of their colonial masters such that there was inadequate enforcement of these laws. Enforcing a law is more important than any other aspect any law without which the law will be useless to those it seeks to protect. The effectiveness of a law is determined not by the number of sections and schedules it contains but rather against the background of how much it is observed in obedience than in breach and its effectiveness in providing adequate remedy for those whose rights has been infringed upon by its breach. Without effective enforcement therefore, victims of copyright infringement cannot truly be said to be sufficiently or adequately protected by the law.

Interestingly, Nigeria Copyright Act is not only concerned with provision of legal protection simpliciter, but with provision of remedies for infringement of such rights. These discuss therefore focuses more not on the availability or otherwise of remedies to these victims under the current legal regime but on the adequacy of these remedies in ensuring only that the victims are not left helpless.

The Act created dual window for the enforcement and protection of these rights by providing for both civil remedies and criminal liabilities for any such infringement. It further provides that both windows can be explored and simultaneously pursued at the same time'.

While the criminal prosecution is undertaken by the Nigeria Copyright Commission on behalf of the state[209], the civil actions are pursued by individuals, groups, corporate bodies etc. The Act provides:

> Subject to this Act, infringement of Copyright shall be actionable at the suit of the owner, assignee, or exclusive licensee of the copyright...and in an action for such infringement, all such relief by way of damages, injunction, accounts or otherwise shall be available in any corresponding proceedings in respect of infringement of other proprietary rights[210]

It is against this legal provision that this chapter examines the adequacy of the civil remedies provided by the Act and enquires how strong and adequate it is towards assuaging the feelings of the copyright owners and also how far it has deterred potential infringer from engaging in such acts that constitutes infringement.

4.2 Damages

The remedy for infringement of intellectual property rights is usually an award of damages. The aim of the damages is to restore the victim to the position they would have been in if no wrong had been committed[211]. Damages are losses which results from the defendant's acts or conduct. There should be payment of monetary compensation to the winning party as far as this can be achieved through monentary value for the harm suffered from the act of infringements[212]. The remedy of damages therefore has the objective of putting the plaintiff in the original position he ought to have been before the infringer violated his rights hence

[209] Section 38(5)
[210] Section 16(1)
[211] Lionel Bentley and Brad Sherman,Intellectual *property* Law 1101
[212] 5 Adejoke *O.Oyewunmi,Nigeria Law of Intellectual property* 108

the saying that the remedy of damages is compensatory[213]. It does not aim to punish the defendant[214]'. This explains why situations where damages are awarded varies base on case to case assessment. In *Livingstone* Vs *Raywards Coal* Co.[215] Lord Blackburn explaining remedy of damage rationale behind it stated:

> ...that sum of money which will put the party who has been injured... in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation.

On the issue of damages in intellectual property, courts have to deal with recurrent circumstances. The similarities are often broad outline rather than of detailed detail. Accordingly, statements about the proper approach to assessment provide general guidelines not strict rules. In particular the judges resist being saddled with any single test for all cases[216].

There are different types of damages which the court awards to successful litigant whose rights has been trampled upon by the other namely; general damages, special damages, exemplary or punitive damages and nominal damages.

a. General Damages

This is a type of compensatory damage whichcomes into play due to the defendants acts under the maxim *ubi jus ibi remedium.* Accordingly evidence that will enable the court to find that damage has occurred need not sufficiently be led or strictly be proved by the plaintiff. The court in making an award for general damages looks at the facts of each case,

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[213] *Blaney Vs Clogau St David Gold Mines* (2003) FSR 360 *CA,*

[214] Lionel Bently and Brad *Sherman,Intellectual property Law,pg.1101*

[215] (1880)5 App.Cos.25

[216] W.R. *Cornish,Intellectual Property;Patens,Copyright,Trade Marks And Allied Rights"* 4hEdition,(London,Sweat & Maxwell) 1999,74

especially the claim of the parties, their conducts and evidence adduced to awards what it thinks is just, fair and equitable in the circumstance. On the various ways infringement can occur, the court is reluctant to lay down static on definite rule(s) as to how general damages should be computed. However in accessing the damages that are payable, the court further considers the profit lost by the claimant, royalty lost and other secondary losses. The plaintiff should be able to minimally prove these as copyright infringement simpliciter is neither actionable per se or a strict liability offence. More specifically, damages may be determined thus:

a. Where the sales which the defendant has made would have been made by the plantiff for profits, the plaintiff would be entitled to his loss of profit.
b. Where the defendant undercut the plaintiff's prices and the latter had to reduce his prices to compete, the plaintiff is entitled tocompensation for reduction in his profits
c. In case of sales by the defendant which the evidence shows the plaintiff would not himself have made, the plaintiff is entitled to a fair and proper royalty as the price or hire which should have been paid for the use of his invention to legalize those sales etc[217].

