

EMERGING ISSUES IN COPYRIGHTS AND INFORMATION AND COMMUNICATION TECHNOLOGY

An Overview of the Nigerian Copyright Law

Copyright legislation was introduced into Nigeria from the British empire at the turn of the 20th century; primarily to encourage innovation, by protecting the intellectual property of originators of certain work categories to the exclusion of others.

The categories of protected work under the Nigerian copyright law include literary works, musical works, artistic works, cinematography films, sound recordings and broadcasts.¹

Literary works is a broad category that includes novels, stories and poetical works, plays, stage directions, film scenarios and broadcasting scripts; choreographic works; computer programs; textbooks, treatises, histories, biographies, essays and articles; encyclopedias, dictionaries, directories and anthologies; letters, reports and memoranda; lectures, addresses and sermons; law reports, excluding decisions of courts; written tables or compilations.²

The Automatic Existence of Copyright and the Value of Formalities: Copyright automatically subsists in an original creative work whether or not such works have been registered with the Nigerian Copyright Commission (NCC). However, formalities such as registration enable the NCC to fulfill their statutory mandate of maintaining a comprehensive database of authors and their works in Nigeria. The formalities also enable the public know who owns the copyright in a particular work and eases the transfer of copyright to licensees or agents as the

¹ Section 1 Copyright Act, Cap C28 LFN 2004

² *ibid*

case may be. Formalities also make it possible to enforce copyright in foreign jurisdictions.

The Nature of Copyright Protection: Copyright does not protect ideas but the original expression of ideas. Three broad categories of the rights offered protection include the rights of authorization, moral rights and economic rights. Rights of authorization include the right to translate, the right to adapt a work, the right to perform in public, the right to broadcast, the right to make reproductions, the right to use work as basis for an audiovisual work.³The copyright holder or the author also has the moral right to claim authorship and to reject any action that would change the nature of the author's work. The rights holder/author also has the economic rights to profit from their work

The Duration of Copyright: Copyright does not subsist indefinitely. The copyright law provides duration for copyright after which the work is free from exclusivity and becomes a public work that can be freely used by third parties without any authorization. The author of a literary, artistic or musical work enjoys copyright throughout his lifetime and for 70 years after his death. The copyright in films, sound recordings, performances, photographs last for 50 years from the time the work was first published and/or created.

Exceptions and Limitations: The exclusive nature of copyright for original authors and rights holders is limited by certain exceptions and limitations contained in schedule 2 and 3 of the Nigerian Copyright Act. These include:

³ See Section 6, 7 & 8 of the Nigerian Copyright Act and Section 7,8, & 9 of the South African Copyright Act

1. **Fair Dealing provisions:** The Copyright Act allows the use of Copyrighted work without authorization for private use, educational purposes (not more than three copies of a book may be made for use in a Library), scientific research, criticism or review, public interest broadcasts, parodies, pastiches or caricature.⁴ Copyrighted work may also be used without permission for other purposes such as judicial proceedings, the duplication of computer programs for backup purposes, the broadcast of public lectures, short excerpts from literary work, incidental inclusions of artwork in film and broadcast, and ephemeral use of artistic work. ⁵

2. **Compulsory licenses:** The Copyright Act permits qualified persons to apply to the commission for a non-exclusive licence to produce and publish a translation of a literary or dramatic work which has been published in printed or analogous forms of reproduction for the purposes of teaching, scholarship or research⁶. This is usually granted after such inquiry as may be prescribed and the payment of the required fees and after any pre-conditions are met. ⁷

3. **Exceptions for the visual and hearing disabled:** The Copyright Act contains an important exception that allows the reproduction of copyrighted material in braille, sound recordings for exclusive use of the blind and disabled persons, without authorization from the owner of the Copyright⁸

⁴ Second and Third Schedule to the Copyright Act

⁵ ibid

⁶ Fourth Schedule to the Copyright Act

⁷ ibid

⁸ Schedule 2 of the Copyright Act

Copyright Infringement and Enforcement in Nigeria

Copyright is infringed by any person who without the licence or authorization of the owner of the copyright does, or causes any other person to do an act, the doing of which is controlled by copyright.⁹ Copyright infringement includes the importation of a work which were it produced in Nigeria would have been an infringing copy and the unauthorized exhibition and distribution of copyrighted works. The act makes copyright infringement actionable at the suit of the owner, assignee or an exclusive licensee of the copyright who is entitled to all such relief by way of damages, injunction, and accounts or otherwise as is available in any corresponding proceedings in respect of infringement of other proprietary rights¹⁰.

