AN EXAMINATION OF THE CONCEPT OF COPYRIGHT OWNERSHIP IN NIGERIA

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DECLARATION

I declare that the work in this Dissertation titled "An Examination of the Concept of Copyright Ownership in Nigeria" has been performed by me in the Department of Private Law. The information derived from the literature has been duly acknowledged in the text and a list of references provided. No part of this Dissertation was previously presented for another degree or diploma at this or any other Institution.

_____	_____	_____
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CERTIFICATION

This Dissertation titled "AN EXAMINATION OF THE CONCEPT OF COPYRIGHT OWNERSHIP IN NIGERIA" by Zayyana Dan-Ali IBRAHIM meets the regulations governing the award of the degree of Master of Laws LL.M of the Ahmadu Bello University, and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This dissertation is dedicated to my father Alhaji Ibrahim Dan-Ali and my mother Hajiya Amina Usman.

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Alhamdulillah. I acknowledged with humility my profound gratitude to Allah, the Almighty, the Glorified and the powerful, for giving me the opportunities, wisdom, courage, strength, health and foresight to complete this research. All praise is due to Him (Allah), the beneficent, the overseer and the merciful. May His peace and blessings be upon His slave, servant and messenger, Muhammad (S.A.W).

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Penal Code, Cap P3, Laws of the Federation of Nigeria, 2004.

LIST OFABBREVIATIONS

A.C.L.R.	-	All Criminal Law Report
ALL.ER.	-	All English Law Report
All N.L.R.	-	All Nigerian Law Report
A.C	-	Appeal Cases
C.R.APP.R	-	Criminal Appeal Law Report
C.C	-	Criminal Code
F.S.C.R.	-	Federal Supreme Court Law Report
E.N.L.R.	-	Eastern Nigerian Law Report
Q.B.	-	Law Report, Queen's Bench
N.L.R.	-	Nigerian Law Reports
N.W.L.R.	-	Nigerian Weekly Law Report
P.C.	-	Penal Code

ABSTRACT

Copyright is a property that possesses the essential attributes of ownership and transmissibility. The ownership in copyright is transferrable as movable property by assignment, testamentary disposition or by operation of law. Therefore, the incidence of ownership is subject to contractual agreement that may exist between the author and other persons before or after the creation of the work. In the same vein, the provisions of the Copyright Act concerning first ownership of copyright and its consequences are also subject to the traditional tenet of freedom of contract. Generally, the concept of ownership of copyright depends on transaction if any that took place between the author of a work and another person. But if there is none, both the authorship and ownership of the work are on the author. However, this has generated difficulty in determining an owner of copyright in a work where there are two conflicting interest between author of a work and any other person claiming ownership in the same work. In addition, the Act provides that an author of a work is the person who created the work or made the production of the work possible. In some instances, there would be a creator of a work and at the same time, someone made its production possible. In that situation, there is a problem of determining the concepts of contract of service and contract for service of an employer. Moreover, there is also difficulty and uncertainty in the transfer of copyright ownership of a joint interest. This is because the Act is not clear as to whether the consent of other co-owner should be sought before transferring ownership to any interested party. This research is aimed at examine the concept of copyright ownership in Nigeria with a view to identify the difficulties and contradictions inherent in the existing definitions of copyright ownership and to identify loopholes of the Copyright Act in respect to the concept of copyright ownership. The Method used in carrying out this research is doctrinal. This research made some findings amongst which it discovered that neither in the provisions nor in the interpretation section of the Copyright Act has the word "Copyright" been defined. Finally, it is part of the recommendations of this research that a statutory definition be inserted either in the provisions of the Act or in the interpretation section of the Act.

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CHAPTER ONE
GENERAL INTRODUCTION

1.1 Background to the Study

Copyright is one of the intellectual property that possesses the essential attributes of ownership and transmissibility.[1] The ownership in copyright is transferrable as movable property by assignment, testamentary disposition or by operation of law.[2] Therefore, the incidence of ownership is subject to any contractual agreement that may exist between the author and other persons before or after the creation of the work. In the same vein, the provisions of the Copyright Act[3] concerning first ownership of copyright and its consequences are also subject to the traditional tenet of freedom of contract.[4]

However, unlike many other movable properties, copyright ownership cannot be taken into physical possession. It falls into that class of properties more appropriately described as *choses in action.*[5] This is because rather than the proprietary right over it being exercised through physical possession, it can only be realized by an action in court.[6] What the owner has is a right of action.

Ownership in copyright comes into existence automatically without need for formalities.[7] The result is that it is possible for the question of ownership never to arise at all, until the copyright is the subject of some dispute. It will then be necessary to work out who is the owner, with no assistance from registers or formal documents. The rules of law governing ownership of copyright are therefore important.[8] Authorship and ownership as distinct

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[1] Asein J.O. (2012) *Nigerian Copyright Law and Practice*.2nd edition, Books and Gavel Ltd, Garki Abuja. p.74
[2] *Ibid.*
[3] Cap. C28, Laws of the Federation of Nigeria, 2004.
[4] Asein J.O.(2012).op. cit. p.74
[5] *Ibid.*
[6] *Ibid.*
[7] Robin J. and Daniel. (1993). *A guide to Intellectual property: Patent, Trade Marks, Copyright and Designs.* 4th edition, Sweet and Maxwell, London. p.140
[8] Section 11, *Copyright Act.*

concepts under the Nigerian copyright law are very important in exploiting the fruits in a work and laying claim to copyright protection. Ownership flows from authorship.

The person who makes the work is normally the first owner of the copyright in the work, provided he has not created the work in the course of employment in which case his employer will be the first owner of copyright. The owner of the copyright in a work may decide to exploit the work by the use of one or more contractual methods. He may grant a licence to allow others exploit the work while he retains ownership of copyright. Alternatively, the owner may assign the copyright to another that is transfer the ownership of the copyright to a new owner, relinquishing the economic rights under copyright law.

Under the Nigerian Copyright Act,[9] ownership of copyright is not automatic.[10] For example, if the author is not a citizen of Nigeria or domiciled in Nigeria, he cannot lay claim to copyright ownership, unless the work was first published in Nigeria or being sound recording made in Nigeria. Likewise, if by contract of employment, an author transferred the copyright in his work to the employer, he cannot also lay claim to copyright ownership.[11] The Copyright Act provides guide as to who may claim copyright and the duration within which such copyright ownership will last. The statutory provisions also define the extent of the copyright owner and limits to these rights.

1.2 Statement of the Research Problem

The concept of copyright ownership tends to prevent those activities that constitute copyright infringement thereby protecting the works of Authors from illegal or unauthorized use. The ownership of copyright in a work at any given time depends on the transactions that have

[9] *Ibid*.
[10] Babafemi F.O. (2007) *Intellectual Property. The Law and Practice of Copyright, Trade Marks, Patents and Industrial Designs In Nigeria*.1st edition, Justinian Books Limited, Ibadan.. p.24

[11] *Ibid.*

taken place since its initial creation. Therefore, the Act cannot in itself indicate with certainty the current ownership of any particular copyright. This explains why the Act does not define who a copyright owner is generally but restricts itself to the initial owner (author). This is of paramount importance because in its pro-author position the Act gives the first advantage to the author whether an employee or independent contractor. This presumption is subject to any contrary agreement in writing in favor of the author.

However, this has generated difficulty in determining an owner of copyright in a work where there are two conflicting interest between author of a work and any other person claiming ownership in the same work. In addition, the Act provides that an author of a work is the person who created the work or made the production of the work possible. In some instances, there would be a creator of a work and at the same time, someone made its production possible. In that situation, there is a problem of determining the concepts of contract of service and contract for service of an employer. Moreover, there is also difficulty and uncertainty in the transfer of copyright ownership of a joint interest. This is because the Act is not clear as to whether the consent of other co-owner should be sought before transferring the copyright ownership to any interested party.

1.3 Aim and Objective of the Research

The aim of this research is to examine the concept of copyright ownership in Nigeria with a view to realizing the following objectives:

i. To identify the difficulties and contradictions inherent in the existing definitions of copyright ownership.
ii. To identify the problem of ownership of copyright in photographic work.
iii. To identify loopholes of the Copyright Act in respect to the concept of copyright ownership.

1.4 Research Methodology

The method used in this research is mainly doctrinal.

It is conducted mainly in the library using statutes and case laws as primary sources while textbooks, journals and articles constitute the secondary sources of this research. This includes materials sourced from the internet.

1.5 Scope of the Research

The scope of this work is limited to copyright ownership in Nigeria by reference to the concepts of authorship and ownership of copyright. Accordingly, the Copyright Act of 1988 Cap. C28, Laws of the Federation of Nigeria, 2004 is the main law in focus. However, references may be made to other laws, treaties and international conventions related to intellectual property when the need arise.

1.6 Literature Review

The concept of copyright ownership in Nigeria is an interested area of concern by many writers. However, none of those texts have not been found wanting either by leaving some gabs or not up-to-date as to the current position of the law. Despite all these, the eminent works of authors in this area of interest have duly been considered below.

Babafemi[12] in his book "Intellectual property. The Law and Practice of Copyright, TradeMarks, Patents and Industrial Design" dealt with this concept of copyright ownership. The author expatiated fully on the categories of persons conferred with the copyright ownership under the Act.[13] However, his work did not touch the extent of the right conferred

[12] Babafemi F.O. (2007) *Intellectual Property. The Law and Practice of Copyright, Trade Marks, Patents and Industrial Designs In Nigeria*.1st edition, Justinian Books Limited, Ibadan.
[13] See Section 2(1), S. 3(1) and S. 4(1) of the *Copyright Act, Cap C28 Laws of Federation of Nigeria, 2004.*

upon an owner of the copyright. This is due to the fact that, copyright is not perpetual in nature but limited in duration.[14] This research discusses the gap created by his work.

Stewart[15] in his book "International Copyright and Neibouring Right" explained the old common law rule as for the period within which a copyright would subsist in an author to the effect that "an author should enjoy copyright ownership on published work during his lifetime and fifty years thereafter". However, as for unpublished work, no limitation of period was imposed.[16] This work is aimed at giving an update as to the current position of the law in relation to both published and unpublished works within the Nigerian jurisdiction.

According to Asein[17] in a book titled "Introduction and Notes to the Nigerian Copyright Act." Copyright is simply the exclusive right to control the doing of certain acts in Nigeria in relation to the work in which the right subsists. The author dealt with almost all the area of copyright ownership in Nigeria. However, there were some amendments and incorporation of new provisions that took place in 1999 in respect of copying by reference to international agreement, limitation to the right of action, anti-piracy measure, criminal liability in respect of infringement of Folklore and limitation on suit against the Commission. All these have not been covered in this book. This research covers the gap.

According to Olueze,[18] in his book "Nigerian Copyright Law" posits that copyright is not a monopoly right. It does not confer on the owner the right to prevent others from creating identical work provided the identical work is conceived of independently. It is *simpliciter* a negative right to prevent the appropriation of the work of one man by another. Moreover, the author also tried to provide a nexus between copyright and other works of industrial property.

[14] Section 2(3-4),S. 3(1)(a-b) and S.4(1) *ibid*
[15] Steward S.M. (1985) *International Copyright and Neibouring Rights.* Sweet & Maxwell, London.
[16] See *Caird vs Sime* (1887) 12 AC 326.
[17] Asein J.O. (1994) *Introduction and Notes to the Nigerian Copyright Act*. A Publication of the Nigerian Copyright Council.
[18] Olueze I.M. (1998) *Nigerian Copyright Law.* Maglink International Ltd , Apapa, Lagos, Nigeria

To him, copyright does not protect ideas but the ways in which such ideas were presented. The ideas conveyed in copyright work may be subject of industrial application. It is therefore plain from the language of the Copyright Act that copyright works except artistic works are contemplated for industrial application. However, it ceases to be subject matter of copyright protection if at the time such work was made; it was intended by the author to be used as a model or pattern to be multiplied by any industrial process. However, there is a gap in this book as the author did not discuss any work that is copyrightable which this research intents to cover.

Moreover, Olueze[19] dealt with the issue of morality for the copyright protection. He argued that there is nothing in the Copyright Act suggestive of any power of the court to deny copyright protection to a work that is otherwise protectable merely on the ground of immorality. The court has no authority to dismiss an action of obscene or immoral material. He opined that allegation of immorality or obscenity in a suit for copyright infringement is factual and therefore constitutes no defense to copyright infringement claim. He therefore suggests that the court should interpret the laws as they are and not as they ought to be.[20] However, the writer left a gap as he did not in any way highlighted the defenses that will avail an infringer from liability.

Robin and Daniel[21] in a book titled "A guide to Intellectual Property: Patent, Trade, Copyright and Design" were of the view that illegal and immoral works constitute an exception from the general rule. The court will not protect a work that is illegal, immoral, indecent or similarly undeserving of protection. According these authors, to draw a line between that which amount to a work eligible for copyright and that which does not is to say that anything worth copying

[19] *Ibid*
[20] *Ibid*
[21] Robin J. & Daniel A. (1993). *A Guide to Intellectual Property: Patent, Trade, Copyright and Design* (4th Edition). London. P.136

is worthy of protection against copying.[22] With due respect to the learned authors, this rule though useful as a guide, but the book is limited in the sense that it did not explained the conditions stipulated by the Copyright Act for a work to be eligible for copyright protection even though it is worth copying, and such conditions must be complied with. This research covers the gap.

Ocheme[23] in his book, "The Law and Practice of Copyright in Nigeria" opined that copyright is a property albeit more appropriately a specie of intellectual property. Property per se embraces everything which is or may be the subject of ownership, whether legal or beneficial or private ownership. He further goes on to define property as anything of value including real estate or contractual right, chose-in-action and other interest in or claims to thing.[24] He classified copyright as among the intangible, invisible and abstract proprietary rights granted by law to the 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.[25] The author concluded that copyright in Nigeria is a statutorily granted right exercisable by certain group of persons over some designated works of art, and upon specified terms and conditions 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.[26] This work is wider in scope as oppose to this research, which is limited to copyright ownership in Nigeria.

[22] *Ibid.* p. 134
[23] Ocheme P.A.(2000). *The Law and Practice of Copyright in Nigeria*. ABU Press Ltd, Zaria.
[24] *Ibid.*
[25] *Ibid.*p.2
[26] *Ibid.*P.3

Ameh,[27] in his article "Analysis of Institutional Framework for the Enforcement of Copyright Law in Nigeria." The author fully discussed the roles played by the Nigerian Copyright Commission, the Nigerian Police, Nigerian Custom service and other relevant agencies in enforcement of copyright law in Nigeria. He also pointed out some challenges for the enforcement of copyright law in Nigeria to include technological advancement, optical disc piracy, shortcoming of legal provisions, challenges of human resource, funding of agency, high level of ignorance, etc. However, the author did not provide suggestive ways of tackling all those challenges for proper enforcement of copyright law in Nigeria. This research covers the gap.

Ameh,[28] in another article titled "An Appraisal of the Role of Nigerian Copyright Commission in the Enforcement of Copyright Laws in Nigeria" dealt with the administration of copyright in Nigeria specifically the role of the Nigerian Copyright Commission in the enforcement of copyright. He touched on the establishment of the commission, its composition as well as its statutory function as provided under the Copyright Act. However, this article did not explained as to what is copyright and what constitute copyright infringement and the mechanisms employed by the commission in discharging its statutory functions. This article also found wanting, as it did not explain how far the Commission has gone in achieving its desired goals.

According to Ifeoma,[29] in an article "Copyright Administration in Nigeria" posits that copyright seeks and aims at protecting the author's economic interest nationally and internationally. It is not only of economic significance to the authors but also to the public in

[27] Ameh I. (2014). "Analysis of Institutional Framework for the Enforcement of Copyright Law in Nigeria." *Journal of Private and Comparative Law. Vol.* 6 & 7. ABU Zaria. pp. 197-222.
[28] Ameh I. (2012). "An Appraisal of the Role of Nigerian Copyright Commission in the Enforcement of Copyright Laws in Nigeria." *Journal of Commercial Law (ABUJCL). Vol. 5 No.1*. pp.140-161.
[29] Ifeoma E.C. (2012, January, 28). Copyright Administration in Nigeria. *Nnamdi Azikwe University Digital Library, Faculty of Law Affiliation*. Retrieved from http://naulibrary.org/dglibrary/admin/book directory/thesis10017.pdf.

general. Copyright does not prohibit copying or replication. It is not one of those rights that admit of no exception.[30] This shows that certain acts are exempted from copyright control. Moreover, the author goes on to state that the exceptions do not have general application to all the eligible works. Thus, its application depends on the nature and type of a particular work.[31]

However, this article is limited in two areas. The first one is where the writer limited the protection to only the economic interest of the copyright owner. This is far from that, because an author may loss the economic interest of his work either by assignment, licensing, testamentary disposition and or by operation of law, while the moral right or interest of the copyright holder subsist and needs be protected. The second limitation of this article is that the writer did not highlight the nature and type of works that such exceptions do not apply.

Nikko[32] in his article "Books Piracy in Nigeria: Issues and Strategies" highlighted the problem of copyright infringement in literary works in the Nigerian publishing industries and identifies the different forms in which this type of piracy is exhibited. He finally makes recommendations aimed at reducing copyright infringement in literary works in Nigeria. However, the article is limited to only literary work. It does not cover other works that are copyrightable. This research covers the gap.

Ali,[33] in his article titled "The Nigerian Copyright Act and Criminal Liability" discussed the legal remedies for infringement of copyright. He classified the liabilities as criminal and civil liabilities. The writer also opined that the most important civil remedy available to the victim of a copyright infringer is an injunction restraining the infringer from ever repeating the infringement. Finally, the author was of the view that remedies for infringement of copyright

[30] *Ibid.*
[31] *Ibid.p.4*
[32] Nikko C. (2013, October, 13)." Book Piracy in Nigeria: Issues and Strategies." *Journal of Nigerian Law Intellectual Property Watch.* Vol.1 No.9. Retrieved from www.eajournals.org/wp-content/uploading
[33] Ali Y.O. (2012)."The Nigerian Copyright Act and Criminal Liability". *Journal of Intellectual Property.* Nigerian Institute of Advance Legal Studies. Retrieved from www.nials-nigeria.org/journal/GBOL.pp.134-146 , accessed on the 3rd September, 2016 by 6:25 pm

are rather vague in the Copyright Act and suggest that available remedies for infringement of copyright are legitimately the function of any law for they served as deterrent to future adventurers and speculators and help protect the right of the copyright holder.[34] However, the writer did mentioned criminal liability without explaining any.

Aguda[35] in his article "The Nigerian Copyright Law and Its Relevance to Social Change" opined that copyright protection is or should mainly be designed to protect an author, artist, creator and so on from the unlawful reproduction of his works. According to him, the concept of copyright has led to the emergence of two conflicting philosophies. The first one being more obvious than other is to the effect that a creative writer, an artist or an artiste has full and unfettered protection of that which he had created and should be able to reap full benefit there from. The second philosophy posits that in the general interest of the intellectual and artistic development of humanity, the dissemination of ideas and knowledge should not be unduly impeded.[36] The writer suggest that a creator of a work in Nigeria who has devoted his time and energy and applied his intellect in the achievement of his creation must look forward to the necessary protection of the law if he is to make that particular creation available to the state for its development. Again, the state must be willing to offer and give the needed protection so that such a creator and others likewise minded may use their intellect for the betterment of Nigeria.[37]

However, the article does not put into consideration the fact that even though the author has an unfettered right over his work, there are issues of public interest in dissemination of ideas. This is why the Act provides exceptions to copyright control which were not covered by the author. This research fills the gap.

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[34] Ibid. pp.145-146
[35] Aguda A. (1992). "The Nigerian Copyright Law and Its Relevance to Social Change." In Uvieghara E.E. (Ed). *Essays on Copyright Law and Administration in Nigeria*. (pp. 3-12).Y-Books:Ibadan
[36] *Ibid.* p.4.
[37] *Ibid.*

Akande[38] in his article "International Dimensions of Nigerian Copyright Law" opposed the idea of copyright protection between countries on the principle of reciprocity. The author argued that where the protection is based on that principle, the foreign authors have ample reasons to complain of the mutilation of their works and the loss of royalties in other countries. Whereas the national authors would found that, their interests were prejudiced by the abundant publications and sale of unauthorized foreign works at cheap prices. This article is found wanting as it did not explain the persons whose work will be protected by foreign country and conditions attached thereto. This research covers the gap.

According to Alikhan,[39] in an article titled "International Dimensions of Copyright Law- The Global Perspective" posits that the essence of copyright is that the law grants authors and other creators of works of the mind certain rights to control for a limited time. He also opined that protecting the right of these creators is not only fair and just, but also encourages creative activity.[40] On the other hand, this article dealt with the minimum standard of protection relating to the rights of authors and the duration of protection as provided under the Berne Convention. However, the writer left a gap as he did not refer to the provisions of the Nigerian Copyright Act concerning the minimum standard of protection. This research covers the omission.

Itanyi[41] in his article titled, "Toward Combating Intellectual Property Infringements in Nigeria" opines that the Copyright Act, which conferred automatically the right on the owner to the exclusion of any other person to do any act that is otherwise protectable. And these rights take effect immediately the work is produced without the formality of registration. The

[38] Akande J. (1992)." International Dimensions of Nigerian Copyright Law". In Uvieghara E.E. (Ed.). op cit. pp. 55-69.
[39] Alikhan S. (1992)." International Dimension of Copyright Protection-The Global Perspective." In Uvieghara E.E. op cit. PP.15-35.
[40] *Ibid.* p.15
[41] Itanyi N. (2016). " Towards Combating Intellectual Property Infringements in Nigeria: Challenges and Prospects." *The Nigerian Law Journal. Vol. 5 No. 1*. p. 122

limitation of this article is that the author did not discuss the conditions precedent before a work qualified to be copyrightable. This research fills the gap

Ameh [42] in his article titled " The Effect of Technologies on the Protection of Copyright in Nigeria: A Call for Reform." The author in his conceptual clarification defined the concept of copyright and a digital technology. He opined that the Nigerian Copyright legal structure as presently constituted does not adequately cover internet related activities. The writer also highlighted some of the major challenges confronting the enforcement of copyright, which include the use of internet, an offence that is difficult to trace the infringer who commits the offence. However, the article differs in context with this research as it only limited to copyright in relation to digital technology whereas this research relate to the concept of copyright ownership in Nigeria in all woks that is copyrightable.