In *Cow & Co Ltd Vs Cannon Rubber Manufacturer Ltd"*[218] damages were given on the ground of reasonable royalty upon all infringing articles made and sold by the defendants.

In the Nigeria case of *Ndinwa* Vs *Igbinedion*[219], it was stated that general damage are those damages that disturbs a legal right. It is the loss that stems from the defendants act and its

[217] Micheal Fysh, *Russel Clarks* on *Copyright* in *Industrial Designs* (5th edition, London) Sweet & Maxwell Limited(1974)107

[218] (1961)RPC 236

[219] (2001)5 NWLR(Pt705)pg150

quantum need not be pleaded or proved as it is generally presumed by law. General damages is quantified on what the opinion and judgment of a reasonable person in the circumstances of the case are. Further in *Akwa Rubber Estate Vs* Iju *Ind. Ltd'*[220], the court stated the basis of damages as restitutio in integrum. In *UAC (Nig) Plc* Vs *Irole'*[221], the court held:

> ...In general, it must be proven that such damage has been suffered, but the quantification is a jury question. As there is no jury in Nigeria, general damages claim rests with the trial judge.

It flows from the aforesaid that the award of this remedy is primarily premised on the plaintiff first proving his case as failure to do so will see the collapse of his claim and dismissal of his case. After case proving the court looks at the quantum of money claimed by the plaintiff for general damage and exercises its discretion judicially and judiciously.

b Special Damages

This type of damage is awarded by court where there is before the court, an overwhelming evidence that such damage was actually suffered by a party. Here the law does not presume that such damage(s) ordinarily resulted through the action of a party but is based on clear, unequivocal, convincing and proved evidence adduced before the court hence it must specifically be pleaded and proved by the plaintiff. In *UAC (Nig)* Plc Vs Irole'[222], the court has this to say regarding special damages:

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[220] (2001)5 NWLR (Pt 706) 408 at 423

[221] (2001)5 NWLR (Pt 707) 583 at 594-595

[222] ibid

> If there be any special damage which is attributable to a wrongful act, that special damage must be averred and proved and if proved will be awarded

Distinguishing between general and special damages, the court further stated:

> "...It is usually a question of pleading and proof and the mode of assessment. One is specially pleaded and strictly proved because it is exceptional in its character such as it will not interfere from the nature of the act which gave rise to the claim. The other is general damages which when averred as having been suffered, the law will presume to be the direct, natural or probable consequence of the act complained of, but the award is a jury question..."

Special damages are proved through tendering in court infringing materials of the defendant, receipts, machines and documents evidencing losses that flow directly from the breach or infringement. Section 136 of the Evidence Act 2011 provides for this. What this means is that special damages is not awarded anyhow. Thus where the claimant failed to specifically plead and strictly prove this type of damage, his plea on it is bound to hit the rock.

c Exemplary or aggravated or Punitive Damage

This damage compensate the plaintiff and punish the defendant prevent similar behavior in future[223]. In England, section (97), 191J and 229 (3) of Copyright, Design and Patent Act of England 1988 confers jurisdiction to award additional damages for infringement of copyright, rights in performance and unregistered design right, having regard in particular to "the flagrancy of the infringement and the benefit which has

[223] F.O. Babafemi, *Intellectual Property The Law And Practice Of Copyright, Trade Marks, Patents And Industrial Designs In Nigeria* .109

accrued by reason of the infringement[224]. In *Ravenscroft* Vs *Hebert'*[225], the court described flagrancy as implying scandalous conduct, deceit as well as deliberate and calculated copyright infringement while benefit was defined to mean reaping a pecuniary advantage beyond the damages the defendant would otherwise have to pay .Consequently, distress humiliation and damage to reputation has been taken into account in accessing additional (exemplary) damages. The House of Lords in *Rookes* Vs *Barnard*[226] held that award of exemplary damages is right and proper whenever it is necessary to teach a wrong doer that a tort does pay. In this case, the court found clinical disregard of the claimant's rights.

