

APPRAISAL OF THE INSTITUTIONAL FRAMEWORK FOR THE ENFORCEMENT OF COPYRIGHT LAWS IN NIGERIA: NIGERIAN COPYRIGHT COMMISSION IN PERSPECTIVE

By

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Abstract

In the globalization and abandon intellectual innovation, a nation must be able to rip her ideas, inventions, creative works towards technological advancement and global competitiveness. To foster natural talent, Nigeria need to identify her intellectual researchers and inventors, it also need to create a friendly environment and initiate strategies to protect all the intellectual stakeholders and their creative idea or products. Piracy has become a great challenge in the current Information Technology regime to government and the intellectual property. Piracy refers to the unauthorized and illegal reproduction or distribution of materials protected under intellectual property law. Copyright emphasizes creative work¹ that has economic value and is protected through a plethora of legislative enactments the paper adopted doctrinal method in conducting this research. The paper found that emerging digital environment like the internet and global knowledge economy has not been addressed in the current Nigerian Copyright Act. The execution of the Commission mandate include problems in the justice administration system (slow judicial processes) and dearth of technical tools for anti-piracy operations, inadequate personnel in the Commission, and paucity of funds to execute programmes is another finding of the paper. The paper recommends amongst other that the Nigerian Copyright Act be reviewed to address the challenges of effective protection of creative rights and benefits especially in the emerging digital environment like the internet for global

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¹S.I(I) of the Copyright Act Cap C28, Laws of the Federation of Nigeria, 2004 embraces literary, musical and artistic works, cinematograph films, sound recordings and broadcasts.

knowledge economy and to incorporate Statutes of minimum standards under international treaties to which the country is signatory. It is further suggested the Commission should to engage more proactive enforcement of the Copyright Act mid review urgently for more stringent penalties for infringement to ensure effective check of piracy in the country.

1.1. Introduction

In the present era of globalization and liberalization the world economy, a nation must be able to harness her ideas, inventions, innovations and creative works toward technological advancement and global competitiveness. To nurture national talents, Nigeria, requires identification of her researchers and inventors, creation of an enabling environment and to initiate strategies to protect all the intellectual stakeholders and their creative works. In the information and communication technology (ICT) age, piracy has become a global challenge to national governments and intellectual property.² It is perhaps the most negative development under Nigeria's copyrights regime.

Piracy refers to the unauthorized and illegal reproduction or distribution of materials protected under intellectual property law³; It is also the unauthorized recording and reproduction of recordings of live concerts without the permission of the artistes concerned⁴. Piracy has grown into a huge industry and continues to threaten the survival of creativity, innovation and enterprise. Nine out of every ten Compact Discs (CDs), Video Compact Discs (VCDs), Digital Versatile Discs (DVDs), software, books and other copyright works are pirated, accounting for a huge loss in income to right owners, revenue to government and the economy⁵.

Copyright emphasizes creative work⁶ that has economic value and is protected through a plethora of legislative enactments⁷. These laws enable

²Se Li, H.H. (2006) Piracy, Prejudice and Profit: A Perspective from US-China Intellectual Property Rights Disputes, in the Journal of World Intellectual Property, Vol.9 No.6 November pp.727-746

³Ladan, M.T. (2007) Materials and Cases on Public International Law, Ahmadu Bello University Press Limited p. 805.

⁴Oloko, T. (2011), The Administration and Regulation of Intellectual Property Rights in Nigeria. The Nigerian Law Journal Vol 15 No. 1. p.153. See also Nigerian Copyright Commission website: <http://www.nigcopyright.org/strap.htm>. Accessed on 19th May, 2013.

⁵ibid

⁶S.I(I) of the Copyright Act Cap C28, Laws of the Federation of Nigeria, 2004 embraces literary, musical and artistic works, cinematograph films, sound recordings and broadcasts.

⁷Copyright Act Cap. C28, Laws of the Federation of Nigeria 2004,-Copyright (Security Devices) Regulation 1999, Copyright (Video Rental) Regulation 1999, Copyright (Optical Discs Plants) Regulation 2006, Copyright (Collective Management Organizations) Regulation 2007, Copyright (Dispute Resolution Panel)

establishment of institutional frameworks⁸ for the administration and enforcement of copyright in Nigeria. Despite these legal and institutional frameworks, piracy of books, films, music tapes and records still goes on unabated in this country.

There are a lot of pirated copyright works smuggled into the country from some foreign countries. While these pirated materials are imported, many others are produced locally within the country. This paper examines the enforcement functions of the Nigerian Copyright Commission for protection of Copyright owners with the aim of identifying the problems that are militating against the effective regulation and control of copyright infringement in Nigeria, so as to make appropriate recommendations to address the challenges.

1.2 Definition of Copyright

The Copyright's Act did not help in providing a clear cut definition of the word copyright, it rather create confusion by providing that copyright means copyright under the Act. If the enable act cannot provide a working definition where else would the definition come from? However legal definition of reveals that copyright is a property right that subsists in various works, for example, literary works, musical works, artistic works, cinematograph films, sound recordings, and broadcast⁹, Copyright law protects original works of authorship 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 device¹⁰.

Copyright is the right of an author to control the reproduction of his intellectual creation. It confers on the author the authority to control his creation after disclosure and prevents others from reproducing his personal expression without his consent¹¹. In this sense, copyright is usually regarded as a property of a unique kind. It is intangible and incorporeal¹². The item to which the property right applies - the author's intellectual work - is incapable of possession, except as it is embodied in a tangible object such as a manuscript, book, record or film, and so forth. The tangible object may be in the hand of several people, but copyright prevent them from reproducing it. It provides protection for the rights of authors

Rules, 2007, Copyright (Reciprocal Extension) Order 1972 and Copyright (Levy on Materials) Order, 2012 (effective from 2013).

