THE LAW AND PRACTICE OF COPYRIGHT IN NIGERIA

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A Thesis submitted in partial fulfilment of the requirements for the award of the degree of Master of Laws (LL.M) to the

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DEDICATION

This thesis is dedicated to God Almighty whose abiding grace propels me; to my parents Ocheme Ada Agbo and Elizabeth Enyanwu Oji who either dead or alive have nurtured me to bear the fruits of this work, and to my wife and children whose basic necessities were often compromised in order to see this work become a reality.

Elizabeth E. Ocheme (Mrs)
Emoche +
Gloria
Esther
Theresa
Veronica and
Ehi

DECLARATION

I hereby declare that this thesis has been written by me and that it is a record of my own research work. It has not been presented or published any where, at any time by anybody, institution or organization. All quotations and references are indicated with specific acknowledgement to the sources.

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ZARIA

JUNE, 1997

CERTIFICATION

The Thesis entitled: **THE LAW AND PRACTICE OF COPYRIGHT IN NIGERIA** by PETER AGBO OCHEME meets the regulations governing the award of the degree of MASTER OF LAWS (LL.M) of AHMADU BELLO UNIVERSITY, ZARIA, and is approved for its contribution to knowledge and literary presentation.

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If this work deserves any credit at all, I share it with you all. However, I am solely responsible for the views expressed and for any deficiencies that may be found therein.

P. A. Ocheme, Esq
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ABSTRACT

Emerging as one of the branches of property law, Copyright is founded upon the capitalist principle of private proprietary right exercisable within and outside the limitations of political, economic and cultural boundaries. It is one of the international intangible rights secured by law. It subsists even while the owners are asleep and continues to be upheld even when they have long been dead. In Nigeria, among many jurisdictions of the world, the works which now attract protection under the law of copyright are works of human minds and hands. Thus, our natural endowments as found in either liquid or solid minerals, desirable as they are, do not enjoy copyright.

But yet, copyright is a legal system designed to protect creations in their material forms. This is why a distinction has to be drawn early enough between form and substance. Mainly, in copyright, the Law demarcates ideas from its field of application and seeks only to protect the form through which these ideas are given structure and expression. On the basis of that principle, copyright protects the idea from the moment it is reduced to a tangible form. This distinction is one of the features of copyright which often blindfolds many, nay Lawyers, from understanding the concept. This is compounded by the theories of creator's benefits as may be opposed to or be reconciled with that of the public interests among which he is also a member.

In the Nigerian context, the scope of human activities enjoying copyright and related neighbouring rights has widened. Almost every imaginary efforts of man (nay woman) at making the world a better place - be it In aural, sight, touch and smell - have attracted the force of law at

preservation, compensation and enforcement. Thus, works of art and literature, music, broadcasting, film, etc, in their sanctity, and with their various adaptations now enjoy legal protection. And, in some works, this protection subsits well after their authors may have died. The Nigerian legal jurisprudence in this area now appears to-be running ahead of practical realities, not as a result of our uncreativity but due to our ignorance and lethargy.

Following closely behind the heels of this works-categorization, we also consider the elements occasioning infringement of copyright. They at first appear highly monopolistic if not absolute in nature. However, going down the legal lane, the law conversely created a variety of exceptions and exemptions which together water-down the strict liability nature of copyright. In fact, under the current Nigerian copyright legislation, whatever has been assured the copyright owner soon appears to evaporate through the basket-like instruments of copyright enforcement.

From a cursory study of copyright at the international scene, this research discovered a seemingly inexhaustible rich well of topical issues. The universal nature of works of human mind and their dissemination has inevitably led to the conclusion of international conventions which allow foreigners to benefit from the protection afforded to nationals of each other's country. Also, by the working of these conventions, models of uniform legislations and practices have been developed, which tend towards the ideal of a world-set-of-rights. The goals of bringing together the greater possible number of countries and binding them with such protective charters have been achieved with varying degrees of success in many countries. Nigeria seems to be an infant in this arena; albeit, our

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CHAPTER ONE

HISTORICAL SOURCES AND PHILOSOPHY OF NIGERIAN COPYRIGHT LAW

1.1 INTRODUCTION:

The research is aimed at discovering the nature, genealogy as well as antecedent developments of the legal protection offered to creative works in Nigeria, under the name and style of "Copyright". The research also seeks to reveal the boundaries delimiting the idea of property and proprietary rights as a new agenda in the Nigerian jurisprudence of property law. It highlights the phenomenon that in Nigeria, despite our political history, the right to use and enjoy private property is one which has been extended even to abstract properties such as Copyright. This Work attempts also to demystify the maxim of property law which says that possession is nine-tenths of the law[1] The exception to this maxim holds that the owner of intellectual property continues to enjoy his proprietary rights well after his death!.

As a result of global advancement in science and technology, the legal principles of copyright (as laudable as they may appear) are however, in constant conflict with our social, economic and legal practices. The research highlights the problems associated with the implementation of the copyright legal provisions vis-a-vis these changes in other spheres of our national development, and where necessary, recommends possible solutions.

Copyright as a legal concept is one of the most complex and technically difficult branches of property law. It is an arcane area populated only by "experts" who most often hide behind an almost

impenetrable arcade of jargons.[2] Besides the complexities of international as well as national laws on the subject, the language used by the experts often makes it almost impossible for the general public - and even some Lawyers - to understand the wider implications of copyright legislations and practices. The research aims at exploring these problems in the hope of clarifying them, at least within the context of Nigeria Copyright regime.

1.2 OBJECTIVE

The objective of this Chapter is to discuss such issues as the definitions, the ideological or philosophical principles underlying copyright generally and with particular reference to Nigeria. The sources of the law of copyright in Nigeria would also be identified.

In addition to providing the conceptual foundation, the Chapter also contains an overview of the succeeding Chapters by way of brief commentaries. This is aimed at announcing the analysis of the research findings as detailed in the relevant Chapters.

1.3 DEFINITION OF BASIC TERMS:

Copyright is a property, albeit more appropriately, a specie of Intellectual property.[3] Property *per se,* embraces everything which is or may be the subject of ownership, whether a legal ownership, or whether beneficial or a private ownership.[4] Property as known to law is that aggregate of rights guaranteed or protected by law. These may be corporeal or incorporeal, tangible or intangible, visible or invisible, real or abstract. In short, property is anything of value including real estate, contractual rights, choses-in-action and other interests in or claims to

things. Although the term "property" can be defined from various perspectives e.g. social, political, economics and or legal. Our own perspective in this Work is legal. In this perspective, property is defined as the legal relation between two or more persons with regards to a thing(s). It is not the thing *per se*. It includes rights, privileges, obligations, immunities or duties arising thereto or from the thing. Much still, that thing is that which has value in property i.e. it is capable of being owned, etc.

In specific classification, Copyright is one among the intangible, incorporeal, invisible and abstract proprietary rights granted by law to the creator or originator of a tangible, corporeal, visible and real object. It is an abstract property incorporated in a physical property, although the ownership of the latter needs not necessarily be vested in the holder of the former. In certain exceptional circumstances, e.g. in an architectural work, the ownership of the intangible copyright could equally vest in the person who sketched the plan (architect) and who owns the building. As a property, the copyright owner, is vested with a legal right upon the creation of a literary, or dramatic, or musical or artistic work. *Ipso facto*, God is the copyright owner of all natural creations including man.[5] By extension of this logic, one can hypothesize the rule which says: God is the unltimate owner of every man's intellectual property (including his copyright) since the creative works of man emanate from the natural brains of man even if developed to a higher sensitivity by his chosen efforts. Deriving from this natural law, the artificial creations of man are ascribed to him, and protected by law as a private proprietary right exercisable by the man. This specie of right, seemingly monopolistic in character, thrives as one of the ethos of a free and capitalist economy. This legal right, though abstract in

nature, vests the holder with the sole and exclusive privilege of multiplying copies of his creative work by publishing, selling or disposing of the same as it pleases him for a stated period of time.[5]

Copyright in Nigeria is a statutorily granted right exercisable by certain group of persons,[6] over some designated works of art,[7] and upon specified terms and conditions,[8] as provided by Law. To a layman, copyright may seem to be the right for him to copy another's work. This is far from legal reality, because Copyright as known to law, is a negative right. It is not a right to do anything but rather to stop others from doing something.

The definition of "intellectual property", on the other hand, entails a wider dimension. In Nigeria, the field of intellectual property law encompasses such legal concepts as Trademarks, Patents, Designs, Copyright and Neighbouring Rights. Trademark is a distinctive mark of authenticity, through which the products of particular manufacturers or the vending commodities of particular merchants may be distinguished from those of others. Under our law, this proprietary right enjoys an independent separate legal codification.[9] Patent is a grant by the government or a sovereign to an inventor or his assignee for a term of monopoly over the use and application of an invention. Designs is the grant of a term of monopoly to an inventor over a combination of lines or colours or both, of any three or more dimensional markings which is to be of industrial multiplication and capable of being affixed to any good or textile material but which has nothing to do with the function of that good or material. Patents and Designs are merged in one Code[10] in the Nigerian jurisprudence of intellectual property; while Copyright and

Neighbouring Rights share another.[11] We however, propose for this project to discuss only Copyright.

Basically, the Law of intellectual property sets out to protect unfair business competitions. For example, in copyright such unfairness may be the result of one person copying the original literary work of another and claiming it for himself or exploiting the work for profit without the creator's authority. For example, a research worker may spend many years of hard labour developing a new product to the point when it becomes commercially valuable only to find that upon the news of his invention, competitors take the fruits of his labour for free by duplicating copies of the product.

In the same vein, a manufacturer of an excellent quality product may identify his goods by reference to a trademark or design upon which the purchasing public come to rely as meaning the badge of quality; but he may wake up one morning to find a competitor adopting the same or comparatively similar tradesmark or design on the latter's goods - which may even be of an inferior quality - such that a hard won reputation disappears overnight. These are a few illustrations of the essence of the law preventing acts of unfair competition or exploitation of someone's labour. From the diverse nature of intellectual property law: ranging from technology-related rights to purely artistic rights, from marketing tools (e.g. trademarks) to intangible rights (e.g. folklore) there is a common theme running through all of them i.e. that unfair business competition or exploitation should not be tolerated.

Although the above definition of intellectual property law may appear relatively simple i.e. the recognition and protection of one's fruits of labour

from unfair exploitation, yet the process of practicalising this legal concept is very difficult. It requires more than the letters of the Law to achieve the desired objective. The process involves, *inter alia*, the art of balancing the seemingly monopolistic rights of copyright owners with the equally important fundamental right of others to uninhibited flow of information and frequent uses to which works of art are often put. To adequately understand the complexities of intellectual property law, and with particular reference to Copyright, it may, therefore, be necessary to first identify the sources of the law which gave birth to the concept. This preliminary tracing of the genealogy of the law would, among other things, illuminate the nature, ideology and philosophical under-currents of Copyright as would be discussed subsequently.

1.4 SOURCES OF NIGERIA COPYRIGHT LAW:

The genealogy of the Nigerian copyright law, system and practices is traceable to the English models which have evolved over 200 years ago. This is by reason of our political, historical as well as legal connections with the United Kingdom as a result of colonialism.

The parameters of Nigerian copyright history may be subdivided into three periods:

(a) The period before colonialism;

(b) The period during colonialism; and

(c) The period after colonialism.

In considering these periods, it is necessary to bear in mind that the above demarcations based on the incidences of pre and post-colonial periods are only in relation to acts of political self-rule by the people

themselves. It does not suggest that Nigeria, and indeed her copyright operators, have ceased from being influenced by the British after our Independence. In other words, neo-colonialism still persists between us and the United Kingdom in many ways, including copyright.

1.4.1: The Period Before Colonisation:

This covers the period before the second half of the nineteenth century, precisely before the 6th day of August 1861 when Lagos was first annexed by Great Britain.[12] During this period, there was no form of indigenous statutory copyright law applying commonly in the territories now called Nigeria. It would be superfluous to postulate, therefore, that there was either a uniform customary law regulating copyright in those territories. This is because each of those territories operated independently as an indigenous community with their separate governmental as well as legal authorities. It may, however, be asked whether there was any form of customary law protecting works of art in the independent pre-colonial Nigerian territories. As a matter of fact, there were the Benin, the Nok, the Ife sculptures, to name a few of the many famous works of art produced by the natives of these territories. There were some weaving works of garments, pottery and leather works peculiarly ascribed to notable tribes of Kano, Bida, Kanuris, etc. By the traditions of most tribes in the pre-colonial Nigeria, such works of art were deposited at the shrines of notable oracles or at the palaces of the traditional rulers, be they Chiefs, Emirs or Obas, as they might have been called. Such despositories were for the purposes of public display and exhibitions at feastivals. There was hardly any need for commercial works of art.

The priests of those shrines or the curator of these artifacts at the palaces acting as custodians of the people's culture, traditions and monuments, had the duty to preserve and protect such artifacts in their respective domains. The important interest for such artifacts at this period was for each community to exhibit those creative works of art in order to reflect the wealth of their cultural heritage. Due to the limited trans-boarder mobility among the inhabitants of these territories, there was little or no threat of unfair competition or exploitation sufficient to warrant the issues of copyright in the pre-colonial Nigeria.

Secondly, before the advent of colonialism, most indigenous works of art in the territories now called Nigeria, were group-based. Thus, those who were gifted with the talents of making a particular artistic work, e.g. weaving, pottery, sculpture, etc. were usually grouped together either by communal affinity or for purposes of trade. It was the practice that many individuals contributed to the making of each piece of artifact. These in modern times, are what we now call folklore. The protection of folklore, though akin to copyright, is legally distinguished as a Neighbouring Right, and is outside the strict scope of this research. In the discipline of folklore, the varied indigenous culture of each of the communities could be identified in any of the following components:

(a) Oral folklore: comprising of narratives, poetry, folk epic, proverbs, riddles, jokes and songs.

(b) Social folk customs: comprising of festivals and ceremonies, games, hobbies, folk medicines, traditional religions, divinations, etc.

(c) Material folklore: crafts, folk visual arts, folk architecture,

folk clothing, folk cookery, folk vehicles, etc.

(d) Folk performing Art: for example, drama, music and dance.

All the above activities were mainly done in groups and are varied from one indigenous community to another. Although the development and protection of folklore is not within the strict definition of Copyright,[13] folklore for us in contemporary Nigeria, is the cradle from which the terminology of "copyright" evolved. Even in England, the term "copyright" was first used for literary works.[14]

Our inquiries for any rule of customary law preventing any one tribe or group from making a similar or the same type of works of art earlier made by another, suggestive of offending copyright, revealed that there appeared to be few, if any, such legal sanctions existing in pre-colonial Nigeria. This is due to the fact that Nigerian customary law is not written and as such there is no evidence that in the pre-colonial period there were such laws of any community which regulated copyright activities. This was more-so as every tribe only endeavoured to propagate their distinctive cultural heritage. It was not a thing of pride, therefore, to venture away from one's cultural artifacts in competition with others' culture. More importantly, since trade was restricted to local markets due to immobility, there was no real threat to the composite nature of the territorial economy, let alone artifacts. And since law is only necessary to curb or regulate social ills of behaviour, there was no apparent need for copyright at pre-colonial Nigeria as there equally was no unfair competition or exploitation threatening the proprietary rights of those indigenous communities who were separated not only by natural boundaries but also by their independent governmental structures and cultural behaviours. While it is

the Doctrines of Equity. Secondly, the statutes of the British Parliament generally known as Statutes of General Application. Those were statutes enacted in England before and by 1st January 1900.[16] Other statutes which were enacted in England after 1st January, 1900 could be extended to apply in Nigeria by an enabling Local Order-in-Council.

But the validity of the common law of England which had been inforce from time immemorial and their doctrines of equity still remain in force in Nigeria even now after our political independence. Therefore, the common Law and doctrines of equity applicable to copyright in Nigeria during and after her colonization were and still are the same as in England.

As at the time of Nigerian colonization, the copyright law in England included the common law, the doctrines of equity, and statutes; e.g. as far back as 1709 the British Parliament passed their first copyright legislation,[17] popularly known as the Statute of Anne. By definition, the Statute of Anne was one of the Statutes of General Application in force in Nigeria from the moment of the British annexation of each of the territories which were later amalgamated as Nigeria in 1914. The 1709 Statute remained in force in England and in Nigeria upto 1911 when the British Parliament passed another Act repealing the 1709 Statute.[17a]

The 1911 British Copyright Act, though not a statute of general application, was extended to apply in Nigeria in 1912 by virtue of an Order-in-Council.[18] In the context of Nigerian copyright law, the 1911 British Copyright Act was our main starting point. Under the Act, Copyright subsisted in every original literary, dramatic, musical and artistic work if, the published work was first published in any part of His Majesty's dominion and if unpublished, the author of the work was at the date of making it a

British subject or resident within His Majesty's dominion. Nigeria being one of His Majesty's dominion, it meant that the protection offered by this Act qualified both our works of art as published in Nigeria or such unpublished works by persons who were resident in Nigeria. The 1911 Act also fixed the limitation period for the term of copyright to subsist, by stipulating that the author should enjoy copyright during his life time and for 50 years thereafter.[19] This limitation clause statutorily amended the earlier common law rule that the author of a published work enjoyed copyright in perpetuity.[20] As for an unpublished work the common law rule that the author enjoys copyright in perpetuity still remains the law.[21] In the case of CAIRD v. SIME,[22] the right of a Professor to restrain the publication of his lectures which he delivered orally in the class was held to subsist in perpetuity. In a more precise term, the English House of Lords clarified the confusion between published and unpublished works as protected by copyright under common law and the statutes. In the case of JEFFERYS v. BOOSEY,[23] the House of Lords stated that common law copyright continued to subsist in perpetuity for an unpublished work, but was lost on publication. In otherwords, common law copyright does not extend to published works. This may explain the omission of any form of protection for an unpublished work in the Nigerian copyright legislation.[24] It may well be asked: if a work is unpublished, how do people know about it let alone to copy it? Lord Halsbury in the above Caird's case (supra) had this to say:

> *"It is not denied, and it cannot in the present state of the law be denied, that an author has a proprietary right in his unpublished literary productions. It is further incapable of denial that proprietary right still continues notwithstanding some kind of communication to others".*[25]

And Lord Watson, in the same case, exemplified the issue of legal protection for an unpublished work under the common law as follows:-

> *"The author of a Lecture on Moral Philosophy or of any other original composition, retains a right of property in his works which entitles him to prevent its publication by others until it has, with his consent, been communicated to the public".*[26]

It is submitted that the Nigerian copyright statute has wittingly observed the above common law rule by its deliberate avoidance of providing for legal protection of an unpublished work. It follows that in matters of unpublished works, it is still the common law that will apply.

In England, the 1911 Copyright Act was repealed in 1956. [26a] However, the Act continued its application in Nigeria well after 1956 because, the enabling local Order-in-Council in Nigeria was not affected by the 1956 legislation. Since the earlier Order-in-Council extending the 1911 England Act to Nigeria remained in force even beyond our independence in 1960, the position of copyright law in the emergent Nigerian independent State was virtually the same as in England prior to 1956.

1.4.3. The Period After Nigerian Independence:

Despite Nigeria's attainment of self rule in 1960, the British statutory law, i.e. the Copyright Act of 1911, the common law and the doctrines of equity of England remained the major sources of copyright law in Nigeria. In fact, the principles of English common law (which now fused with the doctrines of equity) despite our local legislations, have continued to hunt our courts especially in the realm of commercial and private law such as copyright.

In 1970, the English Copyright Act of 1911 was repealed by the

Nigerian Copyright Decree.[27] This seemed to have put to rest the ghost of the 1911 Act which, though having been abolished in England since 1956, had prevailed in Nigeria for over half a century. This delay on our side furnishes the argument that Nigerians and their Governments hardly understood the essence of copyright and, therefore, could not care less about the state of the Law - whether it was imperialist or even obsolete. It was this lassitude that greeted the first indigenous Nigerian copyright legislation, such that in all of its 18 years of existence in the statute books, not a single case was reported on its provisions.

Secondly, as a result of the oil boom in the Nigerian economy and due to necessities and exigencies of contemporary Nigeria between 1973 and 1983, Nigerians and their institutions acquired an unprecedented amount of technological appliances with which copies of all works of art may be easily reproduced. This was evident not only in the printing industry (where science and technology have increased the speed of lithographic reproduction) but also in electronic communications through which musical, cinematographic and broadcasting works are easily transmitted. These scientific developments, desirable as they were, however, paved the way for increased piracy and plagiarism thus robbing Peter (the authors) to pay Paul (pirates and their beneficiaries).

Apart from the low level of awareness on the importance of copyright to the Nation's economy, the 1970 Act was also deficient in providing adequate penal or remedial sanctions to deal with the rising incidence of piracy and other copyright abuses.[28] Among the points of inertia and dissatisfaction with the 1970 indigenous Copyright Act, was the absence of an administrative machinery to handle copyright issues which involve

national and international implications in law, diplomacy and the economics.

Apart from the general apathy of the Nigerian government in copyright-related issues, there was also the absence of any private or public spirited organisation charged with the responsibility of administering copyright under the 1970 Act. Despite the flagrant abuses to which works of art were exposed, the battle was left solely in the hands of the different interest groups to contain or curtail the resurgence of piracy as it affects their works.

Although there were campaigns led by the interest groups such as the Nigerian Publishers Association (NPA), the Performing Musicians Association of Nigeria (PMAN); the International Federation of Phonogram and Videogram Producers (IFPI) etc, during the civilian regime of Alhaji Shehu Shagari.[29] These campaigns highlighted the vulnerability of the Nigerian artiste and his works in the helpless prevailing circumstances described above. During the tenure of that regime, there was a Copyright Bill sponsored in the Senate which, *inter alia*, sought protection for Broadcasting.[30] Although the Bill did not succeed into Law, it paved way for the various interest groups in their campaigns to reach out to the public on the dangers of copyright abuses without adequate legal protection.

After the end of the 2nd Republican Government,[31] at the beginning of 1984, and as part of the economic de-regulation policies of the Structural Adjustment Programme (SAP) of the succeeding Military Government of General Ibrahim Babangida, the necessity for a more stringent protection for our indigenous works of art was felt. This was especially due to our increasing involvement in international trade and tourism.

The fiscal policies of SAP which threw open our doors to international operators quickly exposed the yawning gap between our docile copyright legislation and the actual practices of trade negotiations in matters of intellectual property. Thus, it was soon discovered that our law was weak in catering for our national and international works of art and artistes generally. There came an attempt in 1987 to have a new Copyright decree, but this was halted by the intervention of the then Attorney - General of the Federation - Prince Bola Ajibola - "so as to give room for a total reform of the law"[31a]. His action might have been informed by the new reforms of the British Copyright Laws which came into effect almost at the same time as ours.[32]

The A.G. subsequently set up a National Planning Committee on Copyright. The committee comprised of representatives from Ministeries of Trade, Culture, Education, Justice and other interested and concerned bodies such as PMAN, NPA, IFPI, etc. The committee organised a series of Seminars and Workshops to which there were local and international contributions, e.g. the World Intellectual Property Organisation. The communiques drawn from these national Workshops/Seminars gave rise to and informed the content of the subsequent Copyright Decree[33] promulgated in 1988. This Decree (now redesignated as an Act[34]) not only repealed the 1970 Act, but also strengthened the hitherto inadequate position of the law on copyright practices in Nigeria. The principal Act was later amended in 1992.[35] The latest amendment was to provide supportive environment for the administration of copyright in Nigeria. This Act (as amended) now becomes the principal and current source of Nigerian copyright law.

1.4.4 Other Subsidiary Sources

Besides the Nigerian Copyright Act (as amended) which evolved over the phases of history discussed above, there are other subsidiary sources of law relevant to Copyright in Nigeria. The first of these is the Constitution of the Federal Republic of Nigeria.[36] The Constitution being superior to all other laws, its provision on any subject matter over-rides the provision of any other law on the same subject. According to the Constitution,[37] copyright is an item on the exclusive legislative list and by virtue of this, only the Federal legislative authority (be it military or civilian) has the sole power to make laws regulating copyright in Nigeria. Apart from this categorization, the Constitution is silent about the rights and duties of the citizenry on copyright issues. This silence may not be unconnected with the low profile accorded copyright-related issues prior to and during the period of the constitution drafting exercise. It has been noted earlier that copyright was not a topical national issue in Nigeria until the middle of 1980s.

Another subsidiary source of copyright law in Nigeria is as found in the Criminal[38] and Penal[39] Codes which apply to the Southern and Northern States of Nigeria respectively. The Codes contain criminal sanctions against copyright infringements as may be committed within the jurisdiction of either Code. Before the coming of the principal copyright Act in 1988, these Codes jointly and severally supplied the only avenue for criminalising copyright abuses in Nigeria.

Under these codes, the making of or the dealing in infringing copies of copyright work or the giving of unauthorised performances of a copyright work is "a simple offence" and the person so convicted, "is liable

to a fine of fifty (50) pounds; or, in the case of a subsequent offence either to such fine or to imprisonment for two months.[40] The Criminal code but not the Penal Code also provides for an order of forfeiture of copies or plates of the infringing copies either for destruction or for delivery-up to the owner of the copyright or otherwise as may be directed by the court.[41]

The new principal copyright Act of 1988 on coming into force, expressly repealed the provisions of the Criminal Code aforesaid.[42] The Act was, however, surprisingly silent on the corresponding provisions of the Penal Code. Was it that the drafters of the Act were ignorant of the provisions of the Penal Code on the subject? Did the new Act intend to preserve the Penal Code provisions to apply *pari passu* with those of the Act?. No matter the arguments for or against any of these questions, the trite law is that since copyright is a federal legislative phenomenon, the provisions of the federal Act prevails over those of any regional or State Act if there is conflict. In other words, even though the above Penal Code provisions have not been expressly repealed, in the event of a criminal trial for a copyright offence in any of the jurisdictions of the Penal Code, the relevant law to be applied is the Copyright Act (as amended).

The third subsidiary source of Nigerian copyright law is as found in the judgements of the superior courts. It is the principle of the common law that the decisions of the superior courts of law, e.g. the High Court or Court of Appeal until set aside by an appellate court, bind all parties and operate as *res-judicata*. The principle of *stare decisis* which is upheld in the Nigerian judicial system is to the effect that inferior courts (the Supreme Court of Nigeria is the highest) are bound by the decisions of superior courts and not to disturb settled points of law. It is a doctrine that when

a superior court has once laid down a principle of law as applicable to a certain state of facts, it (and all courts below it) will adhere to that principle and apply it to all future cases where the facts are substantially the same, regardless of whether the parties and property are the same. By virtue of these principles and in consonance with the common law of England which is still applicable in Nigeria where relevant, the Case Law is a verile source of the Nigerian copyright law, especially in the area of unpublished works of art. This is an area which the Nigerian Copyright Act has abandoned entirely to be covered by the common law. In Nigeria, the court of first trial for all copyright matters whether civil or criminal is the Federal High Court.[43] This court is vested with the exclusive jurisdiction under the Law,[44] for the trial of all offences or disputes partaining to Copyright in Nigeria. The decisions of this Court (which has many Divisions across the country) until set aside or varied by the appellate court (e.g. the Court of Appeal) are *stare decisis*. Already there have been many such decisions of the Federal High Court on copyright issues as would be discussed later in this work.

Fourthly, section 37 of the Copyright Act (as amended) empowers the Minister responsible for cultural matters to make regulations prescribing anything required to be prescribed where no other provision is made in that behalf by the Act. This statutory power enabling subsidiary legislation under the hands of the Minister could be exercised in the event of a lacuna in the Law as may be applied from time to time. In the exercise of this statutory power, the Minister could extend the application of the Act to protect works of foreign authors or works emanating from foreign countries if he is satisfied that the foreign country in question accords similar facilities

to Nigeria under a common international treaty.[45]

Finally, with Nigeria acceding to various international conventions, or treaties on copyright-related agreements, [46] the terms of such international contracts will serve as a subsidiary source of law to regulate our copyright interests vis-a-vis those of our counter-part privies.

1.5 THE NATURE OF COPYRIGHT PROTECTION:

Arising from the definition of copyright as posited within the framework of intellectual property law, and having discovered the sources from where the laws on the subject are derived in Nigeria, the next important step is to examine the characteristics of the law of copyright. These are predicated on the following principles:

1. That protection is offered only to the material form in which an idea is expressed;
2. That protection is offered only to the original work and no more;
3. That the right subsists in a work irrespective of its purpose; and
4. That the economic right of the author of the protected work is exercisable only within the limits of the public good;

These principles will now be discussed in greater details.

1.5.1 Protection of Material Form:

As a legislation, copyright law is designed to protect creations in their material form. This principle derives from the rule distinguishing form

from substance or idea. For example, water, ice and snow are the same substance in different forms. In the case of water, it is liquid, while ice and snow are hard forms of water substance. Form, therefore is the general arrangement or structure or way in which the substance (e.g. water as in ice or snow) is put together either as a whole or in group or in parts. The principle of protecting form instead of substance seeks to protect literary, musical and artistic properties in exclusion of the ideas behind which they were formed. It seeks to protect only the forms through which such ideas are given structure and expression. The principle postulates that the idea as a unit of thought cannot be appropriated by copyright, until that idea is published.[47] It is the published form of the idea that enjoys copyright, because it then becomes a property worthy of protection. Idea is an abstract property not capable of being protected. But if it is transformed into a physical property e.g. in a book form, it can be protected.

The principle to protect only form emanates from the necessity to safeguard the general public against an individual's claim of proprietary ownership over his ideas. Even as copyright gives the creator of a work the monopoly over his work, this right, *per se*, is not absolute. It would be paralysing to allow ideas to be subjugated in this way. Creation would be impeded by the need to request the consent or authorisation of intellectuals. For example, in the scientific field, not much progress would be recorded if it would require consent of academics from whose ideas the scientific discoveries were supposed to have originated.

Apart from the above aspect of industrial convenience, it is obvious that ideas must be left to circulate freely because that is their very nature, essence and purpose. This is the moral behind the view that ideas or

natural substances be excluded from the field of copyright protection. Further arguments on this issue will be presented in Chapter Three of this work. Suffice to say for now that the current Nigerian Copyright Act has adopted this principle of protecting only the form in which the idea is expressed.[48]

1.5.2 Protection of Original Form of Expression:

The second fundamental principle of copyright postulates that the original work is the touchstone of copyright. The concept of originality as required in Copyright corresponds to the concept of novelty as required in Patent. Both concepts are to the effect that the work sought to be protected by either Law is new or the starting point, previously unknown and not copied or imitated from another. This principle, which is discussed in greater details in Chapter Two of this work, is a subjective issue within the context of the Nigerian Copyright Act. The Act at the very outset, stipulates what is regarded as original work in the following way:

> *"A literary, musical or artistic work shall not be eligible for copyright unless sufficient effort has been expended on making the work to give it an original character"*[48a]

The above requirement for originality goes only to the extent of the author's personality in his efforts in making the work. This impliedly reduces the scale of originality from its degree of "newness" to that which may have been made by an individual not knowing of another person's efforts in making such a similar thing. The allusion to originality as contained in our law is akin to that of the United Kingdom which, as explained by *CORNISH, et al*, is a work emanating from the exercise of some skill or judgement on the part of its author and, therefore, is not simply copied by him from

another's work.[49] To this extent, originality does not restrict the making of a similar work of art if the subsequent maker has not thereby copied another's work. It stops short of asking for the work to be the first of its kind. It is on this scale that originality is distinguished from novelty. Novelty, as required for Patent, is that the work must be such that its type had not been in existence in the past. Novelty is supported by the deposit of the work in proof that no such or similar work had previously been deposited.

The term of originality as intended by our law seems to have the notion of ingenuity rather than novelty. Does it then mean that it carries the stamp of the author's merits in making it? In other words, if two books are written, one by a professor and the other by a junior lecturer on the same subject of Law, does the professor's book enjoy copyright qualification of originality better than the other? Originality in the sense of ingenous creative effort bearing the characteristics of the author may, but for academic argument, be difficult to differentiate from the author's merit, yet it is essential that we distinguish between the two, especially as they relate to copyright eligibility.

As per our copyright law, and indeed those of Ghana, Malawi, Malta and Zambia,[50] a work qualifies for copyright protection if sufficient effort has been expended on its creation so as to give it an original character. Nothing is required of the quality of such effort, neither of the person making it. Thus, quality of the work is not a criterion for distinguishing between works which should or not qualify for copyright protection. Quality being a variable phenomenon deriving from each individual conception or knowledge of arts and literature, is a highly subjective matter and, in fact,

too imprescise for legal protection. Therefore it would be dangerous to say that the professor's book, without more, is eligible for copyright protection in preference to the junior lecturer's. If this is allowed, the application of law of quality (which may vary according to the individual judge's conception) would dangerously work injustice. For example, where does art begin and what is the definition which could cover all its descriptive elements?

S.M. STEWART puts it as follows:-

> *"There is general agreement that the quality or merit of a work are matters of taste and do not enter into the question of what is a work."*[51]

Merit or quality relates more to the personal status of the creator rather than the work itself: a status which may have been achieved before the creation of the work in question. In our belief, a lecture by a professor of Law is more likely to be better rated than one by a greenhorn at the Bar. Originality, on the other hand, does not depend on or demand of any ingenuity or worthy commendation. The creator of the original work earns his copyright protection without any recognition of his talents as to the quality of his work. It is enough even if it was produced by the most poorly endowed fellow.

1.5.3 Protection of the Existence of Work:

It is a fundamental principle of copyright law that the protection offered goes to the issue of existence and not merchantability, fitness or purpose of the work. It is, therefore not a defence that the work copied from, e.g. a textbook on mathematics, contained errors and as such was defective in character. It is the mere existence of the book itself, without

the genuineness or otherwise of its contents, that attracts copyright. This principle deriving from the earlier one, which disregards merit on the part of the author, eliminates any form of legal descrimination on the ground of qualitative assessment of a copyrighted work. The author and his work owe no apology for their poor quality or purpose in the course of their existence. This principle fittingly accords with the prerogative right of God who created all things, whether we call them good or bad. In the same vein, the author of a badly composed music is no less legally protected than that of the good one, except to the extent of the economic benefits derivable from their lawful exploitations. In fact, the badly composed music might, depending on the fashion of time, enjoy greater economic benefits from its exploitation than the other.