Copinger and Skone,[43] in a book titled, "Copyright" Including International Copyright with the Statutes and Orders relating thereto and Forms and Precedence." While attempting to restate the rationale behind copyright protection had this to say "Nothing can with greater propriety be called a man's property than the fruit of his brain. The property in an article or substance according to them by reason of his own mechanical labor is never denied him, the labor of his mind is no less arduous and consequently no less worthy of the protection of the law". It is therefore clear from the above authors' opinion that the exclusive right of author in his work is absolute and non-derogative.

With due respect, the only right of an author in copyright ownership which is inalienable and non-derogative is the moral right in his work. There are instances when an author may lose his

[42] Ameh I. (2015). "The Effect of Digital Tecchnologies on the Protection of Copyright in Nigeria: A Call to Reform." Bayero Journal of Private and Commercial Law. Vol. 1 No. 1
[43] Copinger & Skone J. (1971) *"Copyright" Including International Copyright with the Statutes and Orders relating thereto and Forms and Precedence*. 11th ed. Sweet and Maxwell Ltd, London.

right of ownership wholly or in part, especially the economic right.[44] This research covers such instances.

According to Sodipo,[45] The exclusive right of the owners of certain works, which qualify for protection under copyright, is derivable from the original. However, this author did not recognize the numerous exemptions contained in the second schedule to the Copyright Act[46], which this work intends to cover.

According to Asein,[47] in his book, "Nigerian Copyright Law and Practice." Copyright as a property right is transferable as movable property by assignment, testamentary disposition or by operation of the law as movable property.[48] He further goes on to state that the incidence of ownership of copyright is subject to any contractual agreement that may exist between the author and other persons before or after the creation of the work.

Despite the fact that the author has dealt with the issue of authorship and ownership of copyright, the author did not explained how an author being the first owner of copyright in law[49] may lose or transfer such rights. This research covers the omission.

According to Uloko,[50] in his book "Modern Approach to Intellectual Property Laws in Nigeria." Copyright ownership is not automatic, because there are certain conditions precedent before a claim to it can be raised. However, the author did not explain in details the

[44] See s.10 of the Copyright Act. *Cap. C28, Laws of the Federation of Nigeria, 2004.*
[45] Sodipo B. *The Nigerian Copyright Council and the Administration of Copyright in Nigeria.* Copyright World , issue 32, July/August 1993
[46] *Copyright Act*, op. cit.
[47] Asein J.O.(2012) *Nigerian Copyright Law and Practice*.2nd edition, Books and Gavel Ltd, Garki Abuja.
[48] s. 10(1) Copyright Act. *Cap. C28, Laws Federation of Nigeria, 2004.*
[49] *ibid*
[50] Uloko G. (2010) *Modern Approach to Intellectual Property Laws in Nigeria*. Princeton Publishing Co. Ikeja, Lagos.

conditions thereby referring to the Nigerian Copyright Act.[51] This research is also dealt with this inadequacy.

Ocheme[52]in his LL.M Dissertation submitted to the Faculty of Law, A.B.U. Zaria dealt with the subject matter under review. His work covered almost all the subject, right from the law, practice and the administration of copyright in Nigeria. This research differs with the former in its scope, as it is limited only on the concept of ownership of copyright with reference to its legal frameworks in Nigeria.

It is therefore submitted that concept of copyright ownership is "the exclusive right belonging to the owner of certain work which qualify for protection for a limited number of years under copyright to produce, communicate to the public, broadcast or translate the whole work or substantial part of the work either in its original form or in any other form recognizably derivable from the original, except for certain limited purposes."[53]

It is therefore, concluded that from the review, it shows that the topic of this research has not been comprehensively treated in the Nigerian context and where it is done there is the need either to make further research or to update the existing literature.

1.7 Justification

The lack of interest on the part of students and lecturers to conduct research and present papers at seminars and conferences in this area has contributed immensely to the problem of dearth of literature on this topic, hence the need to have some. Moreover, the interest of a

[51] Section 2(3-4), S. 3(1)(a-b) and S.4(1) Copyright Act, Cap C28, LFN, 2004.
[52] Ocheme P.A.(1997) *The Law and Practice of Copyright in Nigeria*. LL.M. Thesis (Unpublished). Faculty of Law, A.B.U., Zaria.
[53] Umaru M.J. (2011). *Intellectual Property Law in Nigeria. An Introduction.*. 1st edition, Justinian Books Ltd, Ibadan.P.15

copyright owners protected by law is subject to public interest thereby providing some exceptions limiting those rights.

It is therefore desirable to make further research in this area to contribute as an update to the existing literatures and helps provide a striking balance between the interest of a copyright owner and that of the public. This will serve as a guide to the copyright owners as to the extent of their right whenever there is an infringement.

1.8 Organizational Layout

The work is divided into Five Chapters. Chapter one introduces the general Background to the study, Statement of the Research problem, Aim and Objectives of the research, Research Methodology, Scope of the research, Literature Review, Justification and Organizational Layout.

Chapter Two of this research starts with analysis of some basic concepts related to copyright ownership in Nigeria, the Historical Development of Copyright Law in Nigeria from Pre-colonial, Colonial and Post-independence periods. It also dealt with Sources of Copyright Law in Nigeria, which include the Constitution, Local Enactments, Case Laws and English Laws.

Chapter Three introduced the General Concept of Copyright Ownership by explaining the concepts of Authorship and Ownership in Copyright, Works Eligible for Copyright in Nigeria, Conditions for Eligibility of Copyright under the Nigerian Copyright Act, Categories of Person who may Claim Ownership of Copyright in Nigeria, Rights of Copyright Owner under the Nigerian Copyright Act and Duration of Copyright Ownership in Nigeria.

Chapter Four of this research dealt with Enforcement of Copyright Law in Nigeria, the Infringement i.e. civil and criminal infringements, Action for Infringement, Remedies

available to the Copyright Owner, Exceptions from Copyright Control and Problems and Challenges of the Enforcement of Copyright in Nigeria.

Chapter Five is Summary and Conclusion.

CHAPTER TWO
NATURE, HISTORICAL DEVELOPMENT AND SOURCES OF COPYRIGHT LAW IN NIGERIA

2.1 Introduction

The concept of copyright has long been in existence since time immemorial in the Nigerian traditional society, even though there was no form of indigenous legal framework regulating copyright in the works of art. However, each community has its custom and tradition independent of each other dealing with all areas of life including the protection of the works of art belonging to that particular community. With the coming of the Europeans into the country, common law on copyright were applied on the reception of the English common law which gave protection to unpublished works but there was doubt whether the protection was extended to publish works.[54] After the independence, Nigerian has its first indigenous legal framework on copyright in 1970 known as the Nigerian Copyright Act of 1970, which was later repealed and replaced with the 1988 Copyright Act, Decree No. 47 now the Nigerian Copyright Act of 1988, Cap. C28, Laws of the Federation of Nigeria, 2004.

It is in recognition of the above; this chapter discussed the general nature of copyright, historical development of copyright in Nigeria during pre-colonial, colonial and post-colonial independence. In addition, the chapter also dealt with sources of copyright law in Nigeria.

2.2 Nature of Copyright

Copyright is not a right that inheres in perpetuity. It exists for a term of years and then expires. When a copyright in a work expires, the work is said to have fallen into public domain. It can then be exploited by anybody without the consent of the owner and without having to pay compensation to the owner. However, if a third party makes an adaptation of a work in which

[54] Uvieghara E. (1992). "Exceptions to Copyright Infringement: Rationale" In Uvieghara E.E. (Ed). *Essays on copyright Law and Administration in Nigeria*. (pp.73-74). Y- Books: Ibadan

copyright has expired, he acquires copyright in the adaptation, notwithstanding that copyright has expired in the original work.

Being a proprietary right, copyright is transferable. When copyright in a work expires, the rights of all successors-in-title are extinguished, notwithstanding that anything in the transfer agreement. The property right in copyright is transient in nature, unlike rights in other properties that can endure forever. It is transmissible *inter vivos* by assignments, licences and by operation of law and on the death of the owner by testamentary disposition or by the rules of succession operative in the law applicable to the copyright owner.[55]

Copyright is also divisible in nature. It is a bundle of distinctive rights divisible to a period of time within the duration of the right in question, and also to a specified geographical area or country. It also has an exclusive nature of right because the copyright owner in each work has an exclusive right to do a number of acts in relation to the works.[56] These rights may be transferred to third parties independently of in most cases without prejudice to the exclusive right to do other acts in relation to the work.[57]

Even though there is no statutory definition of copyright, however, considering the nature of copyright, the following definition may be adopted as it possesses the various attributes of copyright.

> the exclusive right belonging to the owner of certain work which qualify for protection for a limited number of years under copyright to produce, communicate to the public, broadcast or translate the whole work or substantial part of the work either in its original form or in any other form recognizably derivable from the original, except for certain limited purposes.[58]

[55] Section 11 (1) & Section 6 (2). *Copyright Act*, Cap. C28, Laws of the Federation of Nigeria, 2004.
[56] Section 6, 7 & 8. *Ibid.*
[57] Section 11 (2). *Ibid.*
[58] Sodipo B. (1989). *"Lessons on copyright*." The Gravitas Review of Business and property Law. www.iprights office. Org/copyright. Access on 20th June, 2017.

2.3 Historical Development of Copyright in Nigeria.

2.3.1 Pre-colonial era

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. During this period, there was no form of indigenous statutory copyright applying commonly in the territories now called Nigeria.[59] It would be superfluous to postulate 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 its separate administration 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.[60]

Nevertheless, there was the Benin, the Ife sculptures to name a few of the many famous works of art produced by the people of these territories.[61] There were some works of woven materials, pottery and leather works particularly ascribed to notable tribes of Kano, Bida, Kanuri and others.[62] The traditions of most tribes in the pre-colonial Nigeria entailed that such works of art were synonymous to depositions in the national libraries as well as prelecture room.[63]

The priests of those shrines or the curators of these artifacts at the places acting as custodians of the peoples' culture, tradition and movement had the duty to preserve and protect such artifact in their respective domains. The important interest for such artifacts at that period was for each community to exhibit those creative arts in order to reflect the wealth of their cultural

[59] Ocheme P.A (2000). *The Law and Practice of Copyright in Nigeria*. ABU Press Ltd, Zaria. PP.5-6
[60] *Ibid*.p.6
[61] Umaru M.J. (2011). *Intellectual Property Law in Nigeria. An Introduction.*. 1st edition, Justinian Books Ltd, Ibadan.P.15
[62] *Ibid.*
[63] Ocheme P.A *op.cit.*p.6

heritage. Due to the limited trans-boarder mobility among the inhabitant of these territories, there was little or no threat of unfair competition or exploitation sufficient to warrant the issues of copy right in pre-colonial Nigeria.[64]

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 works were usually grouped together either by community affinity or for the purpose of trade.[65]

Although there were no written customary laws on copy right in the pre-colonial territories of modern Nigeria, it was customary that indigenous works of art were acknowledged in relation to the tribes' families or individuals who created them.[66]

This was more so as every tribe endeavored to propagate their distinctive cultural heritage. It was a kind of pride, therefore, to associate with one's cultural artifacts in competition with others' culture.

More importantly, since trade was restricted to local markets due to the limited transportation facilities, there was little threat to the composite nature of the territorial economy, let alone artifacts. Moreover, since law is only necessary to curb or regulate social ills of behavior, there was no apparent need for copyright in pre-colonial Nigeria as there equally was no unfair competition or exploitation threatening the proprietary rights of those indigenous communities whom were separated not only by natural boundaries but also by their independent government structures and cultural behaviors.[67]

[64] *Ibid.*
[65] *Ibid.*pp.6-7
[66] *Ibid*.p.7
[67] Umaru M.J. *op.cit.*p.17

Therefore, due to the unwritten nature of Nigerian customary laws, the rules of practice preventing piracy or plagiarism in pre-colonial Nigeria were uncertain varying from one place to another and invariably localized. There was neither common practice nor was there common customary law in pre-colonial Nigeria.[68]

2.3.2 Colonial era

This covers the period of 99 years between 1861 and 1960 during which Nigeria was a colony of Great Britain.[69] The territories, which were held as separate colonies and protectorate were amalgamated into one country called Nigeria in 1914. Because of this, the pre-colonial independent territories were fused together into one Nigeria, not only for administrative conveniences but also for judicial purpose.[70]

The canopies of copyright law erected by the colonial masters in the then Nigeria were of two camps. First, the common law of England and the doctrines of equity. Secondly, the statute of the British parliament generally known as statutes of general application.[71] Those were statutes enacted in England before 1st January 1900. Other statutes that were enacted in England after 1st January, 1900 could be extended to apply in Nigeria by an enabling local order-in-council.[72]

However, the validity of common law of England, which had been in force from time immemorial, and their doctrines of equity still remain in Nigeria even now after political independence. Therefore, the common law and doctrines of equity applicable to copyright in Nigeria during and after her colonization were still and are the same as in England.[73]

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[68] *Ibid.*
[69] *Ibid.*p.8
[70] Obilade A.O. (2007).*The Nigerian Legal System.* Spectrum Books Ltd. Ibadan. p.28
[71] Ocheme P.A. *op. cit*.p.9
[72] Obilade A.O. *op. cit*.PP.69-70
[73] *Ibid.*

During colonial era, the copyright law in England included the common law, the doctrines of equity and statutes of general application. For example as far back as 1709, the British parliament passed their first copyright legislation popularly known as the "Statute of Anne". This statute by definition 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 was repealed by the 1842 Copyright Act, which remained in force in England and in Nigeria up to 1911 when the British parliament passed another Act repealing the 1842 Statute.[74]

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 No. 912 of 1912 which remained in force in Nigeria until 1970 even though it was repealed and replaced with the copyright Act of 1956 in the United Kingdom.[75]

Under the 1911 Act, copyright subsisted in every original literary, dramatic, musical and artistic work if the work was first published in any part of Her majesty's dominion and if unpublished, the author of the work was at the date of making it a British subject or resident within Her majesty's dominion. Nigeria then one of His majesty dominion meant that the protection offered by this Act qualified both work of art as published in Nigeria or such unpublished works by persons who were resident in Nigeria.[76] Moreover, the Act also fixed the limitation period for the term of copyright to subsist in the owner during his lifetime and 50 years thereafter. This limitation clause statutorily amended the earlier common law rule that the author of a published work enjoy copyright in perpetuity. As for unpublished work, the common law rule that the authors enjoyed copyright in perpetuity remains the law.[77]

[74] Umaru M.J. *op.cit*.p.15
[75] *Ibid.*
[76] Ocheme P.A.*op.cit*.p.9
[77] *Ibid.*

In *Jefferys vs. Boosey,*[78] the House of Lords stated that common law copyright continued to subsist in perpetuity for an unpublished work, but was lost on publication. In other words, common law copyright does not extend to publish works. This may explain the omission of any form of protection for an unpublished work in the Nigerian copyright legislation.

Lord Hals bury in *Caids vs. Sime*[79] where the right of a professor to restrain the publication of his lectures delivered orally in the class was held to subsist in perpetuity had this to says "It is not denied and it cannot in the present state of law be denied that an author has a proprietary right in his unpublished literary productions. It is further undeniable that proprietary right continues notwithstanding some kind of communication to others."

Furthermore, Lord Watson in the same case said "The author of a lecture on moral philosophy or of among others original composition, retains a right of property in his works which entitled him to prevent its publication by others until it has, with his consent, been communicated to the public."[80]

However, the Nigerian Copyright Statute has wittingly observed the above common law rule by its deliberate avoidance of providing for a legal protection of an unpublished works. It fallows that in matters of unpublished works, it is still the common law rule that was applied.[81]

2.3.3 Post colonial era

In Nigeria, infringement of copyright was governed until 1970 by the English Copyright Act of 1911 which was made applicable to Nigeria by virtue of an Order-In-Council No 912 of 24 June 1912 which was made under section 25 of the Act of 1911 (Great Britain). It is also

[78] (1854) 4 HLC 815.
[79] (1887) 12 AC 326.
[80] Supra,338.
[81] Ocheme P.A. op.cit.P.11

significant to note that although the 1911 Act was repealed and replaced by the Copyright Act of 1956 in England, Nigeria continued to apply the 1911 Act until the Copyright Act was promulgated as Decree No. 61 of 1970.[82]

This Act was the first indigenous legal framework that regulates copyright activities in Nigeria. The Act came into operation on December 24, 1970, which seemed to have put to rest and the ghost of the 1911 Act.[83] The Copyright Reciprocal Extension Order aimed at protecting copyright in foreign works in Nigeria albeit with retrospective effect from 1970 closely followed the Decree in 1972. The said Order that was made pursuant to section 14 of the 1970 Copyright Decree (now section 33 of the 1988 Copyright Act) contains the list of countries that were then signatories to the Universal Copyright Convention.[84]

However, the 1970 Decree was found inadequate, as the Decree could not combat the increasing rate of piracy and other copyright infringements, the periods of subsistence of copyright in the various eligible works were ridiculously low.[85]

For instance, under the 1970 Act, literary, musical, and artistic works lasted for only 25 years after the end of the year in which the author died; cinematography films and photographs lasted for 25 years after the end of the year in which the work was first published. As regard to sound recording and broadcast, copyright also lasted for only 25 years after the end of the year in which the recording was made or the broadcast took place.[86]

Furthermore, the 1970 Act also found wanting in the area of administration of copyright. There was no effective administrative structure under the 1970 Act.[87] As regards the

[82] Babafemi F.O. (2007). *Intellectual Property. The Law and Practice of Copyright, Trademark, Patents and Industrial Design in Nigeria*. 1st edition, Justinian Books Ltd, Ibadan. P.6
[83] Ocheme P.A. op.cit.P.11
[84] Umaru M.J. op.cit.P.15
[85] *Ibid.*
[86] Babafemi F.O. op.cit.P.5
[87] *Ibid.*

infringement of copyright, what was actually contemplated in the 1970 Act was a civil suit *simpliciter* at the instance of the owner of the copyright. The criminal sanction was minimal.[88] Thus, there was the need to increase the criminal sanctions.[89] Section 12 of the 1970 Act[90] says:

> Infringement of copyright shall be actionable at the suit of the owner of the copyright in the High Court … and in any action for such 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 right.

It is clear from the rest of the provision that what is contemplated and permitted by the Act is civil suit at the instance of owner of the copyright.

Another area found inadequate in the 1970 Act was in regards to the issue of enforcement under the Act, the police did not act forcefully against the infringer. Again, there were also no adequate remedial measures such as empowering the court to grant an injured party an *ex parte* order.[91]Consequently, all the above aforementioned shortcomings and many other problems gave birth to the Copyright Decree No. 47 of 1988 to take care of the inadequacies.

The Copyright Decree No. 47 of 1988 now the Copyright Act of 1988 Cap C28 Laws of the Federation of Nigeria came into force to addressed the shortcomings of the 1970 Act. For example, the period of subsistence of copyright in literary, musical or artistic works other than photographs was extended by the Act from 25 years to 70 years after the end of the year in which the author died. However, in cinematograph films, photographs, sound recordings and broadcast, the period is 50 years after the end of the year in which the work was first published, the recording was first published, or the broadcast first took place respectively.[92]

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[88] *Ibid.*
[89] Umaru M.J. op.cit.P.15
[90] Decree No. 61 of 1970.
[91] Babafemi F.O. op. cit.P.6
[92] *Ibid.*P.5

Again, the issue of lack of administrative structure in 1970 Act, the 1988 Copyright Act has however, now reversed this trend. There is now a body known as the Nigeria Copyright Commission and provide for the establishment of a governing Board for the Commission.[93] Moreover, to adequately address the issue of infringement, the 1988 Act allows the owner of a copyright to bring a civil suit against the infringer and the commission can bring a criminal action against the same infringer. The Act also allows for the appointment of copyright inspectors with the same powers as the police.[94]

However, shortly after its enactment, the 1988 Act was found inadequate. This is because the Act provides for only one body i.e. the then Nigerian Copyright Council to administer copyright matters in Nigeria. This led to the amendment of the Act in 1992, which provides among others:[95]

Establishment of copyright Licensing Panel;

Copyright Inspectors;

Collecting Society etc.

Moreover, the desire to improve the copyright regime in Nigeria led to yet another round of amendment in 1999 incorporating new provisions in respect of copying by reference to international agreements, limitation to the right of action, anti-piracy measure, criminal liability in respect of infringement of Folklore, limitation on suit against the commission etc.[96] In 2004, there was a general revision of all the federal legislations including the copyright Act. This necessitated the re-numbering of the sections of the Act serially to harmonize both original sections and those sections brought about because of the amendments prior to 2004.[97]

[93] Section 31(1) of the Copyright Act, Cap. C28. Laws of the Federation of Nigeria,2004.
[94] Babafemi F.O. op.cit.PP.5-6
[95] Umaru M.J. op.cit.P.16
[96] *Ibid.*
[97] *Ibid.*

The Act (as revised) is the current statute regulating copyright in Nigeria known as the Nigerian Copyright Act of 1988, Cap C28, Laws of the Federation of Nigeria, 2004.

2.4 Sources of Copyright Law in Nigeria

2.4.1 The constitution

This is the supreme law of the land. Since the constitution is superior to all other laws, it follows that its provisions where they apply would affect the interpretation and application of any legislation or general rule of law concerning copyright. Section 1 of the constitution is to the effect that "If any other law is inconsistent with the provisions of this constitution, this constitution shall prevail, and that other law shall to the extent of the inconsistency be void".[98]

Furthermore, apart from setting the limit of other legislations, the constitution makes certain express provisions touching on the subject matter of copyright. For example, in the exclusive legislative list[99] and section 4 of the Nigerian constitution. Section 4 says "The National Assembly shall have power to make laws for the peace, order and good government of the federation or any part thereof with respect to any matter included in the executive legislative list set out in part 1 of the second schedule to this constitution."[100]

It is therefore discernible from the above provision that the subject matter of copyright being one of the matters included in the exclusive legislative list ousted the power of the state Houses of Assemblies to make any law related thereon.