What all these show is that in copyright action, where infringement has been "flagrant" or "specially advantageous" to the defendant and the plaintiff cannot be given "effective relief' under the rules, the court may award any extra (exemplary) damages it considers appropriate[227].

The provision of the Nigeria Copyright Act follows the same line and verbiage with that of U.K. Under the Nigeria statute, precisely Section 16(4) of the Act provides that the court may award such “additional damages" as it may consider appropriate in the circumstances having regard to the flagrancy of the infringement if satisfied that effective relief would not otherwise be available to the plaintiff. The term additional damage as used by the Act connotes exemplary award that is exemplary damages. The test for determining whether any work has been flagrantly been copied or copyright fragrantly breached is not a matter of law but fact based on case by case analysis. In *Yemitan Vs*

[224] Catherine Colston and Jonathan Gallowcy,Modern *Intellectual Property* Law *794*
[225] (1980)R.P.C.19319 *Williams Vs Settle* 1960 (1) WLR1072. The newspaper paid 15Euro for the photograph,and damages of 1,000Euro was awarded
[226] (1964)AC 1129
[227] T.A. Blanco White, *Patents for Inventions and the Protection of Industrial Designs 4th* Edition (London,Stevens & Sons (1974) 434

Daily Times[228] the court found that the plaintiff's copyright was fragrantly infringed. After awarding general damages of N10,000.00, the court further awarded special and exemplary damages too. The court in considering the issue of award of damages condemned the comptemptous manner in which the defendant treated the plaintiff and the impunity with which the plaintiff's work was infringed, the apathetic manner his letters were treated and the non chalance of the defendant. These justified the conclusion of the court in its exemplary award. The same position was taken by the court in the case of *Masterpiece Investment* Ltd Vs *World Wide Business Media Ltd* &Ors[229] where Odunowo J.held as follows:

> ...the court may award additional damages for such matters as the author's reputation or feeling, the vulgarization of the work, economic loss, unjust enrichment...the conduct of the defendant, the means of the parties, etc; nonetheless the amount awarded must not be excessive[230]

It must be noted that where the plaintiff did not prove acts that can be described as "flagrant breach", the court will still award him the damages under general damages if he is able to prove that his copyright right in a work was infringed upon. However the plea for award of exemplary damages will fail as was the case in *Douglas* v. Hello[231] where the claim for aggravated damages failed and the defendant's conduct being found not to be flagrant or offensive to justify the award.

It must equally be noted that where the remedy of account of profit is prayed by the plaintiff, the court cannot award additional or aggravated damaged. So also is where the

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[228] (1977-1989)2 I.P.L.R 141
[229] 1990-1997)3 I.P.L.R.346,Adejoke O.Oyewunmi,Nigeria *Law* of *Intellectual property* 109
[230] Ibid at 366-367
[231] (2003)3 ALL E.R.996

defendant successfully proves innocent infringement. Under such condition, damages are not awarded but the defendant is to render an account of his profit[232]. It is only awarded where the claimant asks for an award of damages[233]. This is to avoid double compensation to the victim or claimant.

This remedy has been very effective and well utilized by the court toward protection of copyright. The judges has shown in the cases above that infringement of copyright especially at a very alarming rate can still be compensated and checkmated through punitive or exemplary award.

d Norminal damages

This type of damage is awarded in cases where the plaintiff has proved the infringement of copyright in his work but fails to show or prove that he suffered any actual damage as a result[234].This type of damage can also be awarded where evidence of damage has been laid but there is no precision as to the level, extent or gravity of the damage incurred. Base on this, the court awards nominal damage to assuage, the feeling of the person whose copyright has been infringed on.