1.6 JUSTIFICATION FOR COPYRIGHT PROTECTION:

The justification for copyright has been stated to be based on the need for mankind to have access to the fruits of knowledge and the corollary necessity to stimulate the search for knowledge by rewarding the searchers.[52] The justification for copyright remains till today as was found in the early 16th century, no matter that science and technology have evolved to threaten the concept in practice. In the words of **Laurence Sterne**,[53] it was reported that:

> *"You may find it in the fragments of Gregorius, and Hermogene's codes, and in all the codes from Justinian down to the codes of Louis and Des Eaux - that the sweat of a man's brows, and the exudations of a man's brains, are as much a man's own property, as the breeches upon his backside"*

Other learned authors,[54] put it even stronger when they said:

> *"Nothing can with greater propriety be called a man's property than the fruit of his brains. The property in an article or substance according to him by reason of his own mechanical labour is never denied him; the labour of his mind is no less arduous and consequently no less worthy of the protection of the Law".*[55]

It stands to reason, from the above findings, that the man's brain work should be protected in the same way as his living home, to enable him enjoy the benefits of his creativity. Coming home to our Nigerian situation, the justification for copyright is primarily anchored on the necessity to encourage creative activities locally without much dependence on foreign arts and culture. For a society as ours to utilize the works of artistes, such works (be they books, music, theatre, film television or radio programmes) must be communicated in one form or the other. The process of communication may be through publication as in books, exhibition as in paintings or sculpture, through live performances as in theatrical works or broadcasting as in television and radio programmes. As these works get processed and become available to the public, they consequently become endangered or vulnerable to the acts of others who would not bother either to create their own comparative works or to pay for the use of other's works in circulation. Such uncaring users are pirates and parasites. Hence the need for copyright.

Today, modern technology has made available to Nigerians easy means of reproduction and communication. The use of television, photocopying machines, phonograms, satellite, computers, etc, jointly and severally, have increased the volume and speed of reproduction and dissemination of these creative works of authors to the extent of uninhibited accessibility by the wider society. Thus, our intellectual works of art and

science and those of other nationals that come within our reach, soon became viable economic products and sources of income for some free-loaders. This is the task for copyright to address. Copyright law, by virtue of its association with industry and commerce along with other commercial legislations, seeks to preserve, promote and protect the development of skills, knowledge, technology and information management, in an atmosphere of unfair competition or exploitation.

According to a survey, released by the American based National Music Publishers Association, the music industry alone contributed in 1992 a total of US 4.72 billion or ₦401.2 billion (at the exchange rate of ₦85 to one US Dollar) to the national economies of 92 countries including USA, France, the UK, Japan, Argentina, South Korea, Mexico, Zimbabwe, Egypt, Burkina Faso, Malaysia, Equador, Columbia and Uruguay.[56] This amount represented what accrued to their domestic collecting societies as royalties. Nigeria was not one of those countries surveyed; perhaps, for the reason that as at then, her own collecting society on musical works had not been established.[56a] Given such a prospect in economic emancipation and as a legal framework, the copyright Law as presently obtainable in Nigeria may justify its essence in any of the following manners:

1. Our law creates an environment whereby the author of a work can legally negotiate the terms for the utilization and exploitation of his creative work to be undertaken by others. This was done by conferring recognition on who is to be called author under the Law, the conditions for protecting his work, and terms of period during which he stands to be compensated for the use of his work. The Law goes further by creating administrative machinery for the

collective organisation and protection of different groups of artistes in their different careers. This enhances the potentials of group-related interests and eliminates the burden of litigation costs on an individual artiste who may be in need to pursue many violators of his copyright at different fronts.

2. Our law provides for both civil and criminal remedies in favour of a Copyright owner against the infringement of both his economic and moral rights. This is to enable the author to enforce his right in an event of a contractual breach or the violation of any of the statutory rights. These civil and criminal proceedings are intended to double-assure the Copyright owner that the society would respect his creative work and that a breach of such respect will not go unpunished even when he (the rights' owner) is dead.

3. Thirdly, the law on copyright in Nigeria is justified on the premises that it guarantees freedom of access by the public to the fruits of the intellects among them, especially when such works of the intellects are used for public purposes. The Law does this by providing exemptions from liability in events which would have otherwise been copyright infringements. While on the one hand, the law caters for the welfare of the artistes and the livelihood of producers of copyright work, on the other hand, the law does not loose sight of the necessity to safeguard the public against the vicissitude of a monopolistic claim, which if unchecked, may result to denying the public of their communal rights to works of the hands and brains of the citizenry.

1.7 OBJECTIVES OF THE RESEARCH:

This research work was embarked upon for a number of reasons. First, it is to investigate the history as well as the philosophy behind the legal provisions on the subject of copyright. In doing this, the work will examine the origin or the evolution and workability of the copyright law within the context of the Nigerian society. Although there appears to be somewhat docility in Nigerian copyright literature, however, by virtue of the historical lineage of the Nigerian copyright with the British copyright system, it may be asserted to a limited level of conviction that the Nigerian copyright law has came a long way, at least, in theory though not so in practice.

The second objective is to venture into a course of legal research which is seen as a grey area by legal researchers in Ahmadu Bello University, Zaria - my great Alma Mata. Copyright jurisprudence and practice, though an old phenomenon in other countries, remains one area dreaded not only by those who survive by the benefits it produces but even by our lawyers. This work, hopefully, will unearth some of the principles embodied in common law, the statutes, judicial as well as academic authorities available in the field. Through this approach, it is hoped that, the study will accentuate intellectual discussions, thereby breaking down the myth that copyright is a "dry area" of intellectual research, practice and development.

The third objective is an attempt at examining the provisions of the current copyright law as epitomised in the 1990 Act.[57] This is with a view to ascertaining its coverage of the doctrinal principles and practice relating to copyright law in Nigeria. Taking these alongside the international

organisations with whom our country interacts on copyright affairs, the work will show the extent to which the subject has become relevant in our Nigerian context.

The fourth, though not the least but final objective, is to show that since the received English law on the subject, and notwithstanding the adaptation of any foreign appendages to our local legislation, our indigenous creative industries have grown and our old commercial practices have metamorphosed beyond the grip of the law. This calls for reviews where necessary. The basis for such reviews would be laid not only at the doorpost of law, but further in reference to the evolution of modern copyright facilities and communication systems which have made easier and cheaper the processes of copying works in such manners not yet envisaged by law.

1.8 THE RESEARCH METHODOLOGY:

Although the concept of copyright had been known to Nigerian criminal jurisprudence since 1916,[58] however, as a means of enhancing commerce and industry, copyright only received indigenous legislative attention in 1970.[59] This first indigenous piece of legislation was revised in 1987 after which a more comprehensive law and practice of copyright was instituted in Nigeria.[60] The research will dwell deeply on these statutory developments and attempt at balancing the law with the practical realities of operating a copyright regime in Nigeria. In an attempt to compare theory with practice, the research will make use of information obtainable from such bodies and organisations charged with the responsibilities of evolving, implementing and monitoring copyright policies

and programmes in Nigeria. This will essentially test the relevance of the law to the social, cultural, economic and technological realities both nationally and internationally.

The research will also entail library search for local and foreign authorities, be they statutory, judicial or academic. These will aid the analysis on the legal philosophy and form the basis for any reviews which may be found necessary.

The various international copyright conventions to which Nigeria has acceded in pursuance of both legal and economic integration with other nations would also be examined. Finally, this research would comment and recommend if necessary, amendments, with a view to foretelling what the future legal positions should be in the practice of copyright law in Nigeria.

1.9 THE SCOPE OF THE RESEARCH:

As is usual with most works on Nigerian Laws, the moment one eye is cast on any aspect of her legal system, the second eye (hopeful that he who does so possesses the two eyes) must necessarily be cast on the English law on the same subject. This is unaviodably so because no meaningful study of the Nigerian copyright law can proceed adequately without a compendious study of the English system, notwithstanding that our local statutes have sought to be indigenous in outlook. The reason for this detour is rooted in our colonial linkage to England.

Consequently, this study entreats a recourse to the Common Law of England, the Doctrines of Equity of the English Courts and their Statutes which, though not now of "general application" as known to lawyers in the

past, but in the event of a lacuna, will have the force of law in Nigeria. Notwithstanding this umbilical connection between us and the English, the research will have Nigeria as its main plot and target place.

This First Chapter introduces the definition, the nature and the philosophical arguments relating to the study of copyright law. It also provides the historical development of our copyright law both from its indigenous and foreign perspective.

Chapter Two investigates the Works over which copyright as a legal regime hovers and crystalizes as and when the need arises. It also elucidates on the conditions for and the intensity of the protection offered to such works, and the duration in which the protection subsists. Chapter Three highlights the various legal personalities of those entitled to copyright and the incidences which may or may not give rise to enforcing their rights. As is popularly known, where-ever there is a right to be enjoyed by one person there is a corresponding duty to be performed by another.

Chapter Four identifies the legal and equitable remedies available to an injured party within the framework of copyright law in Nigeria. It also discusses the exceptions and exemptions mitigating against such remedies at law.

The Fifth Chapter presents the dramatis personne involved in the administration of copyright in Nigeria, thereby bringing to focus the practical realities of the legal regime which had for long been idle in Nigeria. The examination of the practical activities of those involved in copyright in Nigeria consequently sheds light on the problems and efficacy of our laws in combating the evils of copyright abuses within and outside our shores. The chapter also highlights the procedural steps available to

NOTES AND REFERENCES TO CHAPTER ONE:

All sections quoted below, except where otherwise stated, refer to the Nigerian Copyright Act, CAP 68, Laws of the Federation of Nigeria, 1990.

1. For example, See BALOGUN & ORS v. AKANJI & ORS. (1988) Vol 19, I NSCC 180 @ 322-323 per Oputa, JSC; also see S. 146 of the Evidence Act CAP 112 Laws of the Federation of Nigeria (LFN) 1990.

2. For example, See EDWARD W. PLOMAN & L. CLARK HAMILTON "Copyright" London Routledge & Kegan Paul, 1980, P.2.

3. Intellectual Property is also sometimes referred to as Industrial Property, but because the latter can safely also include tangible forms of property e.g. real esates, it is found less appropriate and will not be used in this work.

4. See Blacks Law Dictionary (5th Edn) Westpoint Publishers, London 1976, P. 1095.
5. Ibid, P. 304

5a. Per Karibi-White JSC, in PLATEAU PUBLISHING CO. LTD v. ADOLPHY, (1986) 4 NWLR (Pt. 34) P. 205.

6. SS.2, 10, 11 & 12 OF CAP 68 Laws of the Federation of Nigeria 1990
7. Ibid S.I

8. Ibid. SS. 14 and 15

9. CAP 436 Laws of the Federation of Nigeria 1990

10. CAP 344 Laws of the Federation of Nigeria 1990

11. CAP 68 Laws of the Federation of Nigeria 1990

12. By the Treaty of Ceasation as shown in "The Map of Africa by Treaty" Vol. 1, 1909, P. 3, Lagos was annexed by the British

Government with effect from 6th August 1861.

13. See Part II of Cap 68 Laws of the Federation of Nigeria 1990.

14. See PATTERSON, LAYMAN RAY, "Copyright In Historical Perspective", Vonder bit University Press U.S.A. 1968.

15. Known as Lagos Colony, Southern Nigeria Protectorate and Northern Nigeria Protectorate, respectively.

16. See OBILADE A.O. "The Nigerian Legal System", 1979, Spectrum Publishers, Nigeria pp. 69 - 70.

17. 8 Anne C.19 (1709).

17a By virtue of the Revised Edition (Laws of the Federation of Nigeria) Decree No. 21 of 1990, Schedule I, Item No. 32, this, among other imperial statutes are no longer relevant to Nigeria.

18. Order-In-Council No. 912 dated 24th June 1912.

19. STEWART S.M. "International Copyright and Neighbouring Rights", London, 1985, P.95.

20. MILLAR v. TAYLOR (1769) 4 Burr. 23-03; DONALDSON v. BECKETT (1774) 4 Burr 2408. Both reported by Gavin Mcfarlane in "Copyright through the cases" Waterlow Practitioners Series, London, 1986, pp. 1,5 and 15 respectively).

21. Per Conzens-Hardy M.R. In MANSELL v. VALLEY PRINTING CO. (1908) 2 Ch. 441 @ 445.

22. (1887) 12 AC 326.

23. (1854) 4 H L C 815.

24. Cap 68 Laws of the Federation of Nigeria 1990.

25. **opcit** @ 337.

26. Ibid @ 343 (26a)= See Eliz.2 C.74 of 1956.

27. Decree No. 61 of 1970.

28. See for example, ASIEN J.O. "Introduction & Notes to the Nigeria Copyright Act" A publication of the Nigerian Copyright Council 1994, P.9.

29. This was between October 1979 and Dec 1983.

30. Broadcasting works as well as Cinematograph were not hitherto protected under the 1970 Act.

31. The first Republic of Nigeria was in October 1963. There was a Coup-de-tat on 31st Dec 1983.

31a. BANKOLE SODIPO: "The Reform of the Copyright Law" Nig. Law Reform commission paper of 18/10/88, Lagos.

32. The process of reform for the 1988, UK Copyright Designs & patents Act started in 1985. See PETER GROOVES "Copyright & Designs Law; A Question of Balance" 1991, Graham & Trotman London, Back cover page.

33. Decree No. 47 of 1988.

34. Cap 68 Laws of the Federation of Nigeria 1990 following the revision of all existing Federal Legislations prior to 1990.

35. See Copyright (Amendment) Decree No. 98 of 1992.

36. The 1979 Constitution as contained in CAP 62 Laws of the Federation of Nigeria 1990 is currently the enforceable Constitution in Nigeria, as amended from time to time by Military Decrees.

37. Ibid, 2nd Schedule Item 13.

38. SS 491-493 of CAP 77 Laws of the Federation of Nigeria 1990.

39. SS. 426 - 427 of CAP 89 Laws of Northern Nigeria, 1963.

40. op cit.

41. op cit. S. 493.

42. S. 40 of CAP 68 Laws of the Federation of Nigeria 1990.

43. CAP. 134 Laws of the Federation of Nigeria 1990, See also S. 228 of the 1979 Constitution.

44. S.38 of Cap 68 Laws of the Federation of Nigeria 1990.

45. S.33 of Cap 68 Laws of the Federation of Nigeria 1990.

46. Chapter 5 of this work, particularly para. 5.2.2(a).

47. UNESCO Paper No. UNESCO/PRS/COPY/CME.1/4, Paris 15th August, 1987 (P.9).

48. S.1 (2) (b).

48a S.1 (2) (a).

49. CORNISH W. and PHILIPS J.: "Copyright in the U.K. (R.I.D.A.) January, 1984, P.72.

50. "The ABC of Copyright" UNESCO Press 1982, P.32.

51. STEWART S.M.: "International Copyright and Neighbouring Rights, London 1985 P.50.

52. "The ABC of Copyright" UNESCO Press 1982. P.22.

53. Quoted in GARDNER: "Copyright in the 19th Century Vol. III L.Q.R. 1942 P.507.

54. COPINGER & STONE JAMES: "Copyright", Sweet & Maxwell Ltd, London 1958.

55. Ibid P.2.

56. Copyright News Vol. 2 No. 12 of July - to Sept 1994, P. 1.

56a. The Nigerian Musical Collecting Society who established in 1995.

57. Cap 68 Laws of the Federation of Nigeria 1990, as amended by Decree No 98 of 1992.

58. The Criminal Code (now redesignated as Cap 77 Laws of the Federation of Nigeria of 1990) was applicable to the entire country between 1916 and 1959 after which the Penal Code was enacted by the Northern Nigerian Government with effect from Sept 1960.

59. op cit Note 27.

60. op cit Note 33.

CHAPTER TWO

THE NATURE AND SCOPE OF THE WORKS PROTECTED BY COPYRIGHT IN NIGERIA

2.1. INTRODUCTION

This Chapter examines the types of works which receive protection under the Nigerian copyright law, the conditions required for the protection of copyright in the work, the nature and scope of the rights conferred, and also the duration of the protection offered by the law.

In general, the current Nigerian Copyright Act (hereinafter referred to as the Act) applies to existing works,[1] i.e. works that were made before the commencement of the Act, as well as to future works[2], i.e. works made after the commencement date. It also states that an act done before the commencement date of the Act does not abate as a result of the enactment of the Act.[3]

In the main, copyright[4] as distinct from neighbouring rights,[4a] applies only to the original works of:

(a) literary works
(b) musical, works
(c) artistic works
(d) cinematograph films,
(e) sound recordings and
(f) broadcasts.

In general, the Act subjects literary, artistic and musical works to similar rules[5] but the works of cinematograph films[6] are subjected to somewhat different rules. Even after adverting to the work of architecture specifically within the meaning of artistic works[7] yet the Act nonetheless particularly

singled out architectural works for a distinct rule in the general nature of copyright.[8] As a rule of procedure, the Act delineated the nature of copyright in sound recording[9] and broadcasting[10] from all others.

It is better that before embarking on a full scale discussion on the characteristics of these works, we first of all deal with issues which are common to all of the works protected by law. These common themes are the requirements of fixation, efforts and originality of the author, the legal thread of relationship of the works or its author to Nigeria, and also the issues of registration or non-registration as a qualification for copyright protection.

2.2 FIXATION OF THE WORKS PROTECTED:

This is the physical form in which the work is expressed. The Nigerian Copyright Act provides that eligibility for copyright is obtainable for literary, musical or artistic works, where:

> *"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"*[11].

However, the Act also provides a caveat that an artistic work shall not be eligible for copyright if at the time of making it, it was intended by the author to be used as a model or pattern to be multiplied by an industrial process.[12] What this caveat aims at forestalling perhaps, is the confusion that may arise as a result of a fixation requiring industrial process as would have been protected under the Designs or Trademarks law.[13] A possible construction of this provision is that a drawing or a painting produced upon

a hardware is not excluded from copyright protection under the Act, unless more than one copy of such hardware is capable of industrial reproduction.

The aims for the legal requirement of fixation are: first, it is of evidentiary value, since works that are not fixed in any medium from which they can be perceived, would themselves be difficult to produce in evidence before a law court in order to compare them with an alleged infringing copy. Secondly, since copyright law essentially protects expressed ideas and not ideas, such expressions are better done through a particular medium from which they can be perceived, otherwise, the argument disappears. For example, a play or a novel is only protected because it is contained in a written book. This is particularly so in the areas of literary, artistic and musical works where it would be impracticable to speak of any such work without a medium. One cannot possibly imagine a sculpture, painting, a book or a musical composition without the physical medium in which they are contained and from which they can be perceived, let alone be copied.

More technically, the requirement of fixation in copyright implies something more than transcient or inconsiderable object. In other words, the fixation must allow for some premanency. The statutory definition of the required medium is sufficiently elastic to include any instrumentality of expression which is presently known e.g. painting on a canvas, writing on paper, moulding with wax; and any other medium that has not yet been discovered and which may be developed in the future.[14] Our law has widened the scope of the media of expression to include such that the material work can be perceived or reproduced either directly with human senses (i.e. sight, hearing, touching or smelling, etc) or with the aid of any

mechanical, electronic or other devices. A micro-film or computer programme on a chip, for example, would be considered fixed for this purpose since they are machine legible.

Owing to the absence of requirement of fixation for eligibility of sound recording or broadcast to qualify for copyright under the copyright law can it be said that a broadcast, for example, being a transcient performance has no protection? That is to say, for example, a praise by a praise singer is not protected by our law? The answer is no because the Act defines "sound recording" as a means of "... 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 a cinematograph film."[15] Thus, a broadcast may be protected even in its unfixed form. A live broadcast to the public is, for this reason protected. What, in this instance, is protected is the broadcast, not the medium through which it was made. In other words, a screen-play of a poem in a transcient medium would still not have satisfied the fixation requirement for literary works if the poem is not in a written form, but will become protectable under broadcast, if it was played life through the television channel.

2.3 ORIGINALITY OF THE WORK:

It is a condition precedent under the Nigerian Copyright Act that before some works qualify for copyright protection, there must have been sufficient efforts expended in their making so as to give them an original character.[16] Those works requiring originality of authorial efforts are literary, artistic and musical in nature. There is no such requirement for the works of sound recording, films and broadcasts. It is submitted that the

legal draftsman, in this instance, might have reasoned that the concept of originality does not occur with the latter set of works enumerated above.

The difficulty usually encountered in this area of the law of copyright is the definition of the terms "original" and "sufficient efforts". The word "original" is defined by the Oxford Advanced Learners Dictionary of Current English to mean that which is the "starting point", "newly formed or created; not copied or imitated".[17] In this context, the original character of the work, qualifying it for copyright, denotes that which is new, not copied or imitated from another work. This somehow corresponds with the concept of novelty as required for an invention sought to be protected under Patent Law. That which is novel in Patent according to the Dictionary requires that "it be the first of its kind".[18] However, in treating what may be known as original in copyright, the first element of consideration is idea. It is the principle of copyright law that the protection does not extend to ideas, or schemes or systems or methods. In the case of HOLLINRAKE v. TRUSWELL,[19] the House of Lords stated that copyright is confined to the expression of such ideas, and that if such expression is not copied then copyright is not infringed. It may well be asked, by way of illustration, if a book expressed in English language, is later copied by another person in Hausa language, would this latter reproduction amount to copyright infringement, even as Hausa is a different expression from English? The answer is yes, because the law deals with what is known as the birth of the idea and not with language. Thus, it is an infringement of copyright to make another unauthorised version of a novel either wholly in another language or even by the means of pictures.[20] When ideas are hatched and expressed in a fixed form, they become subjects of copyright, notwithstanding that the

form may be varied.

As earlier noted in Chapter One, the term of originality as intended by our law is not the notion of what had never been in existence. It is that the efforts of the author in giving birth to the idea be such as to require his form of expression to be different from any other's.

It is further submitted that the choice inherent in copyright which seeks to protect the actual expression of idea, rather than the idea itself, has to do with the problem of proof. How do we establish claim to idea, given its unlimited nature? The word "idea" is defined as meaning *inter alia*, "thought; picture in the mind; plan; scheme; design or purpose".[21] Idea, being such a state of the mind freely available for everyone, cannot therefore, be the monopoly of anyone who expresses it. The claim goes only to the form in which it was expressed. To prove this, recourse is had to the mode in which the idea was expressed. Where a later work has been produced independently of an earlier work, especially if it is similar in character, the presumption is that the first author has been copied. To rebut this presumption, the two works must be tendered in evidence in comparison to one another. It is the forms in which these two works were expressed that can be tendered, not the ideas behind them.

Because Copyright in its early stages dealt only with literary works, it was easy to distinguish between two similar works when a claim of infringement is alleged. This is because a literary work of an appreciable quality cannot possibly be reproduced by another author working independently, even if two or more authors may have the same idea. As far back as in 1855, ERLE J. in the case of JEFFERYS v. BOOSEY,[22] explained the impossibility of an independent and honest copy of a literary

work. He stated as follows:

> *"The claim is not to ideas, but to the order of words, and the order has a marked identity and a permanent endurance. The order of each man's words is as singular as his countenance, and although, if two authors composed originally with the same order of words, each would have property therein, still the possibility of such an occurence is less than there could be two countenances that could not be discriminated".*[23] *(underline mine)*

By way of placing a definite reliance on the presumed impossibility of having two identical literary works from independent sources, SARGENT J, in the case of CORELLI v. GRAY,[24] said:

> *"That there is nothing very striking or original either in the novel or sketch, I accept. But the combination of these ordinary materials may nevertheless be original, and when such a combination has arrived at a certain degree of complexity, it becomes practically impossible that it should have been arrived at independently by a second individual".*

The difficulty of independent similar works of art may be found more with literary works, than with other works of art, e.g. music or sculpture. In musical or artistical works it is not impossible to find similar works done independently, moreso when the techniques for doing such works have been published. For example, in producing the sculpture of a famous national figure, two independent sculptors could work from his pictures. As can be seen from the above, the concept of originality is not tied to idea but to the expression of the idea. In support of this principle, the World Intellectual Property Organisation (WIPO), a United Nations' specialised agency on world copyright matters, had stated:

> *"For a work to enjoy Copyright protection, it must be an original creation. The ideas in the work do not need to be new but the form, be it literary or*

artistic, in which they are expressed must be an original creation of the author".[25]

Also it has been noted earlier in Chapter One that originality does not depend on the value judgment of the person adjudicating the claims. This is because an original work, *per se*, "must be independent of the quality, taste or value attaching to the work".[26] Any work meeting all other requirements of the law, would be protected under copyright whether it is considered a good or bad literary, artistic, or musical work. What, therefore, is important in considering the originality of a copyright work is that the work must originate from the author. It must have its origin in the labour of the author, his property and his creation.[27]

2.4 REQUIREMENT FOR SUFFICIENT EFFORTS:

From the analysis given above, it is clear that the work of an author, however poor in intelligence, will be accorded the same rights under copyright law just as the work of a genuis. In **UNIVERSITY OF LONDON PRESS LTD v. UNIVERSITY TUTORIAL PRESS LTD** [28], it was established that originality does not connote novel or unique nature of the work, but simply means that the author created the work independently and that in doing so, he exercised sufficient degree of skill, knowledge, creative labour, taste and judgement to deserve protection. In this case, it was stated that the degree of efforts required depends on the facts of the particular case, and the objective test is that "what is worth copying is worth protecting"[29].

The decision in the above case was followed later by **MEGGARY J.** in **BRITISH NORTHROP v. TEXTEAM** [30], when he said: "...the expression of idea which constituted the work need not be original or novel in form,

of idea which constituted the work need not be original or novel in form, but it must originate with the author and not be copied from another work".[31]

Comparatively, there are few Nigerian cases on the issue of originality and sufficiency of author's efforts as requirements for copyright protection under our law. The case of **OFFERY v. CHIEF S.O. OZA & ORS**,[32] may be of interest here. The brief facts of the case were that the plaintiff, a former Headmaster of 'All Saints School' Oshogbo in 1963 designed and put out for sale a school record book, entitled "New Era Schemes of Work and Record Book". His main contribution to this work was the drawing of several vertical and horizontal lines. In 1967 he discovered that the defendants who were publishers, printers and book sellers, were reproducing and selling some record books which were materially the same as his work. At the suit, it was established that the 2nd defendant, through the 1st defendant had knowledge of the existence of the plaintiff's work prior to 1967. In its judgement, the High Court of Western Region held *inter alia*:

1. that copyright would exist in a product if that product is the result of some substantial or real expenditure of mental or physical energies of the author, and the labour or skill exercised were not negligible or common place ones;
2. that the amount of labour or skill, judgement or ingenuity required to support successfully a claim for copyright was a question of fact and degree in every case;
3. that there was no evidence that the plaintiff put into its production some substantial amount of labour and that the record book merely

showed a layout of horizontal and vertical columns and such could not be called original literary works or an original compilation for giving "ready, convenient and accurate" information to people who needed such information.

In refusing to grant the plaintiff's claims, the Court observed that the plaintiff had not established that the record book in question (i.e. his own record book) was his original idea of a literary work or compilation being the result of his labour or skill. Although this decision was reached under the old colonial legislation i.e. the British 1911 Copyright Act, even now, one cannot help but to agree with the Court's decision because the drawing of mere horizontal and vertical lines are not enough evidence of sufficient effort and industry in a literary work such as to qualify for copyright protection. In other words, his work was not one of a sufficient intellectual creativity.

In summary, though the word 'original' is not defined in the Act, yet it is presumed that the test to be applied is one which does not require the standard of novelty or ingenuity or even aesthetic quality. The only test is that the author must have expended some kind of efforts uncommon to all others. Unlike the requirement of novelty in the Patents Law,[33] it does not require any inventiveness for a work to be accorded copyright in Nigeria. Infact, a nebulous protection is granted by the Act which seems to eliminate the idea of originality entirely! It provides:

> *"A work shall not be ineligible for copyright by reason only that the making of the work or the doing of any act in relation to the work involved an infringement of copyright in some other work".*[34]

What the above provision tantamounts to saying is that a work which has satisfied all other criteria for enjoying copyright does not lose that status for

reason that it is not original. One may, therefore, query why the law should bother about originality of a work if it does not require such work to be new. The rationale for originality as required for a work to enjoy copyright protection is that if such protection is to give the author an exclusive right of exploitation (which is a kind of monopoly), then it is only fair to require him to have done something a bit extra-ordinary to deserve that protection. He cannot simply by appending his name to what could otherwise be a common property and gain exclusive copyright. He should be able to show that his work is a product of his skilled judgement and labour. The work, therefore, must as a result of that effort, be sufficiently original to take it outside the realm of common pool of works available to the public without restriction.

2.5 THE CONSANGUINITY REQUIREMENT:

The fourth requirement to be satisfied by a work seeking protection under the Nigerian copyright law is what I may call 'the consanguinity principle'. This consanguinity criterion is expressed in the legal relationship of the work or its author on the one hand and to the entity known as 'Nigeria' or 'an international body' on the other hand. The Act refers to this criterion as virtues of authors' nationality or domicile or works of government, state authorities or international bodies.[35]

The object of this consanguinity test is that even if the work seeking protection in copyright already met the three other conditionalities earlier discussed above, but fails to meet this fourth requirement, it cannot qualify to be protected by our law. This is because for copyright to subsist in any work in Nigeria, either its author or the work itself as an entity must be

or an international body prescribed by Nigeria under its laws.[36] It may be important to consider in details how this connection may be established and the consequences attaching thereto.

2.5.1. The Author's Consanguinity To Nigeria:

Copyright is conferred on every work that is eligible where the author, or in the case of a work of joint authorship, any of the authors, is at the time when the work is made, an individual who is a citizen of or is domiciled in Nigeria or is a body incorporated by or under the laws of Nigeria.[37] A work is recognized as having been jointly authored where it is a product of collaboration between two or more persons or between a person and a corporate body and is such as the contributions of each author is inseparable from the contribution of the other author or authors.

Citizenship as provided under the Nigerian Constitution [38] is attainable either by birth[39] or by registration[40] or by naturalisation.[41] On the other hand, a person's domicile is a bit more difficult to ascertain legally. The Act does not provide a guide but the more general rule is that it refers to a person's permanent home. This may be imposed by law or it may be elected by choice of the individual. Since the material time for determination of eligibility is the date the work was made, the status of the work is not affected by any subsequent changes in the citizenship or domicile of its author. Where the author of the work is a body corporate, the authorial consanquinity to Nigeria is simply by evidence of its incorporation under the law of Nigeria.

2.5.2 The Work's Consanguinity To Nigeria:

2.5.2 The Work's Consanguinity To Nigeria:

Apart from eligibility through the author's consaguinity to Nigeria, any work other than a broadcast, and which already met the three earlier mentioned criteria (fixation, originality and sufficient efforts) may be granted copyright, depending on any of the following circumstances :

1. For a literary, artistic, musical or cinematograph film, it must have been first published in Nigeria.[42]
2. For a sound recording, it must have been made in Nigeria.[43]
3. Broadcasts do not require to be made either in Nigeria or containing materials on Nigeria before it can enjoy copyright protection under Nigerian Law, in-so-far-as it is made either by a Nigerian Government or a prescribed international body.[44]

As to (1) above, the Act in a rather confusing manner, states that publication made in Nigeria shall not be treated as being different from the first publication by reason only of an earlier publication made elsewhere if the two publications took place within a period of not more than 30 days.[45] It is my view that a publication not made in Nigeria cannot, for reason of another publication being made elswhere within 30 days, be regarded as having been made in Nigeria. All that is required is that if a work is published elsewhere before its publication in Nigeria, so long as the two publications take place within the period of 30 days, it shall qualify for protection under Nigerian Copyright Law. The provision regarding sound recording is considered to be neater, because it has avoided the controversy of being 'first published' or 'first made' in Nigeria. And as to (3) above, we are surprised that our statute does not seek to distinguish a

locally made broadcast from an alien one for qualification under our Law. Supposing that the foreign broadcast is anti Nigerian national interests, would our law still protect its legitimacy and publicity here? It seems that our lawmakers on this subject failed to realise that not all foreign broadcasts are government controlled as is the case in Nigeria.

2.5.3 The Consanguinity of Government Work or International Body:

Copyright shall be conferred on every work which is eligible for copyright by the requirements of fixation, originality and sufficient efforts, if made by or under the direction or control of the Nigerian government, a State authority or a prescribed international body.[46] The philosophy here is to enable government ascribe and, when it deems it necessary, proscribe copyright in works done by government officials in the course of their official duties. It is the requirement of most government scholarship awards in Nigeria that the copyright in the academic thesis or dissertations of beneficiaries shall be reserved in the donors. As to the term 'International Body', the Act reserves in the Minister responsible for Cultural Affairs [47] or the Nigerian Copyright Council,[48] the power to prescribe who or what that body would be. The quantum of copyright conferred on this kind of government works or of international bodies are as contained in the First Schedule to the Act.

2.6 REGISTRATION FORMALITY FOR COPYRIGHT PROTECTION:

In the other branches of intellectual property law in Nigeria,[49] registration of the property in question is a condition precedent to legal recognition and protection. This does not seem to be so for works eligible

for copyright protection under our law. There is nowhere in the Act which specifies that a work, having satisfied all the four requirements discussed above, should be formally registered before enjoying protection of copyright in Nigeria.

The philosophy of our law on this subject is that copyright accrues naturally out of the fact of creation of the work concerned. This is akin to God's own rights over mother earth. Copyright in this regard operates as an inherent right flowing from the moment the author completes his work. Its existence does not depend on any form of announcement of the work, neither on its registration. It is also immaterial whether or not the author is aware of the existence of the right. It may well be argued that an author who does not know of his right in copyright may not enforce it since the maxim is that equity aids only the vigilant. However, it is no defence to say that since the author is ignorant of the law, the infringer can go unpunished. Because of the nature of the law on copyright, the right conferred upon an author subsists during and even after his death. In other words, it is not one in which an action would abate so easily.

Our legal position ignoring the requirement of registration in copyright seems to suggest an antecedent from the British copyright system. It may also be an antecedent of the two major international Copyright Conventions[50], to which Nigeria has acceded. As a result of these, Nigerian works of literary, artistic, musical or dramatic nature need no form of registration to qualify for protection in any of the subscribing countries.

However, more out of practice than of principle of law, and perhaps as an antecedence of Nigeria's observance of the Universal Copyright

Convention, the symbol of letter 'c' in a circle "©" has often been imprinted on our works of art by which author(s) put the public on notice of the existence of their copyright.

What comes close to registration, as required by the Nigerian Copyright Act is the duty placed on printers, publishers, producers or manufacturers of copyright work to keep a register of all such works produced by them.[51] This register is only an in-house record kept by a printer or producer for the purpose of ascertaining information about the works, and it is not an ingredient for the existence or non-existence of copyright in such works.

Also, as part of its corporate efforts to maintain both local and international standards in literary publication and library services, the National Library encourages all literary publications emanating from Nigeria to bear designated code numbers, identifying each particular publication with Nigeria. These are of two types: those bearing the designation 'ISBN' (International Standardised Book Number) which is for books; and those bearing the designation 'ISSN' (International Standardised Serial Number) for serials. Both set of numbers are controlled by the National Bibliographic Control Department of the National Library.