Anti-Piracy measures

The Copyright Act contains a provision that allows the Copyright Commission to prescribe any design, label, mark, impression or any other anti-piracy device for use on, in, or in connection with any work in which copyright subsists¹¹. Under Section 21 (2) of the Copyright Act, any person who- (a) sells, rents, hires or (b) offers for sale, rent or hire, any work in contravention of the prescribed design, label, mark, impression etc., commits an offence and is liable on conviction to a fine not exceeding N100, 000 or imprisonment for a term not exceeding 12 months or to both such fine and imprisonment. The anti-piracy measures also cover the importation and possession of said prescribed anti-piracy device the acts of which will upon conviction attract a fine of N500,000 or/and a term of imprisonment not exceeding five years.

In light of this, the Nigerian Copyright Commission has prescribed the use of a

⁹ Section 15 (1) (a) of the Copyright Act

¹⁰ Section 16 (1) Copyright Act

¹¹ Section 21 (1) Copyright Act

Hologram for sound recordings and Cinematographic works offered for distribution in Nigeria.¹²

- **Civil liability**

Generally, infringement of copyright attracts civil liabilities as the infringement is actionable at the suit of the owner, assignee or an exclusive licensee of the copyright, as the case may be, in the Federal High Court exercising jurisdiction in the place where the infringement occurred¹³. The act also makes it possible for both Civil and Criminal Actions to be carried out simultaneously in respect of the same infringement¹⁴

- **Criminal liability**

Under the Copyright Act, the making, distribution, importation, or the reproduction in any form of an infringing copy of a work protected by copyright constitutes an offence and any person found guilty shall be liable upon conviction to a fine or to a term of imprisonment depending on the particular act or to both such fine and imprisonment.¹⁵

- **Simultaneous Criminal and Civil Liability**

Section 24 of the Copyright Act permits simultaneous criminal and civil actions for copyright infringement and NCC is known to pursue both measures to heighten the threat of double sanctions.¹⁶

¹² See Copyright (Security Devices) Regulations 1999 as made by the NCC

¹³ Section 16 Copyright Act

¹⁴ Section 24 Copyright Act

¹⁵ Section 20 Copyright Act

¹⁶ <http://www.copyright.gov.ng/index.php/news-events/item/344-ncc-sues-mtn-for-copyright-infringement>

Criminal Liability as a Deterrent? NCC v MTN

In 2015, the Nigerian Copyright Commission instituted criminal charges against MTN for the unauthorized use of songs owned by the artist, Dovie Omenuwoma-Eniwo aka Baba 2010.

The offences, according to the charge, are contrary to and punishable under Section 20(2)(a) and 20(2)(b) of the Copyright Act, Cap C28 Laws of the Federation 2004.

Interestingly, the criminal suit was instituted after a civil proceeding that was settled out of court for a sum of 50 million Naira only

According to the NCC, the criminal proceeding would serve as a stronger deterrent against copyright infringement.¹⁷

Copyright and the Digital Economy

Nigeria is recorded to have the highest level of internet usage in Africa. According to the 2016 Digixfacts report, Nigeria has 63 million people on the internet.¹⁸ Popular sites visited by Nigerians include social networks such as blogging platforms, YouTube, Facebook, twitter. These platforms have created an outlet for creators to “broadcast themselves” and create and share content, not only within Nigeria, but with the world. Many Nigerians have in turn been able to leverage on this visibility to gain economy for themselves, bypassing the established bureaucracy of the mainstream sectors of engagement. As indicated in the previous lecture, the nature of the digital ecosystem also demonstrates unlimited access to available content and the ability to share that

¹⁷ <http://www.vanguardngr.com/2015/12/ncc-files-criminal-charges-against-mtn-over-alleged-copyright-infringement/>

¹⁸ <http://www.digitxplus.com/wp-content/uploads/2016/10/2015DigitalFactsBook-Abridged-1.pdf>

content with others.