4.3 Injunction

An injunction is another important remedy for copyright infringement that originated in the English Courts of Equity. Like other equitable remedies, it is traditionally given when a wrong cannot be adequately remedied by an award of damages. It is essentially an equitable remedy and a prohibit order which is granted at the discretion of the court compelling a party

[232] Copy Right act Section 37(4) C28 LFN 2022

[233] *Cala Homes Ltd Vs Alfred McAlphine Homes Ltd(1996)* FSR *36*

[234] F.O. Babafemi, *Intellectual Property The Law And Practice Of Copyright, Trade Marks, Patents And Industrial Designs In Nigeria* 110

to do or refrain from doing an act or continuing a state of affair[235] . An injunction principally is a prohibitive order, ordering the stopping of an action or prohibiting the further doing of act or continuing a state of affair. An injunction can be made by the court before, during and after an action has been commenced in court. This means that there are different categorization of injunction depending on the stage of proceeding it is made. They include interim, interlocutory and perpetual injunction.

A Interim injunction

Interim injunction is a type of injunction that is usually made before the principal action is commenced or at the filling of an action. It is an order of court sought by the applicant to stop an act or further action so as to avert a foreseeable or imminent damage. It is very useful tool in copyright enforcement even though by its nature, it lasts for a short period of time usually 14 days or pending the determination of the Motion on Notice for an interlocutory injunction. It is granted only in cases of urgency requiring immediate relief. It is always ex-parte however the motion on notice is usually attached to it as exhibit. This ensures that the other party is heard. An example of this type of injunction includes Anton Pillar (Quia Timet) injunction[236] which the court may grant even though the claimant's right has not yet been infringed upon but is being threatened and Mareva injunction[237] which is used to stop a party from removing some materials relevant to the suit from outside the jurisdiction of the court so as not to render the suit before the court nugatory especially where the defendant who is in possession of those materials are found liable'[238]. An applicant of

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[235] *Jimoh* v. *Aleshinloyell* (2014) 15 NWLR (pt 1430)227

[236] *Anton Pillar A.G Vs Manufacturing Process Limited* (1976) Ch.D *55,* (1976)1 All *E.R* 779

[237] *Mareva Compania Naviera S.A Vs International Bulk* Carrier(1975)2 Lloyds *Rep.509,Sotiminu Vs Ocean Steamship(Nig)Ltd(1992)9* NWLR (Pt239) 1 at 25

[238] Fabano Carlos,"Maximizing Plaintiff Protection in the World Of Asset Freezing and By passing the Due

Anton Pillar injunction must make out a strong case by showing that there is an imminent danger or very substantial damage or further damage resulting from the defendant's action to the material unless restrained by the court. The court granted this injunctive relief in the case of *Yemi Anikulapo* Kuti & *Ors* Vs T.M. Iseli &Ors[239]. There the issue before the court was whether the plaintiffs could secure an order of injunction to retrain the defendants without any evidence of actual infringement. The court answered this poser in the affirmative. This injunction which originated from the principle laid down in *Anton Pillar* Vs *Manufacturing Process*, enables intellectual property owners to preserve evidence prior to trial and the British courts has over time developed this type of order. This order commonly called search order permits a claimant (and their solicitor) to inspect the defendant's premises and to size or copy any information that is relevant to the alleged infringement. This order aims to ensure that evidence is not destroyed and may further require the defendant to provide information on the source of the infringing copies or their intended destination. According to Lord Denning MR, the rationale behind the order being so passive is:

> ...it serves to tell the defendant that, on the evidence put before it, the court is of the opinion that he ought to permit inspection-nay order him to permit and that he refuses at his peril not only of proceedings for contempt, but also of adverse inferences being drawn against him; so much so that his own solicitor my often advise him to comply[240].

The Nigeria Copyright Act provides for this relief and shows an applicant the procedure to getting same[241]. By the provision of Section 37 of the Act, in an action for infringement of any right under the Act, an applicant can approach the court through an ex-

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[239] (2003-2007)5 I.P.L.R 53

[240] *Anton Pillar A.GVs Manufacturing Process Limited* (1976) Ch.D 55,at 61 para *D-E.*

[241]Copy Right Act section 37 C28 LFN 2002

parte application supported by affidavit asking for order of the court for detention and seizure as well as inspection and search of places, materials, individuals etc for the purpose of abating further infringement in so far as there is reasonable cause for suspecting that there is in any premises any infringing copy or any plate, film or contrivance use or intended to be used for making infringing copies or capable of being used for the purpose of making copies or any article, book, document by means of or in relation to which any infringement under the Act.

