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ENFORCEMENT OF COPYRIGHTS IN THE AGE OF GLOBAL CONNECTIVITY: RE-EXAMINING THE ELEVANCE OF THE PRINCIPLE OF TERRITORIALITY

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Abstract

With every technological innovation, copyright jurisprudence faces conflicting shades of impact. On the one hand, the emergence of Internet technology, like its predecessors, enhances communications systems so that across huge distances and space, works of creativity travel regardless of physical territorial borders. On the other hand, copyright abuses, especially in the virtual world, have become much more possible with incredible ease. In response, the copyright protection scheme is always reformed to contain such threats. The core problem addressed in this study revolves around the growing inability of traditional copyright enforcement mechanisms to address infringements that occur online and across jurisdictional lines adequately. The principle of territoriality, deeply rooted in copyright law, is encountering challenges as it attempts to grapple with infringements facilitated by digital technologies. Copyright holders are confronted with the perplexing task of asserting their rights in an environment where creative works can be instantaneously accessed, distributed, and exploited worldwide. This research aims to assess whether the principle of territoriality, which underpins many aspects of copyright enforcement, remains effective and relevant in light of the global connectivity that digital platforms facilitate. Through a review of international copyright treaties, court cases, and contemporary scholarly discourse, this research explores the tensions arising from the conflict between territoriality and the Internet's borderless nature. Doctrinal research methodology (qualitative research) was employed to investigate this challenge. This involves legal analysis of international copyright treaties, judicial decisions,

and scholarly literature to trace the historical evolution of the territoriality principle and its limitations in the digital age. It concludes by recommending an installation of a global technology-aided copyright enforcement framework that, although it recognises the peculiar economic and creative needs of individual nation-states, requires the participation of all key stakeholders, including critical Internet actors, in ensuring global compliance with enforcement orders.

1.1 Introduction

Today's world economy is knowledge-driven, built on man's creative and ingenious intellectual outputs. Intellectual creations have brought about remarkable economic gains and prosperity for economies worldwide. Indeed, countries' revenues show significant contributions from intellectual property rights in copyright, trademark, industrial design, etc.[1]

A major specie of Intellectual Property Rights is Copyright[2]. It is the exclusive right[3] to control the exploitation of products of human intellect, from literary works, artistic works to musical works, cinematograph films and others. Virtually throughout the world, the principles that underlie copyright protection are the same.[4] At the heart of copyright jurisprudence is the principle of territoriality, which, in fact, is the pith and substance of this paper.

Territoriality of copyright implies that copyright laws are geography-sensitive. In other words, copyright and, indeed, intellectual property rights are always "located" in the country that grants them and can be infringed only by acts occurring there[5]. This position has been expressed in judicial decisions of courts

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[1] The Global Innovation Policy Centre, an affiliate of the US Chambers of Commerce, notes that America's IP is worth $6.6 trillion, more than the nominal GDP of any other country in the world. It further states that IP-intensive industries account for over 1/3– or 38.2%– of total U.S. GDP, IP accounts for 52% of all U.S. merchandise exports- which amounts to nearly $842 billion and that the direct and indirect economic impacts of innovation are overwhelming, accounting for more than 40% of U.S. economic growth and employment. See further: https://www.theglobalipcenter.com/resources/why-is-ip-important/

[2] Others mainly are, Trademark, Industrial Design, Patent, Trade Secrets, amongst others

[3] Rights to reproduction of a copyright work work, its distribution, publication, performance and adaptation amongst others

[4] Copyright protection generally rests on the tripod of originality, fixation and territoriality.

[5] Reindl, A. P. (1998). "Choosing law in cyberspace: Copyright conflicts on global networks". *Michigan Journal of International Law,* 19(3), 799-872

around the world.[6] In the United States, the Court in *Subafilms, Ltd. v. Mgm-Pathe Communs. Co.*,[7] had established the non-application of the copyright law outside the territorial borders of the United States.[8]

However, there have been efforts to, in some respects, harmonise legal frameworks for copyright protection throughout the world. This is expressed in the form of several international treaties.[9] Despite these Treaties, territoriality has remained a constant feature of copyright protection worldwide.[10]

Without a doubt, the principle of territoriality is primarily anchored on the political sovereignty of nation-states. By this, sovereign governments are forever entitled to absolute control over affairs within their territories. This certainly is the traditional time-honoured meaning of sovereignty. It postulates that States dictate the affairs of the people within defined territorial boundaries. But the concepts of state and sovereignty have never been an unchanging, inflexible idea. Historical events, internal or external, have always compelled a re-working of these concepts and principles to suit the exigencies of time.[11] The example of