Moreover, the constitution is not silent as to which court has the jurisdiction to entertain cases relating to copyright infringement. It clearly states that "… The Federal High Court shall have

[98] Section 1(3) of the Constitution of the Federal Republic of Nigeria 1999 (as amended)
[99] Item 13, 2nd Schedule. *Ibid.*
[100] Section 4(2) *Ibid.*

and exercise jurisdiction to the exclusion of any other court in civil causes and matters… any federal enactment relating to copyright…"[101]

The Federal High court also conferred with the jurisdiction and powers in respect of criminal causes and matters relating to copyright matters. This is a constitutional affirmation of the provision of section 38 of the Copyright Act, which says, "The Federal High Court shall have exclusive jurisdiction for the trial of offences or disputes under this Act."[102]

However, the constitution is silent about the rights and duties of the citizenry on copyright issues. This might not be unconnected with the low profile accorded copyright-related issues prior to and during the period of the constitution drafting exercise.[103]

2.4.2 Local enactment

The first indigenous Nigerian legislation on copyright was promulgated in 1970, known as the Nigerian Copyright Act of 1970. It was repealed and replaced by the Copyright Act of 1988. Another Copyright Amendment Decree has since amended the 1988 Act in 1992 and 1999.[104] The primary source of copyright law in Nigeria today is the Copyright Act of 1988, Cap. C28, Laws of the Federation of Nigeria, 2004.

Apart from the primary legislation, the Act by itself grant various powers to the minister responsible for culture to extend the application of the Act in respect of certain works to foreign authors or works emanating from foreign countries that accord similar facilities to Nigeria under a common international agreement. Similarly, the Act also empowers the Nigerian Copyright Commission by means of Delegate Legislation to make regulations

[101] Section 251(1) (f) *Ibid.*
[102] Copyright Act, Cap. C28, Laws of the Federation of Nigeria, 2004
[103] Ocheme P. op.cit. P.15
[104] Asein J.O. (2012). Nigerian Copyright Law and Practice. 2nd edition, Books and Gavel Ltd, Garki, Abuja.PP.34-35

providing for the procedure of the copyright licensing panel and for the establishment of Collecting Societies.[105]

Another local enactment regulating copyright in Nigeria is the Criminal and Penal Codes, which apply to the southern and northern states of Nigeria respectively against copyright infringements as, may be committed within the jurisdiction of either Code. Before the coming of the principal Copyright Act in 1988, the Criminal and Panel Codes were jointly and severally supplied the only avenue for criminalizing copyright abuses in Nigeria.[106]

However, the Copyright Act of 1988 on coming into force expressly repealed the provisions of the Criminal Code aforesaid but was silent on the corresponding provisions in the Panel Code. Section 40 (3) of the Copyright Act states "Section 491, 492 and 493 of the first schedule to the Criminal Code Act are hereby repealed."[107]

However, it is trite law that since Copyright Act is a federal legislation; the provision of the Federal Act prevails over those of any Regional or State Act if there is conflict. In other words, even though the provisions of the Penal Code relating to the copyright infringement have not been expressly repealed, in the event of a criminal trial for a copyright offence in the jurisdiction of the Penal Code, the relevant law to be applied is the Copyright Act (as amended).[108]

[105] Section 30A (5) and section 32 (7), *Copyright Act*, Cap. C28, Laws of the Federation of Nigeria, 2004.
[106] Section 491-493 and section 426-427 of the *Criminal and Penal Codes Laws* respectively.
[107] Cap.C28, Laws of the Federation of Nigeria, 2004.
[108] Ocheme P.A. op.cit.P.16

2.4.3 Case law

Another source of a copyright law in Nigeria is found in the judgment of the superior courts of record. It is the principle of the common law that the decisions of the superior courts of law until set aside by the appellate court bind all parties and operate as *res judicata*.[109]

The principle of *stare decisis* which is in the Nigerian judicial system is to the effect that inferior courts are bound by the decisions of the superior courts and not to disturb settled points of law.[110]Therefore, much of the copyright law is contained in the judicial pronouncement. While the Act has tried to codify some of the judge made rules, for example in defense of *fair dealing* or the *Anton pillar* (italics mine) procedure, the plentitude of these rules cannot be found in the statute.[111]

As a rule, Nigerian courts are bound to follow the decisions of a higher court in the hierarchy.[112] However, it was held in *Chime vs. Elikwe*[113] that in principle, a lower court is entitled to choose which of two conflicting decisions of a higher court or higher courts of equal standing it would follow. This underscores the importance of case law as a source of Nigerian copyright law. They are enjoined to prefer local decisions where available to foreign ones.[114] However, a binding decision may be abolished by legislation.[115] since this case law on copyright is still at its nascent stage, Nigerian courts in practice are often constrained to put under reliance on foreign decisions, especially those from common law jurisdiction.[116]

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[109] *Ibid.*
[110] *Ibid.*
[111] Asein J.O. op.cit.P.35
[112] Obilade A.O. op.cit.p.115
60 *ibid.*
61 *ibid*
[115] (2013) 2 NWLR, Pt.1920.p.201
[116] Obilade A.O. op.cit. p.115

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,[117] 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.[118] In *Otedola vs A.G. of the Federation*[119] the Supreme restated this to the effect once a superior court pronounced its position on any issue, it becomes binding on all courts of subordinate jurisdiction. 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 source of the Nigerian copyright law, especially in the area of unpublished works of art. This is an area that the Nigerian Copyright Act has abandoned entirely to be covered by the common law.[120]

2.4.4 English law

Mainly because of Nigeria's close historical ties with Great Britain, English law has remained a major source of Nigeria law. The applicable English laws may be classified into two groups.

a. Those directly applied to Nigeria as part of the British Empire and
b. Those received by the operation of local statute

The Copyright Act of 1911 was extended to Nigeria in 1912, comprising the colony and protectorate of Southern Nigeria and the protectorate of Northern Nigeria.[121] The English enactment extended to Nigeria, which has been repealed since independence includes the Copyright Act of 1911.[122]

Before the 1911 Act, unpublished works were only protected by the common law under which the copyright was in perpetuity. This common law principle was applicable to the constituent

[117] Obilade A.O. op.cit.p116
[118] Ocheme P.A. op.cit.P.16
[119] (2015) 2 NWLR, pt.1234, 1112
[120] *Ibid.*
[121] Asein J.O. op.cit.P.36
[122] Obilade A.O.op.cit.P.81

parts of Nigeria before 1914 by virtue of the various reception clauses. Nevertheless, with the extension of the English Copyright Act to Nigeria in 1912, the position of the common law copyright was altered.[123] Section 31 of the 1911 Act abolished common law copyright and conferred copyright on every original literacy, dramatic, musical and artistic work, if:[124]

a. in the case of a published work, the work was first published within such parts of Her majesty's dominion which the Act extends, and
b. in the case of an unpublished work, the author was at the time of the making of the work a British subject or resident within such parts of Her majesty's dominion as aforesaid.

Following the same pattern, Section 16 of the 1970 Act which repealed the 1911 Act as far as Nigeria was concerned also abolished common law copyright by providing that "no copyright or right in the nature of copyright shall subsist otherwise than by virtue of that Act or of some other enactment in that behalf."[125] This implies that no copyright by whatever name called could exist except by virtue of statute. The present copyright Act repealed the 1970 Act but contain no express provision concerning common law copyright.[126] It is doubtful if the transitional and savings provision in section 40 of the 1970 Copyright Act and fifth schedule serve to fill this lacuna.[127]

However, the 1988 Copyright Act in section 40 (3) stipulate, "The transitional and saving provisions in the fifth schedule to this Act shall have effect notwithstanding subsection (1) of this section or any other provision of this Act."

[123] Asein J.O.op.cit.P.36
[124] *Ibid.*
[125] *Ibid.*
[126] *Ibid.*
[127] *Ibid.*

The Fifth Schedule to the 1988 Copyright Act provides inter alia, that the Act shall apply in relation to works made before the commencement of the Act as it applies in relation to works made thereafter.[128] In *liberty Record Inc. vs. M.Y Owotutu Ent. (Nig) Co,*[129] the Federal High Court considered the retrospective nature of the Act and reasoned rightly that the object of paragraph 2 (1) of the fifth schedule is to allow proceeding under section 25 of the Act. Although this would be the literal interpretation of that paragraph, a more careful examination suggest that reference to paragraphs "25" should have read "15". Section 15 is the section dealing with actions (or proceedings) for infringement of copyright. Whereas section 25 merely outlines what constitutes an infringement of performer's rights. The court however reached a faulty conclusion when it concluded that it is only proceedings under section 25, which (sic) endowed with retrospective effect.[130]

In conclusion, it is obvious that since time immemorial, copyright existed in Nigerian traditional societies. However, during British colonial era, the law regulating copyright in England was imported into Nigeria to regulate copyright activities up to the period after independence when the indigenous Copyright Act came into being. The sources of the Nigerian Copyright Act include Constitution, Local Enactments, Case laws and received English law.

[128] Asein J.O. op.cit.P.36
[129] Suit No.FHC/L/116/86. (Unreported).
[130] Asein J.O. op.cit.P.36

CHAPTER THREE
GENERAL CONCEPT OF COPYRIGHT OWNERSHIP

3.1 Introduction

Copyright ownership generally depends on the concepts of authorship and ownership. This is because ownership flows from authorship as the law recognizes an author as first owner of copyright unless there is contrary agreement to that effect.

The ownership of copyright in a work at any given time depends on the transactions that have taken place since its initial creation and therefore the Act cannot in itself indicate with certainty the current ownership of any particular copyright.[131] This explains why the Act does not define who a copyright owner is generally but restricts itself to the initial owner (the author). This is of paramount importance because it provides the fixed starting for the various and sometimes-complex transactions that may follow. However, where there are no such subsequent dealings, the Act governs the entire situation.[132] In this case, copyright vests ownership initially in the author.[133]

Before discussing the general concept of copyright ownership under the Nigerian Copyright Act, it is pertinent to define the concept of copyright. It can be define as

> the exclusive right belonging to the owner of certain work which qualify for protection for a limited number of years under copyright to produce, communicate to the public, broadcast or translate the whole work or substantial part of the work either in its original form or in any other form recognizably derivable from the original, except for certain limited purposes.[134]

It is obvious from the above definition that copyright protection is not automatic on all works. It is comprehensive because it involved all the conditions precedent before a work enjoys

[131] Umaru M.J. (2011). *Intellectual Property Law in Nigeria. An Introduction.* 1st edition, Justian Books Ltd, Ibadan. p. 29
[132] *ibid*.
[133] Section 10(1). *Copyright Act,* Cap. C28 Laws of the Federation of Nigeria, 2004.
[134] Sodipo B. (1989). *"Lessons on copyright*." The Gravitas Review of Business and property Law. www.iprights office. Org/copyright. Access on 20th June, 2017.

copyright protection. Moreover, even works that are copyrightable, the copyright protection is not perpetual in nature. It is for certain limited purposes and time.

The Copyright Act has vested copyright interest either in the author or in any other legal personality in whom the interest is transferred by any means provided by law. It is in recognition of the above that this chapter is aimed at discussing the general concept of copyright ownership under the Nigerian Copyright Act.

3.2 Authorship

Authorship is a question of law and fact.[135] The Act contains specific definitions of authorship for the various categories of works but these definitions are in many cases inadequate so one might have to resort to common law for guidance.[136] However, it may be defined as" the act of creating a work". Under the copyright Act, "an author of a work in which copyright subsist has the right to claim authorship of his work, in particular that his authorship be indicated in connection with any of the act referred to in section 6 of this Act, except when the work is included incidentally or accidently when reporting current events by means of broadcasting.."[137]

The Copyright Act has given the word "Author" a very wide meaning, depending on the nature of the copyright work concerned. 'Author' in the case of cinematograph film or sound recording means the person by whom the arrangements for making of the film or sound recording were made unless the parties to the making of the film or sound recording provide otherwise by contract between them.[138]

[135] Asein J.O. (2012). *Nigerian Copyright Law and Practice.* Nigerian Copyright Commission, Abuja-Nigeria. p.75
[136] *Ibid.*
[137] Section 12 (a). *Copyright Act,* Cap C28, Laws of the Federation of Nigeria, 2004.
[138] Section 50 (1). *Ibid.*

However, the Author of a photographic work is the person who took the photograph, whereas in the case of a broadcast transmitted from within any country, the author is the person by whom the arrangements for the making or the transmission from within that country were undertaken.[139]

In the case of literary, artistic or musical works, author means the creator of the work.[140] Usually this will be the person whose skill, labour and effort it is that warrants copyright protection in the first place. It is normally clear who is the author on this test.[141]

From the above statutory provision, the person who can claim authorship is called the "Author". An author of a work may be described as the person who created the work or made the production of the work possible.[142] He is the person who originate the protectable elements of the work or the person who is responsible for creating, selecting or gathering the detailed concept, data or emotions that are found in the work.[143]

However, it is important to note that an author is very often, but not necessarily be a human person.[144] In *Community for creative Non-violence vs Reid,*[145] the US supreme court defined an author as "the party who actually create the work, that is the person who translate an idea into fixed and tangible expression entitled to copyright protection".

Law predetermines an authorship and parties may not by agreement shift the fact of authorship.[146] However, this position of the law has an exception in the case of cinematograph

[139] *Ibid.*
[140] *Ibid.*
[141] Umaru M.J. op.cit. p.
[142] *Ibid.*
[143] Asein J.O. op.cit. p.113
[144] *Ibid.*
[145] (1973) US PQ 135
[146] Asein J.O. op cit. p.113

films and sound recordings of non-musical works. Nevertheless, the author of a literary, musical, artistic works or broadcast cannot divert his authorship by contract.[147]

Under the Nigerian Copyright Act, the author of a literary, artistic or musical work is defined as "the creator of the work".[148]

It is therefore submitted that a simple test for determining authorship in cases where more than one person has contributed to the creation of the work is to identify the resultant work and ask: who was responsible for providing this necessary skill and labor as a result of which the work is protectable? It is submitted that, where all that was contributed by a person is no more than an idea, which is subsequently clothed by another then the copyright will subsist in the person who has clothed the idea so received in protectable form.[149] For example, if a man employs the services of a ghostwriter to write his biography, based on materials supplied by the subject, the copyright in the final product would ordinarily belong to the ghostwriter.[150] It is submitted that the authorship of a work may be perpetual, inalienable and imprescriptible as there can be no author other than the creator of the work.[151] However, for all cases, the Act extends the meaning of an author to include his heirs and successors-in-title.[152]

Co-Authorship

The Act uses the expression "joint authorship"[153] 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 the other author or authors.[154] From this

[147] Babafemi F.O. (2007). *Intellectual Property. The Law and Practice of Copyright, Trademark, Patents and Industrial Design in Nigeria*. 1st edition, Justian Books Ltd, Ibadan. p.
[148] Section 51 (1), *Copyright Act.*
[149] Asein J.O. op.cit. p.113
[150] Babafemi F.O. op.cit. p.25
[151] Section 12(a) of the Copyright *Act.*
[152] Ocheme P.A (2000).*The Law and Practice of Copyright in Nigeria.* ABU Press Ltd, Zaria. p.61
[153] Section 2 (1), *ibid.*
[154] Ocheme P.A. op.cit. p.63

definition, it may be presumed that every co-author or join-author has an individual right to qualify as an author-sole, having made a significant contribution in both quality and quantity to the work in question,[155] his contribution being such as is inseparable from those of others.[156]

Therefore, a person who merely gives an idea for the making of a work cannot qualify as co-author because his idea can easily be separated from the physical work made. Co-authors of a work are presumed in law to have intended that their work be a joint product having a name or names purporting to be the name(s) of the author(s).[157]

It should be noted that "Co" or "Joint" does not necessarily mean equal and proportionate shares, it may depend on the quantity and quality of the different contributions.[158] However, a book is not necessarily a work of "co or joint-authorship" merely because there are two or more authors named on the covers.[159] Where each author has separately contributed particular chapters or sections, then the book is a collective work, i.e. a compilation of individual author's work.[160]

A collective work is one in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole. As far as collective work is concerned, there can be separate copyrights.[161] There is copyright belongs to the editorial compiler who is the author of the collective work, and copyright in each separate contribution, which belongs to the contributor.[162] However, if the contribution of each author is not distinct, i.e. they have worked together on the whole book and one cannot point to

[155] *Ibid.*
[156] *Ibid.*
[157] *Ibid.*
[158] Umaru M.J. op.cit. p.30
[159] *Ibid.*
[160] *Ibid*.pp.30-31
[161] *Ibid*.p.31
[162] *Ibid.*

specific chapters or sections which are solely work of one, then it is a work of co-or joint authorship.[163]

It should noted that where one of the co-authors does not qualify under sections 2 and 3 of the Act, (i.e. he is a citizen of a non-convention country and the work is not published in a convention country) while the other co-author is a qualified person, the death of the qualified co-author does not affect the copyright of the non-qualified co-author.[164] In other words, the death of the qualified co-author does not disqualify the unqualified co-author from copyright protection. It is immaterial which of them dies first.[165] The duration of the copyright will start running from the year in which the last author dies.[166]

However, a composite work is a work in which a number of authors have contributed distinguishable parts, work containing distinguishable parts which are separately copyrightable. They are very similar to collective works. It is a production consisting of two or more works.[167]

3.2 Ownership

No discussion of ownership of copyright can be completed without making reference to the concept of authorship in copyright. This is because ownership flows from authorship. The determination of ownership is important for at least three reasons. None of the exclusive rights of the owner can be lawfully exercised unless the consent of the owner or that of someone deriving title from the owner is obtained.[168] Secondly, it is only the owner of copyright, his assignee or exclusive licencee who can sue for infringement of copyright in his work.[169] Thirdly, it may be relevant in considering whether the work is susceptible to

[163] *Ibid.*
[164] *Ibid.*
[165] Section 2(4), Copyright *Act*.
[166] *Ibid.*
[167] Section 11 (6) (b), *ibid*.
[168] Section 15. *ibid.*
[169] Section 16. *Ibid.*

copyright protection where the author is not qualified person in which case, his work may not be protected by copyright in Nigeria.

Ownership is the possession of legal right in a copyright work. Therefore, an owner is the person human or juristic on whom the right to exercise copyright control is vested and he is not necessarily be the author of the work.[170] Every tangible work subject matter of copyright has two proprietary interests, ownership of copyright in the work and ownership of the work *per se.* For example, the purchaser of a book acquires ownership of the book *per se* by virtue of the sale. This proprietary interest entitles the purchaser to read the book, or resell the book. However, this does not entitle him to reprint the book to exercise any of the exclusive rights of the owner of copyright in the book.

As a rule, the author of a work is the first owner of the copyright in that work.[171] The Act has gone further in its pro-author protective scheme to provide that where a work is not the author's employer under the contract of service or apprenticeship or not having been so commissioned is made in the course of the author's employment, the copyright in the work belongs in the first instances to the author, unless otherwise stipulated in writing under the contract.[172]

However, a question may arise where the work has been brought about by a joint or combined effort of more than one person, in whom the first ownership rule will be vested? Although the Nigerian Copyright Act is not specific on this, however it recognizes the concept of co-owners.[173] It is therefore submitted that the first ownership rule be applied in the co-owners of the copyright.

[170] Babafemi F.O op.cit. p.
[171] Section 10 (1), *Copyright Act.*
[172] Section 10 (2), *ibid.*
[173] Section 11 (6), *ibid*.

3.3.1 Co-Ownership

Although there is no specific definition of co-owner, one may draw inferences from section 11 (6) of the Act.[174] For the purpose of that subsection, the phrase "co-owners" is defined as persons who share a joint interest in the whole or any part of copyright or if they have interest in various copyright, in a composite production. In other word, either co-owners have joint interest in the copyright in question or the works in respect of which they hold their separate copyright that were merged into a composite work.[175]

3.3.2 First Ownership Rule

The Act vest ownership of copyright conferred by virtue of sections 2 and 3 in the author in the first instances, that is,

a. all eligible works of which the author is a citizen of or domiciled in Nigeria;
b. all eligible works of which the author is a body corporate incorporated by or under the laws of Nigeria;
c. any literary, musical or artistic work or cinematograph film first published in Nigeria of which the author is not a citizen of or domiciled in Nigeria, nor a body corporate incorporated in accordance with laws of Nigeria; and
d. any sound recording made in Nigeria of which the author is not a citizen of or domiciled in Nigeria, nor a body corporate incorporated in accordance with laws of Nigeria.

As can be seen from the above, the author of an eligible work is the initial owner of copyright in respect of the work.

[174] Asein J.O. op.cit. p.135.
[175] *ibid*

However, the general rule of first ownership is subject to the following exceptions:[176]

Government work or works by prescribed international bodies,

Works made for publication in periodicals; and

Works in respect of which there are contrary agreements.

3.4 Transfer of Ownership in Copyright

As a rule, the author of a work is the first owner of copyright in that work.[177] The presumption of ownership in favor of the author could be displaced by a written stipulation under the contract. There are three methods by which copyright as a property may be transferred. It is transmissible either by assignment (inter vivos), by testamentary disposition or by operation of law.[178]

3.4.1 By Assignment

An assignment of copyright is a transfer of the ownership of the copyright. After the transfer, the original owner is now himself excluded from using the property unless the new owner gives him a licence to that effect. The Act stipulates 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."[179]

However, it is important to note that it is not only existing copyright that can be transferred. Future copyright that does not yet subsist may be assigned. The Act provides

> An assignment, licence or testamentary disposition may be effectively granted or made in respect of a future work or an existing work in which

[176] Asein J.O. op.cit. p.126
[177] Section 10 (1), *Copyright Act,* Cap. C28, Laws of the Federation of Nigeria, 2004.
[178] Section 11 (1), *ibid.*
[179] Section 11 (3), *ibid.*

> copyright does not yet subsist and the prospective copyright in any such work shall be transmissible by operation of law as movable property.[180]

Therefore, a future copyright means copyright that will or may come into existence in respect of any future work or class of works or either subject matter or on the occurrence of a future event. An assignment of future copyright is known as an equitable assignment.[181]

An assignment does not require any form of consideration to acquire legal force except in the case of assignment of expectancy.[182] An assignment of expectancy is an assignment of an expected copyright in a future work.[183]

The requirement being an assignment to be in writing does not provides that the assignor must sign the deed of assignment neither is there any prescribed form for it to acquire legal efficacy.[184] It is submitted that the assignor is usually signed the deed for further to evidence its emanation from him in case of dispute as to its authenticity in future.[185] However, any assignment of copyright that fails to comply with the requirement of writing will not be a valid statutory assignment.[186] Such an assignment may have effect as an equitable assignment. Equity looks to the intent rather than to the form. Once there is proven intention to assign, the form of the assignment is immaterial. Besides, the assignee may lead oral evidence to identify the subject matter of the assignment.[187]

However, an assignment may be in respect of only one part of the rights of the copyright owner. The Act provides:

> An assignment or testamentary disposition of copyright may be limited so as to apply to only some of the acts, which the owner of the copyright has the

[180] Section 11 (7), *ibid*
[181] *PRS vs London Theatre of Varieties Ltd.*(1924) A.C. 1
[182] *Ukatta v. Emembo* (1963) 7 ENLR. 173.
[183] Umaru M.J. op.cit.p.35
[184] *Ibid.*
[185] *Ibid.*
[186] Olueze M.I. (1998). *Nigerian Copyright Law.* Maglink Internationational Ltd, Apapa, Lagos, Nigeria. p.54
[187] *Ibid.*

> exclusive right to control, or to a part only of the period of the copyright, or to specified country or other geographical area.[188]

It should be noted that in an action for infringement, a legal assignee is not required to join the assignor, however, his equitable counterpart must necessarily join the assignor in an action for copyright infringement. In *PRS vs London Theatre of Varieties Ltd,*[189] the court held that:

> An equitable owner may commence proceedings alone, and may obtain interim protection in the form of an interlocutory injunction, is not in doubt, but it is always the rule of the court…that, in general when a plaintiff has only an equitable right in the thing demanded, the person having the legal right to demand it must in due course be made a party to the action.