Interestingly the Nigeria Court has not performed badly in granting this relief. In *Ferodo* VS *Unibros Stores*[242], *(a* case involving infringement of trademark) the order was granted to enter the defendant's premises, inspect any documents relevant to the suit and to restrain the defendant from repeating the infringement. The Supreme Court in *Kotoyo Vs* CBN[243] held that interim orders do not constitute beach of fair. This approach is commended and should be sustained because of evidential value it offers to the victim, in proving their cases in court and arriving at the justice of each case by the court.

B Interlocutory injunction

Interlocutory injunction is the most common of all types of injunction. It is an injunction which seeks for stay of action or state of affair pending the determination of the substantive suit already before the Court. It is Motion on Notice wherein both the plaintiff and the defendant, file their applications and objections for the grant or refusal of the application. The principle governing the grant or refusal of interlocutory injunction are as laid down in old case of American *Cyanamid* Co *Vs Ethicon* Ltd[244] where the House of Lords held that the object of interlocutory injunction is to protect the plaintiff against injury by violation of his

[242] (1992)2 NWLR (Pt 509)

[243] (1989)1 NWLR (P(98) pg 419

[244] (1975) A.C 396 at 400

right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty where resolved in his favor at the trial. However before grant it is granted, it further held; the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the trial[245]. Fabiyi JCA described interlocutory injunction thus:

> An injunction issued at any time during the pendency of an action for the short-term purpose of preventing irreparable injury to the petitioner prior to the time the court will be in a position to either grant or deny permanent relief on the merit. It calls for the exercise of discretion, which is the ability to read between the lines[246].

Therefore just like in every other case where interlocutory injunction is sought, the applicant or claimant in copyright matter has to satisfy the court that he has an arguable case. This however does not mean a strong case or a prima facie case[247].

The House of Lords expressed their views that the use of such expressions as "a probability, a prima facie case" or "a strong prima facie case" in the context of the exercise of discretionary power to grant interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. However the court no doubt must be satisfied that the claim is not frivolous or vexatious, in order words; there is a serious question to be tried[248']. Yet in doing that, the court ensure that damages must not be sufficient remedy and so

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[245] Ibid 405

[246] *Omaliko* Vs *Awachie* (2002) 12 NWLR (Pt 780) 1, See Further D.U Odigie,"Interlocutory Injunctions In Civil Litigation*:* Not At Applicant's *Beck* And Call." *Journal of Private And Property Law, University of Benin* (Vol 3,2012) 37

[247] Ibid 407

[248] ibid

the court must weigh the balance of convenience, the financial ability of the applicant to pay for damages if his case fails and most importantly being an equitable relief, the conduct of the parties will be paramount. The applicant must not be guilty of delay in bringing the application as delay defeat equity and injunction cannot be granted over a completed act[249]. Therefore in approaching the principles by which to grant interlocutory injunction, the court is not bound by any rigid rules. All the relevant features of the case before the court are considered. In *Hubbard* Vs *Vosper[250] (a* case involving copyright infringement and breach of confidence), Lord Denning M.R said:

> In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to on the strength of the claim but also to the strength of the defense, and then decide what is best to be done. Sometimes it is best to grant an injunction so as to maintain the status quo until the trial. At other times it is best not to impose a restraint upon the defendant but leave him free to go ahead. For instance, in *Fraser V* Evans[251], although the plaintiff owned the copyright, we did not grant an injunction, because the defendant might have a defense of fair dealing. The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made subject of strict rules[252].

In *Harman Pictures N.V.* vs *Osborne[253],* the court ordered an interlocutory injunction so that status quo will be maintained and the plaintiff's property protected pending the determination of the action[254]. Similarly, in *Married Media Ltd* Vs *Lawrence Akapa,* in context of who to restrain from further printing of a magazine, the trial court order both

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[249] *Foseco Int Ltd* V's *Fordath* Ltd(1975) FRS 507

[250] (1972)2 Q.B 84

[251] (1969)I Q.B 349

[252] Ibid 351

[253] (1987)2 All E.R 324

[254] J.O. Odion and N.E.O Ogba, *Essay on Intellectual property law,*

parties from further printing until the determination of the suit. The appellate court set aside the order against the appellant. Where there is evidence that there is no likelihood of reoccurrence or further publication the court will refuse the application. Thus in *Proctor Vs Bayley* & Sons[255], the court refused an application for injunction even though infringement was proved, as the defendant had used infringing article on one occasion, five years previous to the action. However, where there is evidence of intention or threat by the defendant to infringe, the court can grant an injunctive order even though there is no infringement yet[256]. Therefore, whether to grant or refuse an injunctive relief is a discretionary power[257] of the court which the court determines base on evidence before it.