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[6]*Island Records Ltd v Pandun Technical Sales and Services Ltd & Anor [1993] FHCLR 318.* This was perhaps the earliest judicial pronouncement on this issue in Nigeria. The Courts in several other cases followed the same reasoning. Some of these cases are: *SocieteBic S. A. v Charzin Industries Limited &Anor [1997] 1 FHCLR 727.,Microsoft Corporation v Franike Associates Ltd [2011] LPELR- 8987(CA) 17[G-18[A] and more recently, on 1st March 2021, the Federal High Court of Nigeria, sitting in Lagos, delivered a ruling in Voice Web International Limited v Emerging Markets Telecommunication Services Ltd &Ors, Suit No FHC/L/CS/576/2017 upholding the same position on the non-protection of foreign works even though writers criticized these decisions.* These writers include: Bankole, S. (2020) Are foreign copyright works protected in Nigeria? *Queen Mary Journal of Intellectual Property*, Vol. 10 No. 2, pp. 238–254 *and* Adebambo, A, and Nkem, I. (2021) *Protection of Copyright in Foreign Works in Nigeria: An Analysis of the Decision in Voice Web International Limited v Emerging Markets Telecommunication Services Ltd &Ors* available at: https://academic.oup.com/grurint/advance-article/doi/10.1093/grurint/ikab120/6356829 by guest on 28 October 2021

[7]24 F.3d 1088 (9th Cir. 1994). A much earlier case of *United Dictionary Co. v. G. & C. Merriam Co.* 208 U.S 260 (1908) also held same position.

[8] In Germany, Supreme Court German Reich, Case I 403/01, 26 March 1902, *RGZ* 51, p 139, at 140; Supreme Court German Reich, Case II 45/02, 2 May 1902, *RGZ* 51, p 263, at 266; Supreme Court of Canada, *Society of Composers, Authors and Music Publishers of Canada* v *Canadian Assn. of Internet Providers*, 30 June 2004, [2004] 2 SCR 427.

[9] Such as the Berne Convention for the Protection of Literary and Artistic Works 1886 (hereinafter 'the Berne Convention'), the Universal Copyright Convention (UCC) 1952, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) 1995 amongst others

[10] These Treaties only require domestic enforcement of copyright on the principle of national treatment. In most Countries, these Treaties, in cases of conflict, are subject to domestic jurisdiction. See Jack, S. and Eric, P. (2005) *The Limits of International Law*, Oxford University Press, New York on discussions on treaties and domestic legislations.

[11]Kate, C. and Richard, H. (2020) Sovereignty in a digital era. A report commissioned by the Dialogue of Civilizations Research Institute Berlin. The report in fact concluded that: *It is time to recognize sovereignty*

such a compelling historical event that fits in more pungently is the passage, in the United States, of the Berne Convention Implementation Act of 1988.[12] The passage of that Act was primarily out of a realisation that the United States' copyright interests suffered a great deal, especially on the international stage. With the increase of organised international piracy of copyrighted works of American authors, it had often been pointed out how critically important it was for the United States to have a major role in influencing the direction of international copyright matters.[13] Hence the US joined the Berne Union simply to protect its national interests.[14]

Undeniably, joining the Berne Union was of huge significance. Even more importantly, it proved that domestic copyright laws are never sufficient to protect a nation's interests. Every time, therefore, the world met, countries of the world modified their laws to conform. The enactment of the Digital Millennium Copyright Act[15] proved again that in response to the WIPO Internet Treaties[16], the formulation of which the US played significant roles, the domestic copyright law had to be reworked.

In these times, the Internet technology compresses time and space thus making the world a more globally-networked environment. In an age of global connectivity, which mirrors the world as a borderless space[17], the territoriality principle that survived through these decades now needs to be re-conceptualised, re-understood and re-constructed. In doing this, the concept of political sovereignty, which is at the base of territoriality, may also yield a new

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as fungible, rather than absolute. It is more a process of bargaining in an increasingly hybrid international, globally networked context of digitalization for which neither history nor a reliance on unregulated private actors mediating for states have any real lessons.

[12] Pub. L. No. 100-568 (1988)

[13] Marshall, L.A. (2019) Understanding Copyright Law (7th Edition) Carolina Academic Press, North Carolina, United States, p. 1023

[14] External foreign events compelled a re-organization of domestic affairs and framework. United States' refusal to enter Berne in 1886 was the result of rivalries between American and British publishing houses over the national treatment doctrine and the extension of protection to non-resident foreigners. See Marshall, L.A, (2019) *Understanding Copyright Law* (7th Edition) Carolina Academic Press, North Carolina, United States, p. 1023. The losses the US encountered at the International Stage compelled its joining the Berne Union. This buttresses the precedence of International Law over municipal affairs.