However, it was held in *Labrum Ltd vs Building and Civil Engineering Contractors Ltd*[190] that no action can be defeated on account of misjoinder or non-joinder of a necessary party to the action. Nonetheless, an interested party may be joins in the proceedings at any point in time, even at the stage of appeal.

Moreover, the Nigerian Copyright Act has recognized co-ownership in copyright.[191] It is also settled law that a co-owner is capable of assigning a jointly owned copyright to a third party and that subject to any contract between them and fees received by the assignor of a joint copyright shall be shared equitably between all the co-owners.[192] However, the Act is not clear as to whether the consent of other co-owner must be sought before assigning their interest.

It is submitted that since the said provision does not expressly dispense with the consent of the other co-owner, his consent may be inferred from the general intendment of the Act,

[188] Section 11 (2), *Copyright Act .*
[189] supra
[190] (1962) 1 ALL NLR. 387.
[191] Section 11 (6), *Copyright Act.*
[192] Section 11 (5), *ibid.*

which is the protection of all the copyright owners against unauthorized exploitation of their copyright interests.[193]

3.4.2 By Licensing.

A licence is not the same with assignment. While an assignment is the transfer of ownership of the total or part of copyright interest, a licence merely authorizes the doing of certain acts, which are otherwise the exclusive preserve of the copyright owner.[194] In other word, a licence is a permission to do something with respect to someone else's property. Therefore, while the assignor gives up his ownership of the copyright and thereby losing control over same, the licensor or grantor retains his ownership of the copyright, which is the right to exclude everyone other than his licensees from use of the property.[195]

It should be noted that a copyright owner could not transfer the ownership of his copyright by licence[196] just as licencee cannot assign a licence granted to him by the grantor to third party. The question is can a licencee has the locus-standi to institute an action for infringement in respect of the rights granted to him? The Act is clear on this as it provides "Subject to this Act, infringement of copyright shall be actionable at the suit of the owner, assignee or exclusive licencee of the copyright, as the case may be…"[197]

An exclusive licence is define by the Act to mean "A licence signed by or on behalf of a copyright owner, authorizing the licencee to the exclusion of all other person (including the person granting the licence), to exercise any right which would otherwise be exercisable exclusively by the copyright owner" [198]

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[193] Umaru M.J. op.cit.p.37
[194] *Ibid*.p.42
[195] *Ibid*.p.43
[196] Section 11 (1), *Copyright Act.*
[197] Section 16 (1), *ibid.*
[198] Section 51, *ibid.*

Although the Act provides no requirement as to form, it stipulates that an exclusive licence shall be in writing.[199] This means that unlike in the case of ordinary licence or non-exclusive licence, which may be granted orally or in writing,[200] the existence of an exclusive licence cannot be inferred from conduct.[201] Accordingly, an exclusive licensee has the same right of action and is entitled to the same remedies for conversion and for infringement as the person granting the licence [202] as if the licence is an assignment and the owner of the copyright is not entitled to these remedies.[203] A mere consent of a copyright owner to any person to do any act that is otherwise exercisable by the owner, may amount to grant of non-exclusive licence. In *I.J Adenuga vs Ilesanmi Press & Sons (Nig) Ltd* [204] it was held that an author who merely submitted his manuscript to a publisher might not be said to have consented to its publication. If he really intended his book to be published, he would enter into a written agreement to that effect. *Adio,* J.C.A who reads the leading judgment, held:

> It should be noted in this connection that there was evidence before the court that the respondent was not only a publisher, it was also a printer. Voluntary submission of a manuscript of a book, visits of the author to the establishment office of the printer and publisher to which the manuscript was voluntarily submitted, and the correction and signing of each page of the "page proof" were not conclusive evidence that the author of the book had consented to its publication. All the foregoing acts could equally be construed as evidence of the author of the book requesting the printing of the book simpliciter…

In this case, the Plaintiff/Appellant's claims against the defendants/respondents were N350,000.00 damages for the infringement of his copyright in his Book; an order for delivery up to the plaintiff/appellant of all copies of the said Book which are in the possession of the defendants/respondents and an injunction restraining the defendants/respondents from

[199] Section 11 (3), *ibid.*
[200] Section 11 (4), *ibid.*
[201] Umaru M.J. op.cit.p.43
[202] Babafemi F.O. op.cit. p. 34
[203] Ibid.
[204] (1991) 5 N.W.L.R. (Pt. 189) 82.

reproducing or authorizing the reproduction of the plaintiffs/appellant's literary work titled "West African School Certificate Examination: Objective Chemistry."

The appellant testified that in 1977 he submitted the manuscript of the book to the respondents. He corrected the page proof later. There was no written agreement between the appellant and the respondents in relation to the publication of the Book. However, sometime in 1980, the appellant discovered that the respondents had published the Book and copies were being sold to the members of the public. The appellant further testified that he did not orally or in writing vest the respondents with authority to publish the book. He had never received any letter from the respondents since he gave the manuscript to them and had not received any amount as royalty on the book. He identified, under cross-examination, a letter written by him in which he asked the respondent for royalty. Either of the parties did however not pleads this letter.

The respondents' Chairman/Managing Director testified 'that the appellant agreed that the respondents should publish the book and that he had never refused to negotiate the royalty with the appellant. He agreed that there was no written agreement between the respondents and the appellant in relation to the publication of the book and that no royalty had been paid to the appellant.

The learned trial Judge dismissed the appellant's claims. He held that the appellant gave his consent to the publication of the book. The trial Judge also held that it could be inferred from the conduct of the appellant that he gave a non-exclusive licence to the respondent to publish the book.

Dissatisfied with the decision, the appellant appealed to the Court of Appeal. The Court of Appeal considered and construed the provisions of Sections 5(1); 10(3); 11(1); and 2(a) of the

1970 Copyright Act applicable at the time to the case, and unanimously allowing the appeal, stated, inter alia;

(1) Copyright is, subject to the exceptions specified in Schedule 2 of Act 61 of 1970 in the case of literary work, the right to control, in Nigeria, the reproduction of it in any material form, the communication of it to the public, and the broadcasting of it.

(2) "Reproduction" is defined in Section 19(1) of the 1970 Act now section 51(1) of the 1988 Copyright Act as the making of one or more copies of a literary, musical or artistic work, cinematograph film or sound recording.

(3) Copyright would be infringed by any person who, without the licence of the owner of the copyright, did or cause any other person to do an act, the doing of which was controlled by copyright. In the instant case, the respondent by publishing the book and selling copies of it to the members of the public infringed the copyright of the appellant in the book unless it could show that it had the licence of the appellant.

(4) By virtue of the Copyright Act No. 51 of 1970 applicable at the time the cause of action in this case arose, the consent of the owner of a copyright to the publication of his book may be in an assignment of the copyright or in the granting of an exclusive licence or a non-exclusive licence.

However, the mere signing of the proof copy of a manuscript could not be a valid and effective substitute for a written agreement that will set out the terms of transaction for publication such as whether it was an assignment or an exclusive licence that was being granted; the reward of the author which could be royalty or a share of the profits made on the publication and sale of the books.

(5) An exclusive licence is a licence in writing signed by the owner or by the person duly authorized by the owner in that behalf authorizing the grantee to the exclusion of all

other persons including the grantor, to exercise the right which by virtue of the Copyright Act, 1970 would (apart from the licence) be exercisable exclusively by the owner of the copyright.

(6) Since the respondents in this case averred that they had an exclusive licence to publish the book, that onus was on them to lead evidence to establish the averment.

(7) An exclusive licence, by virtue of S.10(3) of the 1970 Act must be in writing and could not be inferred from conduct as in the case of non-exclusive licence. Failure of the respondents to prove its averment meant that they did not have the exclusive licence claimed.

Nevertheless, a licence granted by one co-owner of a copyright has the effect as if granted by his co-owner, and any fee received therefrom shall subject to any contract between them be shared equitably between the co-owners.[205] Nevertheless, one right owner cannot grant a licence to a third party without the consent of the other co-owner as such would amount to infringement of copyright.[206] A licence will therefore not pass any interest since if it does, nothing will remain in the grantor out of which to grant subsequent licences.[207]

Moreover, as part of the balancing of interest of the owners and the need to give society greater access to information and knowledge, the law defined the scope of protection subject to the permitted exceptions and allows for the regime of voluntary licensing in order to facilitate the exploitation of those rights.[208]

However, the Act permits in some instances the Commission to grant a Compulsory Licence where the owner of the copyright could not be reached or is not willing to grant a voluntary licence on reasonable terms upon an application made to it by the interested party.[209] And

[205] Section 11 (5). *Copyright Act,* Cap. C28, Laws of the Federation of Nigeria, 2004.
[206] Olueze M.I. op.cit. p.60
[207] Babafemi F.O. op.cit. p.34
[208] *Ibid.*
[209] Section 37, *Copyright Act.*

where the application is granted, the licencee shall pay to the owner of the copyright in the work royalties in respect of copies of the translation in the work sold to the public.[210]

3.4.3 Testamentary Disposition.

Another method by copyright ownership may transferred is testamentary disposition.[211] This means that a person can in his will, give out part or all of his copyright interests to another person. But such a transfer of the copyright interest will become legally valid or effective only after the demise of the testator (i.e. the person who made the will). This is because a testator's will is revocable up to the last minute of his life.[212] Therefore, upon the death of the copyright owner, the copyright will devolve upon his personal representative for the benefit of the person to whom he has bequeathed it or if the copyright owner has died intestate, for the benefit of his next-of-kin.[213]

A testamentary disposition may be limited so as to apply to some only of the acts, which the owner of the copyright has the exclusive right to control or to a part only of the period of the copyright or to a specified country or other geographical area.[214]

3.4.4 Operation of Law

Some of the instances where copyright ownership is transmitted by operation of law are:

a. Where a debtor is declared bankrupt by a court, his property (including copyright) becomes liable for distribution among his creditors. The property will therefore vest in a trustee or an official receiver.[215] However, the trustee shall not be entitled to sell or authorize the performance of the work, except on the terms of paying to the

[210] Babafemi F.O. op.cit.p.49
[211] Section 11 (1), *Copyright Act*.
[212] Umaru M.J. op.cit.p.41
[213] Babafemi F.O. op.cit. p.30.
[214] Section 11 (2), *Copyright Act*.
[215] Section 20 (1), *ibid.*

author such sums by way of royalty or share of the profits as would have been payable by the bankrupt…[216]

b. Where the copyright owner dies intestate, the copyright in his work devolves according to the rules of intestate succession, which may be statutory or customary, defending on the deceased personal law.

c. Where, by or under a written contract, an author of a work vests the copyright in the commissioner of the work or his employer, such copyright shall belong in the first instance to the commissioner of the work or the employer of the author as the case may be.[217]

d. On expiration of copyright[218] by effluxion of time, the work goes into public domain, and any person may copy the work.[219]

3.5 Works eligible for copyright in Nigeria.

The Act explains work to includes translations, adaptation, new versions or arrangements of pre-existing works, and anthologies or collection of works which by reason of the selection and arrangement of their content, present on original characters.[220]

However, the status of any work is determined by its eligibility for copyright protection. Under the Act, six categories of works are recognized for copyright it states "Subject to this section, the following shall be eligible for copyright"[221]

a. Literary works

b. Musical works

c. Artistic works

[216] Section 62, *Bankruptcy Act*, Cap. B2, Laws of the Federation of Nigeria, 2004.
[217] Section 10 (2), *Copyright Act.*
[218] *First Schedule to the Copyright Act.*
[219] Umaru M.J. op.cit. p.42
[220] Section 51 (1), *ibid.*
[221] Section 1 (1) ,*ibid.*

d. Cinematograph films

e. Sound recordings, and

f. Broadcast

From the way the section is framed, the list of copyrightable works is definite and exhaustive. Aside from the neighboring rights, therefore, there can be no copyright in any work that does not come expressly or impliedly within the six categories of works enumerated above. However, this appears to be unduly restrictive, each of the six categories is broadly defined to accommodate a wide range of materials. For instance, the protection of computer programmes is not immediately obvious from the six categories above but a further reading of the definition of "literary works" in section 51 of the Act, which reveals that they are protected as such.[222]

The meaning and scope of each category of work is often wider or narrower than its understanding in common parlance. For example, literary work is defined broadly to include not only computer programmes but also written tables and compilation. On the other hand, a sound recording is defined narrowly to exclude a sound track associated with a cinematograph film.[223]

However, the ascertainment of the exact scope of each of the foregoing categories of works will be by purposive perusal of the relevant provisions of the Act.[224]

3.5.1 Literary works

The expression "literary works" appears synthetic in meaning. Ordinary, a cursory observation would relate its meaning to only bibliographic sources. With the modern trend in

[222] *Ibid.*
[223] *Ibid.*
[224] Olueze I.M. (1998) *Nigerian Copyright Law*. Maglink International Ltd, Apapa, Lagos, Nigeria. p.16.

technology, the scope of literary works has come to encompass computer programmes or works similar thereto.[225]

As a general remark, it may be safe to assert that a literary work involves words or characters that are written, spoken or sung and does not apply to single words no matter how unique.[226] This point was made clear in the case of *Exxon Corporation vs Exxon Insurance Consultants International Ltd*[227] to the effect that the definition of a work necessarily requires some modicum of information, instruction or literary enjoyment. This is particularly true for the literary works.

Also in *Yusufu Ladan vs Sha Kalla Publication Co. Ltd,*[228] the plaintiff alleged that the defendant had infringed his copyright in a dramatic literary work titled:" Sisi Lagos", which the defendant had reproduced in his magazine "Shakallo". The court in determining whether the play qualified as an original literary work and hence a proper subject of copyright, adopted the classical statement of Peterson J. in *University of London Press Ltd vs University Tutorial Press Ltd*[229] on what constitutes a literary works. In his words:

> Although a literary work is not define in the Act, section 51 states what the phrase includes, the definition is not a completely comprehensive one, but the section is intended to show what amongst other thing is included in the description "literary work" in the sense in which that phrase is applied,..… many things which had no pretensions to literary style acquired copyright, for example a list of foxhound and hunting days and trade catalogues … in my view, the words "literary work" covers work which is expressed in print or writing, irrespective of the question whether the quality or style is high. The word "literary" seems to be used in a sense somewhat similar to the use of the works "literature" in political or electioneering literature and refers to written or printed matter.

As brilliant as this statement is, it is now obsolete in some respect. With the advancement in technology, it is not necessarily that every literary work be in the form of written or printed

[225] *Ibid.*
[226] Asean J.O. op.cit. p. 41
[227] (1982) R.P.C 69;(1982) Ch.119.
[228] (1972) NCLR 428.
[229] (1916)2 Ch.601 pp. 608-609.

matter.[230] Writing was defined in section 48(1) of the 1956 English Copyright Act to include any form of notation, whether by hand or by printing, typewriting or similar process. Once a work is shown to meet the statutory requirement of originality, it is immaterial that the work is devoid of meaning or that it is ordered in an "Unknown" language.[231]

In *D.P Anderson and Co. Ltd vs Leiber Code Co*,[232]it was held that "the particular characters adopted in writing need not be intelligible to everyone". Therefore, since some form of notation is called for, by this definition, it has been suggested that a recorded speech in as much as it consist of sound is not literary work[233] also contentions, are machines readable only "writing" such as computer programmes.[234]

The problems are less tractable under the Nigeria Copyright Act. First, the items that qualify as literary works are set out in a long list and include computer programmes. Second, nowhere is the word "writing" used in relation to literary works generally, except in the case of written tables, compilations, and so no definition of the word is necessary or even offered.[235] All that is required for a literary work to be eligible is that it be "fixed in any definite form of expression now known or later to be develop, from which it can be perceived, reproduced or otherwise communicated either directly or with the aid of any machine or devices.[236]

Under the Nigerian Copyright Act, "literary work" includes, irrespective of literary quality any of the following works or works similar thereto.[237]

a) novels, stories and poetical works;

b) plays, stage direction, films scenarios and broadcasting scripts;

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[230] Asean J.O. op.cit. p.41
[231] Ibid.
[232] (1917)2 K.B 469
[233] *Ibid.* p. 42
[234] *Ibid.*
[235] *Ibid.*
[236] *Ibid.*
[237] Section 51(1).*Copyright Act*.

c) choreographic works;

d) computer programmes;

e) text-books, treaties, histories, biographies, essays and articles

f) encyclopedias, dictionaries and anthologies;

g) letters, reports and memoranda;

h) lectures, addresses and sermons;

i) law reports, excluding decisions of courts;

j) written tables or compilation;

One striking feature of the foregoing provision is that it has given literary work a very wide meaning, thereby accommodating certain works that would ordinarily not have qualified to be called literary work.[238] For instance, such things as street dictionaries and stock exchange list, list of football fixtures and tools coupon, examination question, etc. are regarded as literary works.[239] Ordinarily certain factors such as style, form, content, aims and objectives, length and general literary quality of work can be properly have to be taken into account before a work can be properly described as literary work.[240] But going by the provision under discussion, all these factors are irrelevant in determining a literacy work. A literary work does not need to have some measure of literary quality. It is equally irrelevant whether the work is published.[241]

Since the list is not exhaustive and the court may by reasonable extension includes works that are expressly mentioned, the potential scope of literary work is open.[242] For instance, in *Grace vs Newman*[243] a trade catalogue was upheld as literary works, although they are not expressly

[238] Umaru M.J. (2000). *Intellectual Property Law in Nigeria. An Introduction.* 1st edition, Justian Books Ltd, Ibadan. p.17
[239] *Ibid.*
[240] *Ibid.*
[241] *Ibid.*p.18
[242] Asein J.O. op.cit. p.55
[243] (1875)LR 19 eq.623

mentioned under the English Act. The court may accept them under the Nigerian Act as "works" similar to written tables or compilations.[244] Moreover, to qualify as a literary work, the material does not have to meet the taste of literary critics neither does it have to satisfy more than the minimum threshold of literacy quality or style. A works is still protectable as a literacy work irrespective of its content, length purpose, form and whether it is published or not.[245]

However, it should be noted that some works may be excluded as literary works by implications. For instance, it is doubtful if copyright subsists in statutory enactments. The 1970 Act in section 19(1) (g) had defined "literary work" to included law reports and enactments or other written laws. However, the present definition of "literary work" in the 1988 Act mentions law reports (excluding court decisions) but omit enactments and written laws.[246] This omission could be viewed as a deliberate departure from the old law, implying that enactments and written laws are now excluded from the list of materials qualifying as "literary works".[247]

In addition, to give effect to the general intendment of the Act, as has been said earlier, liberal and purposive approach should be adopted in the interpretation of the expression "literary works". For example, the meaning of "poetical work" may be extended to include misery rhymes. In addition, "textbooks" may encompass pamphlets, booklets or loose-bound publications while "treatises" may be extended to include research projects or theses.[248] On the other hand, "biographies" envisages autobiographies and bio-data while "articles" may include interviews and translations. "Directories" may be read to include diaries and

[244] Asein J.O. op.cit. p.55
[245] *Ibid.*
[246] Section 51(1), *Copyright Act*.
[247] Asein J.O. op.cit. .pp.57-58
[248] Olueze I.M. op.cit. p.17

yearbooks, while "dictionaries" may accommodate concordances and commentaries.[249] The meaning of "lectures" may be extended to include talks and papers.[250] Besides, the Act does not make "literary quality" a condition precedent for qualifications as literary works. Accordingly, works like "logarithms and statistical tables may come within the meaning of "written tables.[251] In the same manner, examination papers, pool coupons, sales quotation forms, sales catalogue, telegraphic codes or selections made from earlier works may come under the umbrella of "compilations" as literary works.[252]

Furthermore, the Act includes "choreographic works" in the list of literary works. A choreographic work is defined as "a composition of movements for dancing or any other patterned succession of gestures mostly created to accompanying music.[253]

This simply means the arrangement of the music of a play or drama reduced to writing as was held in the case of *Tate vs Thomas.*[254] There is no doubt that more than one copyright can exist in a work. This music embodying action and scenery for its proper performance may be a choreographic creation as well as musical work.[255]

Again, in keeping with the technological age, the Act incorporates "computer programmes" in the definition of literary works". Computer programmes is define in the Act as "a set of statement or instructions to be used directly or indirectly in a computer in order to bring about a certain result".[256] Computer programmes therefore, comprise only the computer software that is data, information or input used for the operation of computer with a view to getting the

[249] *Ibid.*
[250] *Ibid.*
[251] *Ibid.*
[252] *Ibid.*
[253] Section 51. *Copyright Act*.
[254] (1921)1 CH. 503.
[255] Olueze M.I. op.cit. p.18
[256] Section 51(1), *Copyright Act.*

requisite output.[257] In the case of *Apple Computer, Inc vs Franklin Computer Corp,*[258] the U.S court of Appeal noted that a computer program, whether in object code or source code, is a literary work and is protected from unauthorized copying from both its object code and source code.[259]