⁸Nigerian Copyright Commission, Custom and Excise, The Judiciary, Nigeria Police Force and so forth. 1

⁹David B. (2007) Intellectual Property 6th ed. Essex, Pearson

¹⁰Williams F. Theories of Intellectual Property on line at

<http://cyber.law.harvard.edu/people/tfisher/iptheory.pdf>. 5th April 2014

¹¹Asein, J.O. (2012), Nigerian Copyright Law and Practice, 2nd edn. Books & Gavel Publishing, Abuja, p.5

¹²Aboki, Y. (2002), Economic and Cultural Basis for Copyright Protection in Nigeria. In: Asein J.O. and

¹²Nwauche E.S. (ed) A Decade of Copyright Law in Nigeria. Nigerian Copyright Commission, Nigeria, p.76.

in order to encourage further creativity, thus enriching the nation's store of literature, drama and music¹³,

1.3 Establishment of the Nigerian Copyright Commission (NCC)

The Nigerian Copyright Commission is established by the Copyright Act in section 34(1)¹⁴ it has dual capacities of administration and enforcement of the law. The Act also provides for the establishment of a Governing Board for the Commission and the appointment of a Director-General and other supporting staff for the Commission¹⁵. According to section 34(2) of the Act, the Commission shall be "a body corporate with perpetual succession and a common seal and may sue and be sued in its corporate name subject to the proviso"¹⁶: Copyright Act is the principal legislation in respect of copyright matters setting out provisions for protection of the rights of owners in the protected works. The Act has also identified and involved various bodies to ensure compliance. Such bodies include the Nigeria Police Force, the Judiciary, the Nigeria Customs and Excise Department, the Nigerian Copyright Commission and the Collective Management Organizations (Collecting Societies). These bodies under reference are to ensure and assist the commission in the smooth and successful implementation of the act.

1.3.1 Enforcement Mechanism of the Nigerian Copyright Commission

The enforcement of copyright is the responsibility of the copyright holder¹⁷; by application to the courts the copyright owner can stop a person making further infringement on the use of his material by seeking an injunction, interdict or other order. The powers of the Nigerian Copyright Commission may be assessed through its enforcement measures as provided by different sections of the law¹⁸, The enforcement mechanism are aimed at reducing the level of piracy in the country and ensuring the right of owners to receive reward for their works. The Act empowers the Commission:

- (i) to receive and grant compulsory licences¹⁹, (ii) to constitute Copyright Licensing Panel²⁰, (iii) to

¹³Ekpere, IA. (2002) Copyright Law and National Development: Philosophical and Economic Paradigm for the Next Millennium. In A Decade of Copyright Law in Nigeria, p.68.

¹⁴Copyright Act, Cap C28, Laws of the Federation of Nigeria, 2004.

¹⁵ S.35(1) *ibid*

¹⁶Section 47(1)-(3) *ibid*

¹⁷Correa, C.M. and Li, X. (2009) Intellectual Property Enforcement: International Perspectives, Edward Elgar Publishing p.21 1. <http://books.google.com/books>. Accessed on 22nd July, 2011.

¹⁸Sections 21-23, Copyright Act *op cit*.

¹⁹Section 37 *ibid*

appoint Copyright Inspectors²¹ as it may deem fit, (iv) to approve and regulate the operations of collecting society²², (v) to prescribe, design, label, mark impression or any other anti-piracy device for use in connection with any work for which copyright subsists²³.

The enforcement powers of the Copyright Commission are carried out through its enforcement organs as given by law²⁴. The Commission enforcement mechanisms are aimed at curbing piracy in the country so that the right owners receive reward from the commercial exploitation of their works.

1.3.2 Copyright Inspectors

The enforcement role of the Commission is discharged primarily through its Copyright Inspectors. A Copyright inspector shall, for the purpose of this Act have power²⁵ to:

- (a) enter, inspect and examine at any reasonable time any building or premises which he reasonably suspects is being used for any activity which is an infringement of copyright under this Act²⁶, (b) arrest any person who he reasonably believes to have committed an offence under this Act²⁷, (c) make such examination and inquiry as may be necessary to ascertain whether the provisions of this Act are complied with²⁸, (d) require the production of the register required to be kept under section 14 of this Act and to inspect, examine or copy it²⁹, (e) require anybody who he finds in such building or premises to give such information as it is in his

²⁰Section 37(2) *ibid*

²¹Section 38, *ibid*

²²Section 39, *ibid*.

²³Section 21(1), *ibid*

²⁴Sections 21, 22, and 23 *ibid*

²⁵Section 38(2)(a) *ibid*.

²⁵Section 38(2)(a)(g), *ibid*.

²⁶Section 38(2)(a) *ibid*.

²⁷Section 38(2)(b) *ibid*.

²⁸Section 38(2)(c) *ibid*

²⁹Section 38(2)(d) *ibid*

power to give in relation to any purpose specified in this Act³⁰,

The section further provides:

(f) carry out such examination, test or analysis within or outside the premises as is required to give effect to any provisions of this Act and to make instant photograph where such examination, test, analysis or photograph shall be required to be endorsed by the occupier of the premises or his agent, but a refusal by an occupier to endorse any document containing the result of an examination, test analysis or photograph shall not invalidate the result or finding of the examination test, analysis or photograph³¹ and (g) exercise such other powers as the Commission may delegate it to give effect to the provisions of this Act³².