[15] Public Law 105–304—Oct. 28, 1998

[16] WIPO Copyright Treaty 1996 and WIPO Performances and Phonogram Treaty 1996

[17] There are arguments that it is not as borderless as it is thought to be. See Jack, G. and Tim, W. (2006) *Who Controls the Internet: Illusions of a Borderless World.* Oxford University Press, Oxford, New York even though the work shall be reviewed in this paper.

technology-determined meaning. These issues directly relate to the enforcement of copyright in this age of global connectivity considering the pivotal place of territoriality in the jurisprudence of copyrights.

Therefore, the thesis of this paper is that the exponential growth in information and communications technology whittles down significantly the relevance of the principle of territoriality in the jurisprudence of copyright. The paper argues that retaining the principle of territoriality, in this current technology-driven age, is counter-productive, especially to the economies of the developing world. To carry out this task, the paper is broken essentially into five segments. The first segment introduces the thrust of this paper; the second delineates the scope of the whole idea of global copyright enforcement in the context of this paper while the nature/character of the Internet technology---the virtual environment—constitutes the third segment. The fourth segment examines the effects of territoriality on the economies of the developing world. The fifth segment concludes this paper.

1.2 What Does Global Copyright Enforcement Mean?

It is important to define the scope of the whole idea of global copyright enforcement, at least, in the context of this paper. A global copyright enforcement mechanism is not suggested to mean the same law everywhere in the world. Such a suggestion would certainly disregard the diversity in the cultures, practices and customs of the human race spread across the world. Intellectual Property Law is itself an expression of a people's preferences and aspirations and need not conform to another country's idea of what creative rights should be protected. In other words, the classes of works to be protected need not be the same, the duration of copyrights, the qualification for copyright protection and a host of other elements of copyright protection may be determined by individual countries.

However, in relation to the enforcement of copyright, a global enforcement procedure/mechanism is urgently required especially in the light of the astronomical advancement in ICT. Consequently, global copyright enforcement means unanimity in the recognition, protection and enforcement procedure/mechanism of copyrights in any creative works especially works infringed in the digital environment. This would require domestic legal systems to entertain any copyright claim regardless of the author's or creator's territorial affiliations. In that sense, the only litmus test to be conducted is a confirmation that such works enjoy copyright protection in the country of origin. This would

also further require multinational tech companies to comply with orders of the Court without questioning the bindingness of such judicial reliefs based on territorial competence. Therefore, the whole idea of global copyright enforcement especially in cases of online infringements demands a global consensus of both countries and big techs in the enforcement of copyrights.
This type of framework respects the diversity of individual countries to dictate the contents of their copyright laws. It only requires that in copyright enforcement claims especially against infringements committed online, it would be unfair to wield the territoriality shield to excuse the liability of infringers of copyright works. Similarly, effective enforcement of copyright claims in this age requires the active participation of big techs[18] --- owners of major online platforms --- whose offices may not enjoy the ubiquity of their Internet-aided platforms.

Territoriality, in this age, would not only constitute shields protecting its nationals (infringers of copyright) from liability for copyright breaches; but also lend itself as a disincentive on knowledge production, creativity and innovation[19] and could consequently, undermine international relations, diplomacy and cooperation.[20] Countries sticking to their territorial copyright laws certainly provide the excuse for counterfeiting and piracy: the twin copyright threats that have pervaded the digital world.

1.3 The Character of the Internet Technology

Oftentimes, the Internet has been fittingly described as borderless. The expression; "The Internet Has No Borders" received judicial endorsement in a

[18] Key technology giants such as Apple, Google, Amazon, Facebook (now Meta) and Microsoft, Alibaba, Tencent that have excessive digital influence. These companies dominate the cyberspace. In 2018, none of GAFAM (Google, Facebook, Amazon and Microsoft had a market capitalization greater that %1 trillion. By mid-2021, four of the five exceeded $1.5 trillion and one had surpassed $2 trillion. These companies dominate --- and in some cases monopolize—global markets in digital search, digital advertising, cloud infrastructure, social media, digital messaging, mobile operating systems and other digital markets. See further: Moore, M & Tambini, D. (Eds.). (2022) *Regulating Big Tech: Policy Responses to Digital Dominance,* Oxford University Press, New York, USA.