However, as to the scope of the protection in literary work, the Act stipulates, "Subject to the exceptions specified in the Second Schedule to this Act, copyright in a work shall be exclusive right of control the doing in Nigeria of any of the following acts that is-[260]

a. In the case of a literary or musical work, to do or authorize the doing of any of the following acts:
    i. Reproduce the work in any material form;
    ii. Publish the work;
    iii. Perform the work in public;
    iv. Produce, reproduce, perform or publish any translation of the work;
    v. Make any cinematographic film or a record in respects of the work;
    vi. distribute to the public for commercial purposes, copies of the work by way of rental, lease, hire, loan or similar arrangement;
    vii. broadcast or communicate the work to the public by a loud speaker or any other similar device;
    viii. make any other adoption of the work;
    ix. do in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-paragraph (i) to (vii) of this paragraph;

[257] Olueze M.I. op.cit. p.18
[258] (1983)714 F.2d 1214
[259] Asein J.O. op.cit. p.56
[260] Section 6 (1), *ibid.*

3.5.2 Musical works

Of all eligible works, musical work remains the most generic for the singular reason of its direct impact on the people, the ultimate consumer of copyright works.[261] Under the Nigerian Copyright Act, musical work means "any musical composition, irrespective of musical quality and includes works composed for musical accompaniment.[262] This definition is of little or no assistance in stating the exact meaning of the words.[263] Music has been described "as any conventional and repeatable inscription or record of vocal or instrumental expertise, which contain the recognizable elements of tone pitch and rhythms."[264]

A musical work is not any particular performance or recording of the music but its composition. A sound recording and the music played in the sound recording are two different copyright works.[265] Sound recording attracts its own copyright. What is protected in the former is not the sound but the recording of it that is protected. They are quite distant and separated types of copyright work.[266]

However, the work may be serious or light it may consist of songs, operas or musical and may be compose for one or more instruments.[267] The key word here is "composition" and it is this element that distinguishes a musical work from mere lyrics.[268] This was reaffirmed by the English House of Lords in *Chappel & Co. Ltd vs Redwood Music Ltd*,[269] that the music and lyric of a song in which each had its own separate copyright and that a song in which the

[261] Olueze M.I. op.cit. p.18
[262] Section (51) (1). *Copyright Act*.
[263] Umaru M.J. op.cit. p.19
[264] *Ibid.*
[265] *Ibid.*
[266] *Ibid.* p.20
[267] Asein J.O. op.cit. p.59
[268] *Ibid.*
[269] (1981)R.P.C 337

words were written by one person and the music by another was neither a collective work nor was there a separate and independent copyright in the resulting song.[270]

Music infringement cases can be very difficult. If plaintiff alleges infringement of his musical work, he must first of course establish his own copyright.[271] Thereafter he has two huddles to cross. First, he must show that the allegedly infringing piece is sufficiently similar to his own work. Secondly, he must show that it was copied from his work. This was illustrated in the case of *Francis Day & Hunter vs Bron*[272]the first plaintiff, Francis Day and Hunter Ltd, music publishers owned with another publisher two copyright in a very popular song titled "In a little Spanish town". The defendant, Sydney Bron and his company published a song called "Why" composed by one peter de Angels. The plaintiffs claimed that the music of "why" reproduced or was an adaptation of a substantial part of "in a little Spanish Town". The court heard the recordings and voice and piano rendering as well as evidence from expert. The judge at first instance concluded that there was a definite though not any similarity between the two pieces. However, he also accepted the evidence of the composer of "why" that there had been no conscious copying. There was also insufficient factual evidence to prove subconscious copying from de Angel's memory, even though he might have heard "Spanish Town" without remembering it. Therefore, the plaintiffs lost their case. They also lost their Appeal. At the appellate court, the court of appeal accepted that subconscious copying could be possible but it would have to be shown that the composer was in fact familiar with the plaintiffs' work. Proof of similarity, coupled with access to the original work raises a prime-facie case of copying and it is then a question of fact for the court to determine in the particular case whether there is causal connection between the two pieces. I.e. those who would like to judge for themselves can find the two pieces of music set out therein.

[270] *Ibid.* pp..59-60
[271] Marret P. (1996). *Intellectual Property Law*. Sweet & Maxwell. London. p.31
[272] (1963)

In *Roberto vs Lewis*,[273] Sir Huge Roberto was a distinguished musician, conductor of famous Glasgow Orpheus Choir and keenly interested in old Scottish music. He died in 1952 and his executors who now held the copyright in his works brought the case. The case concerned the music (not the words) of a song "Westering Home" which Sir Huge had published as an "Old Dance Tune arranged by him."

The defendant had published a gramophone record of the song (with different words) sung by Vera Lynn. The plaintiffs claimed that this breached their copyright. The term "arranged" was too vague to help the plaintiff attempt to show that Sir Hugh had composed at least part of the tune and the defendants produced as witnesses who had known the whole tune back in the 1930s and earlier, before Sir Hugh had published it. The plaintiffs argued that following *Water vs Lane* (1900) the printed record itself of the tune had copyright. However, the judge decided that the fact in this case were completely different, so that argument failed. However, the plaintiffs did have copyright in another gramophone record of the tune. One defense witness had heard the song sung in the Scots Guards Serjeans' mess in Malaya about 1950. So the question was granted that the plaintiffs had copyright in their recording, if not in the printed score, had the defendant copied from the record of another source? The hypothetical causal chain via the serjeansts' mess Singer back to the plaintiffs' recording was far too weak and the plaintiffs claimed failed.

However, the case of *Austin vs Columbia Gramophone*[274] involved two problems. First, could an old tune with new adoptions be an original musical work? Secondly could a copy that sounded the same, although it was not a note by note copy, infringe copyright? The answer to both question is in the affirmative. In this case, Mr. Austin made suitable adaptations to the tunes of John Gay's opera "Polly" which was first published in `1729 and the new version of

[273] (1976)C.H.591
[274] (1923)

the opera had a very successful run. The defendants cashed in on this by sending their own to the British Museum, with Mr. Austin's score adapted versions very close indeed to the plaintiff's. These were lastly published on gramophone records as selections from "Polly". Mr. Austin sued for copyright infringement and won his case.

Therefore, all the above cases though firmly old ones but have clearly illustrate the principles lying behind music copyright and actions which amount to copyright infringement in musical works.

3.5.3 Artistic Works

Ordinarily, artistic works appear to encompass a wider spectrum of creative products.[275] The term "artistic work" derives its generic meaning from the English Copyright Act of 1911 which was a statute extended by a local ordinance to apply in Nigeria.[276] That Act spoke of "artistic work" as meaning works of painting, drawing, sculptures, artistic, craftsmanship, architectural works of art, engraving and photographs.[277]

However, under the Nigerian Copyright Act, an artistic work "includes, irrespective of artistic quality, any of the following works or works similar thereto"-[278]

a. Painting, drawing, etching, lithographs, woodcuts, engraving and prints;
b. Maps, plans and diagrams;
c. Works of sculpture;
d. Photographs not comprised in a cinematograph film;
e. Works or architecture in the form of buildings models and
f. Works of artistic craftsmanship and (subject to subsection (3) of section 1 of this Act) pictorial woven tissues and articles of applied handcraft and industrial art.

It is important to note that the nature of protection referred to artistic work under this Act "is the exclusive rights to control the doing in Nigeria of any of the following act that is"-[279]

[275] Olueze M.I. op.cit. P.19
[276] Ocheme P.A. (2000). *The Law and Practice of Copyright in Nigeria*. ABU Press Ltd, Zaria. P.48
[277] ibid
[278] Section 51(1)

i. reproduce the work in any material form;
ii. publish the work;
iii. include the work in any cinematographic film;
iv. make any adaptation of the work;
v. do in relation to an adaptation of the work, any of the acts specified in relation to the work in sub-paragraph (i) to (iii) of this paragraph;

In dealing with the first category of artistic work in the English case of *James Arnold & Co. Ltd vs Miafem Ltd*[280], in holding that rubber stereos used for producing designs or transfer paper were engraving under the 1956 English Act was guided by the definition of engraving in Section 48 of the Act. The section defined engraving to include any etching, lithograph, woodcut print or similar work, not being a photograph. In the words of the court, "engraving" "usually means an image produced from an engraved plate but for the purpose of the Act it would suggest not only the image made from the engraved plate itself."[281]

While noting the increase difficulty in determining with precision what is or is not sculpture, the English court in *Matrix (UK)Ltd vs G.H Maugham(plastic)Ltd*[282] also adopted the ordinary approach, describing it as a three –dimensional work made by an artist's hand. It would ordinarily have to be of some permanent nature although it may admit of some as short-lived as an ice sculpture even if it shows soon after completion.

Again in *Vermat and Povell vs Boncrest Ltd*[283] it was held that for a work to be a work of artistic craftsmanship, one should be able to say that the author was both a craftsman (i.e. a person who makes something in a skillful way and who took justified pride in his workmanship) and an artists (i.e. a person with creative ability who produced something with aesthetic appeal). In the reasoning of the court, both attributes need not derive from the same person i.e. the person conceiving may be different from the person executing, so long as the resultant product qualifies as a work of artistic artisanship.

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[279] Section 6(1) (b)
[280] (1980) R.P.C 397
[281] Asein J.O. op.cit. p.62.
[282] (1997) F.S.R.718
[283] (2001) F.S.R 5

Moreover, the Act expressly defines artistic works to include "works of architecture in the form of building models". Such architectural models should not be confused with other models or patterns intended for the industrial application.[284] The main problem aspect of the definition of artistic work is that it does not recognize building but building models as artistic work.[285] The implication of this is that it is only building models and not the buildings themselves that are protected. Yet houses can be build without building models. Perhaps, the omission of building is an oversight by the drafters.[286]

In *Ukaoha vs Broad-Based Mortgage Finance Ltd*[287], the court was rightly upheld the plaintiff's copyright claim in a 17-story building models as a work of architecture.

Concerning the issue of photograph, the legal issue of concern here are firstly, the terminal differences between the protection given to other work 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.[288] 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.[289] He alone can exercise all the right reserved in copyright and to the total exclusion of the person whose picture was taken.[290] This leaves a room for friction between the photographer and the photographed.[291]

[284] Asein J.O. op.cit. p.67
[285] Umaru M.J. op.cit. P.20
[286] *Ibid.* P. 21
[287] (1992)2 FHCLR 477.
[288] Ocheme P.A. op.cit. p.50
[289] *Ibid.*
[290] *Ibid.*
[291] *Ibid.*

3.5.4 Cinematograph film

Perhaps due to its relatively recent development in this sphere of Nigerian mass communication system, cinematograph films did not received protection as early as other works did, until recently arose under the Copyright Act of 1970.[292]

Prior to this, the 1911 Act merely protected it as an artistic work regarding each frame in the movie sequence as a separated photograph.[293] However, it has now become one of the work of art protected under the current copyright law in Nigeria.[294] Under the Cinematograph Act, cinematograph may be limited to motion pictures produced on a screen by projection of light".

However, the Copyright Act defines cinematograph film to includes,"...the first fixation of a sequence of visual images capable of being shown as a moving picture and of being the subject of reproduction and includes the recording of a sound track associated with the cinematograph film."[295]

Deriving from the above statutory definition, it may be postulated that motion picture whether silent or with sound, irrespective of purpose, class, length or material used would qualify as a cinematograph film.[296] 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.[297]

[292] Asein J.O. op.cit. p.70
[293] *Ibid.*
[294] Ocheme P.A. op.cit. P.50
[295] Section 51 (1), *Copyright Act*.
[296] Ocheme P.A. op.cit. p.51
[297] *Ibid.*

One technical issue that may raised is on the point of proving the term "first fixation" in a cinematograph film. Does this means that the fixation principle relates only to the original copy or copies made of the original simultaneously or after wards? 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 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 the law, the plaintiff/author in an action is at a disadvantage where he is unable to produce such a master tape evidence.[298] Although no judicial decision has yet been reached on this issue, it is hoped that the court would not be too strict in their interpretation of the "fixed fixation" requirement under the law.[299]

It is also submitted that court should liberally interpret the expression "first fixation" to include such other copy or copies reasonably derived from the original of the fixation although the probative value or weight to be attached to such a subsequent copy or copies in evidence is a different thing altogether.[300]

It is to be noted however, that the statutory protection accorded cinematograph films is in the nature of "exclusive right of the author to control the doing in Nigeria, any of the following acts"-[301]

i. make a copy of the film;
ii. cause the film, is so far as it consist of visual images to be seen in public, and in so far as it consist of sound, to be heard in public;
iii. make any record embodying the recording in any part of the sound track associated with the film by utilizing such sound track;

[298] *Ibid.*
[299] *Ibid.*
[300] Olueze I.M. op.cit. p.23
[301] Section 6 (1) (c). *Copyright Act*.

iv. distribute to the public, for commercial purposes, copies of the work by way of rental, lease, hire, loan or similar arrangement.

Moreover, the Act goes further to make the sound track of a film part of the film and thereby denying such sound recording the independent protection of copyright it ordinarily would enjoy. This does not mean, however that if the sound is separated from the film it will not enjoys its normal protection but if incorporated into a film, it will become part and parcel of the film.[302] It follows therefore that sound track of a film may be capable of dual copyright interest-film and sound recording copyright interest.[303]

3.5.5 Sound Recording

Like cinematograph films, sound recording have only recently been granted copyright protection as such. A sound recording is to the ear while cinematograph is to eye.[304] The Nigerian Copyright Act defines sound recording to mean, "The first fixation of a sequence of sound capable of being perceived orally and of being reproduced, but does not include a sound track associated with the cinematograph film."

In other words, a movie sound track is protected as part of the film but any recording made there from or simultaneously with the track will qualify as sound recording.[305] Although often approximated to music, a sound recording does not always have to be a recording of a musical rendition.[306] Sound recording is treated and protected separately from music even though music as sound can and most often be recorded. The reason for such distribution is that all song are musical and more particularly when they relate to technical circumstances like

[302] Umaru M.J. op.cit. p..21
[303] *Ibid.*
[304] Asein J.O. op.cit. p.72
[305] Asein J.O. op.cit. p.72
[306] *Ibid.*

engineering, aviation or even meteorology.[307] Interestingly, however, when a sound recording is included in a film, it is regarded as a sound track capable of enjoying dual copyright in both ways i.e. the recording as well as the film subject to contract.[308]

Therefore, the author of a sound recording whose work is incorporated into a cinematograph film, thus making the sound a "sound track" in the film, should enjoys the same rights provided for under the Act[309] as contemplated for authors of literarily, musical or artistic works in their separate nature.[310]

However, the creation of a sound recording may involves more than one author. For instance, the performer may have his authorship in the performance of the sound that is recorded while the producer has a right to the actual recording and processing of the sound. The copyright may subsist in only one of them where the other makes little or no input to the resultant work.[311] The sound recording may not have been from a human performance, e.g. the sound of waterfall or a computer-generated sound or the producer's contribution to the recording may have been so insignificant as not to warrant a separate copyright.[312]

Moreover, it is evident from the definition of cinematograph film and sound recording that there is no copyright in a recording, which merely copies a cinematograph film, or a previous recording.[313] For instance, if John tapes the compact disc he has borrowed from Oliver, he will be indirectly copying the original film or sound recording made by the recording company and as such there is no copyright in John's recording.[314] This appears to be inconsistent with the provision of the Act, which provides that "A work shall not be ineligible

[307] Ocheme P.A. op.cit. p.52
[308] *Ibid.*
[309] Section 9 (2). *Copyright Act*.
[310] Ocheme P.A. op.cit. p.52
[311] Asein J.O. op.cit. p.72
[312] *Ibid.* P.23
[313] Umaru M.J. op.cit. p.22
[314] *Ibid.*

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."[315]

A careful perusal of the definitions of cinematograph film and sound recording will reveal that there is no inconsistency between it and the provisions in questions.[316] The definitions stipulate that the "first fixation" is a pre-requisite for copyright protection of cinematograph and sound recording.[317] In the above example, John's recording is definitely not the "first fixation" of a sequence of visual images or sound ….". and has therefore not necessarily because it had infringed the copyright in the original film or sound recording made by the recording company.[318]

3.5.6 Broadcast

Like sound recording broadcast were first protected, under the 1970 Act. The 1911 Act merely recognized the copyright in materials broadcast (where they are materials eligible for copyright) as belonging to the owner of the copyright in the material such as the broadcast of live events or a performance without an underlying script or work.[319]

The Act define broadcast as "Sound or television broadcast by wireless telegraph or wire or both, or by satellite or cable programmes and includes re-broadcast."[320]

The inclusion of the re-broadcast[321] that is a simultaneous or subsequent broadcast by one broadcasting authority of the broadcast of another broadcasting authority.[322] Broadcast are

[315] Section 1 (4). *Copyright Act*.
[316] Umaru M.J. op.cit. p.22
[317] *Ibid.*
[318] *Ibid.*
[319] Asein J.O. op.cit. p.73
[320] Section 51 (1). *Copyright Act.*
[321] Asein J.O. op.cit. p.73
[322] Section 51 (1). *Copyright Act*.

protected as transmitted signals implying that the need for a separated recording is only for evidentially purposes and is not a requirement for the enjoyment of copyright.[323]

The Act also went further to define a broadcasting authority" to mean, "Any authority established under any law in Nigeria or elsewhere providing broadcasting services for public reception."[324]

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 a telecommunication system or otherwise than by wireless telegraphy for reception-[325]

a. at two or more places (whether for simultaneous reception or at different times) in response to request different users or for presentation to members of the public.

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".[326] 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. In view, there is no material difference between a cable programme and satellite, at least in legal terms.[327]

The nature and scope of copyright protection in broadcast available to the broadcasting authority is the exclusive right to control the doing in Nigeria any of the following Acts-[328]

[323] Asein J.O. op.cit. p.73
[324] Section 51 (1). *Copyright Act*.
[325] *Ibid.*
[326] Ocheme P.A. op.cit. p.54
[327] *Ibid.*
[328] Section 8 (1), *Copyright Act.*

a. the recording and 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 recognizably derived from the original, and
c. the distribution to the public, for commercial purposes, of copies of the work by way of rental, lease hire, loan or similar arrangement.

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.[329] By way of heralding a solution to practical problems, the Act indicates that:

> Where the owner of the copyright in any literary, musical or artistic work authorizes a person to incorporate the work in a cinematograph film and a broadcasting authority broadcast the film, the owner of the copyright shall, in the absence of any express agreement to the contrary between the owner and that person, be deemed to have authorized the broadcast.[330]

This statutory provision is seemingly shielding the broadcasting authorities against claims by authors of other copyright works. It is seem to be a legislative leniency for broadcasting houses in Nigeria.[331] Nevertheless, it also seems to have a good legal reasoning as can be seen in the U.S case of *Soney Corp. of America vs Universal City Studios*[332] where the 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 popularize them, but that they would not object to their works being recorded by private home viewer."

[329] Section 8 (2)*, ibid.*
[330] Section 9 (1), *ibid.*
[331] Ocheme P.A. op.cit. p.55
[332] (1984) 81 U.S.L.W. 409

In the Nigeria 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.[333] This is aim at insulating the broadcasting organizations most of whom are government owned, from claims of private authors whose works may have been so included in their broadcast without any authorization.[334]

3.6 Conditions for Eligibility of Copyright

Having considered the categories of works that are specifically designated as eligible for copyright protection under the Nigerian Copyright Act, this is only the first step,[335] in that a claimant must show that his work falls within one of the six categories recognized under the statute for copyright purposes. The Act stipulate additional requirement for literary, musical and artistic work but the work of cinematograph film is subjected to somewhat different rules.[336]

As a rule of procedure, the Act delineated the nature of copyright in sound recording and broadcast from all others.[337] The Act stipulates that "A literary musical or artistic work shall not be eligible for copyright unless-"[338]

a. sufficient effort has been expended on making the work to give it an original character.
b. the work has been fixed in any definite medium of expression now known or later to be developed from which it can be perceived, reproduced or otherwise communicated either directly or with the aid of any machine or device.

[333] Ocheme P.A. op.cit. p.55
[334] *Ibid.* p. 56l
[335] Asein J.O. op.cit. p.49
[336] Ocheme P.A. op.cit. p.27
[337] *Ibid.*
[338] Section 1 (2), *Copyright Act*.

It may be deduced from the content of the provision of S.I (2) of the Act that there are two requirement applies to the works of literary, musical or artistic works and not to cinematograph films, sound recording and broadcast. The reason for this is not immediately clear but it makes sense that the copyright conferred on the other three categories of works is based on the fact of creation and not on the creative content.[339]

3.6.1 Originality of work

It is a condition precedent under the Nigerian Copyright Act that before a work of literary, musical or artistic enjoys a copyright protection, there must have been sufficient efforts expended in their making so as to give them an original character.[340] The Act does not define the word "original" for one to appreciate its contextual import in all its ramifications.[341]

However, Charlesworth's Mercantile Law[342] proffers a definition thus, "Original merely means that the work must be the product of the independent skill and labor of the author and must not have been slavishly copied or derived from some pre-existing work".

Obviously, the above definition underscores the need to expend sufficient effort in the making of the work, so much, so that the author must justify his claim to copyright in his work.[343]

However, in treating what may be known as "Original" in copyright, the first element of consideration is "Idea".[344] It is the principle of copyright law that the protection does not extend to ideas, or schemes or systems or methods[345]. This was restated in *Hollinrake vs Trust well,*[346] "that copyright is confined to the expression of such ideas, and that if such expression is not copied, then copyright is not infringed. To further give credence to the theory of

[339] Asein J.O. op.cit. p.74
[340] Ocheme P.A. op.cit. p. 31
[341] Olueze I.M. op.cit. p.25
[342] 4th edition. p.627
[343] *Ibid* p.26
[344] Ocheme P.A. op.cit. p. 31
[345] *Ibid.*
[346] (1894)3 ch.420

originality, the court in *Ladbroke (Football) Ltd vs William Hill (Football) Ltd*[347] it was held that to determined whether a work has the originality requisite to render it original work within the Act, it is right to take into account the considerable skill, judgment and labor expended by the author in the work.