In the context of copyright, this raises the question of copyright application in the digital space.

To what extent is the Nigerian copyright Act applicable to the digital space? At what point, would copyright infringement have said to occur and who would be held liable for this? The paper considers this under a few themes.

- **Exceptions for the Blind, Hearing Impaired and otherwise Disabled in the Digital Economy**

As earlier indicated, the Nigerian Copyright Act very importantly exempts from copyright protection, the reproduction of published work for the exclusive use of the blind or disabled persons.¹⁹ In other words, through a process called reverse engineering, approved institutions can reproduce published work, sound recordings in a way that is accessible to the disabled without authorization from the copyright owner. In the context of the digital space, reverse engineering may require the circumvention of **technology protection measures (TPM)**.

Technology protection measures are technologies used to control access to copyright content, or to prevent users from copying protected content. For example, a password is a technology protection measure and circumventing this may be akin to breaking into someone's house.

Discussion: In the absence of any other provision, to what extent would the Nigerian copyright Act be considered to cover the circumvention of technology protection measures? .

¹⁹ Section s Second schedule to the Copyright Act LFN 2004

- **Exceptions: Parody, Pastiche and Caricature Online**

Parody, Pastiche and Caricature: The Nigerian Copyright Act exempts from copyright control, exaggerated and often humorous imitations of original work; whether such an imitation serves to mock, celebrate or is created solely for entertainment.

The ability to share content widely on the internet has significantly amplified imitations of original work. Daily, video skits are produced that imitate an original work of art, either to celebrate such art or to mock it.

At the moment, there is no judicial interpretation from Nigerian courts of law that have tested the applicability of this provision to content shared on the internet. It would however, be important for this to be clearly distinguished from piracy which attracts civil and criminal liability.

Further, in reaching any judicial decision, the purpose of the [imitated] work, the permissions granted by the copyright owner are useful considerations to take into account. Foreign legislation and judicial interpretation also serve as guidance for adjudicating on these matters.

- **Dealing with User-generated Content**

Online communities such as blogs, social networking platforms and sharing sites thrive on content generated by members of these communities. The members who generate specific content, on the face of, hold the copyright to the generated content. As “social” platforms, the terms of use on these platforms also give a non-exclusive license to the platform holders to share content posted on the platforms with others who use the platform. Through privacy settings and terms of use, the community members also agree to allow other users of the platform access to the copyrighted material and permission to share

with others; without further authorization required. In an instance where a user signs up to use a community platform and through available settings, agrees for his content to be shared by other users of the platform, a copyright infringement may be difficult to establish.

The circumstances however, differ. There are instances where a user, may generate and share content, whose copyright is owned by another. In such instances, a copyright infringement claim may exist.

- **Intermediary Liability**

The current Copyright Act does not provide protection for intermediaries for copyright infringement of users of their platforms. Intermediaries have however, taken several precautionary steps to limit their liability for the copyright infringement actions of users. Intermediaries also work with relevant government agencies to enforce local legislation and regulations related to copyright enforcement. These are all steps taken to exempt or limit intermediaries from the liability of platform users.