[19] IP is the new catalyst for rapid economic growth

[20] The US, noting the flagrant denial of protection to its intellectual property rights by Ukraine, imposed, in 2002, $75 million in trade sanctions against Ukraine (which sanctions were terminated in 2005 after Ukraine amended its laws to strengthen IP). See further: B.E, Deborah, (2013) Intellectual Property: The Law of Trademarks, Copyrights, Patents, and Trade Secrets, Fourth Edition, Delmar, Cengage Learning, United States. P. 327

2017 Ruling delivered by the Supreme Court of Canada.[21] That decision confirmed that Canadian courts have jurisdiction to issue interlocutory injunctions against a party's activities that extend even beyond Canada. The Court noted that the "Internet has no borders—its natural habitat is global." It would be correct[22] however, to describe the Internet as a "network of networks". This is referring to certain physical attributes of the Internet. This brings to mind pictures of the hard wires and cables installed together to bring about this connectivity and eventual transmission of information from one point to another as the Internet, as we know it today, grew from a collection of packet computer networks.

In other words, it is the connection of a computer network to another and to another that creates the Internet today. The physical attributes of the Internet are true especially when a study of its evolution is undertaken. But in the current times, when a reference is made to the Internet, what is being talked about is its amazing wonder and capabilities; its ability to defy both space and distance in connecting people for either private or business deals. Therefore in whatever sense we look at it--- the Internet either as a collection of physically connected computer networks with the use of cables/wires or the Internet in its abstract ubiquity--- a definition of the Internet is difficult to proffer.

Graham[23] writes that "a search of UK primary legislation in January 2007 reveals that although 12 current Statutes now contain the word: "Internet", none attempts to define it". He further opines, "the Internet is undoubtedly easier to describe than it is to define."

In Nigeria, this writer is not aware of any Statute that offers a clear definition of the Internet; not even the Copyright Act. However, there is some definition of some worth akin to a definition of the Internet. For example, the Nigerian Communications Act 2003, which in fact deals with the communications sector in the country (which of course, covers the Internet), contains some definitions of some key terms common to Internet use. In its section 157 of the Act, the following definitions of these terms are offered:

> "Network facilities," means any element or combination of elements of physical infrastructure used principally for or in connection with the provision of services but does not include customer equipment;

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[21] Google, Inc. v Equustek Solutions Inc., 2017 SCC 34

[22] At Least in some respect. See: Graham, J.S.H (2007) *Internet Law and Regulation*, Sweet & Maxwell, London p. 1

[23] Ibid p.1

"Network facilities provider" means a person who is an owner of any network facilities;

"Network service" means a service "for carrying communications by means of guided or unguided electromagnetic radiation;
"Network service provider" means a person who provides network services;

Under the Cybercrimes (Prohibition, Prevention) Act 2015, the word "internet" was mentioned in about five portions[24] of the Law but without any definition of it. One therefore wonders why no statute[25] in Nigeria has defined very clearly the "internet". Today, the Internet is not viewed in terms of the physical devices and tools that work to put it together to ensure its functioning. The Internet is rather viewed without its physical boundaries. In this sense, it is described as "borderless." It is so described as if there are no physical devices including wires and cables that are connected together to produce the Internet.

As difficult as it is to define the Internet, a description of its functioning sufficiently proffers an understanding of what the Internet is. The focus would be on the suite of Internet network transmission and addressing protocols that glue them together. In other words, there are protocols--standard procedures--for regulating data transmission between computers that connect devices together that then in turn result in what is known as the Internet.

These protocols allow the networks and the computers attached to them to communicate and (using a common address system) to find other computers attached to the Internet. The collection of protocols is known as TCP/IP, after the two most important protocols in the suite: TCP (Transmission Control Protocol) and (Internet Protocol).[26]

The most characteristic, omnipresent, indicator of the Internet is the IP address. This is the unique 32-bit number (e.g. 194.72.244.100) permanently or temporarily allocated to every device on the Internet. IP addressing alone, however, is not enough to distinguish the Internet. The Internet is a public network. IP addresses are used on both public and private networks, certain

[24] Sections 21(3), 25(1), 58, First Schedule to the Act and under the Second Schedule to the Act
[25] To the knowledge of this writer; that is.
[26] Graham, J.S.H. (2007) *Internet Law and Regulation*, Sweet & Maxwell, London p. 1

ranges of addresses being reserved for private use. Private Internet networks are often known as intranets. These are internal company networks, which make use of Internet protocols and internet-compliant software such as web browsers. Intranets are hidden from the public Internet by a protective firewall, configured so that the intranet cannot (or should not) be accessed from outside. An extranet is semi-public, available only to selected outsiders such as suppliers and customers.[27]

Interestingly, it is to these networks that several devices are linked. Information technologies such as phones, television sets etc. are then linked to the Internet which in turn creates an environment—digital environment or virtual environment---that allows dissemination of information, enhances communication, businesses, relationships and consequently, result in claims in rights and obligations between individuals or participants in the cyberspace. The Internet now can really be described only in terms of the features that bind its components together--- common software protocols and addressing systems --- and its public accessibility.[28] A definition or any description of the Internet must capture the components of the Internet and the fact of public accessibility. These two are prominent characteristics of what the Internet is.