In *University of London Press vs University Tutorial Press*[348] the court opined that:

> The word "original" does not in this Connection means that the work must be expressed of original or inventive thought. Copyright Act is not concerned with the originality of ideas, but with the expression of thought, and in the case of "literary work" with the expression of the thought in print or writing. The originality, which is required, relates to the expression of the thought. But the Act does not requires that the expression must be in an original or novel form, that the work must not be copied from another work, that it should originate from the author.

The above dictum was cited with approval in *Ladbroke (Football) Ltd vs William Hill (Football) Ltd*[349]. Originality therefore, must not by any dint of imagination be stretched to mean novelty of thought or ideas as stated above.[350] It is however, to be noted that the choice inherent in copyright that seeks to protect the actual expression of ideas, rather than the idea itself, has to do with the problem of proof. How claims are established to ideas, given its unlimited nature? The word "idea" is defined as meaning inter alia "thought, picture in the mind, plan, scheme, design or purpose".[351] 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 form in which it was expressed. To prove this, recourse is made to the mode in which the ideas were expressed.[352] Where a later work has been produced independently of an ealier work, especially if it is similar in character, the presumption is that

[347] (1964) 1 ALL.ER. 465
[348] Supra.
[349] supra
[350] Olueze I.M. op.cit. p.26
[351] Ocheme P.A. op.cit. p.32
[352] *Ibid.*

the first author has been copied.[353] 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.[354]

The requirement of sufficient effort provided in the first wording of S.I (2) (a) of the Act mean that a sufficient, conceivable, independent skill, labour or judgment must have been expended on the work.[355] This need not be overwhelming sufficient in the true sense of sufficiency. What is required is a real labour or judgment in the making of the work. The case of *Offrey vs Chief S.O Ola & Ors*[356] was very instructive as to the guiding principle of sufficient effort. In this case, the plaintiff in 1963 while the headmaster of All Saint's School Oshogbo, designed and put out scheme for sale a school record book known as "New Era Scheme of work and record book". The plaintiff's labor in the book consisted mainly in the drawing several horizontal and vertical lines. In 1967, the plaintiff realized that the 2nd defendants who are publishers, printers and book sellers were producing and selling some record books which are materially the same as his book, especially at pages 1 to 42. The 2nd defendants knew of the existence of the plaintiff's book prior to 1967, through the first defendant who was then an administrative assistant of Anglican Schools in Oshogbo area, and the second defendant printed and published the record books on the instructions of the first defendant.

The plaintiff claimed against the defendant an account of all monies received by them either jointly or severally from various copying and printing, and sales of the books from January 1967 up to the date of judgment and the payment over to the plaintiff of the amount found due on the jointly or severally from various copying and printing among other thing.

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[353] *Ibid.*
[354] *Ibid*
[355] Olueze I.M. op.cit. p.27
[356] (unreported suit no.HOS/23/63) decided on the 27th june,1969.

The court held that copyright would exist in a given product if that product is the result of some substantial or real expenditure of mental or physical energies of the producer and the labor or skill was not a negligible or common place one.

The court held that the amount of labor and skill, judgment or integrity required to support successfully a claim for copyright was question of fact and degree in every case. In the instance case, there was no evidence that the plaintiff had put into its production some substantial amount of labor. The record book merely showed a neat layout of vertical and horizontal columns on some pages and such could not be called an original literary work compilation for giving ready, convenient and accurate information to people who needed such information. The plaintiff had therefore not established that record book in question is an original literary work or compilation being the result of his labor and skill.

Therefore, it is submitted that 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.[357] The only test is that the author must have expended some kind of efforts uncommon to all others.[358] Mreover, it does not require any inventiveness for a work to be accorded copyright in Nigeria. In fact, a nebulous protection is granted by the Act, which seems to eliminate the idea of originality.[359] 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".[360]

3.6.2 Fixation

This is the physical form in which the ideas were expressed. The Act provides that eligibility for copyright is obtainable for literary, musical or artistic works where "the work has been

[357] Ocheme P.A. op.cit. p.37
[358] *Ibid.*
[359] *Ibid.*
[360] Section 1 (4), *Copyright Act.*

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."[361]

The Act does not prescribe any standard or form required of the fixation.[362] However, the principle underlying the requirement of fixation is largely evidentiary. Fixation principle therefore, is of high probative value to copyright.[363] Moreover, it appears from the content of section 1 (2) of the Act that the requirements of originality and fixation are conjunctive. They are mandatory requirements every literary, musical or artistic work must meet.[364]

However, the Act also provides a caveat that, "That an artistic work shall not be eligible for copyright, if at the time when the work is intended by the author to be used as a model or pattern to be multiplied by any industrial process."[365]

What this caveat is aimed at forestalling perhaps, is the confusion that may arise as a result of a fixation requiring industrial process sought to be protected under the designs or trademarks law.[366] A possible construction of this provision is that a drawing or painting produced upon hardware is not excluded from copyright protection under the Act unless more than one copy of such hardware is capable of industrial reproduction.[367]

The aims for the legal requirement of fixation are: firstly, it is of evidentiary value, since works that are not fixed in any medium from which they can be perceived, would themselves

[361] Section 1 (2)(b), *ibid*.
[362] Olueze I.M. op.cit. p. 29
[363] *Ibid.*
[364] *Ibid* .p. 30
[365] Section 1 (3), *Copyright Act*.
[366] Ocheme P.A. op.cit. p.28
[367] *Ibid.*

be difficult to produce in evidence before a law court in order to compare them with an alleged infringing copy.[368]

Secondly, since copyright law essentially protects expressed ideas and not ideas, such expressions are better done through particular medium from which they can be perceived, otherwise, the argument disappears.[369] For example, a play or a novel is only protected because it is contained in a written book. This is particularly so in the means of literary, artistic and musical works where it would be impracticable to speak of any such work without a medium.[370] This has been aptly illustrated by Lord Farwell, J in *Donoghue vs Allied Newspapers Ltd.*[371] Wherein His Lordship declared-

> There is no copyright in ideas. A person may have a brilliant idea for a story or for a picture or for a play, and one which appears to him to be original, but if he communicate that idea to an author or an artist or playwright, the products which is the result of the communication or the playwrights is the copyright of the person who has clothed the idea in form whether by means of a picture, a play or a book, and the owner of the idea has no right in the production.

The above dictum clearly stresses the importance of clothing or fixing a work in perceivable form or medium of expression. More technically, the requirement of fixation in copyright implies something more than transient or inconsiderable object.[372] In other word, the fixation must allow for some permanency. Moreover, the law has widened the scope of the medium 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 smelting etc) or with the aid of any mechanical, electronic or other devices.[373]

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[368] *Ibid.*
[369] *Ibid.* p.29
[370] *Ibid.*
[371] (1913)29 T.L.R . P.109
[372] Ocheme P.A.op.cit. p.29
[373] *Ibid.*

Thus, in *Nicholas vs Pitman*[374], the defendant took nearly verbatim notes of the plaintiff's lecture. The plaintiff had delivered the lecture from memory though it was contained in a manuscript. In granting the injunction sought against the publication of the lecture by the defendant, the court held that the audience, although at liberty to take notes and use them for their personal purposes, could not rightly publish the notes for profit without prior authorization. Similarly, in *Macklin vs Richardson*[375] the defendant was prevented from publishing his copy of the plaintiff's play, which the former had taken down from the mouth of actors at a private performance.

It is therefore, submitted that it does not matter whether the fixation for this purpose was carried out without the permission of the author or even without his knowledge.[376]

3.7 Categories of person's who may claim copyright

The Nigerian Copyright Act having deal with the eligible works in which copyright subsist, it goes further in identifying the persons whose works passed eligibility test. These persons may be either in respect of their citizenship or in respect of place of domicile, connection to their works, and relationship of the work to government or institutional framework or by reciprocal extension of copyright protection.

a. Author's citizenship or domicile in Nigeria

This is 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.[377] The Act refers to this criterion as

[374] (1984) 26 CH D. 334
[375] (1770) 27 E.R. 451
[376] Asein J.O. op.cit. p.84
[377] Ocheme P.A. op.cit. p.38

virtues of author's nationality or domicile or works of government, state authorities or international bodies.[378]

The object of this is that even if the work seeking protection in copyright has already passed test of originality, sufficient effort and fixation, but fails to meet the requirement of author's status as to citizenship or domicile of the authors, it cannot qualify to be protected by law.[379]

Thus, the Act provides that-

> Copyright shall be conferred by this section on every work eligible for copyright of which 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, a qualified person, that is to say"-[380]

i. an individual who is a citizen of or is domiciled in Nigeria; or

ii. a body corporate incorporated by or under the laws of Nigeria.

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 such that the contributions of each author is inseparable from the contribution of the other author or authors.[381]

Citizenship as provided under the Nigerian Constitution is a attainable either by birth[382] or by registration[383] or by naturalization.[384] However, the Act does not provide a guide as to how the citizenship of an author would be ascertained. It is submitted that provision of the constitution be applied in such cases. Domicile is an idea of law.[385] As a legal concept, domicile is founded on the trite common law principle of individual liberty of choice of the

[378] *Ibid.*
[379] *Ibid.*
[380] Section 2 (1). *Copyright Act.*
[381] Ocheme P.A. op.cit. p.39
[382] Section 25, *Constitution of the Federal Republic of Nigeria, 1999* (as amended).
[383] Section 26.*ibid.*
[384] Section 27.*ibid.*
[385] Olueze I.M. op.cit. p.32

legal system of domestic life.[386] It is as, "the place in which a man has his fixed and permanent home, and to which whenever he is absent he has the intention of returning."[387]

Domicile is of three ways that is either by birth, or by choice or by operations of the law.[388] Two elements are needed to consummate the concept of domicile i.e. there must be fixed and permanent home, and intention to remain permanently (*animus manendi*).[389]

It is evident from the wording of the section that a foreigner who is only resident in Nigeria does not fall within the meaning of "Qualified person" under the subsection. In view of the transients mobility of authors nowadays, it is submitted that residence be incorporated in the interpretation of "qualified person".[390] Therefore, an individual who is not a citizen of Nigeria neither domicile in Nigeria but had habitual residence in Nigeria may for purposes of the Act be included as qualified person.[391]

However, as to the issue of joint authorship, the work must be produced by the collaboration of two or more authors wherein the contribution of each is inseparable from that of the other or others. The collaboration must proceed from collective efforts of the authors and not by mere coincidence or improvement by one author with or without the nod of the other[392] as was held in *Levy vs Rutley,*[393] that it is not mandatory that each of the joint authors must qualify as "qualified person" within the meaning of the section as it mentioned in the subsection that "any of the authors" qualifies the work for eligibility.[394]

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[386] *Ibid.*
[387] Mosley & Whitley's Law Dictionary,8th edition. p.119
[388] Olueze I.M. op.cit. p.32
[389] *Ibid.*
[390] *Ibid.* p.33
[391] *Ibid.*
[392] *Ibid.*
[393] (1871) L.R. 6 C.P. p.523
[394] Olueze I.M. op.cit. p.33

b. Connection of the Work to Nigeria.

Apart from eligibility through the author's connection to Nigeria, a work is also eligible for copyright protection even though its author or authors is neither a Nigerian citizen nor domicile in Nigeria provided the work is first published in Nigeria or in the case of sound recording is made in Nigeria.

The Act provides that, "Copyright shall be conferred by this section on every work other than broadcast which is eligible for copyright and which"-[395]

a. being a literacy, musical or artistic work or a cinematograph film, is first published in Nigeria; or
b. being a sound recording is made in Nigeria and which has not been the subject of copyright conferred by section 2 of this Act.

Under this circumstance, a literary, musical, artistic work or cinematograph film shall be ineligible for copyright if it was first published in a country other than Nigeria and subsequently published in Nigeria.[396] However, a work first published in other country and later published in Nigeria shall nevertheless be treated as having been first published in Nigeria if the two publications took place within the period of not more than thirty (30) days.[397] Furthermore, a work is deemed to have been published if copies of it were made available in a manner sufficient to render the work accessible to the public.[398] However, where only part of a work is published in the first instance, that part should be treated as separate work.[399]

[395] Section 3, *Copyright Act*.
[396] Olueze I.M. op.cit. p.35
[397] Section 51 (2)(c), *Copyright Act.*
[398] Section 51 (2)(a).*Ibid.*
[399] Section 51 (2)(b).*Ibid.*

However, regarding the issue of sound recording, it is considered to be neater compared with that of literacy, musical or artistic work because it avoided the controversy of being "first made".[400]

c. Persons who are employed to make a work in the course of their employment

In this type of situation, the law stipulates that copyright in the work shall belong in the first instance to the author unless otherwise stipulated in writing under the contract of employment.[401] The Nigerian courts have followed their counterparts in applying tests for determining whether an author is an employee or a commissioned person. There is a distinction between authors who are employed under a contract of service or apprenticeship and a commissioned author, that is someone under a contract for service. The former are employees properly so called, while the latter are commissioned persons or independent contractors. Thus, in *Yusufu Ladan vs Sha Kallo pub. Co. Ltd,*[402] the defendant in an action for infringement alleged that the plaintiff was not the copyright owner because he was an employee. The court held that the author must not only be an employee, the work in question must have been made in the course of employment for the automatic transfer clause to prevail, to transfer copyright to the employer.

The case of *Joseph Ikhuoria vs Campaign Services Ltd and Anor*[403] is indeed, very instructive. The plaintiff claimed against the defendants, damages allegedly suffered by him when the defendants infringed his copyright in a photographic material taken of the plaintiff between July and September 1983 by the wrongful printing, reproduction and display of the said photographic material by the defendants in the newspapers.

[400] Asein J.O. op.cit. p.85
[401] Section 10 (2)(b), *Copyright Act*.
[402] (1972) NCLR 424
[403] (1986) F.H.C.R. p.308

The plaintiff was employed as a layout finish artist by the 1st defendant company. However, sometime between July and August 1983 his boss instructed him to prepare a layout for advertisement for the 2nd defendant, an insurance company. The plaintiff's suggestion as to the apparels to be worn was accepted by his boss and the photographs in which he appeared were however meant to be part of the sketch. The plaintiff admitted knowing that the sketch that he prepared with his photographs therein would be used to advertise the 2nd defendant's company's policy, if approved and that it was the 2nd defendant that commissioned the job. The plaintiff's main grouse was that his photographs borne out of the sketch were inserted in some newspapers without his consent and that he was not paid anything. Even when he had resigned from the 1st defendant company his photograph was still being used for advertisement.

The court reviewed the relevant statutory provisions of the 1970 Copyright Act, in particular, sections 2 and 9, and concluded that the plaintiff was the author of the work. However, *Anyaegbunam J.* went further to refer to the conditions of service, which the plaintiff signed and, dismissing the plaintiff's claim and held, "…but for exhibit H, H2 cited above, I would have stood my ground that the plaintiff was the owner of the sketch…in the premise, I would therefore reject the plaintiff's claim. It is hereby dismissed."

Furthermore, the Act states that:

> Where literary, artistic or musical work is made by the author in the course of his employment by the proprietor of 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 in so far as the copyright relates to the work in any newspaper, magazine or similar periodical or to the reproduction of the work for the purpose of its being so published but that in all other respects, the author shall be the first owner of the copyright in the work.[404]

d. Persons who are commissioned to make a work

[404] Section 10(3), *Copyright Act.*

Where the work has been commissioned by a person who is not the author's employer under a contract of service or apprenticeship, the law provides that the copyright in the work shall belong in the first instance to the author unless otherwise stipulated in writing under the contract.[405]

e. Persons to whom copyright works are assigned.

Copyright is transmissible by assignment, by testamentary disposition or by operation of law, as movable property.[406] Therefore, upon the death of the copyright owner, the copyright will devolve upon his personal representative for the benefit of the person to whom he has bequeathed it or if the copyright owner has died intestate, for the benefit of his next-of-kin.[407]

An assignment or testamentary disposition may be limited to apply to only some acts, which the owner of the copyright has the exclusive right to control or to a part only of the period of the copyright or to a specified country or other geographical area. However, no assignment is effective unless it is in writing.[408]

It should be noted here that by virtue of an amendment to the Copyright Act, the law now allow "Collecting Societies" to be formed in order to protect the interest of copyright owners, instead of each copyright owner suing all infringers, individually. The rights of copyright owners are accordingly assigned to the Collecting Society.[409]

[405] Section 10 (2)(a), *ibid.*
[406] Section 11 (1), *ibid.*
[407] Babafemi F.O. op.cit. p.30.
[408] Section 11 (3), *Copyright Act.*
[409] Section 39, *ibid.*

f. Persons to whom a licence of the work has been granted

Under the Copyright Act, there is a provision to grant licences to others. Thus, an owner of copyright may grant to someone else the right to do acts that would normally infringe his copyright. The Act seems to distinguish two types of licence as discussed above.

g. The Federal or State Government where it has commissioned someone to make a work.

Where the work is made by or under the direction of the Federal Government, a State Authority or a prescribed international body, copyright in the work shall vest initially in the Federal Government on behalf of the Federal Republic of Nigeria, or in the State Authority on behalf of the State in question, or in the international body in question, as the case may be and not in the person who is commissioned to do the work.[410]

h. Persons who are neither Nigerian citizens nor Domiciled in Nigeria but who are citizens of or Domiciled in a country that is a party to an obligation in a Treaty or other international agreement to which Nigeria is a party.

Such persons can claim copyright over their works, if the work was first published-

i. in a country which is a party to an obligation in a treaty or other international agreement to which Nigeria is a party;
ii. by the United Nation or any of its specialized agencies;
iii. by the organization of African Unity (now African Union) or; by the Economic Community of West African States.

Equally, if a company is a body corporate established by or under the laws of a country that is a party to an obligation in a treaty or other international agreement to which Nigeria is a party, as in the above case, copyright shall be conferred by reference to the international agreement.

[410] Section 10 (5), *ibid.*

Finally, the point must be made here that someone who can lay claim to copyright also has the right to claim authorship of his work, in particular that his authorship should be indicated in connection with any of the acts referred to in section 6 of the Act except when the work is included incidentally or accidentally when reporting current events by means of broadcasting.[411] Equally, anyone who can lay claim to copyright can also object and seek relief in connection with any distortion, mutilation or other modification of and any other derogatory action in relation to his work, where such action would be or is prejudicial to his honour or reputation.[412]

3.8 Rights of the Copyright Owner

The various rights 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 *simpliciter* in which case he enjoys only the economic rights become claimable either directly by the owner or through his heirs or successors-in- title.[413] These are bundle of separable rights each of which may be exploited, exercised or alienated independently of the other. In other words, the economic rights of owner of copyright are not an indivisible whole.[414]

The entire idea of copyright protection revolves around two important rights. These are economic rights and moral rights.

3.8.1 Economic rights

[411] Section 12 (a), *ibid.*
[412] Section 12 (b), *ibid.*
[413] Ocheme P.A. op.cit. p.69
[414] *Ibid.*

These are rights which the author could exploit in exchange for economic remuneration to enable him earn a livelihood through the various forms of disposal of the rights granted by the law.[415]

In respect of literary or musical work, the owner of the copyright in the work is vested with the "exclusive right to do or authorize the doing of the following acts"-

(a) Reproducing the work in any material form.

The term "reproduction" is defined as "the making of one or more copies of a literary, musical or artistic work, cinematograph film or sound recording".[416] A literary or musical work is deemed to have been reproduced if one or more copies of the work is made without the consent of the copyright owner.

(b) Publishing the work.

A literary or musical work shall be deemed to have been published if copies of it have been made available in a manner sufficient to render the work accessible to the public.[417] In *I.J Adenugha vs Ilesanmi Press & Sons (Nig.) Ltd*[418] it was held that making the work to the public suffice it to say that sale of the work to the public, display and free gift of copies of the work constitute the commonest acts of publication. However, if a part of a work is published in the first instance, that part shall be treated as separate work for the purpose of publication.[419]

(c) Performing the work in public

The Act does not define "public performance". Nevertheless, to perform a work publicly means to render it at a place or at any place where a substantial number of persons outside the

[415] Section 6 (1) (a-c), *Copyright Act.*
[416] Section 51 (1),*ibid*.
[417] Section 51 (2), *ibid.*
[418] Supra.
[419] Olueze I.M. op.cit. p.63

normal circle of family and its social acquaintance is gathered.[420] Thus in *PRS vs Hawthorns Hotel (Bournemouth) Ltd*[421] a performance by an orchestral trio at an unlicensed residential and two other persons was held to be a "public performance". Also in *PRS vs Carmelo,*[422] the court held that a performance in a private room made audible in an adjoining public restaurant was a public performance.

(d) Producing, reproducing, performing or publishing any translation of the work.

The owner of a copyright also has the exclusive right to control the translation of his literary or musical work.

(e) Making any cinematograph film or record in respect of the work.

The Act confers on a copyright owner the exclusive right subject to the exceptions stipulated in the second schedule to the Act, to control the making of cinematograph film or any recording based on his literary or musical work.[423]

(f) Distributing to the public by way of rental, lease, hire, loan or similar arrangement.

The Act preserves for the copyright owner the right to distribute to the public for commercial purpose, copies of his work by way of rental, lease, hire, loan or any similar arrangement. It appears that distribution of copies of the work to domestic or private users for non-commercial or charitable purposes is not contemplated by the Act.[424]

(g) Broadcasting or communicating the work to the public by loudspeaker or any other similar device.

[420] *Ibid.*
[421] (1933) Ch. 855
[422] (1936) 3 ALL. ER. 855
[423] *Ibid.*
[424] *Ibid.*

The expression "communication to the public" is defined to "includes, in addition to any live performance or delivery, any mode of visual or acoustic presentation, but does not include a broadcast or rebroadcast.[425]

(h) Making any adaptation of the work.

The Act also defined "adaptation" to mean "the modification of pre-existing work from one genre of work to another and consist in 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.[426] For example, a dramatized version of a literary or musical work is simpliciter an adaptation thereof.[427]

(i) Protection of a translation or adaptation of the work.

A copyright owner in the case of literary or musical work has the right to control the reproduction, publishing, performance in public, distribution to the public, broadcast etc of the translation or adaptation of such works.[428]

Moreover, in respect of Artistic work, a copyright owner also has some exclusive economic right over his work. The Act stipulates that -

> "in the case of an artistic work, to do or authorize the doing of any the following acts that is"-[429]

(a) reproduce the work in any material form;

(b) publish the work;

(c) include the work in any cinematograph film;

(d) do in relation to an adaptation to the work in sub-paragraph (ii) to (iii) of this paragraph.