The legal point of note in this regard is that none of these numbers by themselves confer copyright on the authors of those books. The owners or authors may wish, on receiving these international numbers for their books, to notify the Nigerian Copyright Council but they are not by law obliged to do so, and *ipso facto*, they will still receive protection under copyright and even obtain the attention of the Council when their rights are infringed. It may be necessary to ask of the advantages or otherwise of

registration as a condition for Copyright protection. In the jurisdictions where registration is a condition, the major advantage is the legitimacy of priority in the order of whose work was registered as against the claim of others. In this way registration operates as an evidential rule of title to property. Arising from the principle that protection is accorded only to form and not idea, the omission of the registration requirement under our law may present difficulties in proving title where two identical claims are in dispute. In our real property law, registration is required to prove title, whether it is legal or equitable interests therein. It is also my humble opinion that without registration in a developing country like Nigeria, the duration of copyright subsistence as envisaged by our law may prove difficult to calculate. And for a vast country like Nigeria, without formal registration, the existence of certain works of art in some remote areas may never come to the knowledge of those charged with the responsibility of administering copyright issues in Nigeria. Registration would also generate taxable revenue for the administration of copyright, and stimulate protective interests and value for our intellectual works.

For the above reasons, it is considered as a bad law, omitting the requirement for registration of works under our current copyright legislation.

2.7 ENUMERATION OF THE WORKS PROTECTED BY COPYRIGHT:

The Act specifically enumerated the types of work which are eligible for copyright protection in Nigeria as being the following:[52]

i. Literary Works;

ii. Musical Works;

iii. Artistic Works;

iv. Cinematograph Films;

v. Sound Recordings; and

vi. Broadcasts.

2.7.1 Literary Works:

The Act defines literary work to include, irrespective of literary quality, any of the following works or works similar thereto[53]:

(a) Novels, stories and poetical works;

(b) Plays, stage directions, film scenarios and broadcasting strips;

(c) Choreographic works;

(d) Computer programmes;

(e) Textbooks, treaties, histories, biographies, essays and articles;

(f) Encyclopaedias, dictionaries, directories and anthologies;

(g) Letters, reports and memoranda;

(h) Lectures, addresses and sermons;

(i) Law reports, excluding decisions of courts;

(j) Written tables and compilations.

The nature of protection accorded to these literary works, subject to certain exceptions[54] which would be discussed later, is the exclusive right of the author (or his assignee or licencee) to control the doing of any of the following acts in Nigeria[55] :

i) reproduction of the work in any material form;

ii) publication of the work;

iii) performing the work in public;

iv) translation of the work;

v) making any cinematographic film or record in its respect;

vi) distribution for commercial purposes copies of the work by way of rental, lease, hire, loan or similar arrangement;

vii) broadcasting or communicating the work by loudspeakers or any similar device; and

viii) making any adaptation of the work.

These rights subsist in the author of the work from the very first day the work is created until 70 years after the end of the year in which he dies. If the literary work is a creation of a government sponsored author or of a body corporate or of an international body prescribed under the Act, the rights subsist for 70 years from the end of the year in which the work was first published.[56]

The rationale for these limitations is two-fold:

(1) to give the author and his immediate dependants or estate, sufficient time to reap the fruits of his labour during and after his death;

(2) to give to the general public the residual right in perpetuity over the works of their intellects when such works fall into public domain on the expiration of the authorial term of right.

For sponsored literary authors, it is reasoned that 70 years from the year of its first publication would have adequately covered the author's life span. The average life expectancy in Nigeria is 55 years. Most literary authors in Nigeria produce their first works after 20 years of age.

2.7.2 Musical Works:

The term "musical work" was first defined as "any musical work irrespective of quality and includes works composed for musical accompaniment."[57] Thereafter, the term was redefined to mean: "any musical composition irrespective of musical quality and includes works composed for musical accompaniment."[58] It is submitted that were it not for the substitution of the word 'composition' for the word 'works' as underlined in the above quoted definitions, nothing materially has been added or subtracted from the definition of 'musical works' as given in the principal Act. This is because a musical work cannot be a work without its composition and what is composed as a music is itself a work!

However, in a more relevant step, the position of an "author of a sound recording" as distinct from an "author of a sound recording of a musical work" has been clarified in the Amendment Decree.[59] By this Amendment, the author of a sound recording of a musical work means an artiste in whose name the recording was made unless where otherwise provided by contract. The earlier provision[60] had been short of allowing any other person than the recorder of such sound to qualify for authorship of a musical work. By this amendment, not only the composer of a musical work would qualify as author but also such others who made one sound or the other in the work, (be he the drummer, the soloist, etc,) or as they may by their agreement choose, whoever among them in whose name the recording shall be made. The legal implication here is that copyright subsists in the name of the person imprinted on the musical work in question, to the exclusion of all others including those with whom the music was composed. This sounds unfair to those others who contributed

to the composition of the music. Although their contract may stipulate their economic ratio of royalties, yet the moral right would reside in the one whose name is imprinted on the work.

The nature of copyright in musical work in Nigeria is the exclusive right of the owner in whose name it is imprinted, to control the doing of any or all the following acts:[61]

(a) reproduction of the work in any form;

(b) performance of the work in public;

(c) distribution of copies of the work for commercial purpose, either by way of rental, lease, hire, loan or similar arrangement;

(d) broadcasting or communication of the music by the use of loudspeakers or any similar device; and

(e) adaptation of the work.

Even if the work is of a group, it is only one among them who can exercise the above right. These rights subsist in the owner of the musical work from the moment the work is created up to 70 years after the end of the year in which the author dies.[62] But in the case of a musical work sponsored by Government or a corporate body, the rights shall subsist for 70 years after the end of the year in which the work was first published.[63] The rationale for the term in literary works as discussed above may hold equally for musical works.

2.7.3 Artistic Works:

The term 'artistic work' derives its generic meaning from the English Copyright Act of 1911 which was a statute extended by a local ordinance

painting, drawing, sculpture, artistic craftsmanship, architectural works of art; engravings and photographs. However, under the Nigerian Copyright Act,[64] an artistic work is defined to include, irrespective of its artistic quality, any of the following works or works similar thereto:

(a) paintings, drawings, etchings, lithographs, woodcuts, engravings and prints;

(b) maps, plans and diagrams;

(c) works of sculpture;

(d) photographs not composed in a cinematograph film;

(e) works of architecture in the form of building models;

(f) works of artistic craftsmanship; and

subject to certain other rules of law[65], artistic work may include

(g) pictorial woven tissue and articles of applied handicraft and industrial art.

Section 1 (3) of the Act states that certain artistic works may be disqualified from copyright protection if, at the time the work was made, it was intended by the author to be used as a model or pattern to be multiplied by any industrial process. This may be for the reason that such artistic models or pattern are better protected by the Patents and Designs Law.[66]

The question as to whether an artistic work is a work of artistic craftsmanship or that which falls within the contemplation of a model or pattern to be multiplied by any industrial process, is one of fact. The main test to be applied in a dispute on this issue is the intention of the artiste at the time the work was made and it would be irrelevant that the work was subsequently used as a model or pattern capable of industrial multiplicity. So long as the artistic work when made was not intended to be industrially

multiplied, it is protectable under copyright, and the fact that it later was put out for industrial multiplication would not erode the protection it enjoys under copyright. It is, however, submitted that the later industrial multiplication effect would enable its eligibility for registration as a design. Following this argument, it is possible, therefore, that a purely industrial design could benefit from both the protection offered by the designs law and copyright if there was no intention at the time of making it to multiply it by industrial process. Even so, once it is registered as a design it looses its protection under copyright.

The nature of protection offered to artistic work under copyright[67] is the exclusive right of the author to do or authorise the doing of any of the following acts:

(i) reproduction of the work in any material form;

(ii) publication of the work;

(iii) inclusion of the work in any cinematograph film; and

(iv) making any adaptation of the work.

With regards to (iii) above, where an artistic work is included in any cinematographic film or broadcast, the first artiste's right becomes subsumed in the right of the author of the cinematograph film or broadcast.[68]

The above rights of the author of artistic work are protected from the first day the artistic work (other than a photograph) is created and continues to subsist up to and including 70 years after the end of the first year in which the author dies.[69] For a photographic work, however, the author's right terminates by the end of the 50th year after the end of the first year in which the photograph was first published.[70]

The legal issues of concern here are firstly, the terminal differences between the protection given to other works of art as distinguished from that of a photograph, and secondly, who is the author of a photograph: the photographer or the person whose image appears in the picture? The philosophy behind the fewer term given to copyright protection in photographic work may be found in the fact that no one other than the photographer himself can claim to have any more interest after his death to the preservation of his rights in the photograph, and it is anticipated that for a photographic work exisiting for 50 years after it was first published may have exhausted its value in copyright. As to who is the owner of copyright in photograph, the law states that it is neither the person nor object in the picture taken but the producer of the picture i.e. the photographer. He alone can exercise all the rights reserved in copyright and to the total exclusion of the person whose picture was taken.

2.7.4 Cinematograph Films:

Perhaps, due to its relatively recent development in the sphere of Nigeria's mass communication system, cinematograph films did not receive protection as early as other works did, until recently.[71] However, it has now become one of the works of art protected under the current copyright law in Nigeria. The Act defines a cinematograph film to include "...first fixation of a sequence of visual images capable of being shown as a moving picture and of being the subject of reproduction, and includes the recording of a sound track associated with the cinematograph film."[72]

Deriving from the above statutory definition, it may be postulated that any motion picture whether silent or with sound, irrespective of purpose,

any motion picture whether silent or with sound, irrespective of purpose, class, length or material used, would qualify as a cinematograph film protectable under copyright law in Nigeria.

A quaere that may be raised here is whether or not a slide set is a cinematograph film. It is humbly submitted that the above definition does not adequately cover slide sets because slides are not capable of being shown as moving pictures. They, therefore, may be protected as photographs under the protection accorded to artistic works in copyright.

Some other technical issue that may be raised is on the point of proving the term 'first fixation' in a cinematograph film. Does this mean that the first fixation principle relates only to the original copy or copies made out of the original simultaneously or afterwards? Would it not cover such other copies made out of the first fixation in the industrial process of making subsequent copies of the film by the producer? It is submitted that very often, the copies are derived from a master tape and if the tape alone is what is protected under our law, then the plaintiff/author in an action is at a disadvantage where he is unable to produce such a master tape in evidence. Although no judicial decision has yet been reached on this issue, it is hoped that our Courts would not be too strict in their interpretation of the "first fixation" requirement under our law.

The statutory protection[73] accorded cinematograph films is in the nature of an exclusive right of the author to control the doing in Nigeria, any of the following acts:

i) making a copy of the film;

ii) causing the film, insofar as it consists of visual images to be seen in public, and insofar as it consists of sound, to be

heard in public;

iii) making any record embodying the recording in any part of the sound track associated with the film by utilising such sound track; and

iv) distributing to the public for commercial purpose copies of the film by way of rental, lease, hire, loan or similar arrangement.

The right of the author of a cinematograph film begins to run for 50 years after the end of the year in which the work was first published.[74] In this wise, there is a shorter period of copyright subsistence which may be fully exhausted in the life of the author or shortly after his death.

2.7.5 Sound Recording:

The Act defines a sound recording as: "the first fixation of a sequence of sound capable of being perceived aurally and of being reproduced but does not include a sound tract associated with a cinematograph film."[75]

From the point of law and practice, it is trite to say that what a cinematograph film is to the eye is the same as what a sound recording is to the ear. Interestingly, a sound recording appearing as part of a film is not protected in copyright as a sound recording *per se* but, in that regard, only the film itself is protected.[76] Therefore, if an existing sound recording which hitherto enjoyed copyright protection is later incorporated into a cinematograph film, the author of that sound recording loses his right (if he authorised the use?) to the author of the film.[77] This, in my opinion, is absurd and it is hoped that when such a conflict arises in practice,[78] the

Courts will give an equitable relief to compensate the author of such a sound recording. Otherwise, it would be more desirable to hold that a film sound track is protected as part of the film, such that any recording made from the sound, even without the visual signs of the film being shown, will attract copyright benefits. The difficulty would be erased if both works have the same authors.

The scope of the protection accorded an author of a sound recording under the Act is to control the doing in Nigeria, any of the following acts.[79]

a. direct and indirect reproduction, broadcasting or communication to the public of the whole or a substantial part of the recording either in its original form or in any part recognisably derived from the original;

b. the distribution to the public for commercial purpose copies of the work by way of rental, lease, hire, loan or similar arrangement.

It may be noted from the outset that issues relating to translation of sound recording and the protection given to such translation are rules of Neighbouring Rights, which are outside the scope of this work. However, suffice to say that the language used in a sound recording does not by itself denote the basic ingredient of protection under copyright. This means that even if the recording is translated into another language, so long as the original form of recording bearing the sound are reproduced, the copyright protection which is accorded to the original work prevails.

The term of rights vested in the author of a sound recording begins to run for 50 years after the end of the year in which the recording was first

made.[80] Surprisingly, quite as opposed to the immediacy of protection granted to works of literary, artistic and musical nature, the right of the author of a sound recording (as also in Cinematograph film) must first incubate until the end of the first year of its recording before it can be exercised. And by the Act, the computation of a year in this regard is a period of 12 months from 1st January and ending on 31st December.[81] Again, the author's right in sound recording terminates 50 years after the first year of its creation, whether or not the author is then alive or dead.

2.7.6 Broadcasting:

The Act defines 'broadcasting' as meaning:

> *"sound or television broadcast by wireless telegraphy or wire or both, or by satellite or cable programmes and includes rebroadcasting."*[82]

It went further to define a 'broadcasting authority' (i.e. the author of a broadcast) as meaning "any authority established under any law in Nigeria or elsewhere providing broadcasting services for public reception.[83] As if to help in explaining the differences between satellite and cable programmes, the Act provides a definition of 'cable programme' as meaning "visual images, sound or other information sent by means of a telecommunication system or otherwise than by wireless telegraphy for reception (a) at two or more places (whether for simultaneous reception or at different times) in response to request by different users; or (b) for presentation to members of the public."[84] Since the Act was silent on the definition of 'satellite' and how it would have been received in any way different from that of cable programmes as given above, not much inference can be gathered from the elaborate technical definition of 'cable

programme' as being different from 'satellite'. It is submitted that the Act coming merely as a regulatory statute should have avoided such controversy as may be found in engineering terms other than law. To my mind, there is no material difference between a cable programme and satellite.

The nature and scope of copyright protection in broadcasting available to a broadcasting authority is the exclusive right to control the doing in Nigeria, any of the following acts:[85]

a. the recording and the re-broadcasting of the whole or a substantial part of the broadcast;

b. the communication to the public of the whole or a substantial part of a television broadcast, either in its original form or in any form recognisably derived from the original; and

c. the distribution to the public for commercial purpose copies of the work by way of rental, lease, hire, loan or similar arrangement.

The Act provides further that copyright in a television broadcast shall include the right to control the taking of still pictures or photographs from the broadcast.[86] By way of heralding a solution to practical problems, the Act indicates that where the owner of a copyright in any literary, musical or artistic works have authorised a person (or authority) to incorporate his work in a cinematograph film and a Broadcasting Authority broadcasts such a film, the owner of the copyright shall, in the absence of any express agreement to the contrary, be deemed to have authorised that broadcast.[87] This statutory provision is seemingly shielding the broadcasting authorities against claims by authors of other copyrighted works. It is seen to be a

legislative linency for Broadcasting Houses in Nigeria, which todate, remain an entirely a Government business. Be that as it may, it also seems to have a good legal reasoning as can be seen in the U.S. Case of SONY CORP. OF AMERICA v. UNIVERSAL CITY STUDIOS,[88] where the U.S. Supreme Court held that: "...the sale of home audio-visual recording equipment to the public at large did not amount to contributory infringement of copyright in television", for the reason that a substantial number of copyright holders would like their works to be licensed for television broadcasting, not only to popularise them, but that they would not object to their works being recorded by private home viewers. In the Nigerian situation, where any artistic work has been included in a film or broadcast, the mere inclusion operates as an exception to the rights of the author of that artistic work[89]. This is targetted at insulating the broadcasting organisations, most of whom are government owned, from claims of private authors whose works may have been so included in their broadcast without any authorisation.

In line with the term of copyright accorded to works of cinematograph film, photographs and sound recording, the term of copyright accorded to a broadcasting in Nigeria is 50 years after the end of the year in which the broadcast first took place.[90]

As of date, there are only Government Radio and Television broadcasting authorities in Nigeria, who exercise exclusive rights in broadcasting business in Nigeria. Although there are plans to grant licences to private broadcasting houses, the legal rights of such licencess will derive from those of the approving authority be it the Radio or Television Broadcasting Authority.

Theatrical films and Opera. In recent times the scope of Neighbouring Rights has widened to include Folklore and Translators. Although the distinction still remains that Neighbouring Rights derive essentially from Copyright, yet this distinction in respect of folklore is very thin indeed. This is because the line is not easily drawn as to where Copyright stops and Neighbouring Rights starts in folklore.

The second distinction is in the nature of the criteria for vesting Neighbouring Rights vis-a-vis those of Copyright. As noted earlier, Copyright vests in an author upon meeting the criteria of a specified pedigree, fixation, originality of authorial efforts and consanquinty to Nigeria, even though without any formal registration. The main criterion for Neighbouring Rights is that the manipulation (i.e. performance or translation) of the Copyright work must be undertaken by person or persons other than the original author. No formal registration is required also in Neighbouring Rights to vest a legal title.

The third distinction is that the owners of Copyright and Neighbouring rights could seek remedies for injuries before the court of law either jointly or severally. This is irrespective of their separate individual proprietary ownership. This is possible since their terms of title are not only derivative but also distinctive. This distinction has occasioned a lot of operational problems, some of which may now be discussed.

2.8.1 Problems Associated with Copyright and Neighbouring Rights:

The first problem in this area of the Law is that whereas the author's Copyright enjoys prominence in both national and international Copyright Laws immediately on the creation of the work, those of the owners of

behind the scene. e.g. the orchestral conductor, the film production team, the soloist, etc. In neighbouring rights, beginning from the first violinist to the least member of the chorus, from the juvenile up to the most treacherous actor of a film, all should in fairness, have proportionate share even if the proceeds are low. This sheer numerical "share-holders" of this right may be why this specie of Legal property is called"neighbouring rights". This, in effect, raises serious legal as well as economic implications, the details of which are outside the scope of this research.

A third problem associated with Neighbouring Rights when compared to Copyright, lies in the area of employment. While most authors are self employed or few times commissioned, performers and translators on the other hand are almost always employees. In many occasions, performers are in the employment of Copyright owners. For the employed performer it can be said with such finality that once he has been paid his wages, that extinguishes his rights; perhaps save for his moral rights. For the self-employed performers, their remuneration will depend upon the term of their contracts with the Copyright owner.

The combination of these reasons, i.e. the fleeting nature of neighbouring rights, the possibility of repeated performances using different artistes and the fact of being an employee, make the status of the performers or translators a precarious one when compared to the Copyright author. The practice of remunerating performers or translators out of the proceeds of commercial exploitation of a Copyright work usually reduces the amount paid to the author. Secondly, no amount of opposition by the Copyright author such as refusal to permit the performers or translators can restrict the commercial exploitation of the work. This is

because the Law of neighbouring right confers distinctive rights on performers and translators.

It is all these precarious situations and conflicts of interests between Copyright and Neighbouring rights that explain the complexity of our Law in the subject. This complexity may account for why some of the neighbouring rights have to be exercised and asserted through the auspices of the Nigerian Copyright Council and not directly by the individual rights holder.[93] The next chapter discussess how Copyright can be exercised by one and all the groups involved.

NOTES AND REFERENCES TO CHAPTER TWO

All Sections quoted below, unless where otherwise provided, refer to the Nigerian Copyright Act, CAP 68 Laws of the Federation of Nigeria, 1990.

1. CAP 68, Laws of the Federation of Nigeria, 1990.

2. Ibid. Paragraph 1 to the 5th Schedule.

3. Ibid. Paragraphs 2 (1) and (2) to the 5th Schedule.

4. S. 1 (1).

4a. Part II. SS. 26 - 29

5. S.5(1) (a).

6. S.5(1) (c).

7. S.39(1) (e).

8. S.5(3).

9. S.6(1).

10. S.7(1) and (2).

11. S.1(2) (b).

12. S.1(3).

13. CAP 344 Laws of the Federation of Nigeria, 1990.

14. S.1(2) (b).

15. S.39.

16. S.1(2) (a).

17. A.S. HORNBY, ET ALL, (3rd Edn) Oxford University Press, London 1974.

18. Ibid P. 613

19. (1894) 3 ch. 420.

20. Ibid, per DAVEY L.J. @ 427.

21. Op cit Note 17 at P.420

22. (1855) 4 H.L.C. 815.

23. Ibid at P. 1125.

24. (1913) 29 TLR 570 @ P.572.

25. WIPO Background Reading Material on Intellectural Property, WIPO, Geneva 1988, P.211.

26. Ibid

27. Ibid

28. (1916) 2 Ch.601 laying the principle which was later followed in LADBROKE FOOTBALL Ltd. V. WILLIAM HILL (FOOTBALL) LTD, (1964) 1 W.L.R. 273.

29. Ibid, at P. 615.

30. (1924) R.P.C. 57.

31. Ibid. at P.62.

32. Unreported Suit No. HOS/23/68 with Ruling on 276/69 decided on the English Copyright Act of 1911 then applicable to Nigeria.

33. CAP 344 Laws of the Federation of Nigeria, 1990.

34. S.1(4).

35. SS. 2, 3 and 4 respectively.

36. S.4.

37. S.2(1) (b).

38. CHAPTER III of the 1979 Constitution of the Federal Republic of Nigeria, CAP 62 Laws of the Federation of Nigeria, 1990.

39. Ibid. S.23.

40. Ibid. S.24.

41. Ibid. S.25.

42. S.3(1) (a)

43. S.3(1) (b).

44. See S.9(5) cf S.4 Ibid.

45. S.39(2) (c).

46. S.4.

47. S.37(1).

48. See Proviso to S.32(4).

49. Patents, Trademarks and Designs.

50. The Universal Copyright Convention and the Berne Convention.

51. S.13.

52. S.1(1) (a) to (f) respectively.

53. S.39(1).

54. 2nd Sch. to the Act.

55. S.5(1) (a).

56. 1st Schedule to the Act.

57. S.39.

58. S.13(c) of Decree No. 98 of 1992.

59. S.13(b) of Decree No.98 of 1992.

60. S.39.

61. S.5(1) (a).

62. 1st Sch. to the Act.

63. Ibid.

64. S.39(1).

65. S.1(3).

66. CAP 344 Laws of the Federation of Nigeria, 1990.

67. S.5(1) (b).

68. S.8(1).

69. 1st Sch. to the Act.

70. Ibid.

71. Cinematograph Film was not one of the works protected under the Nigerian Copyright Act (Decree No. 61) of 1970.

72. S.39.

73. S.5(1) (c).

74. 1st Sch. to the Act.

75. S.39(1).

76. S.5(1) (c) cf. S.8(1) Ibid.

77. S.8(2).

78. There is yet no reported case on this issue.

79. S.6(1) (a) and (b) respectively.

80. 1st Sch. to the Act.

81. See S.39(1) under the definition of "year".

82. S.39(1).

83. Ibid.

84. Ibid.

85. S.7(2).

86. Ibid.

87. S.8(1).

88. (1984) No. 81 - 1687, 52 U.S.L.W. P.4090.

89. Para. (c) of the 2nd Sch. to the Act.

90. 1st Sch. to the Act.

91. See Part II SS. 23 - 29.

92. S.1(1) (d).

93. See SS.28(4) and 29.

CHAPTER THREE

PRINCIPLES OF LEGAL RIGHTS AND CAUSES OF INFRINGEMENTS TO COPYRIGHT

3.1 INTRODUCTION

The author of a work which enjoys protection under copyright law may often not necessarily be the owner of the copyright conferred to such a work. There is, therefore, a difference between authorship and ownership when both present themselves before our copyright law. These differences shall be examined in details.

Equally, the rights reserved in the author of a copyright work may not usually be the same as those available to an owner of copyright, especially when the owner is himself not the author of the work. As a rule of procedure, the incidents which may vest the right in an author are sometimes quite different from those vesting rights in the owner of copyright. This Chapter will also illustrate those differences and the attendant consequences relating thereto.

Additionally this Chapter discusses the legal personality of the author and or owner of copyright; the scopes of their rights as founded either for their economic benefits or that of the public. The incidences which may or may not infringe these rights are also examined.

3.2 DETERMINATION OF AUTHORSHIP OF A WORK IN COPYRIGHT:

In the lay man's view, the creator of the work or the person who produces the work is known as the author of the work. He is often, but not always, a human being. However, due to the uncertainties that he may or

may not always be the owner of the rights granted under copyright law, the authorship of a work raises a number of issues to be determined both in law and in fact. The Act defines "authorship" of a copyright work differently in respect of the different types of work involved.[1] For example, the author of a literary or artistic work means 'the creator of the work,'[2] whereas the author of a cinematographic film is the "person by whom the arrangements for the making of the film were made, unless the parties to the making of the film provide otherwise in their contract".[3] The author of a photographic work is the person who took the photograph[4], even if the picture was produced in another person's laboratory. The Act in an untidy way, has created a dilemma as to who the author of a musical work truly is. On the one hand, the Act says that the author of a musical work means the creator of the work, and ironically on the other hand, it says that in the case of a sound recording of a musical work, the author means the artiste in whose name the recording was made[5]. Supposing that one person sang the song and another person had the recording done in his name? Also, the author in the case of a broadcast transmitted from within Nigeria (radio or television) is the person who made arrangements for the transmission,[6] and not the person whose voice was heard. For all cases, the Act extends the meaning of an "author" to include his heirs and successors-in-title.[7]

The above legal framework of an author may present some practical problems in the practice of copyright system in Nigeria. For example, what is the position of the person who gave the gist or suggestions on what to write to the author of a book, or one who provided materials for the making of a sculpture or better still, the person whose picture was taken by the photographer? It may be argued that without such inputs mentioned in the

above instances, some works would not have come into existence in the first place. This argument if given a serious thought will throw us back again to the issue of ideas not being protectable by copyright as earlier discussed[8]. Our law on this subject, as if unmindful of the cogency of this argument in any way, has singularly recognised only the writer, the artiste or the photographer who has clothed the ideas or objects, as illustrated above,to be the authors respectively, and therefore the only ones who are entitled to protection under the copyright law.[9] In a rather uncritical following of the above purely legalistic holding, a writer[10] has postulated that if a man employs the services of a ghost writer to write his biography based on information supplied by the subject, the copyright in the final product would belong to the ghost writer. One would have thought that the term "ghost writer" relates to some one whose name is not disclosed as the author of the book. Since the law only recognises the person under whose name the literary work was produced, in the circumstance of a ghost writer, therefore, the final product cannot belong to the ghost writer as he is not known under any name! One could therefore, ask what consideration is due to a confidential secretary who takes down the full text of a book by dictation and reproducing same in a written form. Perhaps, the provisions relating to copyright eligibility[11] will be invoked to deny the ghost writer as well as the confidential secretary of their claims to authorship on the grounds that they have not invested sufficient effort, skill or labour in creating the literary works? Our law only recognise the one in whose name the literary work was produced.

Further problems may also arise in the case of a photographic work where, as we may recall, the author is defined as the person who took the

photograph.[12] Does a person who submits himself to a photographer automatically lose his right of control and use of that picture to the photographer, even if the picture taken is used for a purpose prejudicial to him? Who has the right over the negative?

The photographer is protected as the copyright owner because the picture is the form in which the substance (the object) was expressed, and he must have exercised his personal skill and labour in producing the picture. This is the rationale for granting him copyright in preference to the person whose picture was taken. The old Law[13] which defined the author of photograph as "the person who owned the material on which it was taken" still left room for doubts. Supposing the camera or the film used for the picture did not belong to the photographer that law would have robbed him of copyright title to the picture. Given such a possible circumstance, the new law which defines an author of a photographic work as the person who took the photograph, has not helped matters any better. Perhaps, the law should have simply held the author to be the person who produces the photograph.

3.2.1 Issue of Co-authorship:

Coming closely after the above arguments is the issue of co-authorship of a copyright work. The Act uses the expression "joint authorship,"[14] and regards such an occasion as when a work is produced by the collaboration of two or more authors in which the contribution of each author is inseparable from the contribution of the other author or authors.[15] From this definition, it may be premised that every co-author or joint-author has an individual right to qualify as an author-sole, having

Considering the above provisions, it is confusing in the sense that if the Act has excluded a work which was neither commissioned nor done in the course of an employment from the rights of an employer, there is nothing left to be corrolated in joint interest of both the employer and the employee as required under Section 10 of the Act. This appears to be an inelegant piece of legislative exercise.

3.3 THE SCOPE OF THE AUTHOR'S RIGHT:

The scope of the rights of an author in Nigeria, whether or not he also is the owner of the copyright in the work, depends on a number of considerations. First, there are those rights to which he is entitled as an author simplicita. There are some others to which he is entitled if he also is the owner of the copyright. And there are those rights which the author or owner of copyright must abandon for the larger interest of the society in which he dwells. All these will be discussed under the following subheadings:

a. the author's moral benefit theory;

b. the author's economic benefit theory; and

c. the public interest theory.

3.3.1 Author's moral benefit theory:

The author of a copyright work in Nigeria whether or not he also is the owner of copyright in the work, is entitled as an author *simplicita*, to enjoy some inalienable rights under the Law. These are:

1. the right to claim authorship of his work;[19] and in particular that his authorship be indicated in connection with any of the

acts referred to in Section 5 of the Act - except where the work is included incidentally or accidentally when reporting current events by means of broadcasting.

2. the right to object and to seek relief in connection with any distortion, mutilation or other modification of, and any other derogatory action in relation to his work, whereas such action would be or is prejudicial to his honour or reputation.[20]

And specifically with regards to certain graphic works, or three-dimensional *works and manuscripts, the author of such works, notwithstanding any* assignment, sale or licence to do any of the acts he exclusively controls in the work, still retains his inalienable right to share in the proceeds of any sale of that work or manuscript by public auction or through a dealer whatever the method used by them to carry out the sales.[21]

Essentially, the moral rights (benefit) theory seeks to stamp the author's personality to his work. In other words the author's name shall not be eliminated or alienated during and after his death in the publication of his work. Thus it is said that the author must always be acknowledged even after he has sold his economic right in the published work.

3.3.2. Author's Economic Benefit Theory:

This theory posits that the creator of a work is entitled to earn a living by his talent. It means that the law should protect his work to enable him enjoy the benefits of his creativity. The parameters of this theory presumes that the author is legally and physically capable to determine the mode of exploitation or utilization of his work, whether lawfully or

unlawfully. We shall see later on the extent to which this is practically possible. The quantum of these economic rights as highlighted in the preceding Chapter are altogether alienable either by assignment or by licence. In an unpublished work, the author's economic rights are unfettered under common law, but they become determinable in time upon publication.

3.3.3. The Public Interest Theory:

This theory holds that inspite of the fact that the creative work is the emanation of the author's personality, and for which efforts he is commended and compensated, yet his personality was moulded by a cultural environment which provided him with knowledge, opportunity, materials and experience to create the work. For the reason of these supportive environment, the author's economic benefits are not to become absolute over that of the entire public. This is further explained by the argument that the author, unlike God, perhaps depends on his or other community to appreciate the end result of his creative art and who subsequently may exploit the same either lawfully or otherwise.

This is more so if the work is published. In the case of an unpublished work, the author only has an inherent power to forbid its publication without his consent. He does not stand to gain any economic benefit from an unpublished work.

This third theory further commends itself to the necessity that the general public should have access to the creations of intellects among them in order to enhance the cultural heritage of their communities. The rationale here is that if authors are protected and the public have

reasonable access to their works, the culture and economy of the nation will be enriched, preserved and developed on a sustainable basis.

3.3.4 Rationalization or Reconciliation of the Theories:

In modern times, the issues involved in the preservation and rationalization of the above theories have assumed an incredible complexity. This is what has made the subject and objects of copyright a specialised industry. Copyright both as a legal framework and as an economic principle, is conceptually used to cope with the problems of how to reconcile the interests of:-

(a) authors who gave expression to ideas;

(b) publishers, producers, performers or translators who disseminate the expressed ideas; and

(c) the public who use or abuse the consumption of the expressed ideas.

What is even more disturbing is that while copyright attempts to profer solutions to the above intricacies, its operational methods have attracted a host of other problems, not only in law but also in social, economic and cultural fields. In the wake of global integration due to scientific and technological advancement, a number of other questions rear their heads. How can intellectual creativity be best promoted in an era of uninhibited technological accessibility? How can the livelihood of the author or the artiste be assured against those of other participants in the creation, production and marketing of his work? How can these competing demands be reconciled with those of governments who have the people's mandate and expectation for the general good of the public?

The answers to these, *inter alia*, provide justification for copyright law and practice in our legal economic and social fronts. This work is an attempt at such reconciliations through the legal front.

3.4 OWNERSHIP OF COPYRIGHT

As was mentioned earlier, the authorship of a work protected under copyright may not necessarily be the ownership of the copyright in the work. The Act recognises different forms of ownership in copyright.[22]

Basically, the Act stipulates that the first ownership of copyright belongs to the author of every work which is eligible for copyright by virtue of that author (or authors) being a citizen of Nigeria or of the work itself having been first made or published in Nigeria.[23] However, since the author is free to negotiate the ownership of an existing work or future work either by way of assignment, by license or lease, hire, loan or other arrangements, he may validly transfer this ownership to another person or body.[24] Thirdly, where a work was done under the direction or control of a Government (be it Federal, State or Local Governments) or an international body, the law vests in the Government or that international body the ownership in the copyright of that work.[25] And logically, therefore, where a literary, artistic or musical work is made by an author in the course of his employment by the proprietor of a newspaper, magazine or similar periodical under a contract of service or apprenticeship (and is made for the purpose of publication in a newspaper, magazine or similar periodical), the said proprietor shall, in the absence of any agreement to the contrary, be the first owner of copyright in the work.[26] But this does not rob the employed author of his moral rights as author of the sponsored

work. He is the author while his employers or sponsors are the owners of the copyright in the work created or done by him.

3.4.1 Rights of the Owner of Copyright:

The various rights[27] available to the owner of copyright, (whether as both author and owner in which case he enjoys both the moral and economic rights or as owner simplicita in which case he enjoys only the economic rights discussed earlier), become claimable either directly by the owner or through his heirs or successors-in-title. These are a bundle of separable rights each of which may be exploited, exercised or alienated independently of the other. In other words, the economic rights of the owner of copyright are not an indivisible whole. For example, the owner of a literary work may decide to alienate his right of reproduction to a publisher by an assignment while licensing a Theatre Troupe to adapt the same work into a play. In the same manner, the reproduction rights in a musical work which is embodied in a sheet of waxed record may be assigned to another company to reproduce the same music in the form of a videogram.

Nonetheless, the specific terms of a particular contract of assignment, licence or hire may vary, limit or extinguish each or all of an owner's economic rights in copyright as the parties may choose to make under their hands and seal.