C Perpetual Injunction

A permanent or perpetual injunction is the final order granted at the end of trial base on the merit of a case. The award of this remedy is equally discretionary but will only be granted where the claimant or plaintiff has established prima facie case of infringement of his copyright by the defendant and the defendant has equally failed to discharge the evidential burden on him by rebutting the evidence of the claimant or he cannot rely on any of the defenses provided under law. Once infringement has been successfully established by the plaintiff or counter claimant, perpetual injunction will be granted unless the right is nearing expiry, the claimant's hand is unclean or no repetition of the infringement is likely. In the case of *Yemitan V's Daily Times* of *Nigeria (supra),the* court granted a perpetual injunction against the defendants from any further

[255] (1889)6 RPC 538

[256] 51*Cooper Vs Whitingham* (1880)15 Ch.D.501

[257] W.R. *Cornish,Intellectual Property; Patens, Copyright, Trade Marks And Allied Rights, 4th* Ed.(London,Sweat & Maxwell) 1999,68

sale, use or dealing in the plaintiff's work. So also was the position in *Masterpiece Investment Lid V's World Wide Business Media Ltd &Ors.*

4.4 Account of Profit

Another type of remedy which is available to an owner of copyright work over infringement of his work by the defendant and which can be granted by the courts is that of account of profits. This is a discretionary remedy which is available in most cases as an alternative to damages. It is a court made remedy which originated from the Court of Chancery[258]. As a scholar in the field put it "a *plaintiff who succeeds against a defendant has an option of asking for the remedy of account of profits rather than the award of damages"*[259]. The profit in this regard must however be derivable from the infringements and the defendant's actual profit must be proved[260] hence the claimant is allowed to see the defendant's account. This remedy is resorted to and useful in cases where infringer's profit is much greater than the profit that the copyright owner would have made, where the royalty method of assessing damages applies or where the infringer is able to rely upon the innocence defense[261]. The objective of this remedy is to strip the defendant of his improperly made profit. Therefore since it involves an investigation of records and accounts, the plaintiff has to contend with the laborious and challenging task of obtaining true and accurate statement of account of the defendant or opting for damages.

It is therefore a laborious and expensive procedure and is infrequently resorted to. In principle the account will give a better recompense than damages when the defendant has

[258] Lionel Bently and Brad Sherman.Intellectual *property* Law 1106

[259] J.O. Odion and N.E.O *Ogba, Essay on Intellectual property law,* 51

[260] Catherine Colston and Jonathan Gallowcy, Modern *Intellectual Property Law* 789

[261] 57Tina hart Linda Fazzani & Simon *Clark, Intellectual property* law. 185

been making profit the plaintiff would not himself have made. However where the case is exceptional, exemplary damages may achieve such same result[262].

The remedy of account of profit is judges made rule or a discretionary in nature. Under the English copyright law for example[263], if an alleged infringer admitted the act of infringement as alleged by the plaintiff but however is able to rely on the innocence defense, he will escape liability of damages. This does not however prevent the copyright owner from seeking any other relief. Therefore the defense of innocent infringement where it is raised and successfully proved is a clog in the plea and ordering of this relief. Thus in *Seager* Vs *Copydex Ltd*[264] (a case involving breach of confidence), an order for account of profit was refused due to the defendant's successful reliance on the defense of innocent infringement. The court however awarded damages against the defendant which was assessed based on sufficient monentary damaes for using confidential information which was given to the defendant's company. In *Treadwell Drifter's Inc* Vs *RCC* Ltd"[265] the court held that a party cannot claim for both damages and account of profit at the same time. Likewise in *Redrow Homnes Ltd* Vs *Betts Bros* Plc"[266] the court held that a claimant in a copyright action wont be awarded exemplary damages if he has already pleaded for an account of profit. It must be mentioned at this point that the profit given is the net profit "[267].The Nigeria copyright Act follows this line of thought. It provides:

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[262] W.R. *Cornish, Intellectual Property; Patents, Copyright, Trade Marks And Allied Rights" 77*

[263] Section 97 CPDA 1988

[264] (1967)2 All E.R 415 Per Lord Denning M.R

[265] (1996) SLT,(1048) OH

[266] (1999)1 AC 197,(1998)1 All E.R.385

[267] K.M. Garnelt, J.E. Rayner and G.Davis,Coping and Skone James on *Copyright* 4t Ed, (London, Sweet &Maxwell,1999) 653

> Where in an action for infringement of copy right, 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 of 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 entitled to an account of profits in respect of the infringement whether or not any other relief is granted under this section[268].