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[425] Section 51 (1), *Copyright Act.*
[426] *Ibid.*
[427] Olueze I.M. op.cit. p.67
[428] *Ibid.*
[429] Section 6 (1) (b), *Copyright Act*.

Concerning cinematograph film, the owner is also vested with certain economic right as the Act states, "In the case of cinematograph film, to do or authorize the doing of any of the following acts that is -"[430]

(a) make a copy of the film.

(b) cause the film, in so far as it consist of visual images, to be seen in public and in so far as it consist of sounds to be heard in public.

(c) make any record embodying the recording in any part of the sound track associated with the film by utilizing such sound track,

(d) distribute to the public, for commercial purposes copies of the work, by way of rental, lease, hire loan or similar arrangement.

Concerning sound recording, the Act accorded some economic rights to the owner as it states, "Copyright in a sound recording shall be the exclusive right to control in Nigeria"-[431]

(a) the direct or indirect reproduction, broadcasting or communication to the public of the whole or a Substantial part of the recording either in its originals form or in any form recognizable derived from the original.

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

Lastly, also the Act specifies the nature of economic rights of an owner of copyright in the work of broadcast it states, "Subject to this section, copyright in a broadcast shall be the exclusive right to control the doing in Nigeria of any of the following acts that is-"[432]

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

[430] Section 6 (1) (c), *ibid.*
[431] Section 7 (1), *Ibid.*
[432] Section 8 (1), *Ibid.*

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

3.8.2 Moral Rights

Both the Copyright Act and the Berne Convention have provided for moral rights conferred on a copyright owner. The Nigeria Copyright Act states that, "The author of a work in which copyright subsist has the right-"[433]

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

It is therefore discernible from the above provision that the moral right of an author of any protectable work is perpetual, inalienable, non-derogatory and imprescriptibly in nature. The first moral right referred to in paragraph (a) is associated with one's own work which commonly referred to as the "right of paternity"[434] while the one referred to in paragraph (b) is the right to object to certain types of distribution of one's work otherwise known as " the right of integrity".[435]

[433] Section 12, *Copyright Act*.
[434] Umaru M.J. op.cit. p.48
[435] *Ibid.*

Moreover, the Berne Convention of 1885 held in Paris has conferred moral right on an author of a work. The article provides as follows-[436]

1. Independently of the author's economic right and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and object to any distortion, mutilation or other modification of or other derogatory action in relation to, the said work which would be prejudicial to his honour or reputation.
2. The rights granted to the author in accordance with the preceding paragraph shall, after his death be maintained at least until the expiry of the economic rights and shall be exercisable by the persons or institutions authorized by the legislation of the country where the protection is claimed.
3. The means of redress for safeguarding the right granted by this article shall be governed by the legislation of the country where the protection is claimed.

A careful perusal of the above provision indicated that even after the death of an author of the work, his moral right is still subsisting until when the duration of economic rights whether vested in the author or on any other person has elapsed.

3.9 Duration of Copyright

The duration of copyright depends on the type of work and whether the authorship is ascertained, anonymous or pseudonymous. The first schedule to the Act provides that copyright in a literary, musical or artistic work, excluding photographs, is from the time of creation through the life of the author and seventy years thereafter. Where the author is a body corporate, or the work is made by or under the direction or control of the Government, a state

[436] Article 6, *Berne Convention,* 1886.

authority or a prescribed international body, the term is for a fixed term of seventy years, calculated from the year immediately following that in which the work was first published.[437]

By using a single reference point for all the literary, musical or artistic works authored by natural persons, it means that all the works of a particular author would fall out of copyright at the same date, irrespective of when the works were created. The period of seventy years is computed from the beginning of the year immediately following the one in which the death of publication occurred. This also makes it easier to calculate the term of copyright even the exact date of an author's death is not known.[438] While the material embodying a copyright work may be destroyed, the copyright itself is indestructible although its existence in that case may become no more than notional. On the other hand, so long as the copyright meets the entire legal requirement for its continued existence, it cannot extinguish merely on account of the acts of the owner or any other person. Its continued existence is determined by and subject only to the operation of law.[439]

However, the law permits that whenever the true identity of the author becomes known, the term of copyright may then be calculated from the year immediately following the death of the author and it would not matter whether the author's identity become known during his lifetime or after his death.[440] To have effects, the identity of the author of an anonymous or pseudonymous work must be disclosed by a credible source and in the event that the copyright expire before the identity revealed, it is doubtful if the expired copyright can be revived by a subsequent disclosure.[441]

[437] Asein J.O. op.cit, p.107
[438] *Ibid.*
[439] *Ibid.* pp.107-108
[440] *Ibid.*
[441] *Ibid.*

Where the work in question is a work of joint authorship, reference to "the author" means the author who dies last, irrespective of whether or not he was a person of Nigerian domicile or citizenship at the time the work was made.[442]

The term of years for Cinematograph film and photograph is fifty full calendar years after the work was first published.[443] For Sound recording, the copyright duration is fifty years, after the end of the year in which the work was published.[444] Similarly, for Broadcast, it is fifty years after the end of the year in which the broadcast first took place.[445]

Furthermore, the Act provides that "a performer's right shall subsist until the end of the period of fifty years from the end of the year in which the performance first took place.[446]

3.10 The Public Domain

When the duration of copyright in a work expire or lapses, the work goes into the public domain. This means that the copyright owner no longer has control over what is done with his copyright work.[447] However, his moral rights will continue to subsist in the work forever. Whenever his work is mentioned, he shall be acknowledged as the author of the work.[448] His right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to the said work, remains intact also. This is notwithstanding the fact that the work has gone into the public domain.[449]

In conclusion, it is discernible that concept of ownership in copyright is determined by law. It is the law that specifies the owner of copyright in any work protected by Copyright Act. Therefore, works that are protected by law has been specifically stated in the Act as such any

[442] *Ibid.*
[443] First Schedule to the *Copyright Act,* Cap. C28, Laws of the Federation of Nigeria, 2004.
[444] *Ibid.*
[445] *Ibid.*
[446] Section 27, *Copyright Act.*
[447] Umaru M.J. op.cit. p.49
[448] *Ibid.*
[449] *Ibid.*

work that falls within the categories is protected even though it is subjected to some conditions by the Act. However, all eligible works have a time limit within which such work would enjoy copyright protection.

CHAPTER FOUR
COPYRIGHT OWNERSHIP AND INFRINGEMENT

4.1 Introduction

There are various agencies saddled with the responsibility of ensuring compliance to the Copyright law in Nigeria. The major stakeholders in this area of enforcement are the Nigerian Copyright Commission, the Nigerian Police Force and the Nigerian Custom Service. However, this chapter is concern with the issue of infringement of copyright in Nigeria. The unauthorized use of someone's work without his permission is termed as infringement, and it may be civil or criminal. The right of action in civil infringement is on the owner, assignee or an exclusive licencee while the Nigerian Copyright Commission prosecutes an action for criminal infringement. In an action for civil infringement, the copyright owner shall be entitled to remedies whereas for criminal action, the infringer may be subjected to sanctions, i.e. fine or imprisonment.

However, the Act provides numerous exceptions to copyright control in its Second and Third Schedules, the legal effect of which will afford a complete defence to the defendant if the act complained of falls within the permitted acts in these Schedules. Finally, the chapter highlighted some of the problems and challenges of the enforcement of copyright in Nigeria.

4.2 Infringement

Infringement of copyright occurs when any person, without the licence or authorisation of the copyright owner, does or causes any other person to do any of the restricted or prohibited acts in relation to a copyright work.[450] An act of copyright infringement, *ex facie* presupposes that the alleged infringer has done any of the act that are exclusively the rights of an owner of copyright. In addition, that there is substantial objective similarity between the copyright

[450] Olueze M.I. (1998). *Nigerian Copyright Law*. Maglink International Ltd, Apapa, Lagos, Nigeria. p.89

work and the alleged infringing work so much so that there is a reasonable inference that the infringing work derived substantially from the copyright work.[451]

Basically, for an action of infringement to be established, there must be a causal and not casual connection between the copyright work and alleged infringing work.[452] It is however, to note that the issue of substantial similarity is not determined by word for word comparison (in the case of literary work) of the copyright work and the infringing work coupled with evidence of access to the copyright work does not raised an irrebuttable presumption of infringement, but at most a prima facie case the defendant to answer. It was held in the case of *Francis Day & Hunter Ltd & or vs Bron & A.*[453] Obviously, a defendant can absolve himself from liability for copyright infringement by merely showing that he was unaware that his act constitute infringement of copyright in a work.[454]

What constitutes an infringement varies in a nature and scope from one type of copyright work to another, depending on the set of acts exclusively reserved for the copyright owner.[455] An infringement may be civil or criminal infringement, direct or indirect infringement.[456]

4.2.1 Civil Infringement

The Act stipulates what constitutes an infringement to makes an infringer liable for doing any of the act enumerated by the Act. It states, "Copyright is infringed by any person who without the licence or authorisation of the owner of the copyright,

a. does, or cause any person to do an act, the doing of which is controlled by copyright.

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[451] *Ibid.*
[452] *Ibid.*
[453] (1963) 1 ch. 587
[454] Section 16 (3), *Copyright Act*, Cap. C28, Laws of the Federation of Nigeria, 2004.
[455] Umaru M.J. (2011). *Intellectual Property Law in Nigeria. An Introduction*. 1st edition, Justian Books Ltd, Ibadan. p.50
[456] *Ibid.*

b. imports into Nigeria, otherwise than for his private or domestic use, any article in respect of which copyright is infringed under paragraph (a) of this subsection.

c. exhibits in public any article in respect of which copyright is infringed under paragraph (a) of this section.

d. distribute by way of trade, offer for sale, hire or otherwise or for any purpose prejudicial to the owner of the copyright any article in respect of which copyright is infringed under paragraph (a) of this subsection.

e. makes or has in his possession plates, master tapes, machines, equipment or contrivances used for the purposes of making infringed copies of the work.

f. permits a place of public entertainment or of business to be used for a performance in the public of the work, where the performance constitutes an infringement of the copyright in the work, unless the person permitting the place to be so used was not aware, and had no reasonable ground for suspecting that the performance would be an infringement of the copyright.

g. performs or causes to be performed, for the purpose of trade or business or as supporting facility to a trade or business, any work in which copyright subsists.

For emphasis, the terms "licence" and "authorisation" as used in the foregoing section needs to be defined. The term "authorisation" is synonymous with "permission."[457] However, in its technical sense "authorisation" connotes the granting of right to a third party to do a restricted act whether on the account of the grantee, or only on the account of the grantor.[458] Similarly, the term "licence" in this context means a lawfully granted licence permitting the doing of an act subject to copyright control.[459]

[457] Olueze M.I. op.cit. p.91
[458] *Ibid.*
[459] Section 51 (1), *Copyright Act*.

A person is said to have commits direct civil infringement or primary infringement by an act under paragraph (a) of subsection (1) of Section 15 to this Act. However, indirect civil infringement or secondary infringement is said to be occurred when any of the acts mentioned in paragraph (b) to (g) is committed.

4.2.2 Criminal Infringement

Besides civil infringement, the Act also provides for criminal liability. It states "Any person who-[460]

a. make or causes to be made for sale, hire, or for the purposes of trade or business any infringed copy of a work in which copyright subsist; or
b. imports or causes to be imported into Nigeria a copy of any work which if it had been made in Nigeria would be an infringing copy; or
c. makes or causes to be made or has in his possession any plate, master tape, machine, equipment or contrivance for the purposes of making any infringing copy of any such work,

is, unless he prove to the satisfaction of the court that he did not know and had no reason to believe that any such copy was an infringing copy of any such work, guilty of an offence under this Act and liable on conviction to a fine of an amount not exceeding N1, 000 for every copy dealt with in contravention of this section or to a term of imprisonment not exceeding five years, or to both such fine and imprisonment.

From the above provision, it is discernible that the defence of ignorance or innocence can avail the infringer from criminal liability. In addition, it should be noted that any person who commits any of the above-mentioned acts in paragraph (a) to (c) is said to have commits direct criminal infringement.

[460] Section 20 (1), *ibid.*

Furthermore, it shall be an offence for any person to-[461]

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 purposes 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; or
d. has in his possession, sells, lets for hire or distribution for the purposes of trade or business or exposes, offers for sale, or hire any copy of a work, which if it had been made in Nigeria, would be an infringing copy.

A person found guilty under this provision will be liable on conviction to a fine of N100 for every copy dealt with in contravention of that provision, or to a term of imprisonment not exceeding two years or in the case of an individual to both such fine and imprisonment. However, if the infringer is able to establish his ignorance or innocence, it will avail him a defence.

However, it is to be noted that, the burden of proving innocence of the infringer is on the infringer and not the prosecution to prove the knowledge of the accused person that copyright subsisted in the work. In *C.O.P vs Cosmos Onuh & 2 ors,*[462] the accused persons were charged under section 20 (2) (a) of the Act for piracy of King Sunny Ade's record/cassette "Wait for Me". While rejecting the submission of counsel to the accused persons that the onus lies on the prosecution to prove that the accused persons knew that the cassettes in which they dealt with were pirated as provided under section 20 (2) (a) of the Act, the court gave reason for so deciding thus:

[461] Section 20 (2), *ibid.*
[462] FHC/ABJ/128/1992/. Unreported.

> …there is the tendency for people to deliberately shut their eyes to such knowledge if they knew it would not help their case. It has been proved that the photographs on the fake cassettes were different from the one on the original while the fake product contained two lyrics as against three in the original.

Accordingly, the court convicted and sentenced the accused persons to some terms of imprisonment or an option of fine.

Moreover, apart from sentencing the infringer to a fine or imprisonment, the court before which criminal proceedings was taken is empowered to order for the destruction or delivery up to the owner of the copyright all-infringing copies of the work.[463] However, the exercise of this power is not subject to the conviction of the infringer who established the defence of innocence.[464]

4.3 Action for infringement

Infringement of copyright whether direct or indirect, civil or criminal is actionable at the instance of the owner, assignee or an exclusive licencee of the copyright. Such suit will have to be commence at the Federal High Court, as it is the only court of first instance and in the place where the infringement occurs.[465] The plaintiff may claim damages, injunction, account of profits, etc. just like in any similar proceedings in respect of infringement of other proprietary rights.[466]

In an action for infringement of copyright filed by the owner or an exclusive licencee relating to an infringement in respect of which they have coordinate rights of action, the owner or the

[463] Section 20 (4), *Copyright Act*.
[464] Umaru M.J. op.cit. p.53
[465] Section 16 (1), *Copyright Act.*
[466] *Ibid.*

exclusive licencee may not without the leave of court proceed with the action unless the other is either joined as plaintiff or added as a defendant.[467]

However, if infringement is proved by the plaintiff or admitted by the defendant but at the time of the infringement, the defendant was not aware and had no reason to suspect 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 profit in respect of the infringement, whether or not any other relief is granted.[468]

In addition to the right of action, it was held in the case of *Adenuga vs Ilesanni press & Sons (Nig.) Ltd*[469] that a co-owner may sue a third party for infringement of their work of joint authorship.

4.4 Remedies

As there are two (direct and indirect) level of copyright in both civil and criminal infringement, there are also two avenues of remedies available to the owner of copyright under the Nigeria Legal system. The Copyright Act states, "An infringement of the right conferred by sections 10 and 12 of this Act is actionable as a breach of statutory duty owed to the person entitled to the right".[470]

The above provision is to the effect that a person entitled to copyright has the right to claim ownership under section 10 and authorship under section 12 of the Act. In effect, he has the right to both economic and moral rights in the work. The Act also provides thus:

> "In proceedings for infringement of the rights conferred by the said section 10 and 12 of this act, the person whose rights have been infringed shall be entitled to an award of damages, injunction and any other remedies as the court may deem fit to award in the circumstances.[471]

[467] Section 16 (2), *ibid.*
[468] Section 16 (3), *ibid.*
[469] (1991) 5 NWLR (part 189) 82.
[470] Section 19 (1), *Copyright Act*.
[471] Section 19 (2), *ibid.*

Moreover, there are other civil remedies provided under section 18 and 25 of the Nigerian Copyright Act, which include remedy of Conversion and the remedy of Inspection and Seizure respectively. It is to be noted that all the above remedies are civil remedies and can be enforced by civil proceedings at the Federal High Court where the infringement occurred.[472]

4.4.1 Remedy of Damages

The general principle governing the award of damages in copyright infringement matters are the same as for any other tort action.[473] The principle is to the effect that damages are compensatory and should, as far as possible place the plaintiff in the same position as if the infringement had not been committed.[474] Damages for copyright infringement are at large and do not therefore requires proof of actual or special damage.[475] It is the compensation or indemnity award to the party complaining usually the plaintiff for the loss arising from a wrong in this case, the act of copyright infringement. Damages are usually granted as final remedies in a successful action of infringement.[476] This monetary compensation accrues from the infringer to the rights owner for the financial loss occasioned by the act of infringement.[477]

Therefore, the Act 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 to deter future regressions.[478]

In many cases, a plaintiff's damages may easily be calculated where it is clearly shown that loss of sales has been occasioned by the infringement, the loss of profit can be ascertained. However, this is only possible when the plaintiff's claim is base on his economic rights. In any action based on moral right, the damages would be at large. In *Plateau publishing*

[472] Section 16 (1), *ibid.*
[473] Umaru M.J. op.cit. p.56
[474] *Ibid.*
[475] Oladipo Yemitan V. Daily Times & 1 or (supra)
[476] Asein J.O. (2012). *Nigerian Copyright Law and Practice*. Nigerian Copyright Commission, Abuja-Nigeria. p.302
[477] Ocheme P.A. (2000). *The Law and Practice of Copyright in Nigeria*. ABU Press Ltd, Zaria. p.93
[478] *Ibid.*

company Ltd vs Adolphy,[479] it was held that in an action for infringement of copyright, damages are at large and it is not necessary to proved actual or specific damage.

Copyright is arguably somewhat unusual, in that it may be one of those rare actions in civil law where the courts are enjoin to award damages that go beyond the principle of compensation. The Act states, "Where in an action under this section, an infringement of copyright is proved or admitted and the court in which the action is brought, having regard (apart from all other material considerations) to-

a. the flagrancy of the infringement, and
b. any benefit shown to have accrued to the defendant by reason of the infringement,

Is satisfied that effective relief would not otherwise be available to the plaintiff, the court in assessing damages for the infringement shall have power to award such additional damages by virtue of this subsection as the court may consider appropriate in the circumstances.[480]

The case of *Oladipo Yemitan vs Daily Time & or*[481] the court held that additional damages provided for by section 16 (4) of the Act be construed to mean "exemplary damages". However, this decision of the court has been criticized as it is not only erroneous but also far from the clear meaning and intendment of Section 16 (4) of the Act.[482] This position finds its judicial support in *Bellof vs Press dram Ltd & Anor*[483] where the court was called upon to determine the constructions of section 17 (13) of the English Copyright Act, 1956 which is in pari-material with section 16 (4) of the Nigerian Copyright Act. The court held thus, "Copyright is now exclusively a creative of statute and governed by statute, and it seems to

[479] (1986) 4 NWLR (part 34) 205 at 225
[480] Section 14 (4), *Copyright Act*.
[481] (supra)
[482] Umaru M.J. op.cit. p.57
[483] (1973) 1 ALL E.R

me that section 17 (13) is a code for damages which are additional exemplary and aggravated damages outside the subsections…."

An exemplary damage is awarded not only by way of compensation but also as a punishment to the offender. However, in assessing the monetary value of a copyright work and the loss incurred by the plaintiff because of the infringement, the court is enjoin to consider the nature of the work, the status of the author, evidence of any previous transaction and other circumstances surrounding the case.[484]

However, a person may be liable for primary infringement of copyright without being aware that he was committing an infringing act. In this case, damages will not be awarded against him if he can show that he neither knew, nor had reason to believe that copyright subsisted in the work.[485] This defence is limited and will fail where the defendant knows that copyright subsist but makes a mistake as to the owner. It does not also avail a defendant who made no inquiry whatsoever as to the source from which the work was derived before doing an act constituting an infringement of the copyright in the work.[486] Note that all other remedies are available against the person who succeeded in raising the defence of innocent except the remedy of damages.[487]

4.4.2 Remedy of injunction

An injunction is 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

[484] Asein J.O. op.cit. p.303
[485] Section 16 (3)*, Copyright Act*.
[486] Umaru M.J. op.cit. p.58
[487] *Ibid.*

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.[488]

The remedy of injunction is one of most potent non-monetary remedies available to a complainant in the event of copyright infringement.[489] The party against whom the order was made is liable in contempt if he deliberately disobeys the order.[490] On the other hand, the plaintiff must have a legal or equitable right, which the court is capable of enforcing. In other words, the applicant must not only have a ground for complaining but the court to which the complaint was brought must also have jurisdiction to entertain the case.[491]

The remedy of injunction is useful in cases where the act of infringement is of continuing nature and the injury complained of is such of which damages may not be adequate compensation. Therefore, it may be of no use where the infringement complained of has been concluded and it is unlikely to re-occur in the future.[492]

An injunction may be interim/interlocutory or perpetual/final injunction. An interim or interlocutory is an order restraining the defendant from carrying out alleged infringing activities pending the determination of a pending suit. The idea is to forestall any further infringement while the matter is already a subject of litigation.[493] In the case of *Kotoye vs C.B.N,*[494] the court reiterated that an interlocutory injunction would be granted if:

a. there is a serious issue to try,
b. 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,

[488] Ocheme P.A. op.cit. pp.96-97
[489] Asein J.O. op.cit. p.311
[490] *Ibid.*
[491] *Ibid.*
[492] *Ibid.*
[493] Umaru M.J. op.cit. p.59
[494] (1989) 1 NWLR (part 98) 419 at 441

c. the balance of convenience is in the plaintiff's favor, and
d. there is no conduct on the part of the plaintiff that will make it inequitable for the court to grant the application.