3.5 ACTS CAUSING INFRINGEMENT IN COPYRIGHT:

There are two levels of copyright infringement in Nigeria: civil as well as criminal. As to what constitutes an infringement of copyright, the Act

has outlined quite a number of instances. Any person who, without the licence of the owner of the copyright, does or causes any other person to do an act, the doing of which is controlled by copyright is said to have caused an infringement.[28] Also, anybody who imports or causes to be imported into Nigeria any copy of a work which if it had been made in Nigeria would be an infringing copy under the law has caused as infringement.[29] Equally, anybody who exhibits in public any article in respect of which copyright will be infringed by doing so, shall have caused an infringement.[30] Another instance of copyright infringement would occur where anybody distributes by way of trade, offers for sale, hire or otherwise or for any purpose prejudicial to the owner of the copyright, any article in respect of which copyright is infringed by so doing.[31] All the above quoted instances are of direct infringement. An indirect infringement of copyright may occur where a person makes or has in his possession plates, master tapes, machines, equipment or contrivances used or capable of being used for the purpose of making infringed copies of the work protected by copyright.[32]

The above instances of infringement may differ in nature and degree from one type of work to another, according to the set of controls reserved in and exercisable by the owner of the copyright in the particular work in question. One notable indirect infringement which may be common to all types of work is where a person permits or performs or causes to be permitted or to be performed for the purpose of trade or business or provides as supporting facility to a trade or business, the doing of which infringes any work in which copyright subsists.[33] This is a wide armbit of infringement under which many people consciously or unconsciously may

become liable in their daily business affairs.

In both cases, i.e. whether the infringement is direct or indirect, the essential ingredient of the complaint is that the act was done without the authorisation or licence of the owner of the copyright. It may be argued, albeit not in the express terms of the Act, that the licence or authorisation of the owner need not be expressed in writing, but could be given orally or by implied conduct. Perhaps in answer to such an argument, the Act replies that "*no assignment of copyright and no exclusive licence to do an act the doing of which is controlled by copyright shall have effect unless it is in writing*".[34] This statutorily requires an infringer relying on such licence or authorisation to be heard only upon a documentary evidence thereof.

3.6. DIRECT INFRINGEMENT:

As discussed in Chapter Two of this Work, the primary rights which were guaranteed by copyright to any author or owner of the work, mainly consist of exclusive rights of reproduction, publication, performance, adaptation, commercial distribution, public performance and broadcasting or communication. However, it is not all these modes of exploitation that are appropriated for every work. The Act uses different expressions suggesting the same or similar meaning of an infringement. For example, while the right to reproduce a work in any material form is reserved in the right owner of a literary work, for an owner of a cinematograph film, it is the right to make a copy or copies of the film. It is my humble view that there is nothing materially different between "reproducing a work" and "making a copy or copies of a work".

For a meaningful discussion, we shall examine the infringements

under the positive rights conferred on the copyright owner. This approach is taken because the law of copyright simply forbids the doing by another person what the rights owner can legitimately do himself. The first set of these will be discussed under 'Direct Infringement' which is an occasion where any of the following acts is done by a person who is not an owner of the copyright in the work, and who does so without the licence or authorisation of the owner:-

i) reproduction;
ii) publication;
iii) public performance;
iv) translation;
v) adaptation;
vi) distribution for commercial purposes;
vii) importation;
viii) exhibition; and
ix) taking of still pictures from television broadcast.

By way of avoiding all doubts, the Act states that any of the above acts constituting infringement, (and many others to be discussed later under 'Indirect Infringement') will amount to a ground of claim whether done in respect of the whole or a substantial part of the work, and whether done to its original form or to any form recognisably derivable from the original form.[35]

3.6.1. Infringement By Reproduction:

Reproduction has been defined by the Act as "the making of one or

more copies of a literary, musical, artistic, cinematograph film or sound recording".[36] The restriction here is that no person who is not the owner of copyright in a literary, artistic or musical work may reproduce or authorise the reproduction of the work in any material form without the licence or authorisation of the owner. And the Act further gave an elaborate definition of "copy" as meaning:

> *"A reproduction in written form, in the form of a recording or cinematograph film, or in any other material form, so however that an object shall not be taken to be a copy of an architectural work unless the object is a building or model."*[37]

One inference that may be drawn from the above statutory definition is that reproduction need not be in written form alone; it may be in the form of even a computer programme or in some other graphic representation. Save for architectural work in which case the only form of reproduction or copy known to law is either a building or the model of a building.

An infringed reproduction to afford a ground of claim in copyright must be based on the features of the copyright work, because the law does not forbid the independent expression of the same idea by different authors. Thus, the plaintiff's claim on grounds of reproduction is only sustainable where the later work complained of is shown to have materially copied the earlier work of the rights owner. In the case of FRANCIS DAY & HUNTER LTD v. BRON[38] the plaintiff company owned the copyright in a musical work titled "IN A LITTLE SPANISH TOWN". It was composed in 1926, and had enjoyed a considerable vogue since that time. The defendant published another musical work titled "WHY" in 1959. The plaintiff company in their suit for copyright infringement on account of

reproduction alleged that this later work infringed its copyright in the earlier work, and particularly, that the first eight bars of "WHY" were a conscious or subconscious reproduction of the first eight bars of "IN A LITTLE SPANISH TOWN". At first instance, the trial Judge found that there had been no conscious copying on the part of the composer of "WHY", and so declined to draw the inference that the defendant had heard the musical work in "IN A LITTLE SPANISH TOWN" or even **Bing Crosby's** recording of it. In fact, **Angelis** the composer of "WHY" testified that he had lived most of his life in the United States and denied ever seeing or hearing the plaintiff's music. On the issue of subconscious copying, the trial Judge decided that there was insufficient factual evidence to justify infringement by this means. He, however, found that there was a definite or considerable degree of similarity between the two works.

The plaintiff company appealed to the English Court of Appeal which held *inter alia*, that:[39]

(1) Arrangement and transcription can only be the result of conscious and deliberate process, although reproduction could be the result of a subconscious process.

(2) Infringement of copyright in music is not a question of a note for a note comparison; it depends on whether the substance of the original copyright work is taken by the later or not.

(3) Proof of similarity between two musical works, coupled with evidence of access, atmost raises a *prima facie* case for the defendant to answer. Where there is both proof of similarity and proof of access, this does, however, raise an irrebuttable presumption that the later work has been copied from the

original. In either case, evidence must be led to prove the claim and the denial.

And based on the above findings and principles, the Court of Appeal allowed the appeal and found for the plaintiff company.

What, therefore, should constitute an infringing reproduction under the Nigerian law, having reference to our statute and the principles enunciated in the above case? It must be one which satisfy the following tests:

(i) a sufficient degree of objective similarity between the first and the later work; and

(ii) proof of access by the defendant to the plaintiff's earlier work.

These notwithstanding, because of the very nature of copyright and the character of its abuses, the plaintiff in any action on infringing reproduction, may still find it difficult to prove an alleged copying by direct evidence. Proof of copying often have to be based on tendering a physical object of evidence e.g. copy of the cassette. Except in the very rare cases where the defendant himself admits the allegation, the plaintiff's case is most often built upon circumstantial evidence. What is most difficult to prove is not even the access of the defendant to the plaintiff's earlier work, but the issue of conscious or subconscious effort at copying. Even the English Court of Appeal in another case[40] was relunctant to hold that a man who produced a list of goods for sale enjoyed a copyright in that list such as to prevent any rival who produces a list of his own wares. That, as **Lord Evershed** felt, would be to put a limitation on the defendant's right of trade which went beyond the scope of monopoly conferred by the copyright in literary work.[40a]

Conversely, under our law, so long as the plaintiff is able to show that the defendant copied any bit of his work, he does not need to show that the copying was in respect of the whole work, since the prohibition covers any reproduction of a substantial part of the work;[41] and what is substantial is a matter of fact to be proved in each particular case. The substantial part may either be in quantity or quality of the work copied because a writer may decide to copy only a page of another's book, but that little could mean the most vital part of the work.

3.6.2 Infringement By Publication:

Very much like in reproduction, an infringement of copyright in a literary, artistic or musical work occurs where it is published by another person without the licence or authorisation of the copyright owner. The Act specifies that publication occurs if copies of the work are made available in a manner sufficient to render it accessible to the public.[42] Publication involves more than reproduction. A work may be reproduced in just one piece, but it is published when more copies are sufficiently made available to the public either for sale or for free. In the Nigerian case of I.J. ADENUGA v. ILLESANMI PRESS & SONS (NIG.) LTD,[43] the appellant had sued the respondent company alleging infringement of his work titled "WEST AFRICAN SCHOOL CERTIFICATE EXAMINATIONS OBJECTIVE CHEMISTRY" by publishing same without his licence or authorisation. In evidence, it was revealed that he had submitted his manuscripts to the respondent in 1977 for printing without expressly authorising its publication. When the printing commenced, he even corrected some page-proofs of the manuscripts, but after this, he did not hear from the

respondent again for 3 years when later he discovered that the book had been published by the respondents and that copies of the book were already being sold to the public.

In a not too tidy decision of the Nigerian Court of Appeal; it was held that consent of the owner of the copyright to the publication of his work may be assigned through the grant of an exclusive or a non-exclusive licence. In the opinion of the Court, a person may have the authority to publish a book written by another without infringing the copyright of that person. But the Court did not rule in this case whether there was such an assignment or licence either exclusive or non-exclusive. It simply concluded that since the respondents in this case were publishers and printers, all the appellant did could be construed to be a request to have his book printed and published. Although this decision was based on the 1970 Copyright Law[44] then in force, even so, the solution given by the Court, in my humble opinion, does not seem to accord with the objectives of copyright. The Plaintiff in this case sought for more than a declaratory judgement yet was not awarded any damages for the infringement apparently held to have been committed against him.

3.6.3 Infringement By Public Performance:

The Act does not prohibit a private performance of a literary, artistic or musical work. What it prohibits is a public performance.[45] However, because the Act is silent as to what would amount to a public performance, the courts will have to decide such a question based on the facts in issue. An example of what would constitute a public performance occasioning infringement of a copyright work, occurred in the case of TURNER

(ERNEST) ELECTRICAL INSTRUMENTS LTD v. PERFORMING RIGHTS SOCIETY.[46] Here, the English Court of Appeal held, *inter alia*, that the performance of musical works given by relaying the broadcast via the B.B.C. Television Channels, were performances in public within the meaning of S.1(2) of the English Copyright Act of 1911. What really guided the Court in its decision were such factors as the profits made out of the broadcasts, the size and character of the audience, the nature of the place the performance was held, etc.

Another factor usually in issue with regards to public performance of a literary, artistic or musical work is the relationship of the audience to the copyright owner instead of the performer in question. This was the issue in PERFORMING RIGHTS SOCIETY (P.R.S.) LTD v. HARLEQUIN RECORD SHOPS LTD[47]. The gist of this case was that the P.R.S. administered the performing rights in musical works by taking assignments from composers of the right in their compositions. In pursuit of this control, the P.R.S. licensed the performance of recordings of the musical works it controlled. Until 1976, the P.R.S. did not require the owners of record shops to obtain licences to play records over loudspeakers in their shops, but after a change of policy, the P.R.S. sought a royalty from record shops in respect of this kind of use of the works which it controlled. The defendant company declined to obtain such a licence but yet continued to play the P.R.S. controlled musical works over loudspeakers in their shops. In the action by the P.R.S. for violation of copyright through public performance, the defendants contended that since their shop activities positively benefitted the authors (who were members of the P.R.S.) through increased sales and hence royalties to the P.R.S., their conduct did not

amount to public performance. Rejecting this argument, the Chancery Court held that the P.R.S. was entitled to an injunction, for reasons *inter alia*, that the playing of records amounted to a performance in public within the meaning of S.2(5) of the English Copyright Act 1956.[48] The court went further to explain that:

> *"A performance to members of the public permitted and encouraged to enter the shops to purchase records could only be a performance in public. In addition, some customers came into the shops not to purchase record but tickets from the agencies which operate such shops, and the composers of such musical works had no interest in performing to such people."*[49]

A common event in the Nigerian musical scene is one where the management of an Hotel, including those of 'International status' will show through a videogramme, the performance of a musical work at its lobby for the purpose of attracting customers. They do this most times even without limiting the audience to their Guests. Such display by a commercial concern would amount to Copyright infringement under the law. It does not change the position of liability even if the cassette used was rightly obtained or bought.

In the famous case of the PERFORMING RIGHTS SOCIETY (P.R.S.) LTD v. HAWTHORNS HOTEL LTD.[50] the defendant company caused two musical works, the copyright of which was controlled by the P.R.S. to be performed in the course of a programme of entertainment by an orchestral trio in the lounge of its Hotel. The audience was composed of a number of resident Guests of the Hotel. But unknown to the defendant company, there was also present an official of the P.R.S. who concealed his identity. In an action by the P.R.S., the Chancery Court held that the performance in the Hotel's lounge was a performance in public within the meaning of

S.1(2) of the 1911 English Copyright Act[51]; and it was an infringement of the copyright vested in the P.R.S. since the performance was unauthorised by the plaintiffs.

The above decision was a re-affirmation of an earlier one reached in HARMS LTD AND CHAPPELL LTD v. MARTANS CLUB LTD[52]. The facts were that the Plaintiffs owned the copyright (including the performing right) in a musical play which had been published and produced in the United States of America but which had not yet been produced in the United Kingdom. The action was for the infringement of the Plaintiff's copyright by the performance of a musical work titled "THAT CERTAIN FEELING" which formed part of a play called "TIP TOES". The play was performed by the orchestra at the Embassy Club in Old Bond Street, Westend of London. The audience was made up of 150 Members and 50 Guests. The Embassy Club was an establishment for dinning and dancing, and had a total membership of over 1,000 Ladies and Gentlemen of high society standing. One of the issues that arose for determination was what constituted a performance in public, especially as membership of the Club was somewhat exclusive and by the rules of the Club, no specific limit was placed on the number of Guests who could be introduced by members, except that any visitor who was introduced after 9.00pm had to pay 10s.

Lord Hansworth, then a Master of the Rolls, felt that he had to consider whether there had been admission of any portion of the public into the Club, with or without payment of the 10s. He reasoned that the place wherein the performance took place also had to be considered, bearing in mind that it did not need to be one kept habitually for the exhibition of dramatic performances. In answer to the question whether

200 or so people present at the performance were members of the public, the Law Lord found that they were persons of a class who could be able to pay for entrance to any public theatre where the production in question might be performed, and they had the advantage of listening at a place with which they were familiar, in the sense that it was on Club premises. Sargeant L.J.[53] added to the above comments by saying that those who attended the Embassy Club were very much in the position of persons who subscribe to a season of grand opera, and take their boxes or stalls for the season. In the light of these findings, the Court of Appeal affirmed the judgement entered for the Plaintiffs, by holding that the evidence adduced led to the inevitable conclusion that there had been a performance in public, and that accordingly, the copyright vested in the Plaintiffs had been infringed.

3.6.4 Infringement By Translation And Adaptation:

The Act states that an adaptation is the modification of an existing work from one genre of work to another and consists of altering work within the same genre to make it suitable for different conditions of exploitation, and may also involve altering the composition of the work.[54] On the other hand, the Act was silent as to what may amount to a translation of a work. It is humbly submitted that a translation would involve the reproduction of a work in a language different from that in which it was originally made. Though not exactly the same in content with adaptation, translation is after-the-original-creation-act, just like adaptation is, and therefore, could be treated as an infringement. Infact, the right that

may be infringed in this regard is the right to "do in relation to a translation or an adaptation of the work"[55], and this is wide enough to cover adaptation of the original or any subsequent translation of the work in question.

Adaptation of a copyright work without the prior authorisation of the owner will result to an infringement whether or not the adaptation was in respect of the whole or a substantial part thereof. It also needs not be published before it could amount to an infringement. One of the effects of an infringement through adaptation is the injury to the moral rights of the owner which, as had been pointed out, is reserved in the author of the work. Except where the adaptation is apparently direct in context and volume, it can be defended on the ground of it being another original work, even if based on the same idea as the Plaintiff's work. This may present a practical problem, since the rule is that ideas are not protected by copyright. An English case which clearly illustrates this point is that of REDWOOD MUSIC LTD v. CHAPPELL LTD[56], concerning a musical work titled "ZING - GO THE STRINGS OF MY HEART", where the Plaintiffs sought a declaratory judgement that they owned all the copyright in the musical work together with all arrangements and adaptations thereof. It was contended on their behalf that by S.2(5) (f) of the 1956 English Copyright Act[57], the making of adaptations of a copyright work is one of the acts reserved to a copyright owner, and accordingly, the copyright in such an adaptation should belong to him. However, it was also held that it did not follow that copyright in every adaptation of any work belonged to the owner of the copyright in the original work. In other words what may appear as an adaptation may equally be an original of another author's

work, especially if the latter had no access to the former's work.

An infringement through translation may also present another set of problems for the plaintiff in that the translator of a literary work becomes thereby the author of his translation, under the rules of Neighbouring Rights.[58] This is based on the principle that where a new copyright work in the form of a translation has been derived from an existing copyright work, the derived work should enjoy an independent copyright because it also has sufficient originality.[59] As a cure to such a legal principle defeating the rights of a plaintiff in the original work, the Nigerian Copyright Act[60] underscores the rights of the author or owner of the first copyright work from which the translation took place. It does this by saying that if any person, without licence or authorisation of the owner of copyright, does or causes to be done an act the doing of which is controlled by the copyright owner, such an act will become an infringement. Since the adaptation and translation of a work is one of the acts controlled by the owner of copyright under the Law[61], it goes without saying any more that whoever translates the work without his consent has thereby infringed his rights in copyright. However, in practice, once a licence has been granted for the translation of an existing copyright work, the licencee/translator acquires copyright in the translated work.

3.6.5 Infringement By Distribution or Dissemination:

The Act clearly provides that it would amount to an infringement of copyright in a literary, musical or artistic work if such work, without the licence or authorisation of the copyright owner, is distributed by way of trade, offers for sale, hire or otherwise or for any purpose prejudicial to the

owner of the copyright.[62] Similarly, it would amount to an infringement of copyright if the work is broadcast or communicated to the public by a loudspeaker or any similar device. Under this heading of distribution or dissemination, there could also be considered the prohibition of including a literary, artistic or musical work in a cinematograph film or broadcast or sound recording without the owner's licence or authorisation.[63] In a curious way, however, the Act defines a communication to the public as including any mode of visual or acoustic presentation but does not include a broadcast[64] (underline mine). This tends to permit an inclusion of a literary, musical or artistic work in a broadcast without infringing the copyright of such works. As of now, because the art of broadcasting in Nigeria is either State owned or controlled, one may well understand the liberty accorded such organisation to adapt or translate other authors' works in their broadcasting without offending the rights of the owners of such literary, musical or artistic works. Could this be explained on the public benefit utilitarian principle? In practice, this area of copyright infringement in Nigeria is yet to be seen in a judicial contest and may not feature at all, unless and until private media houses are allowed to operate in Nigeria. The Act however, provides for such owners of literary, musical or artistic works to receive fair compensation from the broadcasting authority or the film maker in the event of such inclusion.[65] In the absence of an agreement between the parties relating to the value of such compensation, the amount shall be determined by the Court.[66]

3.6.6 Infringement By Exhibition

Although S.14(1)(c) of the Act sought to include exhibition as a way

of infringing a copyright work in Nigeria. However, that provision becomes lame when read together with the provisions of paragraph (a) of the same sub-section. The paragraph (c) of the subsection states that:

> *"Copyright is infringed by any person who, without the licence or authorisation of the owner of copyright exhibits in public any article in respect of which copyright is infringed under paragraph (a) of this sub-section."*

Whereas paragraph (a) of the sub-section is to the effect that copyright will be infringed if a person does or causes to be done any act, the doing of which is controlled by copyright. In view of this, exhibition can only constitute an infringement if it is an act controlled by the copyright owner in his work. The point being made is that in the absence of control over exhibition vesting in the owner, how can it be an infringement when someone else does what he does not control? There is nowhere in the Act in which exhibition of any work, either of literary, musical, artistic or any nature, is to be exclusively controlled by the owner. Thus, since exhibition is not one of those rights controlled by a copyright owner under our law, the doing of any exhibition of any work by any other person other than the owner, would not infringe the owner's right as directed under the above quoted paragraphs of S.14(1) of the Act. It is submitted that this omission may occasion a serious threat to the rights of a copyright owner especially in artistic works whose exhibitions may be held for commercial purposes. Perhaps, in an action in this regard, a brilliant counsel may argue that despite such a lacuna, the infringement occasioned by an exhibition is one of the facts infringing the provisions of paragraph (d) in the same sub-section i.e. that it was done for a purpose prejudicial to the owner of the copyright.

3.6.7 Infringement By Importation:

The principal Act[67] in its prohibition of the importation of an infringing copy of any work into Nigeria, had excepted any importation for a private or domestic purpose.[68] That appears to have been an error in legislation because it allows any importation of however much of such a work on the premises of 'private or domestic use' to defeat the exclusive right of a copyright owner. It therefore was a wise and timely correction by the provisions of Section 7 of the Amendment Act[69], thereby blocking the loophole. The latter amendment is to the effect that copyright is infringed by any person who, without the licence or authorisation of the owner of copyright, "*imports or causes to be imported into Nigeria any copy of a work which if had been made in Nigeria would be an infringing copy*".[70] The amendment did not contemplate importation for private or domestic use as an excuse any longer.

Importation into Nigeria of more than two infringing copies of any work will also render the importer liable to criminal sanctions.[71] Thus, while the importation of only one copy of an infringing work will furnish a ground for a civil action, the number of copies must be two and above before it could result to a criminal proceeding. In both proceedings, it is no longer a defence that such imported copy or copies was intended for either private or domestic use, so long as what was imported is a work which if had been made in Nigeria would be an infringing copy.

Another corollary view on infringement of copyright occasioned by importation is that if copyright was not subsisting in any work in Nigeria by the time the importation was made, the mere fact of importing such work does not by itself operate to infringe the right of any one whose work was

developed later in Nigeria. This is because Nigeria being a party to all international copyright conventions has laid open its doors to the reception of works of other nationals which enjoyed copyright under their own national laws and by implication of membership of such conventions, an extended protection in Nigeria.[72] Thus, all other nationals of member states of these conventions are free to export to Nigeria their works, so long as the works themselves, if made in Nigeria would not be an infringing copy. The Nigerian Importers must in this circumstance be on guard by ensuring that such imported works would not be infringing a Nigerian Copyright owner if it had been made in Nigeria. In practice, the only kind of foreign work likely to infringe copyright by importation in Nigeria is a counterfiet of a work of a Nigerian author made outside Nigeria which, if made in this country, would have been infringing copy of the original. This is one of the reasons why copyright jealously guards against piracy or illicit reproduction of Nigerian works from abroad and the act of shipping the same into Nigeria with a view to defeating the rights of the original author.

The Nigerian Copyright Act, perhaps in a dynamism consistent with modern international laws, has a provision to the effect that in the case of a work made outside Nigeria by any person, which if made in Nigeria would have been an infringing copy, the author of that work can only have his work enter into the Nigerian market and be lawfully protected if he gives notice in writing to the Department of Customs of his intention to do so.[73] At first sight, this allowance seems to take the steam away from the earlier discussed sections of the law prohibiting importation of any infringing copy of a work. But in fact, the somewhat loophole is pedalled by two conditions:

(1) that the Notice shall request the Department of Customs to treat as prohibited goods, copies of such work for only 5 years and no more, and certainly not extending beyond the end of the period for which the copyright (if it were made in Nigeria) is to subsist[74]

(2) that where a notice is given under this rule, neither the Department of Customs nor any member or officer or servant thereof shall be liable to the owner of the work or to any other person for any act or omission by the department or its servants in relation to the provisions of the notice given.[75]

And by way of ensuring that this loophole in importation of an infringing copy is not abused, the Act has vested in the Minister of Internal Affairs the powers to make regulations prescribing the form in which notices are to be given and even requiring the person giving such notice to furnish the Department of Customs with such evidence of compliance with any conditions stipulated in the regulations.[76] It may be pointed out that as at December, 1996 the Minister of Internal Affairs has not made any regulations admitting such works into Nigeria which, if had been made in Nigeria, would have been infringing copies of a work in which copyright subsists under our Law. This, however, is not to deny the fact that there abounds in Nigerian markets many copies of infringing copies of works of piracy and that they enjoy patronage from even those who are charged with the responsibility of enforcing copyright in Nigeria, not the least the copyright owners.

3.6.8 Infringement By Taking Still Pictures

From Television Broadcasts:

The act of taking a still picture from a television broadcast is a direct incidence of infringement of the copyright owner of the broadcast.[77] This restriction appears amorphous. What if the picture taken from the broadcase was a moving picture? Worse still, is this restriction applicable to a picture taken by a private user of his television in his sitting room? These questions become relevant when considered against the background that most often, television broadcasts in Nigeria are made to run on free channels available to all private and public places where the viewing of the same is not restricted by the law of copyright in Nigeria. h In my opinion, the claim against the taking of a still picture ought to belong to the rights owner of a cinematograph film and not to the owner of a broadcast. This is because special provisions already exist in the Act with respect to works of art incorporated in a cinematograph film.[78] Be that as it may, the exception granted under the law[79], already extinguishes the claim of an infringement that may be based on taking of pictures from a broadcast.

3.7. INDIRECT OR SECONDARY INFRINGEMENT:

In addition to the above instances of direct infringement of copyright, there are some other indirect or secondary acts of infringement of copyright works under the Nigerian Law. Three of such instances are:

(1) making or possessing offending materials of or for infringement;[80]

(2) permitting the use of a place or facility for an infringement;[81] and

(3) erecting a building which reproduces the whole or a substantial part of an architectural work.[82]

The instances of indirect infringement in (1) and (2) above may relate to all types of works protected under the law. The (3) above instance is in respect of an artistic work only.

The underlying philosophy for making it an offence to possess or make an object or material for copyright infringement is to discourage particularly manufacturers and merchants from engaging in the manufacture or the storage of devices with which works of copyright may be pirated. In this regard, the Act specifically states that:

> *"A person who without the licence or authorisation of the owner of the copyright in a work makes or has in his possession plates; master tapes, machines, equipment or contrivances used for the purpose of making infringed copies of work, is liable for infringement".*[83]

The above provision makes mere possession of any device which is capable of making an infringing copy of a copyright work a sufficient proof of an act of copyright infringement. This is one of the many instances in the current Nigerian Copyright Act which tend to create in the minds of right owners, legal practitioners and even pirates, the belief that copyright infringement is not business smartness but an evil. The Act clearly shows that the prosecution of this evil will not tolerate frivolous technicalities by the defence.[84]

Equally, it is also an infringement to permit a place of public entertainment or business premises to be used for a public performance of a work where the performance itself constitutes an infringement of the copyright in the work. Thus, apart from the infringement arising as a result of the unauthorised performance, the person who facilitated the offending

performance by providing or permitting the place in question, becomes liable for reason of having so provided or permitted the use of the place. However, the law provides a defence of genuine ignorance on the part of the provider of the space. This excuse is that as at the time of his providing or permitting the place, he did not know or had no reason to suspect that the performance was unauthorised.[85] But again, this defence is not a total excuse because if the infringer by providing space has enjoyed any pecuniary benefits thereby, he shall be liable to account for the same to the copyright owner, whether or not any other relief is granted to him.[86]

Thirdly, it is an infringement in an indirect way, for any one to erect any building which reproduces the whole or a substantial part of a work of architecture, whether or not in its original form or in any form recognisably derived from the original. This is where such a reproduction was done without licence or authorisation of the architect in whom copyright vests, or his assignee or licencee. However, by way of avoiding a colossal economic loss on the part of the defendent in such an infringement, the Act rescues him by saying that no injunction or order will issue requiring a completed or partly completed building (infringing copy thereof) to be demolished or even to prevent the completion of a partly completed building simply on the ground that its construction is an infringement of copyright.[87] The only remedy available in this instance lies in damages. It is an important point of law to note that it is not an infringement of copyright in an architectural work to have a house reconstructed in the same style as the original of a building to which copyright relates.[88] By logical extension, therefore, an existing house may be modified to conform

to the same style as another in which copyright exists. If this is the correct interpretation of the law in this regard, it is humbly submitted, that in practice it will defeat the restriction earlier discussed, i.e. erecting a building which reproduces the whole or a substantial part of an architectural work.

NOTES AND REFERENCES TO CHAPTER THREE

All Sections quoted below, except where otherwise stated, refer to the Nigerian Copyright Act, CAP 68, Laws of the Federation of Nigeria, 1990.

1. S.39.

2. Ibid. See definition of "author" in the case of literary, artistic or musical works.

3. Ibid. See definition of "author" in the case of cinematograph film.

4. Ibid. See definition of "author" in the case of a photographic work.

5. Ibid. See definition of "author" in the case of musical work, of the definition of "author" in the case of a sound recording.

6. Ibid. See definition of "author" in the case of a broadcast.

7. See for example, SS. 11(3) and 12(5) respectively.

8. See Chapter Two of this Work.

9. S.9(1).

10. ASIEN J. O., "The Nigerian Copyright Act", 1994, at page 27.

11. As seen in S.1(2).

12. op. cit note 4 above.

13. Copyright Act (Decree No. 61) of 1970.

14. S.2 sub-sections (1) and (4) respectively.

15. S.39.

16. S.35(c).

17. S.9(2) cf S.10(6).

18. S.9(2)(a) and (b).

19. S.11(1)(a).

20. S.11(1)(b).

21. S.12(1).

22. See S.9 sub-sections (1), (2), (3), (4) and (5) respectively.

23. S.9(1) cf SS.2 and 3 respectively.

24. S.10.

25. S.9(5) cf S.4 respectively.

26. S.9(3).

27. See Chapter Two of this Work.

28. S..14(1) paragraph (a).

29. Ibid. paragraph (b).

30. Ibid. paragraph (c).

31. Ibid. paragraph (d).

32. Ibid. paragraph (e).

33. Ibid. paragraph (g).

34. S.10(3).

35. cf. S.5(2) with S.6(i) (a) respectively.

36. S.39.

37. Ibid.

38. (1963) 1 Ch. 587.

39. Ibid @ 622.

40. PUREFOY ENG. LTD v. SYRES BOXALL LTD (1955) 72 R.P.C. 89.

40a. Ibid @ 145.

41. See S.5(2).

42. S.39(2).

43. (1990) 5 N.W.L.R. (Part 189) 82.

44. Decree No. 61 of 1970.

45. S.14(1)(f).

46. (1943) 1 Ch. 167 of with S.25(d).

47. (1979) 2 All E.R. per Browne-Wilkinson, J.

48. Equivalent to our S.25(d).

49. Ibid. at P.841.

50. (1933) 1 Ch. 855 per Benneth, J.

51. That Act was then applicable to Nigeria by virtue of its extension via a local ordinance.

52. (1927) 1 Ch.526.

53. Ibid. at P.532.

54. S.39(1).

55. For example, see S.5(1)(a)(ix).

56. (1982) R.P.C. 109, per Goff J., at the Queens Bench Division.

57. This is equivalent to our S.5(1)(a)(ix).

58. This principle was apparent in the decision reached by the Judges in BRYNE v. STATIST CO. (1914) 1 KB 622, which was based on S.8 of the English Copyright Act of 1911, then applicable to Nigeria as well.

59. S.14(1)(d).

60. S.5(1)(a)(vii) read together with S.14(1)(a).

61. S.5(1)(a)(v), read together with S.14(1)(a).

62. S.14(1)(d).

63. S.8(1).

64. S.39.

65. S.8(2).

66. S.8(3).

67. CAP 68 Laws of the Federation of Nigeria, particularly before the amendment.

68. S.14(1)(b).

69. Decree No. 98 of 1992.

70. Ibid. S.7.

71. S.18(1)(b).

72. S.33.

73. S.36(1).

74. S.36(1)(b) with the proviso thereto.

75. S..36(4) with the proviso thereto.

76. S.36(5).

77. S.7(2).

78. S.8.

79. See Paragraph (M) of the 1st Schedule to the Act.

80. S.14(1)(e).

81. S.14(1)(f).

82. S.5(3).

83. S.14(1)(e).

84. See Also Section 18, sub-sections (1), (2) and (3); SS.21 and 34 on the presumption of guilty knowledge of the defendant; simulateneous prosecution of civil and criminal proceedings, and the presumption of affidavit evidence, respectively.

85. S.15(3).

86. Ibid.

87. S.15(5).

88. See the last sentence in S.5(3).

CHAPTER FOUR

LEGAL REMEDIES AND EXCEPTIONS TO COPYRIGHT IN NIGERIA:

4.1 INTRODUCTION

As there are two levels of copyright infringement, there also are two main avenues of remedies available to the owner of copyright under the Nigerian legal system, viz; through civil and criminal proceedings. To counter-act these remedies, so as not to make them absolute in all respects, the law has equally delineated some of them in certain circumstances. They also will be deliberated upon by this chapter.

4.2 CIVIL REMEDIES:

Ubi jus ibi remedium (there is no wrong without a remedy) is one of the many principles of law exhibiting the very foundations on which the legal science rests. It is a principle deriving from the Common Law giving a right or prohibiting an injury. It is today a principle which is enshrined in the Nigerian Copyright Act.[1] According to this maxim of law, whenever the Common Law[2] and in this work the Statute,[3] - gives a right or prohibits an injury, it also gives a remedy, i.e. lex semper dabit remedium.

A civil remedy is afforded by law to a party through a civil process in court whenever his right has been injured by a delict or a crime.. An infringement of an owner's copyright is an injury which entitles such an owner to either damages, injunction, accounts or any other remedies as the court may want to award in the circumstances.[4]

It may require clarification that the word "remedy" may sometimes be

used in synonym with the word "action".[5] In the realm of civil liabilities the word "remedy" has a more extended significance than the word "action". An action is in fact one peculiar mode provided by law for enforcing a remedy or for prosecuting a claim or a demand in the court of justice. Remedy on the other hand must be understood to mean a right which is obtainable upon the successful prosecution ofhe action. A brief discussion of these civil remedies for any of the infringements earlier discussed, will now follow in the succeeding sub-headings.

However, before dwelling on each of the remedies, it may well be useful to examine an issue which is of fundamental importance to copyright advocates: i.e. the issue of "class representation" either on the side of the plaintiff or on the side of the defendant. Although the various rules of court are quite explicit as regards representative actions in general, it is not an idle talk to raise the issue as it affects copyright infringement and remedies, because of the complexities involved. In the collective administration system of copyright industry, collecting societies made up of individual copyright owners, protect the interests of their members in all their ramifications. This includes the right to sue in respect of infringement of the copyright vested in any, some or all of its members and to receive for the joint benefit of the members, whatever quantum of relief that the court may grant. Also this line of action is necessary because the record and book pirates deal in all sorts of repertoirs and infringe the copyright of so many authors either by offering all the infringing copies for sale at the same time or reproducing them without permission. It is quite rare in practice to find a pirate duplicating just one record or book. The situation, therefore, is such that there are so many infringements at the same time and it

certainly becomes very expensive and impracticable to bring as many suits as there are infringements.