Copyright on Youtube: The Content ID system

Youtube is a video-sharing platform that is freely available online, that enables people watch videos and also share their content with people across the globe. Thus, Youtube an outlet for several creatives seeking to gain visibility. Since anyone, anywhere can upload videos onto Youtube, a number of precautionary steps have been taken by Youtube management to prevent copyright infringement through a robust copyright system known as the

Content ID system. It works as follows:

- Copyright holders are encouraged to submit a reference file with their content to Youtube. After a verification process, if approved they are provided with a content id. To be eligible for a content identifier, the person/entity being granted the content id must have exclusive copyright to the content. As a result, third party licensees to copyrighted material cannot hold a content id.
- After the content ID is generated a content management system known as "content owner" is generated.
- The copyright holder then uploads his content to the content owner where it is kept for reference purposes.
- Whenever a new video is uploaded on Youtube, it is continuously matched with the various content owners for similarities which may be akin to copyright infringement.
- If any match is found, based on your agreed policies for any matched content, the appropriate measures are taken. This may include any of the following:
 - ◆ Muting audio
 - ◆ Blocking a video from viewership
 - ◆ Monetizing the video; sometimes sharing revenue with uploader
 - ◆ Tracking the video's viewership statistics.
 - ◆ (some copyright owners do not require take down but they choose to monetize any video that utilizes their copyright). ²⁰

Copyright on Facebook: The Rights Manager

Following in Google's footsteps, Facebook has also developed a system called the rights manager which serves as a reference library for publishers to

²⁰ https://support.google.com/youtube/answer/3244015?hl=en&ref_topic=4515467

submit copyrighted works and have it matched against content that is uploaded on facebook.

- **Intermediary Liability in the United States**

The United States Congress enacted the Digital Millennium Copyright Act (DMCA) in 1999 to respond to the nuances of digital copyright protection. The DMCA provides safe harbors or limits the liability of online service providers/intermediaries from copyright infringement claims in specific circumstances.

The United States: DMCA safe harbor provisions for Copyright Infringement²¹

The DMCA limits the liability of service providers/intermediaries relating to material online.

- It Provides a safe harbor against monetary damages and most injunctions
- It Covers conduit, hosting, caching, linking activities on the condition that
 - The transmission was at the direction of someone other than the service provider (an internet user)
 - The transmission or other activity was automatically carried out without selection by service provider
 - Content is transmitted to the requester(user) without modification by service provider

²¹ See 17 USC 512 at <https://www.copyright.gov/title17/92chap5.html#512>

- Service provider does not store specific transmission or other instruction for further specific use (see 512(a), (b), (c), (d))
- The liability of the service provider is also limited provided that he abides by the notice-and-take down procedures of the DMCA. See 512(c)
 - i. terminate repeat infringers - 512(i)

The service provider has no duty to monitor (See 512(m))

Disqualifiers: The service provider/intermediary may be found liable where there is:

- actual or “red flag” knowledge of specific instances of infringement
- right and ability to control + direct financial benefit

Key cases

ii. [UMG v. Capital Shelter Partners](#)

iii. [UMG v. Vimeo](#)

European Union - OSP Safe Harbors²²

²² See EUR E-Commerce Directive safe harbors ([2000/31/EC](#))

Bars monetary damages, but only limited protection against injunctions

- “Horizontal” coverage -- all claims, not only copyright
- Covers conduit, hosting, caching (not linking) activities - art. 12, 13, 14
- Hosting safe harbor only applies to “passive” hosts, and the line between “active” and “passive” hosting is blurry See [L'Oreal v. eBay](#) (130-168)
- No duty to monitor - art. 15

Key Cases

[SABAM v. Netlog](#)

[L'Oreal v. eBay](#)

Take Down Procedures in the United States

For content that is found to infringe copyright, one of the actions often sought is to have such content taken down by the intermediary. To further preserve the internet freedom and to prevent arbitrary take-down procedures or content blocking, take down procedures in several jurisdictions are subject to administrative and judicial procedures.

Notice and Takedown Requirements of DMCA Safe Harbors

- Service provider must *“upon notification of claimed infringement respond expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.”* 17 U.S.C. § 512(c)(1)(C).
- In order to be effective, takedown notices must be in writing and: (1) contain the physical or electronic signature of claimant; (2) identify the work allegedly infringed; (3) identify the allegedly infringing material sufficiently to permit its removal or limit access; (4) provide information sufficient to contact the party providing the notice; (5) contain a statement that the complaining party has a good faith belief that use of the material is not authorized; and (6) contain a statement that the information in the notice is accurate and, under penalty of perjury, that either the owner or the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed. See 17 U.S.C. § 512(c)(3).
- A notice that fails to include all of the relevant information will not be admissible to demonstrate actual or “red flag” knowledge on the part of the service provider, provided, however, that if the notice identifies the work infringed, includes information sufficient to locate the infringing work, and provides contact information, the service provider has attempted to contact the submitter in order to assist in obtaining a complete notice. 17 U.S.C. § 512(c)(3)(B).