On the other hand, a perpetual or final injunction is an order restraining the defendant from forever carrying out the infringing activities complained of. It is usually given at the end of the matter before the court. However, the Act has limited the extent for the grant of the remedy of injunction. It provides, "No injunction shall be issued in proceedings for infringement of copyright which requires a completed or partly completed building to be demolished or prevent the completion of a partly completed building."[495]

The reason for the above provision must have been to prevent actions for injunction while work of construction was actually in progress.[496] The appropriate remedy in a situation such as this is damages.[497]

4.4.3 Account of profit

This is another remedy to a successful plaintiff. It entitles him to the profits, which the defendant has made from the infringement.[498] The primary aim of this remedy is to prevent unjust enrichment[499] and it is not available to a plaintiff who has otherwise been adequately compensated in damages either for the infringement or for conversion. The general principle being that account of profit is a condonation of the alleged infringement.[500]

However, at times, the profit made by the defendant may well exceed the damage suffered by the plaintiff. This is so because it is possible that even if the defendant had not committed the

[495] Section 16 (5), *Copyright Act*.
[496] Umaru M.J. op.cit. p.58
[497] *Ibid.*
[498] *Ibid.*
[499] Asein J.O. op.cit. p.314
[500] *Ibid.*

infringement, the plaintiff could still not have sold one additional copy of his more expensive copyright work.[501]

It is submitted that although the court may not assess the exact profit made by the defendant from the infringement, it goes a long way in restoring the parties as much as possible to the status quo.[502]

4.4.4 Anton Pillar Order

This is judicially created device, which enable a plaintiff in some cases to take an infringer by surprise and ensure that vital evidence and information required for the enforcement of the plaintiff's rights are not destroyed.[503] The Copyright Act provides for this order for inspection and seizure where it states:

> In any action for infringement of any right under this Act, where ex parte application is made to the court supported by affidavit that there is reasonable cause for suspecting that there is any house or premises any infringing copy or any plate, film, or contrivance used or intended to be used for making infringing copies or capable of being used for the purposes of making copies or any other article, book or document by means of or in relation to which any infringement under this Act has been committed, the court may issue an order upon such terms as it deems just, authorizing the applicant to enter the house or premises at any reasonable time by day or night accompanied by a police officer not below the rank of Assistant Superintended of Police and-[504]

a. Seize, detain and preserve any such infringing copy or contrivance, and
b. Inspect all or any documents in the custody or under the control of the defendant relating to the action

[501] Umaru M.J. op.cit. p.59
[502] *Ibid.*
[503] *Ibid.*
[504] Section 25 (1), *Copyright Act.*

The classical Anton Pillar order is originally formulated in the case of *Anton Pillar K.G vs Manufacturing processes Ltd & Ors.*[505]However, the Act has provided for criminal sanctions against any person knowingly gives false information under subsection 1 of section 25 of the Act. It provides thus, "Any person, who knowingly gives false information under this section of this Act, is guilty of an offence and liable on conviction to a fine of N1000."[506]

Furthermore, although it is not the requirement of the Act that the plaintiff must make an undertaking to pay damages to the defendant if at the end of the day it is discovered that the order was unreasonably obtained, the court usually insists on such an undertaking by the plaintiff before granting the order.[507]

4.4.5 Right of Conversion

The Copyright Act has deemed all the copies of any work in which copyright subsist, or any substantial part thereof, and all plates, master tapes, machine, equipment or contrivances used, or intended to be used for the production of such infringing copies, to be the property of the owner, assignee or exclusive licencee 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.[508]

4.5 Exceptions from Copyright Control.

Copyright is not one of those rights that admit of no exception. The Act, particularly schedule two thereto, specifies a number of exceptions from the general principal of copyright control. However, the exceptions do not have general application to all eligible works. For instance, all the exceptions specified in the second schedule to the Act applies to literary, musical,

[505] (1976) F.S.R. 129 (1976) ch. 55.
[506] Section 25 (2), *Copyright Act.*
[507] Umaru M.J. op.cit. p.60
[508] Section 18, *Copyright Act*.

artistic works and cinematograph film but have limited application in respect of sound recording and broadcast.[509]

The legal effect of these exceptions is that copyright in work is not infringed by any person whose act comes within the context of any of the specified exceptions.[510] In *Johnston vs Bernard Jones publications Ltd & Beauchamp*[511] it was held that a defendant who proves that his act falls within the rules of exception is protected.

Second schedule to the Copyright Act, provides, "The right conferred in respect of a work by section 6 of this Act does not include the right to control"-

a. Fair dealing

Copyright conferred in respect of literary, musical, artistic works, cinematograph film, sound recording and broadcast shall not be infringing by the doing of any of the Act reserved for the copyright owner by way of fair dealing for purposes of research, private use, criticism or review or the reporting of current events. If the use of the work by way of fair dealing for any of the eligible work is public, it must be accompanied by an acknowledgement of the title of the work and its authorship except where the work is incidentally included in a broadcast.

For the defense of fair dealing to avail any defendant it must be shown that the use is for any of the following purposes, that is-[512]

i. For research;

ii. For private use;

iii. For criticism or review or the reporting of current event.

In *Chatterton vs Cave,*[513] Lord Haterly remarked:

[509] Olueze I.M. op.cit. p.75
[510] *Ibid.*
[511] (1938). Ch. 599
[512] *Ibid.*

> Books are published with an expectation, if not desire, that they will be criticized in reviews, and if deemed valuable that parts of them will be used as affording illustrations by way of quotation, or the like and if the quantity taken be neither substantial nor materials, if as it has been expressed by some Judges, a "fair use" only be made of the publication, no wrong is done and no action can be brought.

However, the criticism must not be flimsy.[514] In any case, the question of the substantiality of the portion taken is one of fact.[515]

Fair dealing for the purpose of private use should be treated with caution. Contrasted with public use, fair dealing on the basis of private use need not be accompanied by acknowledgement. There is nothing in the Act empowering a user to copy a copyright work with reckless abandon under the guise of private use.[516] In *University of London Press vs University Tutorial Press Ltd,*[517] Lord Peterson J. was of the opinion that the doctrine of fair dealing should not be used as engine of abuse when he stressed thus:

> It could not be contended that the mere republication of a copyright work was "fair dealing" because it was intended for purpose of private study; nor, if an author produced a book of questions for the use of student, could another person with impunity republish the book with the answers to the questions. Neither case could, in my Judgment come within the description of fair dealing.

Moreover, a developer cannot rely on "fair dealing" for copying architectural drawings and using it in the construction of a building.[518]

b. imitation by way of parody, pastiche or Caricature.

This does not apply to sound recording and broadcast. Copyright in literary, musical, artistic work or cinematography film is not infringed by a person who does any of the acts mentioned in section 6 of the Act by way of parody, pastiche or caricature. One thing common to all

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[513] (1878) 3 App. Cas. 483
[514] Olueze I.M. op.cit. p.76
[515] *Ibid.*
[516] *Ibid.*
[517] *Supra.*
[518] Olueze I.M. op.cit. p.76

instances of parody, pastiche or caricature is the imitation of style of another person's work.[519]

Parody is a piece of writing intended to amuse by imitating the style of writing used by another author. Pastiche involves composition of a literary, artistic or musical work by one author in the style of another author. However, caricature involves the imitation of another person's style of work by way of ridicule or mimic expression or cartoon or satire.[520] In *Joy Music vs Sunday Pictorial,*[521] it was held that copyright was not infringed where a musical work was copied with intent to satirize.

c. inclusion in a film or broadcast of an artistic work situate in a place where it can be view in the public.

This is not infringement of copyright. For instance, the copyright in an art statue conspicuously mounted in a public place shall not be infringed by mere inclusion of the work in a film or broadcast.

d. reproduction and Distribution of Artistic work.

The reproduction and distribution of copies of any artistic work permanently situate in a place where the public can view it shall not constitute any act of infringement of copyright. However, to qualify under this exception, the work allegedly reproduced must be permanently situate in a conspicuous public place.[522]

e. incidental inclusion of an artistic work in a film or broadcast.

Copyright does not include the right to control the incidental inclusion of an artistic work in a film or broadcast. In other words, copyright in an artistic work does not extend to the right to

[519] *Ibid.*
[520] *Ibid.*
[521] (1960) 2 QB 60.
[522] Olueze I.M. op.cit. p.76

prevent another person who shows that the inclusion of the work in a film or broadcast is merely incidental. However, it appears that accidental inclusion of such work in a film or broadcast is not covered under this exception.[523]

Nevertheless, any person who accidentally includes an artistic work when reporting current events by means of broadcasting is absolved from any adverse claim of authorship by the author of such copyright work.[524]

f. inclusion in a collection of literary or musical work which includes not more than two excerpts from the work, if the collection bears a statement that it is designed for educational use and includes an acknowledgement of the title and authorship of the work;
g. the broadcasting of a work if the broadcast is approved by the broadcasting authority as an educational broadcast;
h. any use made of work in approved educational institution for the educational purpose of that institution, subject to the condition that, if a reproduction is made for any such purpose it shall be destroyed before the end of the prescribed period or if there is no prescribed period, before the end of the period of 12 months after it was made;
i. subject to the third schedule to this Act, the making of a sound recording of a literary or musical work, and the reproduction of such a sound recording by the maker or under licenses from him, where the copies thereof are intended for retail sale in Nigeria and the work has already been previously recorded under license from the owner of the relevant part of the copyright, whether in Nigeria or abroad,

[523] *Ibid*.
[524] Section 12 (a), *Copyright Act.*

subject to such condition and to the payment of such compensation as may be prescribe;

j. the reading or recitation in public or in a broadcast by any person of any reasonable extract from a published literary work if accompanied by a sufficient acknowledgment.

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

k. any use made of a work by or under the direction or control of government, or by such public libraries, non- commercial documentation centers and scientific or other institution as may be prescribed, where the use is in the public interest, no revenue is derived there from and no admission fee is charged for communication, if any to the public of the work so used;

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

i) may, if it is of an exceptional documentary character, be preserved in the archives of the broadcasting authority (which shall for the purpose of this paragraph be deemed to be part of the national archives) established under the national archive Act.

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

(m) the broadcasting of a work already lawfully made accessible to the public and subject (without prejudice to the other provisions of this schedules) to the condition that the owner of the broadcasting right in the work shall receive a fair compensation determined, in the absence of agreement, by the court;

(n) news of the day publicly broadcast or publicly communicated by any other means;

(o) the communication to the public a work, in a place where no admission fee is charged in respect of the communication, by any club whose aim is not profit making;

(p) any use made of a work for the purpose of judicial proceeding or of any report of any such proceeding;

(q) the making of not more than three copies of a book (including a pamphlet, sheet music, map, chart, or plan) by or under the direction of the person in charge of public library for the use of the library if such a book is not available for sale in Nigeria.

(r) the reproduction for the purpose of research or private study of an unpunished literary or musical work kept in a literary, museum or other institution to which the public has access;

(s) reproduction of published work in Braille for the exclusive use of the blind, and sound recordings made by institutions or other establishments approved by the government for the promotion of the welfare of other disabled persons for the exclusive use of such blind or disable person.

From the foregoing, it is clear that any person who without the permission of copyright owner does any of the acts prohibited by the Copyright Act has committed infringement. And that person is liable to civil or criminal sanctions provided by the Act. Likewise, the owner of the copyright is entitled to remedies. However, there are certain acts, which even though

constitute infringement; the infringer is absolve by law from any liability because his act falls within the specified exceptions from copyright control.

4.6 Problems and Challenges of the enforcement of Copyright in Nigeria

The Copyright Act established the Nigerian Copyright Commission and charged it with the responsibility of *inter alia*, being responsible for all matters affecting copyright in Nigeria as provided for in the Copyright Act. Thus, the Nigerian Copyright Commission enforces criminal infringement of copyright on behalf of the state.[525] In addition, other agencies that have their role to play in enforcing copyright in Nigeria include the Police, Custom etc. However, these agencies are faced with so many challenges in the discharge of their duties concerning the enforcement of copyright. Some of these challenges include:

4.6.1 Lack of effective data bank

The Copyright Act requires Nigerian Copyright Commission to maintain an effective data bank of authors and their works made by Nigerians and non-Nigerians found in Nigeria to be kept as records by the Commission.[526] However, the law does not require registration as pre-requisite for this, but once a work is qualified as copyrightable, the Commission is expected to take note.[527]

The Commission operating within its present scope is likely to suffer a serious handicap by the law, which covers copyright by mere existence without fixation registration.[528] In addition, the various agencies combating infringement of copyright in Nigeria are still not free

[525] Itanyi N. (2016). " Toward combating Intellectual Property Infrigement in Nigeria: Challenges and Prospects." *Nigerian Law Journal. Vol. 19, No.1*. p.125.
[526] Section 34 (3) (e). *Nigerian Copyright Act,* Cap. C28, Laws of the Federation of Nigeria, 2004.
[527] Ameh I. (2010-12). " An Appraisal of the Nigerian Copyright Commission in the enforcement of Copyright Law in Nigeria." *ABU Journal of Commercial Law. Vol.5, No. 1*. P.151.
[528] *Ibid.*

from one major challenge- Corruption.[529] This factor undermines the enforcement capacity of the agencies accounting for its low record in terms of interdiction.[530]

4.6.2 Technological Advancement.

This is another challenge to the enforcement of copyright in Nigeria. It is the recurring problem of piracy, which is now compounded by the effect of digital technology on the production and profitable distribution of entertainment and other creative works.[531] A situation whereby pirated disc are produced internally within the country, rather than outside has also somewhat changed the dynamics of enforcement.[532]

The greatest challenge in this area includes the difficulty in the control of information sharing, and getting admissible evidences to convict infringers and so on.[533] Another challenge in this area for combating copyright infringement includes the use of internet, which is difficult to trace the infringers who commit the offence.[534] For example, the service provider, the website and the user could be at different places. Thus identifying the source of infringement or the system from which the infringement occurred become complex.[535] Moreover, the use of advance photocopiers, scanners and other devices capable of producing volumes of materials within the shortest time also pose threat to copyright enforcement.[536] The frequencies in which public and private individuals patronize business centers for photocopy of protected materials are alarming.[537]

[529] Itanyi N. op.cit. p.129
[530] *Ibid.* pp.129-130
[531] Ameh I. (May, 2015). "The Effect of Digital Technology on the Protection of Copyright in Nigeria: A Call for Reform." *Bayero Journal of Private and Commercial Law. Vol. 1 No. 1* p.23
[532] *Ibid.*
[533] *Ibid.* p.25
[534] *Ibid.*
[535] *Ibid.*
[536] *Ibid.* p.26
[537] *Ibid.*

4.6.3 Funding of Agencies

This is another challenge in the enforcement of copyright law in Nigeria. The Federal Government rarely takes the issue of intellectual property as a priority. It is neglected and the effect is that not much budget is made for the agencies engaged in combating infringement.[538]

4.6.4 Short-Coming of Legal Provisions

The failure of legislatures to review the legal provisions relating to copyright in Nigeria contributed to the problem and challenges of enforcement of copyright law. The penalties provided by the law are manifestly inadequate. Some offenders have upon conviction ended up receiving a fine of 1000 naira or less.[539] This is not a punishment considering the fact that these offenders have made huge profit from the pirated works and have by so doing run the owner out of business. The offenders upon conviction should receive higher fine and terms of imprisonment.[540] Moreover, the Nigerian Copyright Act provides a hostage to fortune by requiring that an offence must be committed "knowingly". Knowledge is a state of mind, which is difficult to prove to the degree required in a criminal prosecution in the absence of an admission.

5.6.5 High Level of Ignorance

The theft of intellectual property is not yet equated in the public mind with other offences against property.[541] Some regarded infringement of copyright as no wrong or an offence. This is exacerbated by a failure of the public authorities and commercial organizations to communicate to the consuming public the dangers for using of unauthorized products.[542] It is

[538] Itanyi N. op. cit. p.129
[539] *Ibid.*
[540] *Ibid.*
[541] Itanyi I. op.cit. p.129
[542] *Ibid.*

noted that despite the effort of the agencies like Nigerian Copyright Commission, people are still inadequately informed about what amount to infringement in copyright and how to desist from it.[543] Inadequate information and intelligence to support enforcement is also a major challenge to the agencies.[544]

4.6.6 Freedom of Contract

Dealings in copyright are entirely a matter of contract.[545] That is to say, those concerned may make what rules they please. What has happened in relation to any copyright must be deduced from such agreements formal or informal as the parties has made.[546] This may be a matter of very great difficulty. It should in particular be assumed that any agreement drawn up by parties would prove difficult for lawyers (including Judges) to sort out. This is because for lawyers and parties to the agreement have quite different ideas both as to the way they use language and as to the sort of things, that agreement ought to provide for. This has generated difficulty and challenge to the agencies saddled with the responsibility of enforcement of copyright in Nigeria.[547]

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[543] *Ibid.*
[544] *Ibid.*
[545] Ifeoma E.C (2012, January, 28). Copyright Administration in Nigeria. *Nnamdi Azikwe University Digital Library, Faculty of Law Affliation.* Retrieved from http://naulibrary.org/dglibrary/admin/bookdirectory/thesis10017.pdf. on 08/06/2018. 1:00pm.
[546] *Ibid.*
[547] *Ibid.*

CHAPTER FIVE
SUMMARY AND CONCLUSION

5.1 Summary

Copyright is not a right that inheres in perpetuity. It exists for a term of years and then expires. When a copyright in a work expires, the work is said to have fallen into public domain. It can then be exploited by anybody without the consent of the owner and without having to pay compensation to the owner. However, if a third party makes an adaptation of a work in which copyright has expired, he acquires copyright in the adaptation, notwithstanding that copyright has expired in the original work.

The origin of copyright can be traced right from the period between 14th to 17th century up to the time when it had gain its statutory backing from the United Kingdom in the 15th century. The English Copyright Act of 1911 was imported into Nigeria in the year 1912. Nigeria got its first indigenous Copyright Act in 1970, which later gave birth to the present Copyright Act of 1988.

In Nigeria, it is traceable from pre-colonial, colonial and post-colonial eras. It is obvious that copyright in Nigeria derived its legislative source during post-colonial era, which includes among others the constitution, local enactments, case laws as well as the received English law.

The concept of copyright generally depends on the principle of Authorship and Ownership in any work that is copyrightable. Authorship is the act of creating the work, whereas an author is the person who created the work. The law has presumed the fact of ownership in the author unless there is any contrary agreement. Therefore, an author of a work is the first owner of copyright in that work.

However, the rule of first ownership in copyright may under some circumstance be shifted to another person. This is because copyright is transferrable as movable property either by assignment, testamentary disposition or by operation of the law. It is very important to note that the interest to be transferred from the initial owner i.e. the author, is only the economic interest in the work. Nevertheless, the moral right shall remain in the author, which is subsisting, inalienable and not subject to any agreement.

In addition, the Copyright Act has recognized six categories of works, which are subject to copyright control. They include literary, musical and artistic works of an author. In addition, cinematograph films, sound recordings and broadcast are also part of the works protected by the Act. However, these categories of works protected by the Act are also subjected to some conditions before they qualify for copyright protection. Originality and Fixation are conditions precedent for every work to be eligible for copyright under the Act.

There are also other things to be considered on the part of the author of a work before his work enjoys copyright protection. This includes author's citizenship or his place of domicile, place of first publication of the work, works made in the course of employment, persons who are commissioned to make a work.

Moreover, the Nigerian Copyright Act has provided the extent of the rights in copyright. Therefore, any infringement on such right, the owner has the right of action against the infringer. Even though the Act has recognized infringement to be either civil or criminal, in each of these infringements, the owner is entitled to reliefs of damages, injunction, account for profit accrued to the infringer, inspection and seizure as well as the right of conversion. All these remedies are civil remedies against any civil infringer. As to criminal infringement, the Act stipulate some criminal sanctions which even though not adequate, however, it would serve as a deterrent to the offender and others who have not yet committed the prohibited act.

Finally, there are instances, which even though constitute infringement; however, the infringer is absolved by law from any liability. This is because his act that constitutes the infringement falls within the exceptions provided by the Act. Therefore, in such situation the copyright owner is not entitled to any relief.

5.2 Findings

It is in line with this that this research made the following findings:

1. Neither in the provisions nor in the interpretation Section of the Act has the word "Copyright" been defined. This has generated difficulties and uncertainty as to what the concept mean. This is why still there is no any generally accepted definition of the concept of copyright.
2. In its bid to define who is an author, the Act defined an author in photographic work as the person who took the photograph. This position of law is not on the principle of justice and fairness to the person whose photograph was taken. This is according to the Act, a person may submit himself to a photographer and has no right to claim ownership in his photograph even if the person who took it has been using it for any immoral purposes or is deriving any economic benefits from it.
3. The Act permits in some instances the Nigeria Copyright Commission to grant a compulsory licence where the owner cannot be reached or is not willing to grant a voluntary license on reasonable terms upon an application made to it by the interested party. The problem with this is that the Act did not provide exhaustive ways as to when a person is said to disappear and therefore cannot be reached and what a reasonable term used as yardstick for determining the refusal of an owner to grant voluntary license.
4. The provision of Section 37 of the Act seems arbitral as it did not provides for the atmosphere of fair hearing. What the Section contemplates is that once an application

is made to it, the Commission will *sue moto* constitute a Licensing Panel, which three out of five members of the panel should be members of the Governing Board of the Commission. This does not reflect the principle of fair hearing especially on part of the copyright owner.

5.3 Recommendations

Consequently, this research proffered the following recommendations aimed at correcting the above loopholes of the Nigeria Copyright Act:

1. A statutory definition of copyright should be inserted either in the provisions of the Act or in the interpretation section of the Act in order have a comprehensive and legally acceptable definition of the word "Copyright", this could be done by making amendments in the Nigerian Copyright Act.
2. The protection of the right of copyright owner is of paramount importance to the extent that not only the economic right is protectable but also the moral right of the owner. Therefore, for moral right to be protected in photographic work, the Act needs to be amended by shifting copyright ownership in photograph from the person who took it to the person whom his photograph was taken, for justice and fairness. This will prevent the photographer from unauthorized use of the photograph for any immoral or economic reasons.
3. The provision of Section 37 of the Act also needs to be amended to ensure that before a person may be granted a compulsory license to exercise some rights on a work which otherwise is protected by the Act, a comprehensive laid down procedure should be followed not on mere application to the Commission. This will ensure that only applications on merit will be entertain.

4. Strict adherence to the principle of fair hearing should also be observed. This could be by amending the provision of Section 37 (2) of the Act reconstituting members of the Copyright Licensing Panel to include at least three members of a collecting society to which the owner of the copyright belongs. In addition, to provide an avenue for the owner to have the right of representation in person or by making such representation in writing as to why he refuse to grant the licence voluntarily.

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