The case of EMI RECORDS v. RILEY,[6] may illustrate the difficulties alluded to above and also solutions to be adopted therein. In this case, the Plaintiff for and on behalf of members of the British Phonographic Industry sued the Defendant for reliefs based on infringement of copyright in sound recordings belonging to members of the British Phonographic Industry. The Court sanctioned this procedure and had to deal with the thorny issue as to whether damages can in law be awarded to a plaintiff suing in a representative capacity. **Dillon, J.** had the following reasoning to make:

> *"I think the fundamental factor is the special position of this particular trade of the B.P.I. This is not a case of a small number of Manufacturers getting together as a self-constituted association where there would be a serious likelihood that other pirate cassettes which Mrs. Riley may have sold would have nothing to do with the members of the association, because she herself has admitted that nearly all records in this country and "record" included discs or tapes or similar contrivances for reproducing sound, are produced, made or distributed by members of B.P.I.... In the circumstances of the B.P.I. and the pleaded allegations... it seems to me that it is appropriate that damages should be recoverable by the Plaintiffs in the representative capacity in which they are entitled to sue for an injunction, and it would be a wholly unnecessary complication of our procedure if the Court were to insist that for the purposes of the enquiry as to damages, all members of the B.P.I. must be joined as co-plaintiffs or alternatively, all members except for E.M.I. Records Limited, must issue seperate writ and apply for them to be consolidated with the claim for damages of E.M.I. Records Limited"[7] (underline mine).*

The English courts have followed this decision and at least the procedure of a named plaintiff suing on its own behalf and on behalf of and as

representing all other members of the greater body. Such was the procedure followed in the subsequent suit by EMI RECORDS LTD vs. KHDHAIL & ORS.[8]

Conversely, there is the problem attendant to suing a named defendant on its own behalf and as representing all other persons engaged in the trade or business of selling infringing copies of a copyright work. Is there sufficient identity of interest amongst such defendants to justify the grant of remedies against them recognisable by Law? This issue was settled in the positive in the case of EMI RECORDS v. KUDHAIL.[9] The Nigerian courts will now have to face similar problems and it is hoped that with the peculiar nature of copyright infringement, they will not be too strict on legal rules of class representation as in other matters. Having identified these salient procedural problems, let us now consider the specific civil remedies available to an owner of a copyright work under our law.

4.2.1. The Remedy of Damages:

This is a pecuniary compensation or indemnity recoverable in the courts by any person who has suffered loss, detriment or injury, whether to his person, property or rights, through the unlawful act or omission or negligence of another.[10] Damages are usually granted as final remedies in a successful action of infringement. It is this monetary compensation which accrues from the infringer to the rights owner for the financial loss occasioned by the act of infringement. Under the Act,[11] the courts in awarding damages are required to restore the plaintiff (as much as it is practicable) to the position he would have been had the infringement not happened. The Act, therefore, provides for damages which may be either

compensatory or punitive: on the one hand, as a measure to compensate actual loss suffered or on the other hand, as a measure of punishment for outrageous conduct so as to deter future transgressions. In doing this, the Act requires an objective assessment based on two tests:

(1) the flagrancy of the infringement;[12] and

(2) the benefit derived by the defendant by reason of the infringement.[13]

The compensatory damages for copyright infringement can easily be worked out by the plaintiff adducing evidence to show his dimunitive rate of sales as well as his loss of profit and earnings as a result of the act complained of. This is only possible when the plaintiff's claim is founded on his economic rights. In an action based on moral rights, the damages would be at large. It was held in the Nigerian case of PLATEAU PUBLISHING COMPANY LTD v. ADOLPHY,[14] that in an action for infringement of copyright, damages are at large and it is not necessary to prove actual or specific damage. This statement of the law was based on the decision in the case of EXCHANGE TELEGRAPH CO LTD. v.. GREGORY LTD,[15] which was later followed in FENNING FILM SERVICE LTD v. WOLVERHAMPTON, WALSALL AND DISTRICT CINEMA LTD[16].

The *ratio decidendi* in all these cases is that damages are at large and are not limited by any scale or provision of the law. Equally, the learned authors of Copyright Law in the United Kingdom,[17] had this to say on the issue:

> *"The purpose of damages is to compensate the plaintiff for the loss which he has suffered as a result of the defendant's breach, and while the fact of infringement will give rise to entitlement in damages, the plaintiff must adduce evidence which will enable the court to assess*

> *what damage has been suffered, even if such damage can only be assessed generally and compensated by the award of only a lump sum".*[18] *(underline mine)*

However, other reported cases show the application of a different formula in assessing such damages in copyright. In the case of SUTHERLAND PUBLISHING CO LTD v. CATON PUBLISHING CO. LTD,[19] the depreciation caused by the infringement to the values of the copyright as a chose in action, was used as the yardstick of damage and the measure of damages awarded thereby. Whilst in PIKE v. NICHOLAS,[20] the yardstick used was the profit which the plaintiff would have made from the sale of the infringing materials. In this case, it was further held that *"the defendant is to account for every copy of his book sold as if it had been a copy of the plaintiff's, and to pay the plaintiff the profit he would have received for the sale of so many additional copies."*[21] A different approach was again used in deciding the case of REDMOOD MUSIC LTD v. CHAPPELL & CO. LTD.[22], where the computation of damages was based on what would have been paid as royalty, if instead of acting illegally, the Defendant had acted legally. On the whole, what the learned Judge opined in the case of BELOFF v. PRESSDRAM LTD,[23] in the following words, seems to say it all:

> *"...the process is not by meticulous qualification of individual items, as the damages cannot generally at any rate, be ascertained by an accounting operation... They are a matter of impression rather than scientific or mathematical calculation."*[24]

The above English cases might have been responsible for the award of ₦5,000.00 damages awarded by **Tofowomo J.** in the Nigerian case of ISLAND RECORDS LTD v. I.C. OKALLA COMMERCIAL ENTERPRISES NIG. & OR.[25] In this case, 3,200 infringing copies of records were alleged to be

involved. There was evidence of a royalty payable at the rate of 14% on every 5,000 copies sold. Thus 14% of ₦18,400 being the cost of the 3,200 infringing copies, was mathematically arrived at ₦2,576.

All the above analysis would attest to the principle that damages are at large and not limited by any specific provision of law or scale. In addition to the above compensatory damages, the Act has a statutory provision for what in common law may be called 'punitive damages' where it reads as follows:

> *"Where in an action under (the law) an infringement of copyright is proved or admitted and the Court in which the action is brought....is satisfied that effective relief would not otherwise be available for the infringement, shall have power to award such additional damages as the court may consider appropriate in the circumstances."*[26]

Although the above statutory provision exists in our law, there seems not much room for punitive damages in respect of copyright infringement in Nigeria. Rather, the Act allows for an account to be rendered of proven benefits which may have accrued to the wrong-doer. In fact, the Act has a converse provision to the effect that if at the time the infringement was committed, the defendent was not aware and had no reasonable grounds to suspect that copyright existed in the work to which his action relates, the court will deny the plaintiff's right to damages.[27] It is humbly submitted that this legislative immunity is uncalled for. Copyright by its nature would exist and crystalize in a work upon its creation without regard to anyone's knowledge, and certainly not for the defendant to know. The law ought to presume the defendant to know, otherwise his ignorance of this law is being excused.

An instance of such punitive or additional damages for copyright

infringement was awarded in the English case of WILLIAMS v. SETTLE,[28] where not only the legal rights of the plaintiff regarding copyright but also his feelings were taken into consideration in the £1000 damages ordered by the Court.

4.2.2 Remedy of Injunction:

An injunction is a prohibitive, equitable remedy issued or granted by a court at the suit of a complainant, directed to a defendant in the action or to a party who is made a defendant for that purpose, forbidding the latter to do some act or to permit his servants or agents to do some act which he is threatening or attempting to commit, or restraining him in the continuation thereof, such act being unjust and inequitable, or injurious to the plaintiff.[29] This is a common law process operating *in personam*, and requiring the person to whom it is directed to do or refrain from doing a particular thing. The statutory remedy of injunction under the Nigerian Copyright Act, provides that:

> *"...in any action for an infringement all such relief by way of damages, injunction, accounts or otherwise shall be available to the plaintiff as is available in any corresponding proceedings in respect of infringement of other proprietary rights"*[30]

By this provision the Act has classified copyright as of equal importance, and thus deserving equal protection as real property under Nigerian law. This is a very potent and equitable remedy available to a copyright owner in Nigeria. The injunction may be granted *ex parte* or on notice; it may be intelocutory or final. Be it as it may, the general principles governing the grant of injunction in respect of other property rights, having not been restricted, would certainly apply to copyright. Such principles are as

enunciated in the cases of AMERICAN CYNAMID LTD v. ETHICON & CO[31]; OBEYA MEMORIAL SPECIALIST HOSPITAL & OR v. AG OF THE FEDERATION[32], and also in KOTOYE v. C.B.N.[33]. In these cases, it was reiterated that an interlocutory injunction will be granted if:

i) there is a serious issue to try;

ii) damages will not be adequate compensation for the damage done to the plaintiff (if the application is presently refused but he succeeds at the end of the day);

iii) the balance of convenience is in the plaintiff's favour; and

iv) there is no conduct on the part of the plaintiff that will make it inequitable for the court to grant the application.

As a remedy for an infringement in copyright, an interlocutory injunction obtainable by *ex parte* application is frequently resorted to in order to minimise the injury arising from the defendant's action. In that instance, it will be presumed by the court that the plaintiff is interested in maintaining the *status quo*, or at least, that no further infringement is committed. The nature of interlocutory injunction is such that it is issued at any time during the pendency of the main suit, for the purpose of a short-term prevention of irreparable injury.

In keeping with the modern trend of legislative drafting techniques, our current Copyright Act has made the species of injunction obtainable in copyright *pari passu* with such injunctions obtainable in other proprietary rights.[34] Even so, an interlocutory injunction is one which is limited in duration to some specified period of time, or at the very widest, to the time of concluding the action on its merits. In the category of interlocutory injunctions, there are two distinct types: the first which is generally referred

to as a "preliminary injunction" and which includes such injunctions granted after the respondent has been given notice or opportunity to participate in the hearing. The second which is generally referred to as a "temporary restraining order", differs from the preliminary injunction in that it is issued *ex parte*. This second type offers a better relief to most copyright owners who often are in situations of suffering irreparable injury and who cannot afford to wait for time or notice to the defendant for a hearing. In the practical realities of copyright infringement, the mere service of notice for an interlocutory injunction on the defendant would alert him to destroy or dispose of the incriminating evidence at his disposal; thus acting to the detriment of the plaintiff.

This inevitably leads us to consider the other form of injunction that has now enjoyed statutory flavour under the Nigerian Copyright Act, popularly known as "Aton Pillar Order". This order empowers the plaintiff who has successfully obtained the order of restraint, to also enter the premises of the defendant, inspect and seize incriminating materials in the possession of the defendant in an alleged infringement of copyright. This will be considered under the heading 'Inspection and Seizure' as provided under the Act.[35]

4.2.3 The Remedy of Inspection & Seizure:

This remedy developed from the reasoning that if a complainant has to wait for the infringer to come to court on notice of a summons, he would have, by so doing, alerted the infringer to dispose of any incriminating materials in his possession. In order to minimise this unpleasant happening, the Common Law, and until recently the Act, gave an aggrieved

party the right to apply for what has come to be popularly called an "Anton Pillar Order". It is a process which derived its origin from the order of the English Court in the famous case of ANTON PILLAR K.G. v. MANUFACTURING PROCESS LTD & ANOR.[36] In this case, the defendants, which was an English company and their two directors, were the United Kingdom agents of the plaintiffs, who were German manufacturers of frequency converters for computers. The plaintiffs claimed that the defendants were in secret communication with other German manufacturers and were giving them confidential information about the plaintiffs' power units and details of a new converter, the disclosure of which could be most damaging to the plaintiffs. In order to prevent the disposal by the defendants, before discovery in an action, of documents in their possession relating to the plaintiffs' machines or designs, the plaintiffs applied *ex parte* for an interim injunction to restrain the defendants from infringing their copyright and disclosing confidential information and for an order for permission to enter into the defendants' premises to inspect all such documents and to remove them to the plaintiffs' Solicitors' custody.

On the plaintiffs' undertaking to issue a writ forthwith, **Brightman, J.** at the court of first instance, granted the interim injunction but refused to order inspection or removal of documents. On the plaintiffs' *ex parte* appeal, which was held in chambers with the judgement later in open court, the English Court of Appeal held, allowing the appeal. The appeal court held that in most exceptional circumstances, where plaintiffs had a very strong *prima facie* case, that actual or potential damage to them was very serious and there was a clear evidence that defendant possessed vital

materials which they might destroy or dispose of so as to defeat the ends of justice before any application inter parties could be made, the Court had inherent jurisdiction to order defendants to permit plaintiffs' representatives to enter defendants' premises to inspect and remove such material, and that in the very exceptional circumstances, the court was justified in making the order sought on the plaintiffs' *ex parte* application. **Lord Denning M. R.**, had this to say with regards to the necessity for the *ex parte* proceedings:-

> *"It seems to me that such an order can be made ex parte, but it should only be made where it is essential that the plaintiff should have inspection so that justice can be done between the parties; and when, if the defendant were forewarned, there is a grave danger that vital evidence will be destroyed, the papers will be burnt or lost or hidden, or taken beyond the jurisdiction and so the end of justice will be defeated; and when the inspection would do no real harm to the defendant or his case."*[37]

At first glance, this order looks like another form of a search warrant. This criminal nature of the order in a civil action often becomes a ground of vehement opposition or objection by the defendants, as it raises the question of an invasion to their fundamental rights of privacy and presumption of innocence. By way of distinction and clarification, **Lord Denning** in his judgement explained it thus:-

> *"Let me say at once that no court in this land has any power to issue a search warrant to enter a man's house so as to see if there are papers or documents there which are of an incriminating nature, whether libels or infringements of copyright or anything else of the kind. No constable or bailiff can knock at the door and demand entry so as to inspect papers or documents. The householder can shut the door in his face and say "Get out". That was established in the leading case of Entick v. Carrington (1765) 2 Wils. K.B. 275. None of us would wish to whittle down that principle in the slightest. But*

> *the order sought in this case is not a search warrant. It does not authorise the plaintiffs' solictor or anyone else to enter the defendants' premises against their will. It does not authories the breaking down of any doors, nor the slipping in by a back door, nor getting in by an open door or window. It only authorises entry and inspection by the permission of the defendants. The plaintiffs must get the defendants' permission. But it does do this: It brings pressure on the defendants to give the permission. It does more. It actually orders them to give permission with, I suppose, the result that if they do not give permission, they are guilty of contempt of court. This may seem to be a search warrant in disguise".*[38]

As may be gathered from the above common law decision, the Anton Piller type of injunction and order can only be made if the following conditions are met:-

1) there must be an extremely strong *prima facie* case;
2) the damage, potential or actual, must be very serious to the Applicant; and
3) there must be clear evidence that the defendant has in his possession incriminating documents, or things and that there is a real possibility that he may destroy such materials before an application inter-parties can be made.

Before the coming of the Nigerian Copyright Act, this type of order was sought under the Civil Procedure Rules[39] of the Federal High Court and its inherent jurisdiction by which the Court may have recourse to common law. This was because the then Nigerian Copyright Law[40] had no provisions on inspection and seizure. There were two important decisions of the Federal High Court prior to the current Act which illustrated the principles for and against the granting of the Anton Pillar Order. In the case of FERODO LIMITED v. UNIBROS STORES[41] where the Order was first granted in

Nigeria, ANYAEGBUNAM .J (as he then was) said: "*This application is novel. So far, I have not seen where such an application is reported in our Law reports.*"[42] He traced it to Lord Denning's Book[43] where it was reported that the procedure was invented by an ingenious member of the English Chancery Bar, Mr. Hugh Laddie.

The brief facts of the above Ferodo's case were that the plaintiffs were the sole distributors in Nigeria of Ferodo products. Certain products said to be Ferodo brake linings were being sold by the defendants who were not customers of the plaintiffs. An agent of the plaintiffs had on a trap-trip purchased some of the said Ferodo products from the defendants. The goods when compared to those held by the plaintiffs were discovered to be different from those manufactured by the plaintiffs' parent company. In an affidavit evidence it was further shown that the plaintiffs had certificate and renewals of registration of Trademarks in respect of the Ferodo products.

The plaintiffs thereupon applied ex *parte* on the same date that the substantive action was filed, for a motion to grant the type of Anton Piller Order. **Mr Benthey**, learned counsel for the plaintiff, urged that because of the urgent nature of his application, that it be heard the next day, and when it was called up the next day, he further urged that on account of the confidential nature of it, the interest of justice would be better served if the motion was held in camera. **Justice Anyaegbunam**, the then Chief Judge of the Court, granted all the prayers of the plaintiffs, relying majorly on the English Court of Appeal ruling in Anton Pillar's case (supra).

In a subsequent Nigerian case also decided prior to the current Copyright Act, this type of Order was refused by **Justice M.B. Belgore**,

who was also then of the Federal High Court, Lagos. The case was SONY KABUSHIXI KAISHA (also trading as Sony Corporation) v. SHAHANI & Co. LTD,[44] which was an action for infringement of registered Trademarks. The plaintiffs sought for an order to restrain the defendants from selling or disposing cassette tapes bearing the word "Sony" which infringed their Trademark, and for the inspection and seizure of such materials or documents relating to the alleged infringement either from the defendants directly or from their agents.

In refusing to grant these orders, **Belgore, J.** fomulated and considered four issues. These were:-

1. whether Anton Piller Order was granted in England under the Supreme Court Order or Orders similar to any of the Federal High Court (Civil Procedure) Rules under which the present order is sought;
2. whether the English principle is applicable here in view of our Constitution and laws not being the same as the English ones;
3. whether the facts of this case are as such as those laid down for granting an Anton Piller Order; and
4. whether the principle of Anton Piller Order had been affected by later decisions of higher courts in England.

His second issue above is particularly worthy of examination here especially against the background of our frequent recourse to English Rules when there is a lacuna in our Law. In his words,

> *"....not every tree that grows in the temperate climate of England can grow in the tropical climate of Nigeria and of late not every new Legal principle in England is*

automatically applicable in Nigeria. For one thing, English decisions are no longer binding on our Courts, for another as the English Laws are going more towards European Laws, the Nigerian Laws are going more the American way"[45]

He went further to add that;

"We have to look at our Laws, to our Constitution which is now more akin to the American written Constitution with enshrined provisions than to the flexible and unwritten British one. There is also the fact that democratic pratice and rule of law are in experimental stages and the likelihood of misuse of either is greater here than in England. Little in-road into individual liberty can be taken advantage of and abused. The court who is to shut the gate of individual liberty and privacy against encroachment should not be the instrument of its invasion".[46]

In his final analysis, **Belgore J.** refused to grant the Anton Piller Order in the above case, basing his refusal on the following reasons:

1. I cannot grant any of the orders sought because they were sought under Orders XX, XXVIII, and XXX of the Federal High Court (Civil Procedure) Rules and under any of such orders, I cannot grant the orders *ex parte* and in camera.
2. I cannot grant the orders sought for in requests 2 and 3 for the search of the defendants' premises as I consider such orders to be incompatible with the provisions of the Constitution having given the defendants no prior opportunity of fair hearing before the orders are made.
3. I cannot grant the orders (in requests 4,5 and 6) as to grant them will be against the principle of privilege against self-incrimination and;

4. Finally, I have great doubt as to whether the facts of this case are of such exceptional circumstance that an Anton Piller order should be given on them".[47]

In fact, in yet another case of JOSIAH PARKES & SONS LTD v. A.M.O. MBADIKE & BROS LTD[48] the same **Belgore J.** granted the ex-parte injunction to restrain disposal of threatened materials, but refused the full orders of inspection and seizure.

Such was the uncertain state in the Nigerian application of the Anton Piller principle prior to the Copyright Act. The position now is that our Law has codified extensively the principle of Anton Piller by providing that:-

> *"In an action for infringement of any right under this Act, where an ex parte application is made to the Court, supported by affidavit, that there is reasonable cause for suspecting that there is any house or premises any infringing copy of any plate, film, or contrivance used or intended to be used for making infringing copies or capable of being used for the purpose of making copies or any other article, book, or document by means of or in relation to which any infringement under this Act has been committed, the Court may issue an order upon such terms as it deems just, authorising the Applicant to enter the house or premises at any reasonable time by day or night accompanied by a Police Officer not below the rank of Assistant Superintendent of Police; and*
>
> *(a) seize, detain and preserve any such infringing copy or contrivance;*
>
> *(b) inspect all or any document in the custody or under the control of the defendant relating to the action".*[49]

Armed with the above statutory procedure, the copyright owner can now inspect, seize and preserve infringing materials without giving the defendant any chance of destroying or disposing the same. The materials seized can then be used as evidence in the substantive suit or even in criminal prosecution as the Act contemplates both.[50]

Recent developments since the coming of the current copyright Act show that in almost every case of copyright infringement, the first course of action is to obtain the Anton Piller order. In the cases of ISLAND RECORS v. PANCOS.[51] ISLAND RECORDS v. PANDUM,[52] and ISLAND RECORDS v. LAGOS SHIPPING AGENCY LTD[53] the order were granted. In fact one such Anton Piller order was granted in LITERAMED PUBLICATIONS & ORS. v. RIGHTWAY BOOKSHOP & ORS.[54] But in other cases such as CAPITAL RECORDS v. AGBOOLA[55] and CBS RECORDS v. ATOLAGBE,[56] the applications were rejected. Given the *ex parte* nature of the Application, the courts before granting the order, would normally require the plaintiff to give a substantial security and an undertaking to abide by all consequential orders attending to any abuse of court process.

On the whole, we note that there is a happy development ensuing with the use of this kind of remedy under our law. We commend it as an effective weapon against the indiscriminate abuse of copyright now prevailing in Nigeria.

4.2.4 Remedy of Conversion:

Another remedy for copyright infringement under the Nigerian law is a right of conversion in respect of which the Act provides as follows:

> *"All infringing copies of any work in which copyright subsists, or of anny 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, of the copyright, who accordingly may take proceedings for the recovery of the possession thereof or in respect of the conversion thereof"*[57]

This statutory right is one of the many provisions of the Act which portray the pro-authorship tendency of the Nigerian Copyright Act. It is founded on an equitable presumption that the defeated defendant at trial is further adjudged as having possessed with guilty conscience, such materials for an unlawful purpose of committing infringement of another's copyright. Although the Act is silent as to whether or not this remedy will issue *ipso facto*, it is our opinion that it is a consequential remedy available only to a successful plaintiff in an action for either one or all the other remedies available under the law. In essence, the plaintiff is entitled to take proceedings in respect of the conversion as a seperate ground of action which certainly includes damages for conversion. Proceedings can, of course, be taken to vest the infringing materials and contrivances in the copyright owner. This remedy is quite an effective one as it entitles the copyright owner to claim as damages, the price of all such infringing materials or contrivances.

As succintly put by **Sterling** and **Carpenter**[58] conversion takes place whereby any of the infringing copy or materials:

i) is wrongfully taken out of the possession of the copyright owner;

ii) is wrongfully detained in defiance of the copyright owner's rights, e.g. by refusal to return the copy on demand; or

iii) is wrongfully delivered or disposed of e.g. by scale or other distribution;

iv) is destroyed (other than accidentally); or

v) is wrongfully dealt with in any other way whereby the owner is deprived of use and possession of the copy.

More potently, the Nigerian Copyright Act goes further that even if the offending materials were already the property of and possessed by the defendant, they will be deemed to belong to the copyright owner who consequently, is empowered by the law to take possession of them upon his successfully pleading infringement or likely infringement of his copyright.[59] It might be necessary to distinguish between this statutory right of the plaintiff in copyright entilling him to convert the materials possessed by the defendant for the reason of copyright infringement on the one hand, and the more popular doctrine of "conversion" as known to the law of Equity on the other hand. In Equity, "conversion" is an unauthorised assumption and exercise of the right of ownership over goods or personal chattels belonging to another.[60] By this definition, conversion *per se*, is a tortious act remedable at law. Whereas, under the Nigerian Copyright Act, as discussed above, conversion is a right granted to a copyright owner as a plaintiff, to assume ownership and exercise control over goods belonging to another person for reason only that such goods have or are capable of being used by the defendant to infringe the rights granted to the owner of such copyright.. This, in my opinion, is a converse situation itself whereby the Statute has permitted what would have, otherwise, been unlawful. The Act in this somewhat strange provision, proceed with an emphatic phrase "*shall be deemed*", thus leaving no room for any other supposition as to whom belong such goods, machines, equipment, or master tapes used or capable of being used for infringement. In practice, however, the copyright owner, or his assignees or exclusive licensee, whose right is thereby infringed, would not physically assume possession of such infringing materials without recourse first to the law court. He is required to take

judicial proceedings for the recovery of possession (if the items used were his) or for the conversion thereof (if the items were those of the wrong-doer).

Finally, the Act provides that damages may be awarded in lieu of conversion and in addition to such other damages for infringement. However, this will be granted only where the infringing materials have either been destroyed or wrongfully dealt with in any other way by the defendant whereby the owner of copyright as plaintiff has been deprived of use and possession thereof. In this instance, care must be taken to ensure that the heads of damages do not overlap. Where the relief sought to be granted is "delivery up of infringing materials" this would be answered in the theory that the copyright owner was the original owner of the infringing materials.[61]

4.2.5 Remedy of Accounting For Profits:

The Act provides that:

> *"Where in an action for infringement of copyright, it is proved or admitted that an infringement was committed but at the time of the infringement the defendant was not aware and had no reasonable grounds for suspecting that copyright subsisted in the work to which the action relates, the plaintiff shall not be entitled...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".*[62]

The above statutory remedy seems to have clothed copyright infringement as a strict liability offence. The underlying philosophy here is to do justice to the copyright owner to the extent of depriving the wrong-doer of any benefits he may have derived from his illicit enterprise while infringing the

rights of the plaintiff. Thus, the copyright owner can also bring an action to deprive the infringing party of his underserved gains during the course of infringement. When ascertained, these profits will be awarded as damages to the copyright owner. This without further explanation, may project copyright as a strict liability wrong as found in torts. It is not so.

It is necessary therefore to clarify, that if account is requested for and ordered, the copyright owner loses his right to seek damages either for infringement or in conversion. This is because the Act provides a caveat: *'when it is proved or admitted that an infringement was committed but that at the time of the infringement, the Defendant was not aware and had no reasonable grounds for suspecting that copyright subsisted in the work'*. This caveat shall operate in favour of the wrong-doer to the extent that he shall not be made to suffer double jeopardy by way of both conversion and or damages in addition to accounting for the profits he made. The Supreme Court in the case of PLATEAU PUBLISHING CO LTD v. ADOLPLY,[63] considered Section 12(2) of the Copyright Act of 1970,[64] and held that the evidence of innocent infringement is a defence for the author of the infringing article (underline mine) and not a defence for the publisher of the infringing article. The Court went further to hold that in a copyright action where the court orders an account of profits, the court by that order takes from the wrongdoer all the profits he has made by his piracy, and gives them to the party who has been wronged as the nearest approximation which it can make to justice.

There is another pratical problem with regards to this remedy. It is the difficulty faced by the plaintiff or the copyright owner in proving the defendants account of profit, since it does not behove the

defendant/infringer to give such an accurate account of his profits. It is suggested that copyright owners may prove such an account from the defendant by obtaining *ex parte* the Anton Pillar type of order of inspection and seizure of such records, if any were kept by the wrong-doer.

4.2.6 Remedy of A Levy On Copyright Materials:

By virtue of the amendment made to the Copyright Act,[65] there has come on board another type of remedy available to a copyright owner whose right is infringed. This is by way of a levy/charge on any materials used or capable of being used to infringe his right.[66] The levy to be paid in each particular instance shall be as determined by the Minister of Information and Culture, and as published from time to time by his Order in the Federal Gazettee. This means that different levies may be imposed on different categories of materials used for copyright infringement.[67]

The levy shall be paid into a fund maintained by the Nigerian Copyright Council[68] and the Council is vested with powers of disbursing the funds among approved societies in accordance with regulations made by the Council. This means that the remedy is only available through the offices of the Nigerian Copyright Council and each affected copyright owner can thus benefit from the fund only as a member of an approved collecting society. It is also dependent or what the Minister may by his order prescribe as levy. So far, the Minister is yet to issue any such order.

Due to the chain of processes involved, this remedy appears very remote from practical reality, especially as most copyright owners in Nigeria are yet to form themselves into collecting societies. It is, however, of theoretical importance that the law is already in existence ahead of the

practical realities.

This provision, once again, counts as one piece of the pro-author approach of the Law to check the virus of piracy at all stages. The law specifically stipulates that "material" for the purpose of attracting a levy under this provision, includes any object, equipment, machine, contrivances, or any other device used or capable of being used to infringe copyright in a work.[69] This remedy, coupled with the other cognate remedies discussed above, collectively assure the copyright owner that the law is up in all arms to enforce his legitimate right, so as to enjoy the fruits of his labour against any form of infringement.

4.3 ANCILLARY CIVIL REMEDIES:

Finally, under the inherent powers of the court, declarations ascertaining or declaring rights of parties can also be made. And the rules relating to copyright enforcement in this regard are not different from the declarations that may be sought in court in other proprietary rights. In this regard, there are some other collateral reliefs which though not statutorily provided, are available to a copyright owner under the common law. These include:

i) An action for injury to business by employment of unlawful means.[70]

ii) An action for defamation, where reputation of the author is damaged by the way his work is presented to the public.[71]

iii) An action for malicious falsehood where there has been malicious description of the Plaintiff's work causing injury to the plaintiff.[72]

iv) An action for conspiracy to commit injurious acts such as infringement of copyright.[73]

v) An action for incitement to infringement of copyright where the defendant specifically authorises an actual breach of copyright.[74]

The second to the last among these ancillary remedies may conveniently be handled under criminal prosection, to which this Work will now direct its next attention.

4.4 CRIMINAL SANCTIONS FOR COPYRIGHT INFRINGEMENT:

Generally speaking, under the Nigerian legal system, it is the police or the state that initiates criminal proceedings against persons suspected to have committed offences. All that the complainant has to do is to complain to the police and it lies within the discretion of the Police, and indeed the state, to prosecute. In special circumstances, private prosecution by the victim of crime may be permitted by the court of law and sometime by the fiat of the Ministry of Justice through its attorney.

The Nigerian Copyright Act, in disregard to any law to the contrary, permits both criminal and civil actions to be taken simultaneously by the owner of copyright in the event of an infringement to his right.[75] This rare legislative fiat given to the copyright owner in Nigeria amounts to a double-barrelled-gun, because most often, criminal sanctions against pirates may serve a better deterrent than civil remedies. It may be asked: what benefits is criminal sanction to the author?

The rationale for criminalising copyright infringement under Nigerian law may be explained from in two perspectives:

1. Since the coming together of all the colonial protectorates into one Nigeria in 1914, and particularly in 1916, copyright infringement, even during the colonial days, received penal sanctions. This was without regard to the received English laws in the area of civil or private remedies as earlier discussed. In other words, the notion of criminal penalties for copyright offences had been known to the Nigerian judicial system for as long as our historical and teritorial constitution as a nation.
2. Copyright infringement occasions a series of consequential effects on the nation's legal, social, economic and cultural values. If left unchecked by penal sanctions, it would advesely result to consequential losses in the economy, the break down of law and order; devaluation of our cultural values and depreciation of our creative arts within national and international communities.

It is the responsibility of the state to protect not only the right and properties of its individual citizens but also the collective national interests, security and territorial integrity of the nation. The above reasons, among others, may have informed the necessity to criminalise copyright infringement in Nigeria. In doing this, our law on the subject has jetisioned the principle that no one should suffer twice for his act, because a copyright offender under our law is liable to face both civil and criminal proceedings simultaneously on the evidence of the same act. This is a hybrid character of legislative judgement commonly associated with military governments. In the military style of stamping out undesirable elements

from the nation's legal, econnomic, social and cultural life, most decrees of the Federal Military Government (one of which is the current Copyright Act) contain double-edged punishments at both civil and criminal ends of justice.

Section 18 of the Act creates various offences as follows:

"Any person who:

a. makes or causes to be made for sale, hire or for the purposes of trade or business any infringing copy of a work in which copyright subsists; or

b. imports or causes to be imported into Nigeria more than two infringing copies of such work; or

c. makes, causes to be made, or has in his possession any plate, master tape, machines, equipment or contrivance for the purpose of making any infringing copy of such work;

shall unless he proves to the satisfaction of the Court that he did not know and had no reason to believe that any such copy was not an infringing copy of any such work, or that such plate, master tape, machine, equipment or contrivance was not for the purpose of making infringing copies of any such work be guilty of an offence under this Act and shall be liable on conviction to a fine of an amount not exceeding ₦1,000 for every copy dealt with in contravention of this Section or to a term of imprisonment not exceeding 5 years or both fine and imprisonment".[76]

And Sub-section 2 of the same Section provides further as follows:-

"Any person who

(a) sells or lets for hire or for the purpose of trade or business

exposes or offers for sale or hires any infringing copy of any work in which copyright subsists; or

(b) *distributes for the purpose of trade or business any infringing copy of any such work; or*

(c) *has in his possession other than for his private or domestic use any infringing copy of any such work*

shall unless he proves to the satisfaction of the Court that he did not know and had no reason to believe that any such copy was an infringing copy of any such work, be guilty of an offence and shall be liable on conviction to a fine of ₦100 per every copy dealt with in contravention of this section or to a term of imprisonment not exceeding 2 years or in the case of an individual to both such fine and imprisonment".

The first above quoted section is aimed at the big time pirates who make facilities available for copying copyright materials. Such facilities include printing press, fast moving cassette duplicating machines, etc. The second above quoted section is aimed at punishing people who, either on wholesale or retail basis, sell or expose for sale infringing copies of a work. Criminal proceedings will also be taken against any one who, without the consent of the owner, distributes in public for commercial purposes, copies of a work in which copyright subsists and shall be liable upon conviction to a fine of ₦100 for every copy dealt with or imprisonment for six months or to both such fine and imprisonment.[77]

The Act also provides for criminal proceedings to be taken against Corporate bodies who may be responsible for offences committed contrary to the Copyright law.[78] The main thrust of the law here is that Directors, Managers, Secretaries or other responsible officers of such corporate

bodies shall be deemed liable for offences committed in the name of such body corporates, except there is evidence to show that such offence was committed without the knowledge of the person concerned.

By way of giving 'teeth' to the law, there are two other provisions in the Act which go a long way in easing the process of proving subsistence of copyright, authorship, place and time of first publication of the work in question.[79] These provisions are applicable to both civil and criminal proceedings discussed above. Because of the practical importance of these provisions to the parties interested in copyright protection, they are hereby set out fully.