Section 38(3) of the Copyright Act also empowers Copyright inspector to prosecute, conduct or defend before a court any charge, information, complaint or other proceedings arising under this Act. In the case of **Nigerian Copyright Council v. Musical Copyright Society of Nigeria & Ors**³³, the issue for determination was whether the power of Copyright Inspector to prosecute criminal matters as empowered by section 38(3) of the Copyright Act was not in conflict with the powers of the Attorney-General under section 174 of the Constitution³⁴. Dismissing the preliminary objection, the court held that inasmuch as section 174 gives the Attorney-General power to institute and take over criminal proceedings that were "instituted by any other authority or person", it presupposes that any authority or person "authorized by law" may institute or undertake criminal proceedings. The court was persuaded by the decision of the Court of Appeal in **Olusemo v. Commissioner of Police**.³⁵ Where it was held that the Police had powers to institute criminal proceedings notwithstanding the powers of the Federal and States Attorneys General under the 1979 Constitution. This matter has now been laid to rest by the Supreme Court in case of **Federal Republic of Nigeria v. Osahon**³⁶ upholding the power of police officers under

³⁰Section 38(2)(e) *ibid*

³¹Section 38(2)(e) *ibid*

³²Section 38(2)(g) *ibid*

³³(1999) F.H.C.L 419

³⁴1999 Constitution of the Federal Republic of Nigeria (as amended). 3S (1998) 11 N.W.L.R. (Pt.S7S) at 475.

³⁵(2006) 5 N.W.L.R. (Pt.973) at 261.

³⁶FCTIHC/M/5222/2011

section 23 of the Police Act to prosecute in superior courts so long as they had right of audience in such a court, for example as legal practitioners by virtue of being called to the Bar. The same principle would apply to the Copyright Inspector.

A Copyright inspector shall have all the powers, rights and privileges of a police officer as defined under the Police Act and under other relevant enactment pertaining to the investigation or defence of a civil or criminal matter under this Act. Its powers under the Act include the powers of investigation, arrest and prosecution which are limited to offences arising from the Act itself. **The Federal High Court in Ayika v. Nigerian Copyright Commission**³⁷ held that the Commission has no power to arrest, detain or prosecute any person or persons for any offence not covered by the Act. This should be without prejudice to the incidental powers of the Commission and its Inspectors to pursue matters that arise from the offences that are expressly provided for in the Act.

1.3.3 Copyright Licensing Panel

Compulsory Licensing is based on the need to have access to protected works on practicable terms. Realizing the difficulty or impossibility of obtaining licenses from copyright owners and desire to avoid the creation of monopoly at the expense of the public the grant of a compulsory licence appears to be the solution³⁸. Without facilities like compulsory licence, scarcity of books will obviously attract more pirates. Section 37(1) of the Copyright Act provides that the Commission shall have power to grant compulsory licences in accordance with the provisions of this Act.

Compulsory licence is a feature that is present in most jurisdictions and for other forms of intellectual property as well. Section 37(2) of the Copyright Act provides that in the exercise of Commission's powers to grant a Compulsory Licence, it shall, where an application is made to it, constitute a Copyright Licensing Panel consisting five persons, three of whom shall be members of the Governing Board of the Commission with one of them designated as the Chairman Section 37(4) provides that a person shall not be appointed as a member of the panel if he has any interest in any matter which is required to be determined by the panel. Any person aggrieved by a decision of the Panel shall have a right of appeal to the Federal High Court.

³⁷Ascin, 1.0. opcit.p 356.

³⁸Babafemi, F.O. Intellectual Property: The Law and Practice of Copyright, Patent and Industrial Design in Nigeria, Justinian Books Ltd, (2007), p.53.

1.3.4 Tariffs Arbitration Panel

Where there is a dispute between a collecting society and a user over the tariffs payable by the user, such dispute is to be referred to the Commission which may set up a Tariffs Arbitration Panel for the purpose of resolving the dispute³⁹. The provision of the Act appears to be a mandatory requirement of submission to arbitration. In that wise, it may be argued that a dispute between users and an approved society cannot proceed directly to the court without first being heard by the Panel⁴⁵. Subject to the right of any of the parties to appeal to the Federal High Court, on points of law, the decision of the Panel would be final and binding on the parties before it.⁴⁰

Subject to payment of prescribed fees, a person may initiate proceedings under these Rules for the settlement of a dispute arising from the Copyright (Collecting Societies) Regulation 2007 by a notice as in Form 1 (Applicant's Notice) of the First Schedule, together with a statement of the applicant's case to the Commission⁴¹. Within 7 days of the receipt of the notice in Form 1, the Director General of the Commission⁴² shall cause to be served on the person named as Respondent therein, a notice of the reference of the dispute in Form 2 (Respondent's notice) together with a copy of the applicant's statement⁴³. Except where otherwise directed, the respondent shall, within 14 days of the service of the applicant's notice serve on the Director General of the Commission his written answer to the Applicant's statement and any counterclaim, and the Director General shall cause a copy of the Respondent's answer and counterclaim to be served on the applicant.

Upon this, the Director General of the Commission may at any time before the constitution of the Panel decide whether the dispute is such that should be referred to a Panel. If, after considering the reference the Director General decides to entertain the reference, he shall refer same to a Panel, and if he declines to entertain the reference, he shall direct that no further proceedings shall be taken by any party in connection with the reference⁴⁴.

Subject to the decision to refer a dispute to a panel, the Director General of the Commission shall, within 10 days after the receipt of the last statement or answer from the parties, appoint a Panel in accordance with Regulation 15 of the Copyright (Collecting Societies) Regulations 2007. The Panel shall have power to

³⁹Section 37(3), Copyright Act, op cit.

⁴⁰Section 14, Copyright (Collective Management Organization) Regulations 2007, 8

⁴¹Asein, J.O. op cit p.377.

⁴²Paragraph 15, Copyright (Collective Management Organizations) Regulation 2007. The Commission may make regulations providing for the procedure of the Panel.