This brief discussion on the Internet shows that the Internet is not an abstract phenomenon as it appears. Physical devices and tools are put together to bring about the Internet and ensure its functioning across the globe. The speed is amazing but that amazing speed is the result of an incredible communication procedure that beats the imagination of man. However, in spite of a seemingly deliberate omission to define what the Internet is[29] in our statutes, it is impossible to conduct any meaningful legal analysis of any online breaches without a clear understanding of the roles played by certain players/actors in the cyberspace. In other words, there are Internet actors[30] whose roles ensure a seamless functioning of the Internet.

Is it therefore correct to state that the Internet, because of its physical aspects, is not as borderless as it seems? Can the principle of territoriality be applicable to the Internet platform? In plainer words, can the digital or virtual

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[27] Ibid, p. 2

[28] Ibid

[29] Which in any case permits a continuous extension or expansion of its meanings to capture emerging changes as time ticks by

[30] These actors include: infrastructure and network providers, content providers, hosts, navigation providers, transaction facilitators and access providers

environment/space be delimited like the physical borders of countries? Jack Goldsmith and Tim Wu advanced a very stimulating response.

The main goal of the authors' thought-provoking piece[31] is to show that the Internet is not after all borderless and that territorial government is still effectively able to dictate what Internet contents are permitted in its territory. According to the authors, the territorial government does this via its control of Internet intermediaries such as the ISPs, the physical networks, financial intermediaries, and the like. Jack and Wu argue that government coercion is "the most important thing missing from most predictions of where globalisation will lead, and the most significant gap in predictions about the future shape of the Internet."[32] In some respect, the overall import of this work punctures the argument in this paper that the world is globally-networked. However, this perspective overlooks the fact that the Internet intermediaries are not present in all territories of the world for each territorial government to control. In other words, in territories where the government cannot exercise its coercive powers over the intermediaries,[33] the only option would be a total shutdown of the Internet[34] or bear the defiance of such intermediaries to governmental control.

Jack and Tim did not imagine any type of re-conceptualisation of the principle of territoriality and they seem to emphasise continuous preservation of absolute territoriality because again, territoriality fits into the world's diverse configuration in cultures, customs, and practices. To achieve this, they argue that geo-blocking tools[35] and devices are employed to dictate what gets to be seen or consumed in a given territory. What should however be realised is that copyright infringement can occur even with goods and services allowed in a given country. If a territory applies geo-blocking in regulating what goes in and out of the country when in fact, it has no coercive control over Internet intermediaries, how

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[31] Jack, G. and Tim, W. (2006) *Who Controls the Internet: Illusions of a Borderless World.* Oxford University Press, Oxford, New York.

[32] Ibid. p 180

[33] Nigeria cannot. For example, when it had concerns over Twitter, It could only deny total access to Twitter through its agency the NCC. Jack and Tim admitted on page 81 of that work that "*the techniques of intermediary control are generally less-effective in small nations where opportunities for intermediary control are diminished.*"

[34] See The Mechanics of Egypt's Internet Kill Switch at https://www.theatlantic.com/technology/archive/2011/02/the-mechanics-of-egypts-internet-kill-switch/71354/. Egypt, Myanmar, and Nepal shut down their Internet as the only mechanism to check rising protests against its governments. They could not exercise control over such platforms on the Internet in checking alleged abuses by citizens. The implication is that a total shutdown implies total denial even to innocent law-abiding users.

[35] Geo-blocking is the technology that is used to restrict access to internet content based on geographical location

then would it enforce copyright protection even of works permitted in its territory especially if this breach occurs in the digital environment? Similarly, the authors also argue that "the power over domain names and numbers could also be used as a broader enforcement against other types of unwanted conduct."[36] The simple question would then be: which countries control domain names and numbers? To illustrate this point, let us consider the following cases/situations:

1.3.1 Google, Incorporated v Equustek Solutions Incorporated, 2017 SCC 34

The gist of this case is that Equustek, a small technology company in British Columbia instituted an action against Datalink Technologies Gateway Inc. ("Datalink"), for misappropriation of intellectual property. Equustek claimed that Datalink, while acting as a distributor of its products, began to re-label one of the products and pass it off as its own. Datalink also acquired confidential information and trade secrets belonging to Equustek, using them to design and manufacture a competing product. Datalink filed statements of defence disputing Equustek's claims, but eventually abandoned the proceedings and left the province. Some of Datalink's statements of defence were subsequently struck out.

Equustek obtained several interlocutory injunctions against Datalink, including court orders prohibiting the sale of inventory, a ban the use of Equustek's intellectual property, and a freeze on Datalink's worldwide assets. Datalink ignored all the court orders and continued to conduct business through several different online websites from an unknown physical location.