The first among these, is the legal presumption of proof in affidavit evidence,[80] which states as follows:-

(1) An affidavit made before a commissioner for oaths, notary public or other person competent to administer an oath in terms of the law of the country where the oath is made, which

(a) purports to have been made by or on behalf of the owner of the copyright in a work; and

(b) states that:-

(i) at the time specified therein, copyright subsists in the work;

(ii) the person named therein is the owner of the copyright in the work;

(iii) a copy of the work exhibited in the affidavit is a true copy of the work;

(iv) the author of the work is a citizen or domiciled in a country named in the affidavit;

(v) *the author of the work is a body corporate established or incorporated by or under the laws of the country named in the affidavit;*

(iv) *the work was first made or published in the country named in the affidavit;*

(vii) *the certificate attached to the affidavit is a true copy of the certificate of registration of that incorporation;*

shall be admitted evidence of the facts stated therein without further proof in any proceedings under this Act.

(2) *The Court before which an affidavit is produced under subsection (1) of this Section shall presume, until the contrary is proved, that the statements made therein are true".*

The second provision relates to the legal presumption of the existence of facts by the mere act of the right's owner taking steps to enforce his rights, without undue requirement of evidentiary proof. These the Act made easy by stating as follows:

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

(a) *that copyright subsists in a work which is the subject matter of an alleged infringement;*

(b) *that the plaintiff is the owner of copyright in the work;*

(c) *that the name appearing on a work purporting to be the name of the author, is the name of such author;*

(d) *that the name appearing on a work purporting to be that of the publisher or producer of a work is the name of such publisher or producer;*

(e) where the author is dead, that the work is an original work; and

(f) that it was published or produced at the place and on the date appearing on the work."[81]

It is my humble submission that the combination of the above provisions clearly shift the legal burden on the defendant (in civil proceedings) or the accused (in criminal proceedings) to disprove either ownership or indeed an infringement of copyright. These presumptions which came in the form of a military decree (the Act is itself not of a National Assembly), seems to erode the constitutional or human rights entrenched in the Constitution as to the rule of law.[82] Perhaps, for as long as Nigeria is governed by the military, decrees will continue to have supervening power over the Constitution; otherwise it remains to be adjudged if these presumptions will survive in the face of entrenched human rights provisions in the Costitution.

Notwithstanding all the remedies for copyright infringement as numerously considered above (whether in the area of civil or criminal proceedings) the main and surest way of enforcing copyright, as in all other legal systems, is the due observance of the rules, by first educating all concerned on the evils of copyright infringement and what the entire society stands to benefit by due observance of the law. It is only with a concerted effort at such education that the attitudinal character of all persons connected with copyright in Nigeria will usher in the benefits of the legal regime protecting and promoting creative activities all across the world.

4.5 EXCEPTIONS TO COPYRIGHT:

The Act contains extensive provisions for exceptions to the legal exercise by the owner of copyright in Nigeria.[83] The purpose for these exceptions are to enable specified groups and, sometimes the entire society in general, to use creative works under certain conditions, without injuring the legal rights of the copyright owner. In the main, the exceptions are intended to aid research and scholarship, especially with regards to literary and artistic works.

On the whole, there are 19 heads of exceptions to copyright works of litrary, artistic, musical, sound recording and broadcasting under the Second Schedule to the Act, and 8 other special exceptions in respect of a sound recording of a musical work under the Third Schedule to the Act.

Of particular relevance, the following exemptions are of general nature to virtually all the works protected by copyright in Nigeria:

1) Fair dealing for purpose of research, private use, criticism, review or reporting of current events, subject to the condition that if the use is public, it shall be accompanied by an acknowledgement of the title of the work and its authorship.[84]
2) The inclusion of the work in the collection of any other works, if the collection bears a statement that it is for educational use and both title and authorship are acknowledged.[85]
3) Public recitation of any work which is made for non-commercial purposes.[86]
4) Use made by or on the order or direction or control of the government or by such public libraries or non-commercial centres or scientific institutions for public interests - where no

revenue is derived from such use[87]

5) Any use made of a work for purposes of judicial proceedings or of any report of such a proceeding.[88]

6) Any use of a work for the purpose of aiding a disabled person or for an establishment responsible for the welfare of such persons.[89]

From a cursory look at the many exceptions provided under the Act, there appears to be an erosion of the many rights earlier conferred on the owner of a copyright work. When the exceptions are compared to the rights earlier discussed, the negative aspects seem to outweigh the positive rights in Nigeria. Not only are some of the exceptions ambiguous,[90] but also they are too wide and, therefore, prone to abuse. Given the relative newness of copyright system in Nigeria it would have been expected that the amplitude of the law be given full chance to operate in the positive enforcement before curtailing its excesses, (if any), by the negativity of exceptions. As the law currently stands, there is a hazy atmosphere as to what extent a right owner can successfully assert his right against the number of public institutions in whose offices and establishments various violation of copyright law take place, especially in field of literary works.

For us to be definitive about whether or not these exceptions could erode, and if so to what extent, the positive rights in copyright, there has to ba a spate of judicial contests by right owners versus violators of copyrighted works in Nigeria. For instance, when would the use of a work exceed "*fair dealing for the purpose of research, private use, criticism or review*"? Or when will the use of a work in an approved institution be "*for the educational purposes of that institution*", more so in the event that a

whole book may be xeroxed by students and staff at the Library even when copies of the same book are available at the bookshops for sale?

It is our view that the drafters of the exemption clauses in our Copyright Act have uncritically borrowed such exceptions from the statutes of developed jurisdictions (e.g. American States) where there probably have been a number of judicial pronouncements on the meaning and extent of such exceptions with regards to the rights protected under their laws and circumstances of exceptions. Perhaps, in anticipation of local disputes, it would be necessary for our legislators (military or civilian) to redefine before codifying exceptions to copyright in order to promote positive earnings from the use of creative works and to encourage increased exploitation of such works in the Nigerian copyright scene. As is presently obtainable, there is not much hope for a copyright owner who may be visited by one or the other of the numerous exceptions in the course of his asserting his rights through the law court.

NOTES TO CHAPTER FOUR

All sections quoted below, except where otherwise stated, refer to the Nigerian Copyright Act, CAP 68, Laws of the Federation of Nigeria, 1990.

1. See particularly S.17(1).

2. In R. LEICESTER GUARDIANS (1899) 2 QB 632.

3. SS.17 and 18 respectively.

4. S.15(1) of with S.17(2) respectively.

5. The Nigerian Copyright Act specifically uses the word "action" under S.15.

6. (1981) F.S.R. 503-505-506.

7. Ibid. at P.510.
8. (1985) F.S.R. 36.
9. Supra.

10. Black's Law Dictionary (5th Ed.) P.351.

11. S.15(4).

12. Ibid. paragraph (a).

13. Ibid. paragraph (b).

14. (1986) 4 NWLR (Part 34) 205 at 225.

15. (1896)1 QB 147.

16. (1914) 3 QB 1171.

17. Sterling & Carpenter, "Copyright Law in the United Kingdom", 1986.

18. Ibid. at P.325.

19. (1936) Ch. 323 at P.336.

20. (1969) 5 Ch. 251

21. Ibid. at P.260.

22. (1982) F.S.R. 109 at 1311.

23. (1973) R.P.C. 765.

24. Ibid. Per Ungoed-James J. at P.797.

25. Suit No. FHC/PH/17/84, Ruling on 13/12/85.

26. S.15(4).

27. S.15(3).

28. (1960) WLR 1072.

29. Black's Law Dictionary (5th Ed.) P.705.

30. S.15(1).

31. (1975) 1 All E.R. 504.

32. (1987) 3 NWLR (Pt.60) 325.

33. (1989) 1 NWLR (Pt.98) 419 at 441.

34. See the last sentence in S.15(1).

35. S.22(1).

36. (1976) Ch. 55.

37. Ibid at P. 61.

38. Ibid at P. 60.

39. Order XX Rules 3, 4 and 5.

40. Decree No. 61 of 1970.

41. Unreported suit No. FHC/L/21/80 before the Lagos Judicial Division of the Federal High Court. (Ruling delived on 29th May, 1980).

42. Ibid. @ Page 1.

43. The due process of law, P. 123.

44. Unreported suit No. FHC/LL/35/81 before the Lagos Division of the Federal High Court with Ruling delivered on 26th May, 1981.

45. Ibid. at P. 5.

46. Ibid. at P. 6.

47. Ibid. at P. 20.

48. Unreported Suit No. FHC/L/67/80, ruling delived on 21/8/80.

49. S.22(1).

50. S.21.

51. Unreported Suit No. FHC/L/37/85.

52. Unreported Suit No. FHC/L/38/85.

53. Unreported Suit No. FHC/L/83/84.

54. As reported in the Guardian Newspaper of 8th November, 1996.

55. Suit No. FHC/LD/142/88.

56. Suit No. FHC/LD/143/88.

57. S.16.

58. op cit Note 17 above.

59. S. 16

60. op cit Note 29 above at page 300

61. See S.18(4) and (5).

62. S.15(3).

63. op. cit Note 14 above.

64. This is in *pari materia* with S.15(3).

65. Decree No. 98 of 1992.

66. Ibid S. 32C.

67. Ibid. Sub-section (2).

68. Ibid. Sub-section (3).

69. Ibid. Sub-section (5).

70. This was sought for in the Nigerian case of CBS INC & ORS v. INTERMAGNETIC LTD & ORS. Suit No. FHC/L/56/85, judgement delivered on 6/7/85, which followed an earlier English case of PRATT & ORS v.. BRITISH MEDICAL ASS. (1919) 1 KB 244.

71. See ARCHBOLD v. SWEET, 174 E.R. 55.

72. See EOTHEN FILMS v. INDUSTRIAL & COMMERCIAL EDUCATION MACMILLIAN LTD (1966) F.S.R. 35.

73. See A.M. RECORDS INC. v. AUDIO MAGNETICS LTD (1979) F.S.R. 1.

74. See SOCIETE ANONYME DE ANCIONS ESTABLISHMENT v. PANHARD LEVASSOR MOTOR CO LTD (1901) 2 Ch. 513.

75. S.21.

76. S.18(1).

77. Ibid. Subsection (3).

78. See S.19.

79. SS.34 and 35 respectively.

80. S.34.

81. S.35.

82. See Chapter IV of the 1979 Constitution of the Federal Republic of Nigeria.

83. See the 2nd and 3rd Schedules to the Act.

84. See paragraph (a) in the 2nd Sch. to the Act.

85. See paragraphs (e), (f) and (h) ibid.

86. See paragraph (j) ibid.

87. See paragraph (k) ibid.

88. See paragraph (p) ibid.

89. See paragraph (s) ibid.

90. For example, paragraph (i) ibid.

CHAPTER FIVE

ADMINISTRATION OF COPYRIGHT IN NIGERIA

5.1 INTRODUCTION:

In the last six (6) years, i.e. between 1990 and 1996, Copyright law and practice in Nigeria have attained a different outlook. This is primarily attributable to the numerous activities of the Nigerian Copyright Council (NCC), a governmental organ, with corporate personality for the administration of Copyright law in Nigerian.[1] It may be remembered from the early Chapters of this Work that the administration of Copyright under the old and repealed Copyright Act of 1970 was in disarray. This was because the Federal Ministry of Trade, on whom this responsibility was laid, did not constitute a competent authority to administer Copyright. Until the NCC, there was no organised body charged with the responsibility of overseeing collective administration, enforcement, enlightenment and the development of Copyright in Nigeria.[2]

The administration of Copyright Law in Nigeria is effected through the following institutions. They are: the Nigerian Copyright Council (NCC); the Copyright owners and their Collecting Societies, the specialised Legal Practitioners and the Judiciary. It also includes the Nigerian Police Force; the Customs and Excise Department and the general public who in totality are the end users of the copyrighted works. The task in this Chapter is to examine the role of each of the above groups in the administration of the Copyright law in Nigeria. We would also highlight the problems attending there to.

problems attending there to.

5.2 THE NIGERIAN COPYRIGHT COUNCIL (NCC):

The Nigerian Copyright Council was established in 1988 under the Copyright Act and was formally inaugurated on August 19th, 1989.[3] The Act puts the Council under the supervision of the Minister responsible for Information and Culture.[4] The Council is a public body with perpetual succession and a common seal which may sue and be sued in its corporate name.[5]

The Council constitutes the principal instrument for the realisation of the goals, functions and matters of Copyright in Nigeria.[6] By this institutional arrangement, the essential elements of practicalising the new Copyright law was effectively put in place.

5.2.1: Membership of the NCC Board:

The law created a representative body known as the Governing Board of the Nigerian Copyright Council.[7] It is composed of 25 Members, and headed by a Director who also is the Chief Executive.[8] Among the Board Members, there are 10 appointees of government, one each representing the Ministries of Information and Culture; Education; Trade; Internal Affairs; the Nigerian Police, the National Library, and the Chairman and the Director appointed by the President and Commander-in-Chief of the Armed Forces. The remaining 15 Members represent various interests within the Copyright industry in Nigeria, such as writers, publishers, musicians and publishers, phonographic and vediographic publishers, cinematograph producers, theatre arts practitioners, broadcasting

fields is to put the future of Copyright in Nigeria in the hands of the proprietary owners and public servants whose official functions relate to law, public policy and administration of Copyright. This is done with the hope that between them, they will always be able to strike a desirable balance between the interests of the Copyright owners and those of the public i.e. the users of the works protected by Copyright.

The Council upon inauguration, took off on a very sound note; having its Head Office at No. 16 Aloba Street, Ebute-Metta, Lagos, very close to the National Arts Theatre. The Council as at December, 1995 has a total of 71 staff in its establishments, 14 among whom had undergone various specialist training programmes in Copyright administration, both locally and overseas. As at the end of 1995, plans had reached advanced stages to open two Zonal Offices in Kaduna and Owerri.

For a country like Nigeria, with her diverse constituents (as at June 1997, the population was estimated at 85 million people, divided into 36 States and of people speaking over 500 different Languages and culture), the above structural organisation of the Copyright Council is considered negligible. A staff strength of 71 personnel is considered too few an establishment required to meet the functions of the council as set out below.

5.2.2 **Functions of the Nigerian Copyright Council:**

The statutory functions of the Council include the following:[9]

(1) Responsibility for all matters affecting Copyright in Nigeria as provided for under the Act:

(2) To monitor and supervise Nigeria's position in relation to

provided for under the Act:

(2) To monitor and supervise Nigeria's position in relation to international conventions and advise government there on;

(3) To advise and regulate conditions for the conclusion of bilateral and multilateral agreements between Nigeria and any other country on Copyright affairs;

(4) To enlighten and inform the public on matters relating to Copyright;

(5) To maintain an effective data bank on authors and their works;

(6) Responsibility for such other matters relating to Copyright in Nigeria as the Minister (Information and Culture) may, from time to time, direct.

In addition to the above functions as contained in the principal Act, and perhaps as a result of certain operational deficiencies noticed in the implementation of the Act, there have been added an increased scope of responsibilities for the Council.[10] Additionally, the Council now also has the power, inter-alia.

(a) To grant compulsory licenses in accordance with the provisions of the 4th Schedule to the Act.[11]

(b) To constitute Copyright Licensing Panel.[12]

(c) To appoint Copyright Inspectors,[13] who in turn, are to exercise very wide powers as will be discussed below.

(d) To approve and regulate Collecting Societies.[14]

It may, therefore, be useful to examine briefly how the Council has tried to perform some of these functions given to it by both the enabling as well as the amending statutes.

5.2.2(a) **International Copyright Relationship with Nigeria:**

In pursuance of this function the Council has attained a commendable height in the filed of Nigeria - international Copyright relationshir Nigeria, as at December 1995 has acceded to four (4) International Conventions on Copyright, viz:

(1) The Universal Copyright Convention;[15]

(2) The Berne Convention;[16]

(3) The Rome Convention;[17] and

(4) The World Intellectual Property Organisation (WIPO) Conventions.[18]

Today, Nigeria, through the efforts of the Management and Staff of the Copyright Council, enjoy some level of co-operation with the World Intellectual Property Organisation which is the United Nations' body responsible for all matters of international intellectual property, including Copyright. Nigerians have consequently and actively participated in a number of international symposia and exhibitions by world Artistes held both locally and overseas. For example, the Copyright exhibition held at the Banquet Hall, National Arts Theatre, Iganmu Lagos, from 18th to 28th April, 1992.

Other international bodies like the United Nations Educational, Scientific and Cultural Organisation (UNESCO); the International Confederation of Society of Authors and Composers (ICSAC); the International Federation of Reprographic Rights Organisation (IFRR); and the Association for Advancement of Teaching and Research in Intellectual Property (ASTRIP) - are all such bodies with whom Nigeria co-operates by way of training and enlightenment programmes on intellectual property.

For example, the Creators Copyright Seminar held at the United States Information Service, Lagos between 11th and 15th September, 1989. A more detailed survey of the international scene of copyright issues is presented in the succeeding chapter.

5.2.2(b) Public Enlightenment Programmes on Copyright in Nigeria:

One of the principal duties of the Council is to enlighten and inform the public on matters relating to Copyright.[19] The era before the inception of the Council witnessed a very low level of public awareness on Copyright affairs. At best, around the Lagos axis, this role of the public enlightenment on Copyright issues were variously played by the Performing Musicians Association of Nigeria (PMAN), the Nigerian Publishers Association (NPA), the few local groups of International Federation of Phonographic Industries, and to some extent a couple of Law Firms.[20] Very little was known about Copyright law in the hinterland. Prior to the current Copyright Act, it was not unusual even for lawyers to advise their clients that there was no Copyright Law in Nigeria.[21]

In recent times, the Council has published information on the dangers of piracy in some National dailies and with slots in television advertising. The Council publishes a quarterly magazine[22] which features current national and international issues on intellectual property generally, and Copyright in particular. This magazine is a veritable source of information on Copyright matters in Nigeria. In addition to this quarterly magazine, the Council in collaboration with such other bodies as the WIPO, the United States Information Service (USIS), the American Copyright

In Nigeria, it is not uncommon to see works of art copied freely even in Universities, where one would have expected better respect for Copyright. The general attitude of the Nigerian public is that of easy and unrestricted use of intellectual works. This derogative attitude followed the near apathy or lip service paid to copyright issues by private and public institutions, including government. The Council, therefore, faces an uphill task in dissuading the people from this attitude and to encourage them to respect and compensate the use of intellectual works.

From the variety of the campaigns so far conducted by the Council, it may be asserted to some degree of conviction that the Nigerian intelligentsia and the legal values of their works have of recent been appreciated by the urban audience than was the case before. Hitherto, the indigenous Copyright owners had suffered from piracy without anybody or organisation helping them to cry foul. With the concerted efforts of the various organisations mentioned above, working through the auspices of the Nigeria Copyright Council, the Copyright owners in Nigeria may now hope for a verile Copyright industry.

5.2.2(c) **Maintenance of Data Bank on Authors and Works:**

Another statutory function of the Nigerian Copyright Council is to maintain an effective databank on authors and their works in Nigeria.[24] Essentially, this means that relevant information about all Copyright works made by Nigerians or non-Nigerians found in Nigeria, are to be sourced and kept by the Council. This task, when viewed from the perspective that formal registration is not required to confer Copyright on a work, appears to be anomalous. If a work qualifying for Copyright protection is not

formal registration is not required to confer Copyright on a work, appears to be anomalous. If a work qualifying for Copyright protection is not reguired to be registered, how does the Council know of its existence, let alone keeping a data on it? The Council operating especially within its present limited scope, is seriously handicapped by the law which confers copyright by mere existence without registration.[25]

On the other hand, the scheme of maintaining a data-bank when fully operational may have the implications of a formal registration. One such implication is that the Council would only recognise a particular author and his work on which the Council has the record, and to deny those about whom it has no record. The arguments for and against formal registration have been earlier discussed in chapter two, nonetheless, it is my view that registration is desirable as a cure for conflicts of claims and an avenue for the Council to effectively carry out this statutory function. In other jurisdictions e.g. the USA, registration is a requirement.[26] Therefore, our present Law ought to be amended requiring that any author who wishes his work to be recognised must first deposit a copy with the Council. This will in turn facilitate the development of a good databank on the Nigerian Copyright industry.

In respect of Literary works, it is observed that record keeping is already in progress through the Depository Unit of the National Library. This is done immediately the book is assigned a Library code number. As a matter of law, the National Library Act stipulates that copies of book, sound recordings and films should be deposited at any of the National Libraries.[27] In practice, however, only book authors have often complied with this legal requirement. As part of the efforts to encourage authors of

collection and preservation of literary works. This is akin to the role of data-bank required of the Copyright Council. In this regard, the National Library has excelled over the Nigerian Copyright Council.

In the event that the Copyright Council decides to receive deposit of works in its bid to maintain data, the Council would impliedly be on the verge of formalising registration as a pre-requisite to protection. And for as long as it shies away from this process, the level of data collection would be restricted to few privileged authors who are conversant with the administration of the Council. It is my humble submission that the practice of depositing copies of works at the Council be stepped up, leading to the Legislative review on registration as a legal requirement for copyright protection.

5.2.2(d) **Anti-Piracy Activities:**

Although the principal Act (until its subsequent amendment) did not specifically provide for the Council to have a direct part in Copyright enforcement, this notwithstanding, it can be gathered from the section which requires the Council to be "responsible for such other matters as relate to Copyright in Nigeria"[28] that it should be involved in the prevention of piracy or plagiarism. The Council is statutorily required under the above nebulous provision to lubricate the wheels of copyright enforcement in Nigeria.

In keeping with its objective to curb the abuse of the subjects of Copyright in Nigeria, the Copyright Council has initiated a number of anti-piracy programmes by setting up Anti-piracy Committees at both National and State Levels across Nigeria. These Committees comprise of both

piracy programmes by setting up Anti-piracy Committees at both National and State Levels across Nigeria. These Committees comprise of both authors, owners, publishers of intellectual works, the Customs and Officials of the Copyright Council. They collectively enjoy governmental and non-governmental support in carrying out raids on suspected pirates. Although this is a commendable step in the right direction, it remains to be seen how these campaigns would be effective in curbing piracy in Nigeria. This doubt is raised because piracy is an open and flagrant phenomenon in virtually all the major cities in Nigeria.

In the course of this research, it was discovered that the study of Copyright and anti-piracy strategies have been introduced in the curricula of Police Training in Nigeria. This is with a view to beefing up anti-piracy raids by Members of the Police Force. The Police Force Headquarters has directed the setting up of anti-piracy units in all the State Police Commands. The impact of these commendable steps, however, are yet to be felt because, in practice, these units have not been active. The role of the Police in the administration of Copyright would be discussed in greater details in the succeeding pages.

As a potent amour against piracy, the recent amendment to the principal Act has empowered the Copyright Council to appoint Copyright Inspectors, who in turn, have the power to conduct raids on suspected pirates.[29] The Inspectors can independently carry out investigations in an alleged copyright infringement in aid of a complainant who may not be financially capable of pursuing his rights in a civil action. Where necessary, the Inspectors in collaboration with the Police may conduct raid on private premises and even arrest suspects, and if found necessary, prosecute

producers of copyrighted works as required under the Act.[30]

In the collaborative efforts of the Copyright Council with the National Association of Recording Industries (NARI) it has introduced the Banderole scheme for musical works. The banderole is a security label designed to help law enforcement agents, authors and also the general public to distinguish between genuine and pirated cassettes since those copies coming from the authorised producers carry the designated banderole. As of June 1993, more than 133 music producing companies have registered for the Banderole scheme.[31]

Arising from some of the raids conducted to route out pirates and their illegal devices in different parts of Nigeria, a number of criminal proceedings and civil suits have been instituted.[32] In some instances, the Copyright Council had lent its weight behind the copyright owners by offering evidence to the prosecutor and in civil actions by recommending capable Law firms to the injured party.

Aside from these, the law does not envisage the Council to solely undertake a full-scale anti-piracy activities. It is the duty of the rights owners to combat piracy either through the Law courts or by adopting standard production techniques that would be difficult, if not impossible, to be pirated. Where the original work is itself sub-standard, there is usually not much difference between it and pirated copies. Our Copyright owners would reduce piracy to the barest minimum if their original copies come in good quality and fitted with sufficient security devices to discourage piracy.

5.3 THE ROLE OF COLLECTING SOCIETY IN COPYRIGHT ADMINISTRATION:

The need for collective administration of copyright by a body of rights owners known as "collecting society" seemed to have escaped the minds of the law makers of both the 1970 and the 1990 Copyright Acts. It was not until 1992 that the Government corrected this omission by an extensive amendment.[33] The specific duties of a Collecting Society in the administration of Copyright, may include the following:

(1) To identify prospective users of the works of its members;

(2) To negotiate and issue licences to prospective users of the works of its members;

(3) To monitor and regulate the use and abuse of the works of its members and in the event of an abuse, to take steps to remedy same in accordance with legal procedures;

(4) To collect royalties on such works; and

(5) To distribute such royalties among its members in proportion to the earnings accruing to each of them as per the regulations of the Society.

The legal and economic justification for a collecting society operating in the copyright system may be founded on two or more pillars. First, copyright law provides the basis for authors to receive remuneration and or compensation from those who use their works legally or illegally. Secondly, the fact that these works are likely to be used at different locations and for various reasons, individual authors find it difficult, if not impossible, to monitor where and how their works are being used, let alone being able to collect the compensation for such uses. Thirdly, where the

individual author may have known of all the users of his works lawfully and unlawfully, he still faces no less task in redressing any abuses to his works because these abuses may occur, in many forms at different places and at the same or different times.

In response to these problems, the Copyright industry, like in most other intellectual property fields, has evolved the *modus operandi* of collecting societies. A collecting society is itself a collection of authors engaged in identical works for the purpose of meeting their common challenges. The use of a collecting society is a more convenient and economical way for individual authors getting their due share from the economies of exploitation to which their works are exposed. These economies accrue by way of royalties payable by lawful users and levies/damages payable by unlawful users. One such collecting society was registered in Nigeria in December 1994.[34]

The individual Copyright owner on becoming a member of a collecting society, surrenders his economic, but not his moral rights, to the mutual rights of members of the society. The society in a collegiate manner, administers the collective economic interests on behalf of the owners of the Copyright works registered with the Society.

The society collects and distributes royalties to its members after retaining an agreed percentage to cover administrative costs. The society, which can employ the services of competent staffers and specialised agencies, and given its capability to deploy personnel across the country, therefore, is in a better position to monitor the use and abuse of the works of its members. It is also better placed to enforce the rights of its members for it can sue and be sued in its own name for the protection or defence

of members interests. Because of the collective will and resources, the collecting society is better equipped to deal with the diversities and complex copyright market in the world economy.

By virtue of the powers conferred on the Nigeria Copyright Council in 1992, the Council has issued the first Nigerian Copyright (Collecting Societies) Regulations,[35] in 1993. The Regulation provides the following conditions for any society seeking approval to operate as collecting society under the law:

(i) It be incorporated as a company limited by guarantee;

(ii) Its objects are to carry out the general duty of negotiating and granting Copyright licences and collecting royalties on behalf of Copyright owners and distributing same to them;

(iii) It represents a substantial number of owners of copyright in any category of works protected; and

(iv) It complies with the terms and conditions prescribed by regulations made by the Council.

After satisfying the above preliminary tests, the intending society is required to meet the following procedural requirements before the final approval is given:

(a) Completion of prescribed forms and payment of prescribed fees;

(b) Submission of incorporation documents as a Registered Company under the Companies and Allied Matters Act.[36]

(c) A Declaration that the Subscribers to the Memorandum of Association of the Society shall not be less than 10 persons with proven interest in the area in which the company desires to operate as a Collecting Society.

(d) That the main organs of the Company shall comprise of at least a General Assembly of all its Members and a Management Board.

(e) That the Chief Executive of the Company (or by whatever name he is called), shall not be a Member of the Society; and

(f) That the Management Board of the Society shall include one Member of the Nigerian Copyright Council.

The above hurdles required to be surmounted by a collecting society as provided by our law appear, in my humble view, to be too legalistic and difficult to attain in a developing country like Nigeria. It is not an easy task to find the number of persons required to incorporate a company whose main business would be that of a collecting society which shall survive only on the retention of certain percentage of royalties from its Members. It is to be noted, however, that under the current company law in Nigeria,[37] a company limited by guarantee may be incorporated with only two (2) Members subscribing to the Memorandum of Association. The above provision as regarding a Collecting Society appears to have materially excepted the statutory provisions of our current company law. The requirement for the unusually large number of subscribers to the collecting society appears to be adversely discouraging at inception. It is submitted that the number of 10 here is unnecessary because after incorporation with the minimum of two (2) subscribers, other artistes wishing to join the society could register as members in the same way as shareholders join a company limited by shares.

As if making things more complicated, the Regulation further provided.

that:

"Where the Copyright Council receives more than one application for a licence in respect of any class of Copyright owners, it shall, after due investigation, approve any one of them which in its opinion, will more adequately protect the interests of that class of right owners".[38]

What the above regulation seems to suggest is that the Council would not, as a matter of procedure, approve of more than one society for a given category of works protected by law, e.g. music. For practical purposes, this procedural restriction appears unrealistic, given the size and complex nature of Nigeria and her intelligentsia or artistes. It is, therefore, my view that the limitation may adversely curtail rather than enhance the interests of artistes. For example, Alhaji Mamman Shatta (one of the popular Hausa musicians) may not feel as a Member sufficiently protected by a collecting society composed mainly of, say a handful of Yoruba musicians based in Lagos, which being the only approved society to regulate, monitor, collect and distribute royalties and levies for the exploitation of his works in Kano City or worse still in Maiduguri. For this practical reason, it is my humble view that more than one collecting society could be approved to operate for a given category of work. As a matter of fact, the present single musical Collecting Society operating from Lagos has not effectively covered the **needs** of those musicians in the far north of Nigeria. The law only pretends that it can. The fact that the Copyright Council is national in structure does not require that all collecting societies must have national outlook.

The above strict legal hurdles may apparently account for the few collecting societies in Copyright administration in Nigeria. As at December 1995, there was only one collecting society in the Nigerian Copyright industry. And even for this single one that met the legal requirements, it

remains to be seen how it can effectively canvass the length and breadth of this vast country in its business as earlier described.

The next important issue to be raised with regards to our regulations on collecting society is that of the life-span granted to an approved collecting society i.e. for a term of only three (3) years.[39] This, in my humble opinion, is too short a time to enable a meaningful operation by a collecting society especially in an epileptic system like Nigeria. When compared with the legal facade that an incorporated company has a perpetual life-span,[40] the Regulation on collecting society appears anomalous in this term. It may be argued that the Regulation enables a renewal of term for a collecting society, but in the absence of any criteria for adjudging success or failure of a society, its renewal may be arbitrarily refused. Given the enormity of a Society's operations, the duration of an approved society should rank with the term of the members Copyright, the minimum of which is 50 years. This will reasonably enable the society to effectively monitor and protect its members subsisting interests. Afterall, the society when registered as a company enjoys perpetual succession under the company law.[41]

Finally, the Nigeria Copyright Council reserves the right to withdraw any approval granted to a collecting society if in the opinion of the Council, the society in question has ceased to function as a collecting society or that it does so contrary to its objects or as directed by the Council.[42] This is a safety catch by law to effectively check malpractices in the industry. It is submitted that having given this hammer to the Copyright Council all other restrictive provisions of the Regulation as discussed above, should be relaxed so as to open the way for a verile collective administration of

Copyright in Nigeria. The typical Nigerian businessman is known to avoid investing in businesses where the regulatory rules are too technical and stiff.

5.4: THE ROLE OF THE FEDERAL HIGH COURT IN COPYRIGHT ADMINISTRATION

The Federal High Court has been vested with exclusive original jurisdiction for the trial of offences and disputes relating to Copyright in Nigeria.[43] The Federal High Court which was initially established as the Federal Revenue Court,[44] is a court with a special power to adjudicate over certain matters which are of national economic importance. Copyright as was noted earlier, is a matter within the federal exclusive legislative list[45] and this becomes one of those items within the exclusive jurisdiction of the Federal High Court.

The role for this court in administering Copyright in Nigeria is to give effect to the statutory provisions of the law on Copyright in its civil and criminal jurisdictions. It is the only single avenue for original judicial interpretation of the Law on this subject. To carry out this function, the court is divided into various judicial divisions across the Country.

The Court relies not only on the substantive Law but also on the adjectival laws in the course of its adjudication. Thus, it employs the Civil Procedure Rules[46] of its Court in civil actions and for all criminal proceedings, it has recourse to such other Rules as:

(a) The Criminal Procedure Act,[47] for such offences triable in any of its divisions in the Southern States of Nigeria;

(b) The Criminal Procedure Code,[48] for the offences triable in any of its

divisions in the Northern States of Nigeria, including the Federal Capital Territory, Abuja.[49]

In either of the proceedings i.e. whether civil or criminal, the action must begin in the divisional jurisdiction of the Court where the infringement occurred and or where the defendant resides.[50] By this provision it is intended that in the event of an infringement anywhere in Nigeria, there will be an applicable rule under which the action may begin. Alternatively, the action may begin in the divisional jurisdiction where the defendant resides, *irrespective of where the infringement occurred.*

These Rules of Court also provide adequate safe-guards for offences or acts of infringement committed in more than one division or jurisdiction to the extent that no one can escape prosecution on the premise of the geographical limitations of the procedural codes.

By virtue of Nigeria acceding to the international Copyright Conventions, foreign nationals and companies have themselves become subject to the jurisdiction of this Court. As a result they can sue and be sued for copyright infringements committed anywhere in Nigeria. And in accordance with Nigeria's extradition treaties with other Nations, their subjects and works have become liable to our Laws as we are treated in the like manner under their laws.

Finally, as obtainable with the decisions of all State High Courts, appeals lie from the decisions of the Federal High Courts on copyright matters to the Court of Appeal and where desirable, further to the Supreme Court of Nigeria.

5.5: THE ROLE OF THE NIGERIAN POLICE IN *COPYRIGHT ADMINISTRATION:*

Apart from the general duties of the Police Force to maintain law and order in the society,[51] the Copyright law in Nigeria has expressly listed the Force among those organs charged with the responsibility of Copyright administration in the Country.[52] The Police is represented on the Governing Board of the Copyright Council, thereby indicating the importance of the Police in copyright administration.

Also through the collaborative strategies of the Copyright Council, the Nigerian Police is expected to play a vital role in curbing the activities of pirates. As a measure towards improving the enforcement of Copyright law, the Police Force Headquarters has developed training modules designed to educate the corps on their responsibilities in Copyright matters.

And until the recent amendment of the law granting powers to Copyright Inspectors,[53] the Police had the sole authority, upon warrant, to search and seize any property relating to Copyright infringement. They now share this responsibility with the Copyright Inspectors, while retaining the general powers to maintain law and order in the Society.