⁴³ Paragraph 1(1) Copyright (Dispute Resolution Panel) Rules, 2007

⁴⁴ Paragraph 2, ibid

regulate its own procedure. Disputes under these Rules may be determined on the basis of documents filed only. However, the Panel may, having regard to the exceptional nature of the case, or at the request of a party, order a hearing. A party may be represented at any hearing by a legal practitioner, or by any other person allowed by the panel to appear on his behalf or may appear in person. The notice of representative shall either be stated in the notice to the Director General referring a dispute for settlement required to be given in rule 2(1) or an answer thereto, or made in writing and shall not be effective until notice thereof has been served on the Director General, and a copy of same has been served on every other party and the proof of such service delivered to the Panel⁴⁵.

The panel's final decision shall be communicated to the Director General of the Commission who thereafter shall inform the parties of the decision. It should be noted that an application for settlement of a dispute shall be subject to the payment to the Commission of an administration fee which shall not be refundable. Where it is not paid within 7 days, the applicant is deemed to have withdrawn his application. The amount covers the Panel's fees and any properly incurred outgoing of the members of the Panel and such other expenses as are necessary for the conduct of the proceedings, such as the cost of hearing facilities⁴⁶.

1.3.5 Creation of Collecting Society (Collective Management Organization) (CMO)

Under section 39(1)⁴⁷ of the Copyright Act, a Collecting Society may be formed in respect of anyone or more rights of copyright owners for the benefit of such owners and the society may apply to the Copyright Commission for approval to operate as a Collecting Society for the purpose of the Act. Section 17 of the Copyright Act states:

... no action for infringement of copyright or any right under this Act shall be commenced or maintained by any person(s) carrying on the business of negotiating or granting license (b) collecting and distributing royalties in respect of copyright works or representing more than 50 owners of copyright in any category of works protected by this Act unless it is approved under

⁴⁵ Section 8(1)(2) op cit.

⁴⁶Section 5(1)(2), *ibid*.

⁴⁷ Copyright Act, *ibid*

section 39 of this Act to operate as a collecting society or is otherwise issued with a certificate of exemption by the Commission.

According to section 39(8)⁴⁸ the term "Collecting Society" refers to "an association of copyright owners which has as its principal objectives the negotiating and granting of licenses, collecting and distributing of royalties in respect of copyright works". According to Ezeilos⁴⁹, 'Collecting Society' may also involve the act of copyright owners surrendering their rights to an association of right owners with a mandate to such body to act on their behalf. Such mandate includes the negotiation of tariffs, grant of licenses and the collection of agreed royalties that are a sequel to their right of the owners either directly or through their associations. This is an indirect and cost-effective way of enjoying the fruits of one's intellectual property. Firstly, the owners of protected works come together under an umbrella organization and constitute some of their members into a committee that will assume administrative responsibility for collecting appropriate royalties on behalf of such members. Secondly, the committee seeking a legal right to use copyright material for commercial gains may negotiate with ease with the copyright owners on mutually agreed terms of payment.

The Copyright Act confers upon the Commission the power to grant approval for the formation of collecting societies subject to the terms and conditions specified therein⁵⁰. However, there appears to be no collecting society in respect of other class of works, such as cinematograph films, literary works and artistic works. This may not be unconnected with the requirement that, for an association to gain approval, it must have a membership of not less than one hundred right owners representing the class of rights of which registration is sought⁵¹. Membership of CMO is voluntary; therefore, it will not be easy to get a minimum of one hundred persons subscribing to an association, especially at its inception. Some right owners may need to see tangible achievements on ground before they subscribe.⁵² Thus it is submitted that the requisite number is too high. This is a drawback in the Nigerian copyright protection. It is a challenge to the Commission to ensure that it assists other classes of right owners to form societies. The Commission made the Copyright (Collective Management Organizations) Regulations, 2007 specifying regulations for the management of collecting societies in exercise of the regulatory powers conferred on it.⁵³

⁴⁸ Copyright Act, Ibid

⁴⁹ Ibid

⁵⁰ Ibid

⁵¹ Ezeil, B.O., (2007), *Collective Administration of Copyright in Nigeria*, Lagos, p. 7

⁵² Ibid

⁵³ Section 39 (1) & (2) op cit.

It is an endeavour to further enhance the earnings of right owners that the Commission encourages the formation of collecting societies pursuant to section 32B of the Nigerian Copyright Act. According to section 39(4)⁵⁴ a Collecting Society that has not been approved and registered by the Nigerian Copyright Commission cannot exercise the duties and powers as such. In **Musical Copyright Society (Nigeria) Ltd v. Ade Okin Records & Another**⁵⁵, Ukeje J, after an extensive and exhaustive consideration of the legal term locus standing held that the plaintiff being a Collecting Society and not being registered and recognized by the Nigerian Copyright Commission could not initiate the action. The court, therefore, also lacked the jurisdiction to entertain the action. Similarly, in **Musical Copyright Society Ltd v. Details Nigeria Ltd**⁵⁶ Odunowo J, held inter alia:

.. I have come to the inexorable conclusion, after deep reflection, that the plaintiff is a Collecting Society. Not having been registered pursuant to section 32(b) (4) of the Copyright (amendment) Act 1992 it cannot be permitted to operate as such a body. To do so would be tantamount to subverting not only the letter, but also the spirit of the Copyright laws of this country. That being so the proper order to make is one striking out the suit for lack of locus standing to initiate the action.