With Datalink continuing to conduct business online, Equustek reached out to Google in 2012, requesting it to de-index Datalink's websites or, in other words, to remove all links to Datalink-affiliated websites from its search engines. Following a court order, Google de-indexed 345 individual webpages from the Canadian Google search engine (google.ca), but did not de-index Datalink's webpages from its global domain (google.com). As a result, Equustek sought an interlocutory injunction to order Google to remove all of Datalink's affiliated websites from its worldwide search engine. The Court in upholding the decisions of the British Court of Appeal and British Columbia Superior Court granted the interlocutory injunction.

[36] Supra note 31

What this case proves is that for online infringements of copyright works, remedies limited to the territory of the country involved are not effective. In fact, it was Google's argument that issuing an interlocutory injunction with global effects was improper. Google challenged the global reach of the interlocutory injunction, suggesting that if the injunction is to be granted, it should be limited to Canada alone.

The Court's decision recognises the challenges of a universal Internet order, but concludes that an international takedown is necessary to guarantee the interlocutory injunction as an effective remedy. The Court held that:

> The problem in this case is occurring online and globally. The Internet has no borders — its natural habitat is global. The only way to ensure that the interlocutory injunction attained its objective was to have it apply where Google operates — globally. As Fenlon J. found, the majority of Datalink's sales take place outside Canada. If the injunction were restricted to Canada alone or to google.ca, as Google suggests it should have been, the remedy would be deprived of its intended ability to prevent irreparable harm. Purchasers outside Canada could easily continue purchasing from Datalink's websites, and Canadian purchasers could easily find Datalink's websites even
>
> if those websites were de-indexed on google.ca. Google would still be facilitating Datalink's breach of the Court's order which had prohibited it from carrying on business on the Internet. There is no equity in ordering an interlocutory injunction which has no realistic prospect of preventing irreparable harm.

1.3.2 The Nigeria-Twitter Brawl

In 2021, two major developments in the relationship between Twitter; a micro-blogging site, and the Nigerian government, a sovereign entity demonstrate the concerns of this paper. The first of the two was that on the 8th day of March, 2021, Professor Yemi Osinbajo, Nigeria's Vice-President's tweet was taken down by Twitter following a complaint by Beyoncé Knowles that the vice-president's tweet violated the American singer's copyright. Mr. Osinbajo had posted a video with Beyoncé's song, *Run the World,* playing in the background to mark the 2021

International Women's Day celebration[37] without attributing copyright ownership to the singer. The second development was the outright ban on Twitter in June, 2021 following a removal of President Buhari's tweet considered by twitter to have violated its "abusive behavior" policy.[38]

Firstly, the ban on Twitter demonstrates Nigeria's incapacity to appropriately deal with Twitter without resorting to a total ban. Jack and Wu's prescription would have been for Nigeria to apply its local laws to Internet intermediaries linked to Twitter but in this case, there is no such intermediary on which the Nigeria government could apply its laws to check twitter's alleged excesses. It sadly resorted to a total ban being Nigeria's apparently, lone response mechanism to activities in the virtual space. A look at the country's Internet Code of Practice[39] put in place by the Nigerian Communications Commission shows that even in regulating unlawful content on the Internet, the country cannot do more than a total denial of access via a mechanism known as the Take Down Notice. The Code provides in relation to the Take Down Notice[40]that:

> Upon determination by the Commission that the content reported under Paragraph 7.2 above is indeed unlawful, the Commission shall issue a takedown notice to all IASPs to deny or disable access to the content. The IASP shall be expected to comply with such takedown notice within 24 hours of receipt of the notice.
>
> A person who is aggrieved or whose interest is adversely affected by any takedown notice issued by the Commission pursuant to Paragraph 7.3 (a) above may appeal the decision in accordance with the provision of Chapter V, Part X of the Act.[41]

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[37] "Twitter Removes Osinbajo's Post For Copyright Violation Of Beyonce's Song" (2021) Guardian News Online available at https://guardian.ng/life/twitter-removes-osinbajos-post-for-copyright-violation-of-beyonces-song/ visited the 18th day of December, 2021

[38] "Nigeria suspends Twitter after the social media platform freezes president's account" (2021) The Washington Post Online News available at: https://www.washingtonpost.com/world/2021/06/04/nigeria-suspends-twitter-buhari/ last visited on the 20th day of December, 2021.