It is pertinent to observe that the above powers of the Police, have not been matched with reality in the practice of Copyright enforcement in Nigeria. Though the Police has the right and duty in law to arrest any one who commits an offence in his presence, Copyright infringement is one such offences that has been committed in the view of most policemen without their challenge, let alone arrest. It is a daily occurrence that the Police have watched the illegal photo-copying of books or dubbing of video

films in their totality without batting an eye-lid. All across the country, young people hawk pirated musical cassettes singing aloud illegally reproduced music of both our national and international artistes, sometimes to the pleasure of the Police who may even purchase these pirated copies. It is also no secret that pirated textbooks are displayed at open air and in book stores; some of them jingle bells in calling for buyers. These are all criminal acts offending the provisions of the Copyright law but which have not been "noticed" by the Police in Nigeria. It may be argued for the police that in the absence of a formal complaint by an aggrieved party, they can not rely on mere suspicion. For it takes more than the Police to keep law and order in the Society.

For obvious reasons, the Law does not intend that the Police must receive a formal conplaint before it prevents or prosecute a crime. For now, the Nigeria Police only waits on the side-line until a formal complaint is made to him by an aggrieved party. Thus, in terms of maintaining law and order, the Police has failed to carry out this aspect of their functions under the Copyright law.

The reasons for the Police failure in this regard may be laid at many propositions, some of which are:-

(i) The uncertain procedures for Police prosection of Copyright offences;

(ii) The overlapping private duty and interest of the Copyright owners to institute a civil remedy or to invite criminal proceedings against the offender; and

(iii) The scarcity of physical and intellectual resources at their disposal to maintain the law.

In respect of (i) above, the Police prosecutor is hampered by law and resources to prosecute his case beyond the Magistrate courts of the State. In fact it is a rare occurence for the Police prosector to go beyond chief Magistrate Court, except where he also doubles as a Law Officer. The need has been stressed elsewhere[54] to have Police Lawyers handle their prosecutions instead of surrendering the briefs to State Counsels after completing investigations. The Police Lawyers have not yet began appearance in the State High Courts, needless we ask of them at the Federal High Court. As a result of this unfavourable climate, the Police tend to classify Copyright offences as one beyond their scope - a Federal offence for which they have not been addressed as legal prosecutors. This may inversely dictate their non-challant attitude and failure to initiate criminal prosecution even when the offence was committed in their view.

In respect of the second proposition, it is the maxim of Law that equity aids only the vigilant. Copyright being a private proprietary interest lies in the realm of private Law. As a rule it is the sacred duty of the rights owner and no one else no matter however sympathetic, to initiate action in remedy for this injury. In the main, because Copyright infringement does not immediately affect the general interest of the public - except the piracy is on a large scale whereby the taxes due from the legal sales are evaded - it is the individual rights owner affected by the infringement who is expected to pursue his remedy either through civil or criminal or both proceedings simultaneously. This *laissez faire* principle may inform the police not to be busy-bodied interlopers in matters which are privately routed.

And thirdly, the proposition that our Police, however desirable the

Law may want them to be effective in keeping the society in an orderly manner, they do infact, suffer gravely from inadequate resources to cope with their enormous tasks. The Nigerian Police is presently ill-equipped to deal with public crimes prevention; they are not the least in a position to combat Copyright offences which most often are committed in private. The level of intelligence and high-tech accessories required to combat and detect Copyright infringements are well beyond the stores of the present Nigerian Police. They can only apprehend and prosecute hawkers of pirated works without the means of reaching the real culprits in hiding. Mention may also be made of the prevailing corrupt practices pervading the entire Nigerian society, including the Police. This in a way robs the force of the will-power to come to grips with Copyright enforcement.

It is my humble submission that in principle, the Nigerian Police Force has a vital role to play in Copyright administration in the country. The Law has put in place some directions. There remains the right organizational, economic, and social atmosphere to enable them undertake this arduous assignment to the desired standard. Until this is done or provided, the enforcement of copyright law by the Police will remain to be a rhetoric rather than a reality. This must not be allowed to continue because copyright is a an essential economic and social parts of our lives. Given the noble responsibility to preserve law and order in the society, and to protect lives and properties, the Nigerian Police Force has a sacred duty to protect this proprietary right of the Nigerian intelligentsia from wanton abuse. As house-breaking is a crime very often detected and prosecuted by the Police, nothing can be more criminal than the quiet (and sometimes open) unlawful invasion of our proprietary copyright. The resultant effect

of this crime leaves greater dents and damage to our national psychology and economy than the effects of house-breaking.

5.6. THE ROLE OF THE NIGERIAN CUSTOMS AND EXCISE DEPARTMENT IN COPYRIGHT ADMINISTRATION:

The Copyright Act specifically provides for a procedural intervention by Officers of the Customs and Excise Department against illegal importation of more than two infringing copies of a copyright work into Nigeria.[55] In fact, the Act stipulates that these interventionary regulation shall have the same effect as if it had formed part of the Customs and Excise Management Act.[56]

The essential duty of this Department in the administration of copyright is to treat as prohibited, and restrict the importation of any goods or copies of a work, upon receiving notice from the Copyright owner whose right is threatened by such importation of any such goods or copies of a work which is made outside Nigeria and for which the person giving the notice has a right under the law to protect.[57] Given this chequered procedure, the Customs Department can only act to restrict the importation of any copy of a copyrighted work (whether infringing or not) upon receipt of a written notice from an injured or threatened copyright owner. It goes without saying that the Department cannot on its own volition either treat as prohibited or restrict the importation of any infringing copy of a work. It depends upon the complaint lodged by an aggrieved party before it can do any thing.

The required written notice must state that the informant is the owner of the copyright in the work to which the infringing copy being imported

relates. He should request the Department for a period of not more than 5 years, to treat as prohibited, copies of such work which if it had been made in Nigeria would have been an infringing copy of his work. This procedure may require the asserting party to prove to the satisfaction of the Department his title to the said work in respect of which he is seeking the restriction of the alleged infringing copies. Although the full procedures for asserting his title is not fully provided, the Law has eased his burden of proof by enabling the admission of affidavit evidence, if only there is no counter affidavit.[58]

By way of insulating the Department and its members, officers, servants or agents against likely claims of the other party whose right of importation into Nigeria is being curtailed by acting on the notice given by the copyright owner, the Law has transferred all consequential liabilities arising in this exercise to the doors of the person on whose notice the Department has acted.[59]

As a check on the possible abuse of these provisions, the Law has hinged its operation on the availability of an enabling regulation prescribed by the Minister of Internal Affairs, with such conditions (if any) as may be specified in the regulation. The regulation when made, may include such incidental and supplementary provisions as the Minister of Internal Affairs considers expedient for the purpose of justice.[60] As at December, 1995 no such regulation has been made by the Minister of Internal Affairs. Consequently, the above provision remains only of theoretical importance.

Apart from the above, the Customs and Excise Department, in the exercise of their general duties of guarding against the economic adversity of the country in the importation and exportation of goods and services,

may extend their arms and feet to check smuggling of such goods which attract Custom Duties either when coming in or when going out of the country's shores.. In the process of collecting Duties for such goods, the Department may exercise its right to restrict or prohibit such Copyright goods for which the required tariffs are not paid. This is, to some extent, quite different from the specific duty of treating as prohibited and thereby restricting the specific duty of importation of an infringing copy as may be complained of by the copyright owner.

The inadequacies and problems discussed above in respect of the Police force, apply mutatis mutandis to the role of the Customs and Excise Department. The Customs along our boarders, either at sea, in the air or on the land, pay little or no respect to copyright enforcement in Nigeria. It is a common evidence to see people dubbing Michael Jackson's records life from satellite transmissions and selling the same in our city departmental stores; most of which are patronised by the Customs officials themselves. In fact, it is of practical joke to suggest to the Customs that most goods displayed in such stores were smuggled. The arguments posited above for the Police inertia hold sway for the Customs and Excise Department. If anything, it is to add that officials of the Customs department are more prone to abuse copyright than the Police, given their appreciated economic disposition and exposure to foreign practices.

Thus in relation to copyright administration in Nigeria, this Department ought to muster an effective control strategies against copyright abuses both at our national and international ports. It is, however, a pity that in reality they have often abandoned their positions in favour of copyright adversaries.

5.7. THE ROLE OF THE GENERAL PUBLIC IN COPYRIGHT PROTECTION:

As beneficiaries of our creative works and others' intellects, and in the need to sustain those creators and encourage future artistes, the general public have the following collective roles to play in copyright administration in Nigeria.

(1) **Duty to recognise and respect intellectual works in the same degree as we recognise and respect real properties:** Our country, Nigeria is blessed with great natural resources unrivaled in most African and European regions. Over the years there have grown a large army of men and women who are talented, trained and have excelled in many fields of endeavour, particularly in creative arts, music and folklore. Most of our artistes developed out of self help and necessities. It is the work of these creative minds that enliven the society and propel us to greater heights in international relations. The general public owe them the duty of recognition and respect for the works of such creative minds, if for nothing else, so as to encourage them in their careers which will in turn enrich our corporate heritage as a Nation.

2. **Duty to compensate for honest commercial use of other's work of arts, while retaining the right to freely use the same for private purposes.** Nigerians are a very enterprising a race, highly mobile in demography and properties. The country has also been identified as one of the world strong consumer nations with open trade policies. The Nigerian people and governments have a high propensity for the enjoyment of works of art, most of which we tap

virtually free. Our local artistes themselves believe in self glorification by giving public displays of their works free of charge. The Law has enabled all Nigerians to possess and use free of royalties such works of arts available in the country if such possessions and uses are for private purposes. However, those who engage in the commercial acquisition and disposal of these works of arts owe the authors, and the tax authorities the duty of compensation for their transactions. They are expected to discharge these duties without the force of law, by honest disclosure of their commercial dealings and by payment of taxes relating thereto.

3. **Duty to discourage, disapprove and resist the commercial abuse of others' works either by ourselves or by those known to us:-** This is a composite duty deriving from the preceding ones. At the level of individual persons and at our corporate and institutional bodies we have the sacred duty to discourage ourselves and others around us from abuse of copyright. One sure way of doing this is by refusing to buy counterfeit products and insisting on originals. A phenomenon which has developed in our local markets of recent is the way our traders openly introduce different makes of the same product, calling one original, and the others "Taiwan", "tokunbo" or "second hand". The general public while disapproving of such brazen abuse of copyright would inversely be promoting the ideals of copyright in our psychology. If Nigerians resist the temptation for inferior goods, manufacturers of such goods would no longer take us for a ride, and conversely, our artistes would be handsomely rewarded in royalties for their hard-earned copyright.

4. **Duty to co-operate with law enforcement agents in the protection and prosecution of Copyright infringement - either in civil or criminal actions:** No single or group of artistes, short of God Almighty, has the capacity both natural and artificial of detecting all lawful and unlawful uses to which his/their works of art are exposed. Equally, those charged with the responsibility of Copyright enforcement, be they the Police, the Customs, the Judiciary or the copyright inspectors, are individually and collectively incapable of effective copyright protection and prosecution. In other words, the enforcement of Copyright, as in all moral and legal obligations, lies squarely on the general discipline of the society. The general public have the civic responsibility of prompt intervention, reporting and assisting in the protection and prosecution of Copyright abuses within their knowledge. The enforcement agents rely on the general public to effectively monitor, detect and prosecute offenders of Copyright. For as long as this co-operation is lacking, there will continue to be a culture of copyright indiscipline in Nigeria.

5. **Duty to promote, protect and preserve the values contained in *others' creative works, thereby upholding, and promoting our* collective cultural heritage:** By way of setting public standards and encouraging a conscious national and international Copyright regime, the general public owe a collective duty to uphold the values underlying each creative art. This is feasible if we study these works beyond their physical presentations and understand the moral, spiritual as well as cultural values they possess and portray. In this way, Nigerians will begin to have deeper affection for their

artistes and would sacrifice their individual greed in order to promote, protect and preserve our collective cultural heritage as epitomized in our works of art. This will enable a national consciousness to be developed in reverence for our creative works. The public in our society - as in most civil societies - are led by Government, whether democratic or otherwise. The kind of attitude, importance or level of appreciation paid to Copyright subjects by our Government will in turn dictate the tune of public behaviours towards the same subject. As a sign of an improvement from the past, Nigerian Governments (State and Federal) since 1989 have shown an appreciable respect for the legal tenets of Copyright. For example, the setting up of the Nigerian Copyright Council. The Governments' concerted efforts, however, remain to be seen in the practical arena of combating the evils of Copyright. Since the Government can not do this in isolation of the people, the general public, especially those in closer proximity to piracy - the city bourgeoisie - need to be educated and monitored on the danger of piracy and plagiarism by themselves or others. The rural dwellers are most often consumers of pirated works and are hardly involved in the acts of unlawful copying. In their case, they hardly have any choice but to go the ways shown by the city dwellers.

NOTES AND REFERENCES TO CHAPTER FIVE

All Sections shown below, except where otherwise stated, refer to the Nigerian Copyright Act, CAP 68 Laws of the Federation of Nigeria, 1990.

1. S.30

2. SODIPO B., "The Nigerian Copyright Council and the Administration of Copyright in Nigeria", Copyright World, Issue 32, July/August, 1993, p. 37.

3. Then known as Decree No. 47 of 1988.

4. S.39.

5. S.30(2).

6. S.30(3).

7. S.31(1).

8. S.32(1).

9. 3.30(3).

10. See S.10 of the Copyright (Amendment) Decree No. 98 of 1992, incorporated as S.33A of CAP 68, Laws of the Federation of Nigeria, 1990.

11. Ibid. Sub-section (1).

12. Ibid. Sub-section (2).

13. See S.12 of Decree No. 98 of 1992 incorporated as S.32A of CAP 68 of 1990.

14. Ibid, particularly S.32B of CAP 68 of 1990.

15. See Chapter six particularly paragraph 6.3 of this Work.

16. Ibid, particularly paragraph 6.2. of this Work.

17. Ibid, paragraph 6.5.

18. Ibid, paragraph 6.6.

19. S.30(3).

20. For example, the Firm of Chief G.O. Sodipo & Co., Lagos

21. For example, in YUSUF LADAN V. SHA KALLO PUBLISHER (1972) NCLR 428 the Court upon Counsel's submission, applied the U.K. Copyright Act of 1911, not being aware of the Nigerian Copyright Decree of 1970 which had repealed the English 1911 Act.

22. Titled "Copyright News" with an ISSN No. 1115-3725

23. Such Seminars and Workshops held include the following:-
    (a) Special Seminar on "Adjudication of Copyright Cases" held at the Federal High Court, Lagos from 27th May, 1993.
    (b) National Workshop on "Copyright and the Film Industry" held at the National Arts Threatre, Lagos from 18th to April, 1994.
    (c) National Conference on "Non-Fiction and Academic Authors" held at the National Art Threatre Lagos on 27th Feb., 1995.

24. S.30(3) (e).

25. See the analysis in Chapter Two paragraph 2.6. of this Work.

26. S.14 of the USA Copyright Law, Circular 92, 1994.

27. See S.4 of CAP 264 Laws of the Federation of Nigeria, 1990.

28. See S.30(3) (f).

29. See S.12 of Decree No. 98 of 1992 incorporated as S.32A of CAP 68 of 1990.

30. Ibid, sub-section (2) (a-g).

31. See Copyright News Vol.2 No. 7 of 1993 at P.20.

32. For example, in the case of EVANS PUBLISHER LTD v. ADELEKE FHC/IB/7/94, the Council played an important role in aid of the publishers.

33. See Decree No. 98 where more than 2 pages were added as an amendment, now incorporated as S.32B to the 1990 Act.

34. See Copyright News Vol. 2 No. 13 of 1994 at PP. 1 and 3.

35. See Copyright News Vol. 2 No.8 of 1993 at PP. 1 and 16-17.

36. CAP 59 Laws of the Federation of Nigeria 1990.

37. Ibid S.18.

38. Op Cit Note 35, Regulation No. 7 (2).

39. Op Cit Note 35, Regulation No. 10.

40. S.37 of CAP 59 Laws of the Federation of Nigeria 1900, deriving from the Common Law rule in SALOMON V. SALOMON & CO (1897) AC 22.

41. *Ibid.*

42. Op Cit No 35 above, Regulation No.17.

43. See S. 38; cf. S. 7 (a) (ii) of CAP 134 Laws of the Federation of Nigeria 1990.

44. As per Decree No. 38 of 1973.

45. See item 13, Part 1 in the 2nd Sch. to Cap 62 Laws of the Federation of Nigeria, 1990.

46. Order 7 Rule 3

47. CAP 80, Laws of the Federation of Nigeria 1990

48. Criminal procedure Code (CPC) Law of Northern Nigeria, 1960

49. By virtue of Decree No. 12 of 1984, the CPC is made applicable to the Federal Capital Territory, Abuja.

50. See S.15(1) of CAP 68 Laws of the Federation of Nigeria 1990.

51. CAP 359 Laws of the Federation of Nigeria 1990.

52. SS 22(1 and 31(1)(a) respectively.

53. S.32A incorporated in CAP 68 Laws of the Federation of Nigeria 1990.

54. Proceedings of a National Workshop on Police prosecution, held at the Police College, Ikeja Lagos from 8th to 11th November, 1995.

55. See S.36.

56. Ibid, sub-section (9).

57. Ibid, sub-section (2).

58. S.34.

59. S.37(4)

60. Ibid, sub-section (5)

CHAPTER SIX

NIGERIAN PARTICIPATION IN INTERNATIONAL COPYRIGHT AFFAIRS:

6.1: INTRODUCTION

Before the advent of modern techniques such as cinematography, mechanical recording and broadcasting, all of which have given an immense impulse to the international exchange of works, it had long been recognised that the reasons which dictated the national protection of authors' works were quite imperative at the international level.

Copyright, therefore, is essentially, international in character. Works of Art, Literature and Music have for centuries, been used in countries other than their origin. Authors, artistes and musicians have, from early times, been very concerned about the fate of their works copied in foreign countries. They desired to have their royalties secured for the use of their works in other countries as in theirs.

Protection at the international level is needed now more than ever before due to the improved speed in communication. A book or novel or periodical, for example, may be read in many countries and in many different languages into which it is translated. Artistic works, if unhindered by problems of language and culture, may be enjoyed and copied regardless of national boundaries. Music, as acknowledged by many, is a universal language; and the development of broadcasting, sound recordings and cassette technology has enabled the dissemination of music to every part of the world. Films and television programmes reach

audiences far outside the territorial boundaries of their countries of origin by satellite transmission. The new electronic inter-dependence recreates the world into the image of a global village.[1] In this global village there is need for global Copyright protection.

The earliest steps towards a systematic international Law and organization in the field of Copyright were in the form of conventions. The first convention in the filed of telecommunication and intellectual production was concluded in Paris, France in 1883. This was known as the Paris Convention for the Protection of Industrial Property. The second was the Berne Convention for the Protection of Literary and Artistic Works which was concluded in 1886. The third, which is known as the Universal Copyright Convention (UCC) is a much later development of the 20th Century.[2]

Under the Nigerian Copyright Act, protection is afforded works of other nationals enjoying international copyright. The Act clearly states that:

> *"Where any country is a party to a treaty or other international agreement to which Nigeria is also a party and the Minister is satisfied that the country in question provides for protection of copyright in works which are protected by this Act; the Minister may by Order in the Federal Gazette extend the application of this Act in respect of any or all the works referred to in section 1 (1) of this Act."*[3]

The above statutory provision paves the way for Nigeria to legitimately enter into any treaty, convention or international agreement on mutually reciprocal terms with another country on the subject of ours or their copyright works. In any case the minister must first order such a protection before it becomes real.

The following survey mainly aims at international Copyright

protection but where necessary, we may mention neighbouring rights as well. Our focus will be on the basic principles and attempts by each convention to find solutions to its collective challenges, rather than on the details of their respective provisions. Admittedly, in a work such as this, which is devoted to the major principles, only those international instruments which are of significant relevance to Copyright will be studied in detail. This is why we need only mention in passing the American Conventions, most of which bind countries in North and South America. They do not, therefore, command sufficient international stature to qualify for discussion here.

Our study will, therefore, concentrate on the Berne Convention, the Universal Copyright Convention, the Rome Convention, and the Convention on World Intellectual Property Organization. These in the main, jointly or severally, occupy Nigeria's participation in international copyright affairs.

6.2 THE BERNE CONVENTION

6:2.1 History

The Berne Convention, or to give the full title, the International Convention for the Protection of Literary and Artistic Works (ICPLAW) was concluded in 1886 and is thus the second oldest international treaties dealing with copyright and related subjects. Even though some non-European countries participated in the preparatory diplomatic conferences leading to this convention, the convention was mainly the result of agreements reached between a number of European countries. The original Berne Union was subscribed to by 67 countries in 1887.[4]

The most widely subscribed instrument of international Copyright

almost the whole world. Its coverage spread across Europe, the USA, the USSR and nearly all the former European colonies in African and Asia. Nigeria became a member of this Union by July 1993. As at December, 1995 the total number of countries in this Convention stood at 112, including Nigeria.[5]

6.2.2 **Nature and Feature of the Berne Convention:**

The characteristic features of the Berne Convention are, firstly, rooted in the principle of "national treatment". This requires a member state to give nationals of another member state the same rights as its own citizens enjoy in relation to copyright. This is designed to have a "knock-out" effect, in that copyright owners who find themselves better protected abroad than at home will lobby for a change in their national laws. Similarly, a member state which found itself giving over-generous protection to foreigners could lower its standards. This convention also laid down another fundamental principle, that is, no formality may be required before a foreigner's work is protected. By its rules, Copyright arises automatically on the creation of the work.

There is also the third principle of a minimum standard of protection with regard to the content of copyright, its scope and duration. States which are parties to the convention must grant protection at a level not below that provided for in the convention; but as already said, it could be higher.

For the purpose of the convention, it is important to determine the country of origin of a work. Usually, this will be the country of its first publication; and if the work is unpublished, its country of origin is that of

publication; and if the work is unpublished, its country of origin is that of the creator.[6]

In the sphere of rights protected, the convention originally dealt with the protection of "every production whatsoever in the literary, scientific or artistic domain which can be published by any mode of impression or reproduction."[7]

This original protection was amended in Paris[8] in 1896, and supplemented in Berlin in 1908. In 1914, an additional Protocol was signed in Berne. The Berlin text of 1908 was revised in Rome in 1928. This revision added two further rights: The *droit moral,* which forms the basis of the Chapter VII of the 1988 British Copyright, Designs and patent Act,[9] and the Broadcasting right.[10] The latter right protected authors against communication by radio diffusion of their work. However, under the Nigerian Law, this is mitigated by compulsory licences to be applied in the case of phonograms. Licences could be required by domestic laws of member states to permit the import or export of broadcasts or prerecording of protected works.[11]

In 1948, works of applied arts, industrial designs and models were added to the growing list of protected works under the Berne Convention. Also television broadcasting and all "wireless diffusion of sights, sounds or images" were covered.[12] These took place in the Brussels revision of 1948.

6.2.3 **Duration of Protection:**

The Convention makes obligatory a minimum term of protection for the author's lifetime and for not less than 50 years thereafter.[13] The term of right, in this conventional specification, provides that the author, or after

his demise the persons or institutions authorised by the relevant national legislation, shall, in respect of original works of art, or the original manuscripts of writers and composer, enjoy the inalienable right to an interest in any sale of the work subsequent to the first disposal of the work by the author. (underline mine). This might have informed the similar provision in the Nigerian Copyright Act which states that:-

"Notwithstanding any assignment or sale of the original work, the authors of graphic works, three dimensional works and manuscripts shall have an inalienable right to a share in the proceeds of any sale of that work or manuscript by public auction through a dealer or whatever method used by the latter to carry out the operation".[14]

The above elastic protection offered by the Nigerian legislation bearing similarity with the Berne convention, is yet to be put to test in reality. It is submitted that due to the inadequate publicity given to Copyright in Nigeria, this and many other advantages offered by the Law are yet to be reaped by those affected.

The two most recent revision of the Berne Convention are those of Stockholm (1967) and Paris (1971). In fact the Paris Revision has remained current till now. In the Stockholm revision, the principle of nationality of works was extended to include the country of which the author is a national, irrespective of whether the first publication takes place in a country of the Union. Two other innovations were made at the Stockholm Conference: first, with regards to the administration of the Union, the responsibility of which was shifted from the Swiss Government to the member states acting together in an Assembly. Hitherto the administrative tasks were performed by the Bureaux, that is the "Bureaux

International Bureaux for the protection of Intellectual Property) commonly known as BIRPI. Along with this reform of the Union, the Stockholm Conference adopted a convention for the establishment of a new organisation known as the World Intellectual Property Organisation (WIPO) (in French called OMPI). Today the secretariat of the Berne Convention is operated by the Word Intellectual Property Organisation (WIPO) with Headquarters at No. 34 Chemini des colombettes, 1211 Geneva 20, Switzerland.[15]

The second of the two innovations mentioned above is the protocol in favour of developing countries. This was a reaction to the large number of developing countries attracted by the rival union - the Universal Copyright Convention (UCC). The issues for the protocol arose out of the divergent steps taken by the newly emergent independent states of the former colonies of Britain, France and Dutch Empires, which hitherto had their copyright Laws as those of their colonial powers. When these countries became independent, the question arose as to whether they were still members linked with their erstwhile masters. Most countries from the British commonwealth did not want to remain members, while the francophone countries did. Nigeria for one did not want to remain alongside her British erstwhile master.

6.2.4 **Provision in favour of developing countries**

These provisions appear in the Appendix to the Berne Convention as revised in 1971. The purpose was to permit certain Union countries, under the conditions specified therein, more latitude as regards the rights of translation or reproduction than is normally permitted by the Convention

of translation or reproduction than is normally permitted by the Convention proper".[16]

The Appendix comprises six articles, showing who shall be allowed to avail themselves of these provisions, how, when, and with regard to which rights. The Appendix to the Convention does not however follow this sequence, but deals with licences for the right of translation, then with licences for the right of reproduction of foreign works. In this instace, the first task was to define the beneficiary countries.

Two criteria are used to identify them: one is subjective since it depends on the country itself which , having regard to its economic situation and its social or cultural needs, may elect not to consider itself immediately in a position to make provision for the protection of all the rights provided for in the Convention. This criterion is very vague and arbitrary, in that any country in question is, as it were, both a judge and adjudged. Fortunately, a second criterion is added: the country is not regarded as a developing country unless in conformity with the established practice of the General Assembly of the United Nations. This criterion is more objective, although it changes with the practice of the Assembly. In short, the notion of "developing country" is a flexible one, which is no doubt a good thing, considering the changing factors of this necessarily imprecise concept.

The system of exception to the ordinary national law of each member state involves a set of compulsory licences which are non-exclusive, non-transferable and remunerative. It covers the use of examples of the works for teaching, scholarship or research purposes.[17]

6.2.5 **Provisions Relating to Licences:**

The licences for translation cover all works.[18] The licences may be granted when the work concerned has not been translated within three (3) years of its first publication where the translation required is to be in a language of general use in a developed country, and within only one (1) year for translation into a language which is of general use in a developing country. Even here, it should be noted that these countries, instead of availing themselves of the rules of the Appendix, may choose the alternative option provided, as being available for all - i.e. whether or not developed or developing countries.[19] According to the alternative option, if after a term of ten (10) years - longer than provided in the Appendix - the work has not been translated into a language of general use in the country that takes advantage of the rule, the exclusive right lapses and its exploitation becomes free and gratuitous, consequently, it allows free translation of the work into the language of that country wherein the application is sought. The choice is then irrevocable, and cummulation of both terms becomes impossible, thereafter.

As a rule, the applicant for the translation licence, must in the first place, try to reach an amicable agreement, which is the purpose of the procedure of notification between applicant and author, or failing that, the publisher. Consequently, a supplementary waiting period is provided in the hope that contractual agreements may be reached. This period is six months when the licence is obtainable after only one year. Subsequently if these periods expire without the author granting authorization to the applicant, the national legislation in question may designate the competent authority which may be administrative, judicial or a special body, and under

specific conditions, to grant compulsory licences. In Nigeria, the Copyright Council is empowered to act in this regard, under various conditions.[20]

Under this Convention, the Licence rules ensures a strict observance of moral rights. Accordingly, the name of the author shall be indicated on all copies of the translation or reproduction published under Licence.[21] Similarly, the Licence cannot be granted when the author has withdrawn all copies of his work from circulation.

With regards to the right of remuneration, Article Iv (6) of the Appendix states that due provision shall be made at the national level to ensure that the compulsory licence provides in favour of the owner of the right, for just compensation that is consistent with standards of royalties normally operating on Licences freely negotiated between interested persons in the two countries concerned; and that payment and transmittal of that compensation may be made in any internationally convertible currency or its equivalent.[22]

Exports of copies produced under Licence in one member state is strictly prohibited, in order to avoid competition with owners of Copyright in foreign markets. Thus a French Licence granted to a Nigerian Artiste or his assignee/translator in Paris for the French translation of his literary Hausa work originally will not be permitted for exports to, say, Niger Republic, except and until the contracting parties have obtained the consent of the Author and in accordance with the nation's copyright legislation, even if France, Nigeria and the Niger Republic are all members of the Union.

The conventional provisions on licences for reproduction cover the same ground as regards licences for translations. The same purpose is

envisaged for licensing translations as for reproduction. The licence for reproduction may, in the principle of this Convention, be granted if after five (5) years of the first publication of a given edition, the original copies of the work have not become available in the country required by the applicant. This term is reduced to three (3) years for works that deal with physical sciences and technology.[23] But it is extended to seven (7) years for works of fiction, poetry, drama and music.[24]

Under the Berne Convention, if a translation or a reproduction is made by the Copyright owner in the same language as was in the Licensed publication in the territory concerned, and if translation or reproduction has the same content as that published under licence, then the licence shall terminate.[25] Finally, Licences lapse when the owner of the copyright distributes in the States concerned copies of the work at a price reasonably related to that normally charged in the State for licensed works. But when that occurs, the copies made under licence may continue to be distributed until their stock is exhausted.[26]

In conclusion, the Berne Convention as revised in 1971, did not seem to contemplate the new telecommunication media for dissemination of works, especially videograms, cable and satellite transmission, nor the creation or development of works associated with information technology - e.g. meteorology. All the same, history has shown that technical progress always precedes national and international Laws which form their legal structures. In the circumstance of the new technological advancements, we suggest a review of the Berne Convention, perhaps as may be facilitated by the operations of the World Intellectual Property Organisation (WIPO).

6.3 THE UNIVERSAL COPYRIGHT CONVENTION

6.3.1 History:

This may be called an American-led counter-part of the Berne Convention. It arose out of the very many Pan-American Conventions, starting with the Montevideo Convention of 1889. The notable Pan-American Copyright Conventions were those of Mexico City (1902); Rio de Janeiro (1906); Buenous Aires (1910); Havana (1928), and Washington DC (1946).

After the Washington Convention, there became a clear trend away from regional copyright conventions in favour of world-wide arrangements. This convention was further necessitated by the political re-alignment of nations following the end of the Second World War.

The Universal Copyright Convention was necessitated also due to the Berne Convention adopting the concepts of Western European countries and calls for a minimum standard of protection which some states found excessively restrictive and thus dangerous to their national economies. The conventional permission to developing countries under the Berne Convention was criticised not only for being too sweeping in favour of such countries, but also dangerous for the economies of industrialised states.

One writer[27] observed that:-

> *"In the New World, the interests of the intermediary are readily given precedence on the grounds that, without publishers or cinematographic production, companies with large amount of capital at their disposal for literary or musical works would not be successful".*

In the light of such consideration, the United States of America exerted a decisive influence on the drafting of the Universal Copyright

Convention which was signed in Geneva in 1952.

6.3.2 **Membership:**

Under the influence of the United States, the UNESCO (a United Nations' specialised agercy) initiated this Convention whose provisions were intended to allow States that had reservations with respect to the Berne Convention to become parties to an international instrument which was less protective but more in accordance with each national legal tradition. As of 1st January 1987, the Universal Copyright Convention had a total of 79 countries, including United States, India and the Soviet Union. It may be appropriate to mention here that although the United States was an original signatory to the Universal Copyright Convention, it only became a member of the Berne Convention[28] on 1st March, 1989. Nigeria joined the Universal Copyright Convention on 14th November, 1961 by accession, which is the mode of becoming a party to a treaty to which the State was not an original signatory. It would appear that even though we were colonised by Britain, we did not embrace them at the Berne Convention on our becoming independent. Infact Nigeria acceded to the Berne Convention 33 years after its attainment of independence. One wonders what informed our embrace of the Universal Copyright Convention earlier than the Berne Convention. Perhaps, it was because of those UNESCO protocols which we were eager to sign at the United Nations immediately after the attainment of independence in 1960.

As at 1st January 1995 there were 95 countries as members of the Universal Copyright Convention,[29] including Nigeria.

6.3.3 Nature and Features of Right:

This Convention has the following peculiar features of Rights protection:

(a) **Principle of Multiple Membership:** Given the aim of this UNESCO initiated convention, there was clearly a danger that countries bound by the Berne Convention would be tempted to leave it in order to accede only to the less restrictive Geneva Convention. In order to circumvent this danger, two rules were made to prevent such moves by neutralizing their effect. Both rules are to be found in the declaratory appendix to Article 17 of the Convention, which established the principle that:

> *"This Convention shall not in any way affect the provisions of the Berne Convention of the Protection of Literary and Artistic Works of membership of the union created by the Convention".*

The above declaration saves member states of the Berne Convention wishing to join the Geneva Convention of two consequences. First, the Geneva Convention shall not be applicable to the relationship among countries of the Berne Union so far as it relates to protection of works having as their country of origin a country in the Berne Union in the same manners this is understood under the Berne Convention. Therefore, the principle of precedence in the Berne Convention is affirmed in relations between Countries which are signatories to both conventions.

(b) **Principle of safe withdrawal:** Secondly, works which, according to the Berne Convention, have as their country of origin a country which has withdrawn from the Berne Union after 1st January, 1951, shall not be protected by the Universal Copyright Convention in the countries of the Berne Union.[36] This safety clause has been

described as of necessity "to prevent the younger nations from competing with the elder ones and causing withdrawals".[31] Such departures after the date that was set, were to be final in nature since none of the two Conventions can be applied. But nothing prevents any nation from maintaining dual membership.

(c) **Principle of National assimilation of foreign authors:**

The distinction between published and unpublished works is classically enunciated under this principle as found in the Universal Convention. Article II of the Convention provides that:

(i) Published works of nationals of any contracting State and works first published in that State shall enjoy in each other contracting State, the same protection as that other State accords to works of its nationals as if first published in its own territory; (underline mine)

(ii) Unpublished works of nationals of each contracting State shall enjoy in each other contracting State the same protection as that other state accords to unpublished works of its own nationals; and

(iii) For the purpose of this Convention any contracting State may, by domestic legislation, assimilate to it own nationals any person domiciled in that State.

From the above, it can be gathered that unpublished works of foreign authors are assimilated to those of national authors on condition that the foreign authors are nationals of a country bound by the Convention, or that they are simply domiciled there. As for published works, either the author is a national of a contracting State or though not

a national of a contracting State but his work was first published in the territory of one of the contracting State, he or his work becomes assimilated.