From the ruling of the court, absence of registration is fatal to the success of collecting society in the pursuit of its right in a court of law. The combined import of sections 17 and 39 is simply that the right of legal representation cannot be exercised by any society without the Commission's approval. After the inclusion of the requirement for the formation of collecting societies in the amended Copyright Act of 1999, any unregistered Collecting Society purporting to institute legal action on behalf of its member is likely to be challenged as shown in the cases above. In **Nigerian Copyright Council v. Musical Copyright Society of Nigeria & Ors**⁵⁷ the collecting society was charged for infringing the provisions of the Nigerian Copyright Act which bars any person or society from carrying on business as a collecting society without obtaining a Collecting Society's licence from the copyright regulatory framework under Nigerian Copyright Commission. The court held on the interlocutory application of the accused contending that the complainant prosecution that is, (Collecting Society)

⁵⁴ Copyright Act, *ibid*

⁵⁵ (1992) FHCLR 313

⁵⁶ (1996) FHCLR 473. The Musical Society (Nigeria) Limited has however now been appraised and recognized as a Collecting Society by the Nigerian Copyright Commission

⁵⁷ (1999) F.H.C.R. 419

lacked the legal authority to sustain the charge, and that the right to freely associate is not an absolute right but a restrictive one. The court further held that the Nigerian Copyright Commission is granted power similar to that of the Nigerian Police to prosecute offenders of statutory offences provided for under the Act. It is submitted that proper administration can only be achieved by liberal legislations towards collecting societies to enable them perform in the administration of Copyright in Nigeria. Alternatively, the associating members should arm the Collecting society in question with individual powers of attorney to act on their behalf and do all that is needful. This would improve competitiveness and development in the market environment.

1.3.6 Approval of Copyright Society of Nigeria (COSON)

The Commission approved the formation of Copyright Society of Nigeria (COSON), in May 2010 to represent owners of musical works and sound recordings. COSON is the only approved collecting society representing owners of musical works and sound recordings in Nigeria. The reason for this may be because, the law clearly states that, the Commission shall not approve another society in respect of any class of copyright owners, if it is satisfied that an existing approved society adequately protects the interest of that class of copyright owners.⁵⁸

The provision has been criticized on the grounds that it creates a monopoly in collective management thus depriving right owners of the option of choosing from a variety of associations and therefore called for its liberalization⁵⁹. This criticism has been rejected on the grounds that, the approval of more than one collective management organization in respect of the same class of works would create confusion at the point of negotiation and licensing; and consequently weaken the collective bargaining position of right owners as users are likely to reject double licensing for the same class of work. It would further generate unhealthy rivalry, raise administrative costs and deplete available royalties for distribution to right owners and lead to unnecessary disputes between owners of musical works and the recording companies that own the sound recordings.

Royalty is the percentage of income arising from a book, a piece of music, or an invention paid to the author, composer or inventor⁶⁰. Copyright owners in subscribing to the membership of any collecting society must as a fundamental

⁵⁸Section 39 (3) Ibid.

⁵⁹Adebambo, A. (2008) - The (then Director General), NCC. STRAP and CLAMP - Nigerian Copyright Commission in Action WIPO Magazine op cit, p. 1.

⁶⁰<http://www.punchng.com/Article.aspx>. Accessed on 29th October, 2010. 65 Copyright Act, Cap C28, Laws of the Federation of Nigeria, 2004.

requirement surrender his/her or their rights as per sections 6-9, 11, 12 and 13 of the Copyright Act. What these sections cover are 'economic rights', whereas moral rights ever remain with the creators. The monies collected are to be distributed to respective member after deducting administration costs.

1.4 Copyright Commission and Nigeria's International Relations on Copyrights

Another function of the Copyright Commission is to monitor and supervise relationship with International Convention and Treaties. There are indeed several treaties and international agreements on Copyright to which Nigeria is a party or a signatory. We shall examine some of these treaties and international agreements very briefly in light of section 34(3) (b) 65. Nigeria belongs to many international agreements such as Berne Convention, The Universal Copyright Convention, Rome Convention on Neighbouring Rights, Trade Related Aspect of Intellectual Property Rights and World Intellectual Property Organization Copyright Treaty. The Copyright Commission relates to all the above international bodies.

1.4.1 The Berne Convention

Copyright protection at the international level began about the middle of the nineteenth century based on bilateral treaties⁶¹. A number of such treaties providing for mutual recognition of rights were concluded, but they were neither comprehensive enough nor of a uniform pattern. The need for a uniform regime led to the formulation and adoption of 9th September, 1886 of the Berne Convention for the protection of Literary and Artistic Works. The Berne Convention is the oldest international treaty in the field of copyright⁶².

1.4.2 The Universal Copyright Convention

The contracting states are, amongst other requirements, obliged to provide for adequate and effective protection of the right of authors and other copyright owners. Further, published works of a national of any contracting state, and works first published in that state shall enjoy in each other contracting state the same protection as that other state accords to works of its nationals first published in its

⁶¹ Ibid

⁶² Ladan, M.T (2007), Materials and Cases on Public International Law, ABU Press, Zaria Nigeria p.703.

own territory. Nigeria has been a party to the Universal Copyright Convention since February, 1962⁶³.

1.4.3 Rome Convention on Neighbouring Rights

The term 'neighbouring rights' is the right of performers in their performances, the rights of broadcasting organization in their broadcast and the rights of recording companies, or phonograms producers in their sound recordings⁶⁴. It generally enjoys a lower level of protection, in its scope, duration and quantum than is available to mainstream copyright. The concept of neighbouring rights is generally understood to cover a wide range of activities. The only neighbouring rights identified as such in Part II of the Nigerian Copyright Act are performer's rights and the expression of folklore.

The Rome Convention requires that each member state applies national treatment in respect of the rights, which it accords to performers, record producers and broadcasting organizations⁶⁵. In addition, member states must offer those from other states who are protected by the convention certain minimum rights.⁶⁶ Thus, in the case of sound recordings, (phonograms) these include an exclusive right to authorize all reproductions, and also a right to equitable remuneration for the use of records, broadcasts and public playing⁶⁷. Broadcasters are to have exclusive rights over fixation, reproduction, re-broadcasting and public communication⁶⁸.