In the case of *Plateau Publishing Co. & Ors V's* Adophy *(Supra),* the defendants sought to rely on this section by claiming to be innocent infringers. However they failed to discharge the burden of proving being innocent infringers. It was stated that remedy of account of profitis not given to those who are not innocent infringers. They were awarded damages by the Appeal Court and which position, the Supreme Court upheld.

4.5 Conversion right

Conversion right is another veritable instrument for ensuring that a copyright owner does not suffer loss as a result of the infringement on his work. Another name for this remedy is delivery up. This is a court order for giving up of infringing article or documents for destroying under oath by the defendant. For copyright and unregistered design right, statutory provision includes giving up to the claimant, including ordering delivery-up of what is being used to make infringing copies[269]. In England, it included trademark, performers rights, unregistered design right and copyright to orders for delivery up destruction or forfeiture by the copyright and trademark (offences and enforcement) Act 2003 and amended by copyright and related right regulations 2003. Section 37 of copyright Act provides that:

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[268] Copy Right Act Section 37(4) C28 LFN 2022
[269] Section 99 and 230 CDPA 1988

> all infringing copies of any work in which copyright subsist, or of any substantial part thereof, and all plates, master tapes, machines equipment or contrivances used or intended to be used for the production of such infringing copies, shall be deemed to be the property of the owner, assignee or exclusive licensee as the case may be...

This section empowers the party entitled to an action to go to court for recovery of possession when it comes to conversion. In *Industrial Furnancis* Vs Reaves[270], which is a breach of confidence case, the court ordered the defendant to deliver up when he was not trusted to destroy them under oath. In *Onojovwo* Vs *Daily Times* Of *Nigeria* Ltd[271],it was sttaed that though thoughts and words lack the ability of conversion, the article itself which contains the thoughts and words are not proper object of conversion under the Act. In the same vein, in *American Motion Pictures Export Co Vs Minnesota Nigeria Ltd[272],* court ordered delivery up of the items so as to prevent the copyright from benefiting from the wrong doing[273].

These remedies have been made available by law and the court to victims of copyright infringement so that they will not be left in a mercy state due to acts of infringement and helpless in the hands of the infringers. Therefore a victim of any copyright infringement has several remedies at his disposal to pigeon hole his claim. This will enable the victim and their lawyers to draft their pleadings properly. The court in every situation also have the vires toissue orders and give directions in the cause of proceeding as it finds necessary.

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[270] (1970)RPC 605 at 625-628
[271] (Unreported) Suit No.FHC/4cs/98/93
[272] (1981)F.H.C.L.R 64
[273] J.O. Odion and *N.E.O* Ogba, *Essay on Intellectual property law,* 52,53

CHAPTER FIVE

RECOMMENDATION AND CONCLUSION

5.1 INTRODUCTION

Having critically looked into the Copyright Act in Nigeria in chapter three and chapter four, this chapter summarizes the findings and further recommends the ways forward and conclude thereafter.

5.2 SUMMARY OF FINDINGS

As seen in the previous chapters, this law[274] which contain 109 sections and 12 schedules and a regulation, though did not define the word copyright, unequivocally provides the works protected as copyright works[275]'. It equally provides the acts that amount to infringement and in doing this, it created both civil and criminal regime for infringement which a victim can pursue to get a redress[276] even simultaneously[277].