[39] Internet Code of Practice, (2019) available at: https://www.ncc.gov.ng/docman-main/internet-governance/878-internet-code-practice/file and accessed on the 7 July, 2021

[40] Ibid, paragraph 7.3 (a) and (b)

[41] ibid

The term, unlawful content has been defined under the Code as 'any content in violation of an existing law in Nigeria.'[42] This definition certainly covers copyright works sufficiently especially as the key words in the definition are; 'an existing law' in Nigeria. In other words, an infringing copy surfacing on the Internet would amount to an unlawful content and upon reports to the NCC, it becomes subject to its regulatory control.

As beautiful as this provision is, a critical closer look at the wordings of the paragraph clearly reveals that the Commission's mechanism of a Take-Down Notice[43] does not amount to a total removal of such unlawful content in the strict sense of the word. The wordings used in the paragraph are that "the Commission shall issue a takedown notice to all IASPs to deny or disable 'access' to the content." In other words, the Commission only has control over Internet Access Service Providers particularly in their role of providing Internet access, it however has no control over the hosts of the website or blog on which the unlawful content might be posted. Consequently, the Commission can only issue a takedown notice to all IASPs to 'deny or disable access' to the content; not to completely take the unlawful content down or compel an online service provider such as Twitter to reverse itself in cases of wrong deletion of contents. It must be stated that denial of access to unlawful content only means the content still exists and can be accessible through channels not under the regulatory control of the Commission.[44] This challenge only further demonstrates the need for a global enforcement framework that includes Big Techs so that a country does not have to resort to a total ban because it has no Internet intermediary to enforce its laws and secure compliance.

Secondly, twitter's presence virtually throughout the world underscores the global connectivity of the current times. By the current judicial positions in the country however, foreign works, rightly or wrongly, do not enjoy protection under the Nigerian copyright law. Consequently, had the matter gone before the Nigerian courts, Beyoncé Knowles, on the basis of territoriality, would have lost her copyright claim. If conversely, a court pronounces in favour of a copyright claimant over an infringement occurring on the Internet, in giving effect to such pronouncement, territory-specific remedies are inadequate to roundly address the

[42] Ibid, paragraph 1.4

[43] Section 29 of the Copyright Act repeal and re-enactment Bill, 2021 makes similar provision for a Take-Down Notice.

[44] The Nigerian government's decision to deny access to twitter via its telephone networks has not denied Nigerians from accessing Twitter via any other means. For example, the use of Virtual Private Network (VPN) has enabled access by bypassing the usual channels known to the country. See: "Twitter Nigeria: Users struggle to access site after government suspension" (2021) BBC News Online available at: https://www.bbc.com/news/world-africa-57363779 and accessed on the 7th July, 2021.

infringement. And like Equustek's position, any such judicial remedy must be accorded global reach. It only therefore means that local laws are not enough in addressing copyright infringements especially in the virtual world and the only stumbling block in the way of installing a global enforcement mechanism is the principle of territoriality.

1.4 Territoriality and the Economic Growth of the Developing World

Kur and Dreier[45] argued in support of territoriality that "the issue has become one of fine-tuning a state's national legislation to that state's particular economic, innovative, creative and consumptive needs. In other words, the principle of territoriality enables nation-states to exercise an – albeit limited – freedom to adjust their IP policies and follow their national IP laws to their particular national needs." This position is awfully disconnected from the realities of these times. No economic advancement in any individual country is possible and sustainable unless there is integration into the world economy. This paper recognizes the reality that legal systems around the world may be nationally defined but it is contestable to argue that they are also nationally confined. Social and commercial structures that were predominantly national in the late nineteenth century have taken on a more international hue, creating a transnational market- place where the grounding of national rights in national differences is less compelling[46]

Kamil argues that increased worldwide demand for goods and products and a corresponding lack of proportional increase in worldwide enforcement mechanisms needed to support that demand and production, such as customs, police, and judiciary allow for cracks and niches in the system. Counterfeiters are right there, ready to fill those cracks with counterfeit goods.[47] Additionally, "protecting only domestic works is, in fact, counter-productive as it increases unfair competition from unprotected foreign works and inventions. Those countries in which counterfeiting and piracy take place suffer losses on several levels, both tangible and intangible. When it is shown by credible evidence[48] that

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[45] Annette Kur and Thomas Dreier, (2013) *European Intellectual Property Law: Text, Cases and Materials* (Edward Elgar) p. 13

[46] Dinwoodie, G.B. (2009) Developing a Private International Intellectual Property Law: The Demise of Territoriality? Legal Research Paper Series Paper No 52/2009, University of Oxford, Oxford, UK, p. 768 -9

[47] Kamil, I, (2003) Intellectual Property: A Power Tool For Economic Growth, World Intellectual Property Organization, Geneva, Switzerland.