1.4.4 Trade Related Aspect of Intellectual Property Rights

Trade Related Aspect of Intellectual Property Rights (TRIPS) provides that all members must comply with the substantive Articles (1-21) of the Berne Convention, and other provisions of moral rights. TRIPs generally make the Berne principle confining the extent of exceptions in national legislation to the reproduction right⁶⁹. Furthermore, computer programmes are required to be protected as literary works under the Berne Convention. TRIPS also have their

⁶³Polarin, S. (2003) Intellectual Property Law in Nigeria Studies in Industrial Property and Copyright Law Max & Planck Munich p.19.

⁶⁴Ocherne, P. (2000) The Law and Practice of Copyright in Nigeria. 1 st ed. Ahmadu Bello University Press Ltd. Zaria, Nigeria, p.162.

⁶⁵Asein, IO. op cit. p.185.

⁶⁶Ibid

⁶⁷Articles 5, 10B12, ibid.

⁶⁸Articles 2 and 3, Rome Convention,

⁶⁹TRIPS, Article 13

own code of obligations relating to performers, sound-recording, producers and broadcasting organizations.

1.4.5 World Intellectual Property Organization (WIPO)

The World Intellectual Property Organization (WIPO) is one of the specialized agencies of the United Nations (UN) system of organizations with a mandate to administer intellectual property matters recognized by the members States of United Nations⁷⁰. The agreement between the United Nations and WIPO recognizes that WIPO, subject to the competence of the United Nations and its organs, is responsible for taking appropriate action in accordance with its basic instrument and the treaties⁷¹ and agreements administering inter alia for promoting creative intellectual activity and for facilitating the transfer of technology related to industrial property to developing countries in order to accelerate economic, social and cultural development⁷². The Commission actively participates in international copyright fora to ensure the representation of Nigeria's interest in international norm setting in the areas of copyright. Notable among them were the 24th WIPO Standing Committee on Copyright and Related Rights and 25th WIPO Standing Committee on Copyright and Related Rights held in Geneva from July 16-25 and November 19-23, 2012 respectively⁷³.

Other international bodies include the United Nations Educational Scientific and Cultural Organization (UNESCO) and the International Confederation of Society of Authors and Composers (ICSAC). Further, there are the International Federation of Reprographic Rights Organization (IFRR) and the Association for Advancement of Teaching and Research in Intellectual Property (ASTRIP). These are bodies Nigeria cooperates by way of training and enlightenment programmes on intellectual property, for example, Creators Copyright seminar held at the United States Information Service, Lagos, Nigeria.⁷⁴

1.4.6 The African Regional Industrial Property Organization

Since 1973, World Intellectual Property Organization (WIPO) and the United Nations Economic Commission for Africa (UNECA) have been collaborating to assist the governments of English and Francophone speaking

⁷⁰WIPO, WIPO General Information. WIPO Publication NO. 400 (E) ((1998).

⁷¹Currently administers 23 Treaties.

⁷²Marett, P.(1996) Intellectual Property Law, Patents, Trademarks, Copyright, Sweet & Maxwell, London.

⁷³2012 Nigerian Copyright Commission Report. www.copyright.gov.ng. Accessed on 20th May, 2013.

⁷⁴ Section 34(3)(d), Copyright Act, op cit.

African countries in their efforts to harmonize and develop their industrial property systems and to create the appropriate intergovernmental structures⁷⁵. These efforts resulted in adopting an Agreement on the creation of an Industrial Property Organization for English-Speaking Africa (ESARIPO) during a Diplomatic Conference held at Lusaka, Zambia, in December, 1976, where 13 governments of English-speaking African countries were represented⁷⁶. The Agreement entered into force on 15th February, 1978. By its Council decision the Organization changed its name to the African Regional Industrial Property Organization (ARIPO) in December, 1985.⁷⁷ Membership in ARIPO is opened to all member states of the African Union (AU) and the ECA. ARIPO has its headquarters in Harare, Zimbabwe.⁷⁸

1.4.1 Other Institutional Frameworks

1.5.1 The Nigeria Police Force

The general duty of the Police Force is to maintain law and order in the society. Section 35(1) (e)⁷⁹ has expressly listed the Police Force among those organs charged with the responsibility of copyright administration in the country. It is also for maintenance of public safety and public order. Through the collaborative strategies of the Copyright Commission, the Nigeria Police is expected to play a vital role in curbing the activities of pirates. As a measure towards improving the enforcement of copyright law, the Police Force has developed training modules designed to educate the corps on their responsibilities in copyright matters.⁸⁰

Section 38(1) of Copyright Act provides that "the Commission may appoint copyright inspectors as it may deem fit". The aim of this provision is to complement the duties of the Police force. It should however, be noted that before the amendment of the copyright law, Police Force had the sole authority, upon warrant to search and seize any property relating to copyright infringement. This responsibility is now being shared by them while police still retain the general powers to maintain law and order in the society, copyright inspector, are specifically responsible for copyright matters only.

⁷⁵ Florin, S. op cit. p. 76

⁷⁶ ibid

⁷⁷ Ibid

⁷⁸ WIPO Background materials op cit. p.6

⁷⁹ Copyright Act, Cap C28, Laws of Federation of Nigeria 2004. 90 Ocheme, P. op cit. p.141.

⁸⁰ Copyright Act op.cit.