- A district court in California has held that a notice is defective if the material it identifies is no longer posted at the URL. *In re Maximized Living, Inc. v. Google, Inc.*, No. C11-80061 MISC CRB (EDL) (N.D. Cal. Dec. 22, 2011) (Laporte, MJ).
- Courts in the United States have rejected notices that require service providers to cobble information together from multiple documents. See, e.g., *Perfect 10 v. CCBill*, 488 F.3d at 1113 ("Permitting a copyright holder to cobble together adequate notice from separately defective notices ... unduly burdens service providers."); *Perfect 10, Inc. v. Giganews, Inc.*, 993 F. Supp. 2d 1192 (C.D. Cal. 2014) (addressing who bears the burden of extracting Message IDs from Usenet newsgroup postings); *Perfect 10 v. Google*, 2010 U.S. Dist. LEXIS 75071, *21-36 (examining several kinds of notices); *but see ALS Scan v. RemarQ Communities*, 239 F. 3d 619, 625 (4th Cir. 2001) (concluding that incomplete notices can be substantially compliant).
- Counter-Notice: Section 512(g) creates a "counter-notice" regime protecting service providers from liability both for taking down material in response to infringement notices, and for restoring access ("put-back") to material upon receiving a "counter-notice" from a subscriber contesting the infringement notice.

- **Alternative Copyright (Copyleft): For example the Creative Commons**

The digital economy values collaborative work because to a significant degree, the innovations that have supported the growth of the space have been made possible through collaboration. For many technologists and creatives however, the mainstream copyright provisions do not adequately provide the required

protection and so alternative measures to protect intellectual property in a way that encourages innovation have been developed. In such instances where a copyright owner has specifically authorized how his material can be used, he has exercised his right of ownership and cannot then sue for copyright infringement based on the copyright Act unless he withdraws previous permissions/licenses given.

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Proposed Copyright Reforms in Nigeria

In view of the impact of the digital economy on the lives of Nigerians, the NCC has initiated a series of reforms to the Nigerian Copyright legislation. Some of the proposed reforms include:

1. **Robust fair dealing provisions and criteria for determining fair dealing.**

The bill retains the current law's exceptions for the blind, visually impaired or otherwise disabled persons.

2. **Safe harbors for intermediaries (also known as mere conduits), and system catching, in accordance with international norms;**

The Copyright bill provides for protection for intermediaries which deals with "Information residing on systems or networks at direction of users". It exempts from liability for monetary relief for infringement of copyright on intermediaries and i.e. "if the intermediary does not have "actual knowledge" that the material or an activity using the material on the system or network is infringing or in the absence of such "actual knowledge" is not aware of "**facts and circumstances from which infringing activity is apparent**". (It may be the duty of the courts to determine actual knowledge)

3. The Copyright bill has a provision **on site-blocking**.
4. **Take down notice:** The bill requires a 48 hours' notice to be given to the subscriber by the Service Provider for a take-down notice. This is a less progressive provision than was contained in the initial draft bill. The provision makes it obligatory on a service provider to take all reasonable steps to prevent any content taken down or removed pursuant to this provision from being reloaded onto its system or network and upon becoming aware of such re-loading to promptly remove or disable access to the content without further notice to the subscriber. The provision imposes equal liability on the service provider for infringement as is naturally imposed on the infringer, if the service provider is in breach of requirements for take down in sub-sections 1&2 relating specifically to take down after 48hours notice. Failure to comply is also criminalized, with a minimum penal fine and minimum term of imprisonment. The bill contains a two-strike suspension rule and imposes no requirement for a service provider to establish a repeat offender policy.