From the entire provisions of the Act as well as the judicial pronouncement that proceeded there from, it will be observe that there are still some unresolved issues which have continued to pose serious challenges even in Nigeria. One of this is the determination of the boundary of originality of a work. Its called "the originality test". In several English cases some of which have been examined in this work, confusion and conflict still exist as to application of the parameter set for measuring originality especially when such work in itself is not completely novel or first of its kind. This confusion is manifest in some judgments of

[274] Copy right law LFN 2002
[275] Copy right act section 2 (1) C28 LFN 2022
[276] Copy right act section 36, 44 C28 LFN 2022
[277] Copy right act section 47 C28 LFN 2022

Nigeria Courts. The case of Offery Vs *ChiefS.O Ola&* Ors[278] portrays a good example of such.

Again it has been observed that the with steady advancement in technology ,dictating acts of infringement is becoming more complicated and sophisticated especially for work on the internet. Tracking people who copy works without authorization from the internet is very difficult. Many internet proprietors where these works are copied from hardly know that these works are products of infringement. This constitutes a serious challenge even in the developed world.

Furthermore, the concept of innocent infringer has thrown up a several questions as to the seriousness of the Act in protecting victims of infringement and has constituted a stumbling block to victims in their quest in getting justice from the court. An infringer who desires to escape the full weight of the law, vacuums up pity by relying on such defense so as to pay lesser sum.

The 2022 Nigeria Copyright Act has taken proactive step in protection of copyright work and it is equally not in dearth of adequate remedies that will assuage the minds and hearts of victims of infringement. The Act has provided wide range of remedies which a complainant can rely on in pursuit of his or her rights. These are provided in sections 37 and 38 amongst other provisions of the Act. However the inherent challenge lies is getting quality evidence to prove the cases within the provision of the Act.

[278] (Unreported) Suit No. HOS/23/68. Decided on June 1969

5.3 Recommendation

After comprehensively examining the subject of discuss and issues distilled there from, it is recommended as follows:

1. The courts should be liberal in its understanding of the key words of Section 1(2) (a) of the copyright Act to wit;"sufficient effort" and "original character." This is because setting a high standard in interpretation of the term will cause hardship to young writers and entrepreneurs and stifle competition as was seen in *Offery* v. *Chief* S.O *Ola & Ors (supra).* However law courts should be mindful and meticulous enough to sieve out bad and frivolous cases from the good ones especially where there has been an unwholesome copying by the infringer
2. As submitted in chapter three of the work, the Courts should not blindly follow the god called "judicial precedent" when cases of infringement of copyright is brought before them. Every case should be clinical examined and empirically reviewed before giving their decision. This is because each case that comes before the court has its own peculiar facts and indeed presents the judge with an opportunity to develop the law.
3. In examining if a new work resembles an existing work in determining whether infringement has occurred or not, the court should adopt the reasonable man's test in that circumstance as this will help the court in arriving at the justice of each case.
4. In the quest to provide victims of copyright infringement with adequate remedies, the court should make awards that are encouraging enough to the victims and

deterring enough to the infringers and by so doing sends strong warning signal to the subsequent infringers.

5. Since it is natural as found before that infringers would like to carry out their nefarious activities untracked, the Court should also be disposed in granting an *Anton Pillar* injunction. This will aid the victim in gathering qualitative evidential materials that are necessary in establishing their cases.

6. Consider introducing statutory licensing schemes to hasten using copyrighted works while ensuring fair compensation for right holders

7. Establishing a dedicated copyright office or agency to oversee copyright registrations, enforcement and policy implementation

8. Training of law enforcement agencies to effectively investigate and prosecute copyright infringement cases

9. Updating laws to account for emerging technologies, such as AI generated content, and ensure clear guidelines for their use

5.4 Conclusion

The increasing call to adequately protect copyright woks led to coming into existence of the Copyright Act and its amendments. Works of literary, musical and artistic works are products of creativity, skill and hardwork and must pass the tests set by law for it to enjoy the protection of copyright. The Nigeria Copyright Act has givenboth economic and moral rights to these works and has further provided legal protection to them against unlawful infraction. Owners of copyright works have equally been provided with several remedies under the Act in the quest to enforce these rights in court. These have been examined in this work.

However, there exist several challenges both in the law itself and in its interpretation especially as it concerns the point an act can be said to be constituting infringement, the parameter for measuring the acts of infringement and ways of getting best evidence to prove such infringement. In finding solution to this challenge, several steps has been recommended in this work and it is believed that adopting and implement such approaches will help in granting owners of copyright works better protection and remedy for the work against acts of infringement.

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