1.5.2 The Nigerian Customs and Excise

The Copyright Act specifically provides for a procedural intervention by officers of the Customs and Excise Department against illegal importation of more than two infringing copies of a copyright work into Nigeria. In fact, the Act stipulates that this interventionary regulation shall have the same effect as if it had formed part of the Customs and Excise Management Act. According to section 35(1) (f)⁸¹ membership of the Governing Board of the Nigerian Copyright Commission shall consist of "one representative of the Nigerian Customs Service, not below the rank of a Comptroller of Customs". Section 44⁸² provides procedural details responsibility of National Bibliographic Control Department of the National Library of Nigeria to do so. These numbers and the copyright notices are often misconstrued as "copyright" or evidence of some formal grant or registration but these are not.⁸³

1.5.3 The Judiciary

The Copyright Act⁸⁴ has two provisions with regard to enforcement proceedings. First, Section 16(1) of the Act provides, inter alia, that copyright infringement shall be actionable at the suit of the owner, assignee or exclusive licensee of the copyright, as the case may be, in the Federal High Court, exercising jurisdiction in the place where infringement occurred. Secondly, Section 46 goes further to stipulate that the Federal High Court shall have exclusive jurisdiction for the trial of offences and disputes-under the Act. Section 16(1), however, has been modified by Rules of Procedure⁸⁵ of the Federal High Court, prescribing that "all suits and actions relating to copyrights, patents, designs, trademarks and merchandise marks shall be commenced and determined in the Division in which the defendant resides". The Commission in its 2012 Report said that the court had two significant milestones in the annals of the Commission's prosecutorial efforts in convictions, namely the imposition of a fine of N250, 000.00 which was the highest ever imposed on copyright piracy cases in Nigeria and the mandatory six years, six months imprisonment of one of the broadcast pirates without the option of fine.

⁸¹ Copyright Act op cit.

⁸² Ibid

⁸³ Ibid

⁸⁴ See also S.35(2), *ibid*.

⁸⁵ Sections 16 and 46 Copyright Act, Cap C28 Law of Federation, 2004.

1.5 Challenges of Protection of Copyright

1.6.1 Technological Advancement

A contemporary challenge confronting copyright law and indeed copyright based industries globally is the emergence and application of digital technology in the late 20th century. Digital technology and the attendant digital convergence of information products now mean that different categories of works and data such as texts, sound, pictures and moving images, which used to be reproduced and used independently, can now be compiled in one single medium of fixation such as CDs, VCDs, CD-ROMSs, CD-Rs, DVD-Rs and DVD⁸⁶. It has capacity for reproduction and ease of transmission without loss of quality which has brought about new copies identical to the originals stored in CDs or DVDs. Although digital technology has turned into reality, the promise of innovative ways of distributing creative works on a global scale and the making of higher quality copies of works such as sound recordings, film products, and even books to lower unit cost. It also has a serious down side for content producers in the copyright based industries.⁸⁷ The greatest challenge in this area include the difficulty in the control of information sharing, the getting admissible evidence to convict infringers. Previous worries about widespread piracy may have proven to be exaggerated, but with the advent of digital technology and its application in optical disc production and storage in the optical media, the magnitude of the threat of piracy has become unprecedented.

In response to this menace of optical disc piracy, Copyright (Optical Disc Plants) Regulation 2006 was introduced as part of the Strategic Action against Piracy (STRAP) policy of the Nigerian Copyright Commission launched on 3rd May, 2005. Section 7 of the Regulation provides mandatory inscription of Source Identification Code (SID) on all optical discs introduced in Nigeria in May 2010 onwards. Nevertheless the issue is that of non compliance to regulations by the stakeholders, the Copyright (Optical Disc Plant) Regulation, 2006 provides for the use of SID on all Optical Discs at the point of production. However, even some legitimate plants still produce CD without the code. On 22nd May 2010, the Director General of the Commission had to announce 1st June, 2010 as the deadline for the application of the code. Another instance is where right owners resort to using materials from illegal sources to produce their works; due to the fact that such materials are cheaper and readily available.

⁸⁶Oyewunmi, A. (2011), Towards Sustainable Development of Nigeria's Entertainment Industry in the Digital Age: Role of Copyright Law and Administration. Nigerian Institute of Advanced Legal Studies Journal of Intellectual Property (NJIP), p.80.

⁸⁷Adedaji, A.A. (2011) Combating Piracy Through Optical Disc Plant Regulation in Nigeria: Prospects and Challenges, Nigerian Institute of Advanced Legal Studies Journal of Intellectual Property, p.13S.

Another challenge confronting the enforcement of copyright includes the use of internet which is difficult to trace the infringer who commits the offence. For example, an Internet Service Provider (ISP) could be in South Africa, the site in London, the user in Nigeria and could upload the work to a friend in America. Thus identifying the source of infringement or the system from which the infringement occurred becomes complex.

Oladipo⁸⁸ once remarked that "the internet combines the capability of the mails, the fax, the phone, video, graphics, credit card, archive systems and more in a single, low cost, world-wide interactive computer network". This network brings together the clients, professionals, dealers, brokers, market quote vendor, banks, government and more in an electronic environment that knows no sovereign. This is beyond the reach of any single regulator, respects no geographical boundaries and applies no special law.⁸⁹ The use of new technologies not only on the internet, but also on cellular phones, palm devices, flash drives and other mobile technologies pose threats for copyrights protection. Some of these devices are pre-loaded with illegal content before they are sold. These new technologies are used to pirate music, films, ring tones, games, telecasts, artistic works and scanned books. This is a global challenge and it has been reported that countries with significant problems of piracy using new technology include China, India, Indonesia and Malaysia among others⁹⁰. Copyright legislation has not kept pace with technology, particularly with the digitalization of global networks, digital super highways, digital deliveries and use of copyright products⁹¹.

Also, use of advanced photocopiers such as industrial photocopier, scanners and other devices capable of producing volumes of materials within the shortest time also pose threat to copyright protection. The frequency in which both public and private individual's patronage business centres for photocopy of protected materials is alarming. The claim that there is either scarcity of such materials or low income is not acceptable for pirating copyrighted works.