Accordingly, the basic distinction depends, even as found in the Berne Convention, on the notion of "publication". The distinctive or classical feature of the Universal Convention in this regard is in its definition of the concept of "publication." According to its Article IV, "Publication" means the reproduction in tangible form and the general distribution to the public of copies of a work from which it can be read or otherwise visually perceived. Here, we can see the fundamental difference from the concept of publication set out in the Berne Convention. A phonographic recording, for example, can constitute a publication according to the latter Convention, as soon as the distribution of copies satisfies the reasonable demands of the public, given the nature of the work. On the other hand, such a recording may not be regarded as a publication within the meaning of the Universal Convention, since the grooves of a record can not be read and the sound recording can not be visually perceived.

From the above analysis, the notion of publication under the Universal Convention is, therefore, narrower in scope than in the Berne Convention. One may ask whether films are covered as published works under the narrow definition of the Article VI of the UCC, since they present images to the eye of the beholder. The answer is yes, for the purpose of the film is actualised upon projection. Thus a musical work which has not been printed must be considered as unpublished under the UCC, but may be published under the Berne convention.

6.3.4 **Scope of Works Protected:**

The list of works protected under the Universal Copyright Convention is not exclusive, though shorter than the list under the Berne Convention. It covers only literary, scientific and artistic works; including writings, musical, dramatic and cinematographic works, paintings, sculpture and engravings. The Convention allows the list to grow or be cut down as per national laws of contracting States.

6.3.5 **Formalities for Protection:**

The above works are protected under the Convention only if their authors comply with certain formalities. The formalities relate to such conditions as deposit, registration, notice, notarial certificates, payment of fees for manufacture or publication in contracting States. All or any of these formalities are, however, subject to the variations allowed by the national laws of each contracting State. A singular formality which applies universally among all contracting State is that which requires the inscription of the symbol accompanied by the name of the Copyright proprietor and the year of first publication to be placed on all copies of the work in such manner and location as to give reasonable claim of Copyright.

The above formalities were dictated under the influence of countries (notably the USA) who require the deposit and or registration of the works as conditions precedent for Copyright protection under their national laws.

It is to be noted that Nigeria, being a member of both the Universal Convention and the Berne Convention, has adopted a somewhat middle course in this regard. While on the one hand no formal deposit or registration of works is required, our Copyright works carry the symbol.

The Nigerian Act, however is silent on formal registration and symbolic inscription. With the adoption of the UCC, Nigerian authors are entitled to rights, liabilities privileges, immunities and duties which are contained in the convention as far as international relation in copyright protection is concerned.

6.4 COMPARISON BETWEEN THE BERNE CONVENTION AND THE UNIVERSAL COPYRIGHT CONVENTION:

The structure of the two Conventions is comparable inspite of differences in forms. First, the two conventions allow the law of each member state to conform to the minimum standards laid down by each Convention.

Generally speaking, both Conventions give protection to works of citizens of the other Member States, or works which have first been published therein, on the same terms as native authors' in each member state. However, the following differences exist between the two Conventions:

(1) Under the Berne system, no formalities are required for the right to subsist. Under the UCC system it is required to inscribe the symbol c on all published copies of the work, usually accompanied with the name of the Copyright proprietor and the year of first publication, placed in such a manner and at such location as to give reasonable notice of claim of Copyright protection. Allowance is made for registration under local legislation of Member States of the UCC.

(2) Under the Berne Convention, the term of protection is observed on what is called "comparison of terms rule". The rule is that each

State is bound upon entry, such that if it grants shorter term than those of another in the Union, it shall observe such terms as others when ratifying or acceding to the Convention. This means that the term is governed by the legislation of the country where protection is claimed. In the absence of provision to the contrary in the legislation of the latter country, the term shall not exceed the term fixed in the country of origin. Thus a Nigerian work performed in the Federal Republic of Germany shall be protected in the latter country for 50 years *post mortem* (Nigeria term) and not 70 years *post mortem* (German term), unless the Legislation of the latter country decides to protect the Nigerian work performed for 70 years. This rule, according to Article 7 (8) of the Berne Convention, applies in every case, both general and in the particular cases of certain categories of works.

On the other hand, under the UCC, the minimal term of protection is 25 years *post mortem*. Infact, a different term applies to works of applied art and photographs which is 10 years *post mortem*. There is the general clause that in specific contracts between states the terms may be varied.

(3) The third difference is that unlike the Berne Convention, the UCC system is not retrospective as regards existing works. In short, the principle of "once in the public domain, always in the public domain"[32] is one which members of the UCC are entitled to enforce if they wish.

(4) There are no peculiar provisions relating to developing countries under the UCC. The concept of developing countries under the UCC is as defined in the established practice of the General

Assembly of the United Nations. The UCC uses the licensing formular as established by the 1871 revision of the Berne Convention in respect of developing countries.

(5) There is the fifth fundamental difference in the party authorised to act under the two conventions. Under the Berne Convention, the individual authors and artistes of member states may seek the protection offered by the convention, regardless of the national legislation of the country where the protection is claimed, whereas, under the UCC, it is the Government of the Member states who have the obligation to seek and provide adequate protection.

Given the number of countries that have ratified these two Conventions throughout the world today, one may conclude that there are no more misgivings over their co-existence. Nigeria, like most Western European and Latin American countries, participate in the two Conventions. Perhaps with time and depending on our volume of international trade in Copyright affairs, it would become clear as to which of the two is more advantageous to Nigeria.

6.5: THE ROME CONVENTION ON NEIGHBOURING RIGHTS

6.5.1 History:

Neighbouring Rights, though outside the scope of this study, are also the subject of international instruments. There are a number of international agreements between various countries on the uses and economies derivable from international collaborations and exchanges of performers, folklore, among the host of other cultural activities[32a] now called Neigbouring Rights. The most important of these on account of its

universal field of application, is the Rome Convention. Mention must also be made, however, of the "Phonograms Convention".[33] Which, as its name suggests, is more limited in scope, and also the "Satellites" Convention,[34] which although relating to Copyright as well as to nieghbouring rights, is generally attached to the latter because it mainly concerns the problem of dissemination of works.

The Rome Convention, appropriately titled "The International Convention for the protection of performers, producers of Phonograms and Broadcasting Organisation" was concluded and signed in Rome on October 26, 1961. It came into force in 1964. It has never been revised.

6.5.2 **Membership:**

As at February 10th 1995, there were 47 member states to this Convention, including Nigeria.[35] Instruments of Membership are to be deposited with the Secretary - General of the United Nations allowing for reservation as they may suit each country's national laws. This Convention, which targets Neighbouring Rights mainly, is open to all states who are parties to either the Berne Convention or the Universal Copyright Convention.

6.5.3 **Scope:**

The Rome Convention secures international protection for Neighbouring Rights in the following ways:

(A) **Performers:** Under the Convention,[36] these include actors, singers, musicians, dancers and other persons who perform literary or artistic works. However this does not cover a musical team whose

composite music enjoys Copyright protection. Performers are protected against certain acts to which they have not consented. Such acts are:

(i) The unauthorised broadcasting and the communication to the public of their live performances;

(ii) The unauthorised fixation of their live performances;

(iii) The unauthorised reproduction of such a fixation if the original fixation was made without their consent or if the reproduction is made for purposes different from those for which they gave their earlier consent.

Under the Nigerian Law,[37] the instances of infringing the performers' rights have been extended beyond the above conventional provisions. The Perfomer's right under the Nigerian law would additionally be infringed, if without his consent in writing, a person does any of the followsing acts:

(a) makes a recording of the whole or substantial part of his live performance; or

(b) performs, shows or plays in public the whole or substantial part of the performances; or

(c) imports into the country otherwise than for private or domestic use, a recording of a performer's work which (recording) is an infringing copy; or

(d) in the course of trade or business, sells, or lets for hire, offers, distributes, or displays for sale or hire a recording of a perfomer's work which is an infringing recording.

As to (a) above, there is the proviso that where the recording is for research, private or domestic use, the consent sought shall not be

unreasonably refused. In otherwords, if consent is refused on any of these occasions. they will serve as defences to the performers claim. And as to (c) and (d) above, where the imported copy or the copies for sale, hire, distribution or displary respectively are not themselves infringing copies, then the performer's right has not been infringed by the mere importation or sale or otherwise.

(B) **Producers of Phonograms:** Under the Convention[38], they enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms. Phonograms are defined under this Convention as meaning any exclusive aural fixation of sound of a performance or of other sounds.

This category of right owners, under the Nigerian Law[39] are protected under Copyright, and not under Neighbouring Rights. The reason may be that phonograms by their nature are fixed works of sound recording, and therefore qualify for protection under Copyright. However, despite the legislative categorization, the principle for the protection of producer of phonogram remains the same under our Law as under the Rome Convention. When a phonogram published for commercial purpose gives rise to secondary uses such as broadcasting or communication to the general public in any form also for commercial purpose, an equitable remuneration must be paid by the users i.e. the Broadcasting Organization, to the performers or the producers of the phonogram or to both.

(C) **The Broadcasting Organizations:**

They, under this convention,[40] enjoy the right to authorize or prohibit

certain acts, namely: the re-broadcasting of their broadcasts, the fixation of their broadcasts; the reproduction of such fixation; the communication to the public of their television (and radio?) broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.

Again under Nigerian Law,[41] this protection is found in the area of Copyright rather than Neighbouring Rights. And again, but for this Legal classification, the principles and scope of protection in our national Law remain the same as in the above Convention.

6.5.4 Limitations Allowed to Participating Nations:

In a general term, the Rome Convention allows exceptions to the above-mentioned rights in national Laws as regards private use, short excerpts in connection with reporting current events, and ephemeral fixations by a broadcasting organization by means of its own facilities. Other limitations are for the purposes of teaching or scientific research, and in accordance with such national Laws providing exceptions to Copyright, generally. Furthermore, under this Convention,[42] once a performer has consented to the incorporation of his performance in a visual or audio-visual fixation, the conventional provisions on the performers' rights cease to apply. Perhaps, this explains our statutory limitation to the performers' claim in broadcasting.[43]

6.5.5 Duration of Protection:

Under the Rome Convention, protection lasts until the end of a period of twenty (20) years computed from the end of the year in which:[44]

(a) the fixation was made, in respect of phonograms and for performances incorporated therein;

(b) the performance took place, for performances not incorporated in phonograms; and

(c) the broadcast took place, in respect of broadcasts.

However, under the Nigerian Law, these rights subsists for fifty (50) years from the end of the year in which they first took place.[45] The rationale for the longer term under our Law is hard to explain, given our inexperience in the field.

6.5.6 Administration:

The Rome Convention does not provide for the institution of its Secretariat or a Budget. It however, established an Inter-governmental Committee, composed of contracting States, which considers questions concerning the Convention. As part of the United Nations General Assembly Resolutions, the World Intellectual Property Organisation (WIPO), in conjunction with the International Labour Organisation (ILO), and the United Nations Educational Scientific and Cultural Organisation (UNESCO) are charged with the responsibility of administering the Rome Convention.[46] Nigeria, having joined this Convention, has impliedly made her citizens and institutions subject also to the rules and regulations of the Convention. It is to be remembered that these rules and regulations are usually rationalised within the context of international law, as upheld by the International Court of Justice, the Hague. To enable us participate actively, there is need for us to prepare our people and government by engaging the services of experts in the relevant fields, i.e. law, accounting and

finance, cultural and scientific artistes.

6.6. THE UNITED NATIONS CONVENTION ON INTELLECTUAL PROPERTY:

6.6.1 History:

The World Intellectual Property Organization popularly referred to in abbreviated form as "WIPO", was established by a Convention signed at Stockholm on July 14, 1967, and entitled "Convention Establishing the World Intellectual Property Organization". That Convention entered into force in 1970.

The origins of what is now WIPO went back first to 1883 when the Paris Convention for the protection of industrial property was adopted and secondly to 1886 when the convention for the protection of Literary and Artistic works was adopted. Both Conventions provided for the establishment of an "International Bureau" or secretariat. They were united in 1893 and functioned under various names, the most recent being the United International Bureaux for the Protection of Intellectual Property, also known as "BIRPI" (the French acronym of that name). They WIPO became a specialized agency of the United Nations, in December 1974. Nigeria became a Member of WIPO upon her accession to the Berne Convention in July, 1993.

6.6.2 **Objectives of WIPO** The objectives of WIPO are:

(i) to promote the protection of intellectual property throughout the world through cooperation among Member states and, where appropriate, in collaboration with any other international

organization;

(ii) to ensure administrative cooperation among the various intellectual property Unions.

Intellectual property as we have earlier pointed out, comprises of two main branches: firstly industrial property, which includes inventions, trademarks and industrial designs; and secondly copyright, chiefly in literary, musical, artistic, photographic and audiovisual works.

As to the promotion of the protection of intellectual property throughout the world, WIPO encourages the conclusion of new international treaties and the modernization of national legislation. It gives technical assistance to developing countries. It assembles and disseminates information on copyright related subjects. It maintains services for facilitating the protection of inventions, marks and industrial designs for which protection in several countries is desired; and it promotes other administrative cooperation among member States.

In specific relevance to Copyright in the developing countries, WIPO's objectives include:

(i) Co-operation to encourage and increase the creation of Literary and artistic works by their own nationals and thereby to maintain their national culture, language and practices corresponding to their own ethnic and social traditions and aspirations.

(ii) Co-operation to improve the conditions of acquisition by developing countries of the right to use literary and artistic works in which copyright is owned by industrialised foreigners. It does this by advocating that those conditions are less rigid to the developing

countries they are in the developed countries.

As to the administrative cooperation among the various Unions, WIPO centralizes the administration of the Unions at its International Bureau in Geneva, which is the secretariat of WIPO, where it supervises such administration through its various organs. This centralization ensures economy in the services provided for the member states and easy accessibility to private and public organisation concerned with intellectual property globally.

6.6.3 **Membership:**

As at 9th April, 1995, there were 151 States as parties to the Convention establishing WIPO, including Nigeria. Membership of WIPO is open to any State which is a member of the Paris or Berne Convention; and to other States satisfying any of the following conditions:

(i) If it is a member of the United Nations, any of the specialised agencies brought into relationship with the United Nations or the International Atomic Energy Agency:

(ii) If it is a party to the Statute of the International Court of Justice; or

(iii) If it has been invited by the General Assembly of WIPO to become a party to the Convention.

To become a Member, a State must deposit an instrument of ratification or accession with the Director-General of WIPO at Geneva. Furthermore, States which are parties to either the Paris or the Berne Convention may become Members of WIPO only if they are already bound by or concurrently ratify or accede to at least the administrative provisions of the Stockholm (1967) Act of the Paris

Convention or the Paris (1971) Act of the Berne Convention.

6.6.4 Scope of WIPO Activities:

As at 1st January, 1995, WIPO administered the following Unions or Treaties, considered in two categories: the first are treaties on Industrial Property and the second category are those covering Copyright and related subjects.

Category A: Industrial Property:

1. The Paris Union, which is for the protection of industrial property;
2. The Madrid Agreement, for the repression of false or deceptive indications of source on goods;
3. The Madrid Union, for the international registration of Trademarks;
4. The Hague Union, for the international deposit of industrial designs;
5. The Nice Union, for the international classification of goods and services for the purpose of the registration of Trademarks;
6. The Lisbon Union, for the protection of appellations of origin and their international registration;
7. The Locarno Union, for the establishment of an international classification of industrial designs;
8. The PCT (Patent Cooperation Treaty) Union, for co-operation in the filing, searching and examination of international applications for the protection of inventions where such protection is sought in several countries;
9. The IPC (International Patent Classification) Union, for the establishment of world-wide uniformity of patent classification,

10. The Vienna Union, for the establishment of an international classification of the figurative elements of Trademarks;
11. The Budapest Union, for the international recognition of the deposit of micro-organisms for the purposes of Patent procedure;
12. The Nairobi Treaty, which is specifically targetted for the protection of the Olympic symbols;
13. The Geneva Trademark Laws Treaty, dealing with the synthesizing and simplification of formalities for trademark registration.

Category B: Copyright and Neighbouring Rights;

14. The Berne Convention, for the Protection of Literary and Artistic works;
15. The Rome Convention, for the protection of Performers, Producers of phonograms and Broadcasting Organisation (a treaty which is administered in co-operation with the UNESCO and the ILO)
16. The Geneva Convention, for the protection of Producers of phonograms against unauthorised duplication of their programs, and
17. The Brussels Convention, which relates to the distribution of programme carrying signals transmitted by satellite.

The responsibility placed on WIPO by the United Nations to carry into effect these international co-operation agreements, stems from the fact that most of these Treaties did not create separate Secretariats and budget for their implementation. The United Nations General Assembly provides the budgets for WIPO's services in respect of each Treaty so far as each Treaty meets the required administrative protocols for implementation.

One may very well ask, what is our advantage in participating in any of the above schemes? Under Article I of its Agreement with the United

Nations, WIPO as a specialised agency, is responsible "for appropriate actions, in accordance with basic instrument of the treaties or agreements relevant to any of the above, for promoting creative intellectual activity and for facilitating the transfer of technology related to industrial property to the developing countries in order to accelerate their economic, Social and cultural development". (underline mine)

However lofty as any of the above schemes may appear in planning its activities for the developing countries, the WIPO (like most international agencies) is guided by national, political and cultural climates and the relevant objective or policies of the concerned countries for development. This is particularly important in the actual use and transfer of technology such that it would encourage domestic creative activities. Also the use and transfer of literary and artistic works of foreign origin must conform to local cultures. There is a world of advantage to satisfy our quest for and access to the many scientific and technological information contained in millions of Patent document deposited at WIPO's Central and Regional Offices all round the world.

In a nutshell the WIPO promises to open a verile window to the world of intellectual property, a vast reservoir for Nigerians to tap from in our march towards becoming a leading partner in international copyright affairs.

NOTES AND REFERENCES TO CHAPTER SIX

All Sections shown below, except where otherwise stated, refer to the Nigerian Copyright Act, Cap 68 Laws of the Federation of Nigeria, 1990.

1. MARSHALL MCLUHAM AND QUENTIN FIORE: The Medium is Message. Penguin 1967 (Quoted in "Copyright and Designs Law: A Question of Balance" by PETER GROVES GRAHAM AND TROTMAN, London 1991, P. 192.

2. It was first adopted in 1952

3. See S.33

4. See Claude Colombet: "World Congress on Copyright Teaching and information", UNESCO/PRS/CPY/CME.1/4. Paris 15/8/87/ at P.105

5. See WIPO Publication No. 400 (E), Geneva 1995, P.49

6. See the Berne Convention (1971 Revision), Article 4.

7. Ibid, Art.1

8. As contained in the Paris International Declaration Act of 1896

9. cf S.11

10. cf S.7

11. Paragraph (G) to 2nd Sch. of CAP 68 LFN 1990

12. As contained in Article II (1) of the 19971 Revised Edition

13. Ibid, Article 7 (1)

14. S. 12 (1)

15. op cit Note 4, at P.70

16. op cit Note 5, P.117

17. cf with Para. 2 (5) (6) of the 4th Sch. to CAP 68 LFN 1990

18. See Article II of the Appendix

19. Article 30 (2) of the Appendix

20. See the 4th Schedule to CAP 68 LFN 1990

21. Article IV (3) of the Appendix, cf with Para. 2 (7) (9) of 4th Sch. to CAP 68.

22. See our Para. 2 (4) (b) of the 4th Sch. to CAP 68.

23. See Article III (2) of the Appendix, cf with Para. 3 (8) (a) & (b) of the 4th Sch. CAP 68

24. For detailed Rules of Licence, see "Guide to Berne Convention" WIPO publications, 1978. P.5

25. See Article II (6) of the Appendix, cf with Para 3 (6) of the 4th Sch. to CAP 68

26. Ibid.

27. H. DESBOIS: Le droit d'auteur en france', 2nd Ed. Para. 823, P.82

28. See Copyright Office, Library of Congress Circular 93a, Washington DC, February, 1989.

29. op cit Note 5, at P. 118

30. op cit Note 24, at P.52

31. op cit Note 27 at P. 239

32. See RINGER BABARA "Origin and Evolution of the Universal Copyright Convention", Copyright Bulletin, Vol. II. No. 4 of 1977 at

P.48

33. The Geneva Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication (1971).

34. Concluded in Brussels, on 21st May, 1974

35. op cit Note 4, at P.52

36. Article 3 (a) of the Rome Convention

37. See Chapter III, Paragraph 3.5 of this work; and cf S.25

38. Article 10 of the Rome Convention

39. See S.6 (1) (a) of Cap 68 LFN 1990

40. Article 6 of the Rome Convention

41. SS 7 and 8

42. See Article 7 Rule 2

43. See S.8 (1)

44. See Article 14

45. See S.24 and the 1st Schedule thereof.

46. op cit Note 4 at P.54

CHAPTER SEVEN

SUMMARY OF RESEARCH FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

7.1: SUMMARY OF FINDINGS

This research has attempted to assert that Copyright is not a very remote concept, although it has often been misunderstood by many. One common misunderstanding about Copyright is that it is an authority to copy another's work without harm. In a sarcastic tone, one may hold such misunderstanding as responsible for our non-observance of Copyright law in Nigeria.

In trying to identify the subject matter, many definitions were posited. In the main, experts all agree that Copyright is the preservative and prerogative right in literary or artistic property recognised and sanctioned by law.

The history of the laws revealed that it is one of the legacies of colonialism in Nigeria. In fact the point was confirmed that Nigerian sovereignty/independence has not eradicated the continuing influence of our colonial masters in this vital field of our national economic, cultural and legal developments.

The research examined the ideological principles in the concept of Copyright. Our findings reveal that there are twin-like propellers driving the framework of Copyright, each working in opposite direction and in the centre is Copyright seeking to balance the interests of those behind each of the propellers. In other words, Copyright is a concept of balancing the

legal interests of the private rights owner vis-a-vis those of the public using his work. It is a notion of live and let live thereby maintaining societies' cultural patrimony.

In the examination of the nature of Copyright, we have demonstrated that Copyright subsists in books, newspapers, journals, magazines, music, maps, illustrations, architecture, paintings, photograph, discs, videos, motion pictures, television and radio programmes/broadcasts, theatrical productions, computer programmes, date-bases, private letters and even written or unwritten Lectures. The Research confirmed that although the producers of these numerous works reserve certain authorship or ownership rights over their creations, yet because they are members of the society, their rights of monopoly are not totally absolute, particulaly after the works have been published.

The various avenues of exercising these rights and the corresponding duties were duly appraised. As thinkers, writers and artistes strive to meet the needs of the modern world, so does Copyright provide the system whereby society can reward them. The law on this subject in Nigeria, however, appears to be running behind the tide of technological advancement which may result in robbing the law of its efficacy.

While examining the provisions of the Nigerian Copyright Act, this Research discovered that there are many instances by which the right of a Copyright owner may be infringed. But as many as there are of these infringements, they also seem to be matched point-by-point by the various exceptions and exemptions from liability. For example, the exemption from Copyright liability for literary works used for purposes of research, private use, criticism or review of current events, has been stretched very far by

our educational institutions. This study disclosed that given the leverage of exceptions and the rate of technological advancement which makes copying easier, the injured plaintiff may be discouraged from the outset and resign from the effort of seeking remedy to his injury under the law. This has watered down the strength of the work. Nonetheless, in our situation there appears to be too few judicial decisions in this area of the law, to justify a positive conclusion in the practical realities of Copyright in Nigeria. In other words the law is available in the statute book, but not really epitomised in practical response.

On the international scene, the Research found that Nigeria has joined the three major Copyright Conventions. The resultant effects of these international co-operation are the numerous opportunities thrown open to our artistes vis-a-vis their international counter-parts in the global efforts of protecting their talents. The themes of these conventions have the combined effect of a world-wide protection such that our works, among other nationals, qualify for international Copyright protection. The benefits which can be derived from our participation in these world bodies are numerous. It is my strong belief that whatever we may have lost by our colonial and neo-colonial subjugation, may be recovered through effective participation in these international conventions. This may be possible though reparation for our ancient artifacts now generating immense revenues in foreign museums and theatres. By our entry into the various international conventions, there is the hope that our ancient artifacts held in Europe and American, even if not returned, could become subjects of bilateral agreements with which economic and cultural exchanges could be developed to our mutual benefits with the countries that are hoarding them.

It remains to be seen how Nigeria could make use of these lucrative international avenues.

In the practical field of Copyright administration in Nigeria, the Research discovered that the Law has provided extensive directions on how those in private and public lives can participate in the enforcement of Copyright Law. For the first time before and after the independent Nigeria, there has now been established a distinctive corporate body responsible nationally and internationally for coordinating Copyright affairs on our soil. In addition to the creation of the Nigerian Copyright Council, the Law as well as the people and government of Nigeria have awaken to the interests which were hitherto unheeded features of Copyright. The Research noted, however, that in practical realities, despite legal provisions and administrative machineries Copyright law is not effectively enforced.

While accepting that some of our problems are attributable to the prevailing poverty in Nigeria, this research blames the low profile of Copyright in Nigeria on our ignorance of the importance of its law and its economies. As is popularly said, ignorance is a big disease. As a result of this circumstance the starting point or Copyright emancipation is yet to be discovered in Nigeria, and until then, we may continue to grope in the dark along the corridors of Copyright potentialities which are capable of competing with our oil industries.

7.2. CONCLUSIONS:

The following conclusions have been drawn from the research:

7.2.1: The Universal Nature of Copyright:

Copyright as a legal concept is of a universal application. The cultural materials over which the concept crystalises have ancient traditions in Nigeria as well as the world over. However, as a legal concept, the roots of copyright law in Nigeria were imported from British following their colonization of the territories now known as Nigeria.

In addition to the above political apanage, the evolution of legal, economic and technological integration of the world in the nineteenth and twentieth centuries have jointly and severally contributed to the international nature of copyright. Nigeria, having embraced the prevailing international copyright conventions is now faced with the difficult tasks of meeting the practical requirements as demanded by these international conventions.

7.2.2: The Poor Identity of Copyright in Nigeria:-

History has it that as a legacy, the disciple normally copies his master even if he can not excel him. In many ways, Nigerians have copied their colonial masters, the British. In the arts and culture, in education, in religion as well as in ideological and legal jurisprudence we have been officially oriented to, and sometimes taking hooks and sinker, the British ways.

Though the Copyright law in Nigeria has its origin from Britian, yet Nigerians do not attach much importance to it as British or English people do.

Even among the elite Nigerians who were the first apostles of the

British, Copyright was a neglected concept, and was more often abused by them. This, perhaps was our own conception of "transfer" of knowledge; And, perhaps, due to the negligence of both the Nigerian governments and the elites to "copy" their British master in this regard, the indigenous Nigerian artistes were left sleeping (some even died in their slumber) for many years without recourse to their copyright protection as provided under the law.

There are signs that this perversion is still persisting. Almost a decade after we have reproduced reproduced as near as possible the British copyright provisions into our statutes, the majority of our people, including our Legislators, are yet to be persuaded out of their accustomed negativism with regards to copyright in Nigeria.

7.2.3: **Copyright as a Specialised Industry:**

The low profile of the Nigerian copyright industry may not be unconnected with its sophistication in form and in context. It is not only an abstract property but also one which requires more than a legal mind to discern its amplitude.

In the period before the Second Republic (1979-1983), Nigerians treated copyright as colonial theme which was left to lie undisturbed so long as they can go scotfree from paying compensation to any foreign artiste whose music or books we freely copied and sold openly in our markets. Thereafter, as a result of the new Nigerian law on the subject, and particularly with the establishment of the Copyright Council, the subject matters of copyright began to engage the minds of our local authors, artistes and lawyers - particularly those who are based in Lagos and more

recently in the hinterlands. Even with the enlightenment campaigns of the Nigerian Copyright Council as enumerated in Chapter five, Copyright is still seen by many as the baby of the Federal Government, so much so, that many private copyright owners do not even know of its existence. The complexity of copyright law is shrouded *inter alia* with the difficulties of explaining the originality of author's efforts; the absence of registration which again leads to problems of priority of titles; burden of prof of infringement among the many legal exemptions and the rigors of litigation. As a branch of the Law, Copyright in Nigeria started being taught at the Nigerian Law School and was only recently introduced to the undergraduate curriculum of our Universities. Thus, to a large extent, Copyright is still the subject of the "learned men" in the Society.

7.2.4: **The Hybrid Nature of Copyright Law and its Enforcement in Nigeria**

Copyright law in Nigeria has a hybrid quality of having civil and criminal remedies. However, this hybrid quality is found more in principle than in practice. There is no reported case of the prosecution of this crime under our Criminal and Penal Codes, even though the former had it prescribed since 1916. In the new dispensation and perhaps as a demonstration of the Governments commitment to enforce the law, there have been some arrests and confiscation of suspected materials of copyright infringement. Even so, such criminal steps seem to only pave way to subsequent civil remedies because the public law enforcement agents invariably drop into positions of witnesses at the civil trials. Without adequate training, our Police and the Ministry of Justice can not go far in

the public prosecution of copyright infringement.

7.2.5: **The Economic Potentialities of Copyright in Nigeria:**

The philosophy behind copyright protection is that Copyright is a property which needs to be protected just like any other porperty e.g. a building. It has a lot of role to play in the economic development in Nigeria. This is in addition to its relevance in our intellectual and cultural emancipation. The experience of other nations clearly show that copyright when properly articulated and harnessed can yielded a reasonable amount of foreign exchange earnings. In Nigeria, the arts abound more than the technology. Therefore, Copyright, in comparison with other areas of intellectual property in Nigeria, promises to be of greater advantage in the nation's quest for foreign exchange earnings. In an almost parallel consideration, Copyright is also a verile research field for further studies in Law, the Arts and Culture.

7.2.6: **The Short-comings at Copyright Administration in Nigeria:**

Our research concludes that in comparing law with practice, the administration of Copyright in Nigeria is a far-cry. The problems of the Nigerian Copyright Council are many; ranging from inadequate staffing, concentration in Lagos, to budgetary and logistic problems in public enlightenment and campaigns. Neither the Police, nor the Customs Department are any better equipped to do more than a lip service to copyright enforcement. This is not to mention the bane of bribery and corruption which erodes the confidence we have in their observing the rules.

Another equalling palpating problem is the speed of technological development in electronic devices which make copying easier for the infringer of copyright. There is hardly enough strategies and facilities at the disposal of the law enforcement agents and rights owners to combat this menac

A third area of our problem, is the next to none availability of operational and commercial training in handling copyright issues and materials in Nigeria. Not only our courts but also our commercial operators are groping in the dark as to what to do with the rudiments of legal and mercantile matters involved in copyright law and administration which are now international subjects.

7.3: RECOMMENDATIONS:

In view of the foregoing, we have the following suggestions towards improving the law and practice of Copyright in Nigeria.

7.3.1: Funding of Research and Development of Copyright in Nigeria:-

Copyright in the context of intellectual property in Nigeria is relatively a new legal phenomenon. So far, the Nigerian Governments (mostly at the Federal level) and some of her citizens have displayed the political will to promote copyright law. In fact, there is already a legal framework in this direction. It is recommended that these lofty ideals, their attendant benefits and the constraints of copyright implementation be made subjects of research and development in our tertiary institutions of learning. To achieve this, there must be a conscious funding of learning not only through the use of government bursary but also by the private economic sector who stand to benefit most from the developments in the copyright industry.

7.3.2: Re-Orientation Programmes for Public Discipline in Copyright in Nigeria:

Law on its own, no matter how comprehensive it may be, cannot be self-enforcing. Therefore, all those charged with the responsibility of articulating and implementing Copyright law and policies in Nigeria have the singular task of educating and re-orienting the Nigerian public from their present indiscipline towards Copyright. Because of the high incidence of ignorance, it is recommended that the personnel and programmes of the Nigerian Copyright Council be spread across to wider areas of the country to diffuse their unnecessary concentration in Lagos. This is with a view to

harnessing the variety of our works; ensuring their lawful uses and preventing their abuses which now pervades all over Nigeria. The earlier this is done the better it would be to allay the fears and rebut the presumptions of most people at the northern side of Nigeria that copyright is an issue only for the "Lagosians". In this regard, all institutions of higher learning in Nigeria where Copyright is being taught should organize Copyright Campaign Weeks to enlighten their communities about Copyright issues.

7.3.3: **Effective Public Prosecution of Copyright Offences:**

The Police and the Ministries of Justice at the Federal and State Capitals should take their batons of Copyright criminal prosecution more seriously. As a Federal offence for which proceedings hold at the Federal High Court, there is ample opportunity to do this work now that the Court has spread its Judicial Divisions across the country. When copyright criminal trials are effectively conducted and reported in the media, as has been done with Drugs, such steps will stimulate public respect and confidence in the industry. It will minimise piracy and plagiarism because most Nigerians fear public condemnation.

7.3.4: **Relaxing the Rules on Copyright Collecting Societies in Nigeria:**

After putting in place a national legal framework for copyright in Nigeria, the economic gains to be derived therefrom are easily realisable through an effective collecting society system. Despite the many problems of our time, the most of which are political and economics, it is quite commendable that the Nigerian Copyright Council has taken the initiative to grant approval to collecting societies to operate under our copyright

system. However, it is observed, with humble respect to those concerned, that the present regulations for such societies appear to be too stringent and nationalistic. For one, it is considered almost impracticable for one single society to operate the length and breadth of this vast country for the interest of, say, all our musicians. For another, the incorporation requirements for a collecting society under the regulations appear too cumbersome and discouraging. It is recommended that the present rules be relaxed somewhat to enable more societies to be registered perhaps with limited operational territories so as to effectively cater for the interests of their members. There ought to be no pretences that because the Copyright Council is national in structure so also must all collecting societies.

7.3.5: **Establishment of Copyright Arbitration Panels:**

One sure way of promoting the ideals of Copyright is to encourage negotiation and arbitration instead of litigation. Our present copyright law and practices are only geared towards litigation, with all its attendant costs and delays. Our judicial experience is one which is repleted with delays and this may account for why we observe copyright more in its abuses than uses. Consequently those injured may be discouraged from enforcing their rights at our law courts.

Nigeria, having acceded to all current and relevant international copyright conventions has, by implication, exposed her citizens to those international obligations in respect of the works of other nationals being used and abused in Nigeria. Consequently, in order to enhance our interests and those of our counterparts to these conventions, it is

recommended that Copyright Arbitration Panels be put in place in Nigeria for the resolution of Copyright disputes. A possible way of ensuring the effectiveness of such Panel is to prescribe that Copyright Agreements/Contracts should provide for subscription to arbitration as a first instance in a dispute. This will avail our people involved in the Copyright industry the opportunity to develop along the lines of international standards while we stand to reap the wealth available to us by virtue of our association in the international arena of intellectual property law and practices. The law as it stands now does not empower the Nigerian Copyright Council (NCC) to establish a Panel. It is suggested that the Council should strive to see that such Arbitration Panels are set up by the Federal Government.

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