[48] The court in Nigeria in the case of Microsoft Corporation v Franike Associates Ltd |2011| LPELR-8987(CA) 17[G-18[A] and the recent case of Voice Web International Limited v Emerging Markets

counterfeit and pirated goods are being manufactured in a country and there is little or no focused government effort to prevent such manufacturing from taking place, the harmful reputation, which this creates, discourages manufacturers of legitimate goods from establishing their facilities in those countries. Such decisions result in a loss of FDI, as well as the concomitant technology transfer and foreign know-how that normally accompany FDI. Loss of FDI also manifests itself in a loss of foreign income, which ultimately affects a country's balance of payments"[49]

Over the years, Nigeria has become a target destination and transit route for counterfeit and pirated goods. Foreign and local traders flood market with cheap sub-standard fakes while local manufactures illegally imitate products of established brands. Reasons for the widespread proliferation include informal structure of the economy, corruption, outdated legislation, weak policy and enforcement mechanisms, and lack of proper awareness on the dangers of consuming substandard and counterfeit products.[50] With particular reference to software development, Nigeria loses about $287 million to software piracy annually and an earlier study showed that 82% of software installed on personal computers in Nigeria was unlicensed.[51] Nigeria's creative industry suffers similar fate. The World Bank reports that for every legitimate film sold, nine others are pirated.[52] About 80% of international music CDs available in Nigeria are pirated. In the local industry, 40% of products are copied, counterfeited, or sold illegally.[53] Only an estimated 11% of Nigerian consumers pay for their music. Music piracy impacts both local industries and foreign investments. The local industry loses out on revenues and deters foreign investment. The social

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Telecommunication Services Ltd &Ors, Suit No FHC/L/CS/576/2017 insisted that foreign works enjoy no protection in Nigeria.

[49] Supra note 47

[50] "Impact of Intellectual Property Infringement on Businesses and the Nigerian Economy" (2019) PriceWaterhouseCoopers available at https://www.pwc.com/ng/en/assets/pdf/ip-infringement-ngr-economy.pdf accessed on the 20th November, 2021

[51] 'Why $287m yearly loss to pirated software is dangerous to economy' (2016) The Guardian News Online available at: https://guardian.ng/technology/why-287m-yearly-loss-to-pirated-software-is-dangerous-to-economy/ and accessed on the 2nd of December, 2016.

[52] "Nigeria's film industry: a potential gold mine?" (2013) Africa Renewal available at: https://www.un.org/africarenewal/magazine/may-2013/nigeria's-film-industry-potential-gold-mine accessed on the 20th of November, 2021

[53] "Promoting and Protecting Intellectual Property in Nigeria" (2015) ICC & BACAP Report, available at: https://iccwbo.org/content/uploads/sites/3/2017/01/Promoting-and-Protecting-Intellectual-Property-in-Nigeria.pdf and accessed on the 20th day of November, 2021

implications of piracy are also notable. Local creativity is dampened by piracy, as producers are unable to compete with cheap substandard pirated products.[54] The point therefore to note is that in the light of increasing digitisation of copyright material, online piracy continues to grow in a manner that defies local enforcement mechanisms within nation-states and consequently wreaks havoc on the economies of the developing world most of whom lack the critical *techniques of intermediary control.*

1.5 Conclusion:

Installing a global enforcement framework with the participation of all critical stakeholders including today, the Big Techs, does not imply imposing a single legal system on all nations of the world. It does not also mean an erosion of the diversity feature of world's populations. It only requires setting up protocols and procedures that guarantee compliance with copyright enforcement orders without wielding the big territoriality stick. This means courts, the police, Internet actors all over the world are to collaboratively play roles to ensure that no part of the virtual world permits access to any copyright material that has been elsewhere infringed upon. The Google-Equustek scuffle confirms, contrary to Jack and Tim's prescription for Internet control, that even for stronger nations, bigger Internet actors play strategic roles in giving life to court orders. Similarly, nations of the developing world do not have to resort to a total ban as the only control mechanism. Copyright is the fine balance between public access to information/creative outputs and the rights of creators. A total ban denies the larger public the needed access.

Consequently, it is recommended that instead of acceding to treaties that are rarely complied with[55], an international technology-guided enforcement procedure should be the focus of the global community now. An enforcement procedure that captures roles to be performed by all critical Internet actors should be developed to quickly respond to these concerns. This means a reconceptualisation of the principle of territoriality in copyright jurisprudence. While this paper may not exhaustively prescribe detailed contents of this procedure, it needs be stated that a meaningful enforcement of copyrights in the cyberspace goes beyond the remedial mechanisms within the territorial borders of nation-states.

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[54] Supra note 50

[55] Nigerian Constitution, like most countries' Supreme Law, still requires a ratification and domestication processes before treaties/conventions are enforced within the country.