⁸⁸Oladipo, B., (2003) *Information Technology and The Law, The Nigerian Perspective Book 2, Legal Digest Publishing* p.116.

⁸⁹Haruna, A.Z. (2012) *Implementation of Copyright Law in Nigeria: Issues, Challenges and Prospects*, Unpublished LL.M. Thesis, A.B.U. Zaria, p.166. See also WIPO (2010), *Advisory Committee Report on Enforcement Presented at its 6th Session in Geneva*.

⁹⁰Haruna, A.Z., *ibid*

⁹¹Adedeji, A.A. (2011) *op cit.* p.145.

1.6.2 Optical Disc Piracy

Optical disc piracy comes with new challenges exposing the inadequacies of the protection offered to content and its distribution by copyright law and, international treaties. One of the most prominent is their ineffectiveness in combating illegal reproduction of works at the manufacturing stage in the absence of a control or regulatory mechanism for the supervision of optical media production which is simpler and more efficient than civil or criminal measures for addressing copyright violations. Optical disc regulation is a preventive type of law aimed at encouraging owners of CD optical disc production business to produce legitimate licensed goods and not to infringe any person's copyright.

1.6.3 Economic Policies

It has been observed⁹² that the importance of Intellectual Property in economic development lies in its commitment to instituting a viable copyright system compatible with international best practices and one that would ensure that owners of works protected by copyright and other investors in the copyright based industries derive maximum economic benefits from their investment of time, energy, talent and money in creative productions for overall national economic development. He further stated that by their very nature, the copyright based industries situate right at the heart of efforts of government at poverty reduction, wealth creation and employment generation and tally with objectives of vision 2020, the Transformation Agenda and Millennium Development Goals (MDGs). In spite of this realization of the potential benefits of IP, there is no national policy or any specific plan at the moment aimed at mainstreaming copyrights into national development. In fact, in Nigeria it is pirates and infringers who provide more job opportunities and generate more revenue than legitimate operators.

1.6.4 Challenge of Human Resources

There are human resources challenges when it comes to enforcement of copyright law because of low staff strength. Nigeria has a population of over 140 million people spread across its 36 States and the Federal Capital Territory. With the high level of infringement of copyrighted materials, for example, music, film, books and so forth, the Commission's staff strength of 262 personnel is grossly inadequate to match the number of pirates. This is more so because out of 262 personnel, 132 of which are located in the Federal Capital while the remaining

⁹²Ezekude A., (2012), Director General Brief on the Nigeria Copyright Commission, Activities Presented at the Copyright Commission, Abuja p. 5

130 are spread across its six zonal offices. This means that an average of 18.5 staff in each zone⁹³. Moreover, copyright inspectors who are the policing agents responsible for investigation, inspection, raiding, arresting, detaining goods and prosecutions of offenders are included in this staff figure. Even though it is true that the police can also exercise this power, the philosophy behind the employment of the inspectors is to relieve the over stretched police work force and to bring rapid response to copyright infringement issues. The fact that infringing materials reported out of the country shows some degree of laxity on the part of the customs service, and, it exposes the fact that our borders are porous.

1.6.5 Funding of the Agency

The funding of enforcement agencies and their collaborators has been less than adequate⁹⁴. The Director of the Copyright Commission lamented the non-prompt release of budgetary allocation for the Commission which hampers enforcement activities. The Commission cannot achieve much if it suffers inaccessibility of funds. It must be emphasized that, funding is at the core of enforcement, enlightenment, training and infrastructure.

1.7 Conclusion

The Nigerian Copyright Commission established structures to support the efficient enforcement of the provisions of the law. The introduction of Strategic Action against Piracy (STRAP) to fight piracy is a milestone in the development of copyrights in Nigeria as this will assist rights owners to benefit more from their creation. STRAP is a tool used by the Nigerian Copyright Commission to fight piracy in Nigeria. The paper found that emerging digital environment like the internet and global knowledge economy has not been addressed in the current Nigerian Copyright Act. Another key challenge in the execution of the Commission mandate include problems in the justice administration system (slow judicial processes) and dearth of technical tools for anti-piracy operations, inadequate personnel in the Commission, and paucity of funds to execute programmes. It is also noted that there is no incorporation of provisions for minimum standards under international treaties to which Nigeria is a signatory, for example, WIPO and WCT Internet Treaties. It was further observed that collaboration -with regional, inter-regional and international agencies/organizations is yet inadequate for an effective check on the incidence of

⁹³Haruna, A.Z. *op cit.* p.162

⁹⁴Adebambo, A. (2008), *op.cit.* p.4

piracy across national boundaries. It is recommended that the Nigerian Copyright Act be reviewed to address the challenges of effective protection of creative rights and benefits especially in the emerging digital environment like the internet for global knowledge economy and to incorporate Statutes of minimum standards under international treaties to which the country is signatory. It is further suggested the Commission should employ more proactive enforcement of the Copyright Act mid review urgently for more stringent penalties for infringement to ensure effective check of piracy in the country. The Commission needs to intensify its raid on street sellers of suspected pirated works. Finally, the Commission should identify more areas for collaboration such as awareness creation, intelligence gathering, surveillance, antipiracy raids, prosecution and capacity building. It is recommended that the Commission maintains efficient collaborative linkages with both international and domestic partner agencies including the US Patent and Trademarks Office the UK Intellectual Property Office, the International Federation of Phonographic Industries, Queensland University of Technology, Australia, the Nelson Mandela Institute of African University of Science and Technology, Nigeria Customs Services, Nigeria Police, Economic and Financial Crimes Commission, National Information Technology and others.