



DEFENCES TO COPYRIGHT INFRINGEMENT IN NIGERIA*

1.1 INTRODUCTION

Work eligible for copyright protection after passing the prescribed tests under the copyright Act¹ are literary, musical, artistic works, cinematograph films, sound recording, broadcasts, performance and folklore expression². Various rights³ are conferred on the authors or creators of these works and there are various acts⁴ any of which may constitute an infringement of any of such rights. Any such infringement may attract liability⁵ and, in some cases, criminal sanctions.⁶ Such a violation will be actionable at the instance of the author or owner of the copyright as a breach of statutory duty.⁷

It is instructive to note that although the author is recognised as the initial owner of the copyright in the work he has authored,⁸ in some cases, ownership of the copyright in the work may reside in a person other than the author.⁹ Nonetheless, the word “author” as used in this work means the owner of the copyright or performer’s right. In the same vein, any reference to copyright infringement is inclusive of performer’s right infringement.

However, a person who is alleged to have infringed another person’s copyright in a particular work may have recourse to any of the defences available to him. This writer has perused all the available materials (both local and foreign) on copyright but none of them has treated collectively all the defences available in actions for copyright infringement. The aim of this work therefore is to critically and collectively discuss these defences and their scope for ease of reference not only to the law students and lawyers but also to those who may be interested in the subject, instead of being left to grope for the defences in the various and scattered relevant provisions of the statute or chapters of the text books, when the need arises.

2.2 DEFENCES

The defences available for copyright infringements vary in nature and degree just as the instances of infringement may differ from one type of work to another. This work considers the permitted acts contained in the Second and Third Schedules to the Act as defences because for their permissiveness, they would have been classified as acts of infringement. We shall discuss the defences, exceptions and their scope presently.



2.2.1 Innocent permission.

Section 14 (1) (a) of the Act provides that it is an infringement of copyright by a person who, without the licence or authorisation of the owner of the copyright does, or causes any other person to do any of the acts which are the exclusive preserve of the author. It goes further to list the other acts in paragraphs (b) to (g) thereto as constituting acts of infringement. The relevant paragraph for our purpose is paragraph (f) thereto which states that permission to use a place of public entertainment or of business for a performance in the public of the work without the consent of the owner of the right of performance is an infringement of the copyright in the work

... unless the person permitting the place to be so used was not aware, and had no reasonable ground for suspecting that the performance would be an infringement of the copyright.

The scope of this defence should not constitute a problem since it exonerates only a person who innocently permits a place to be used for a performance in the public without any reference to the other acts enumerated in paragraphs (a), (b), (c), (d), (e) and (g) of section 14(1) of the Act. This include any person who does or cause the doing of any of any act controlled by copyright; imports into Nigeria, except for private use, any article in which copyright is infringed; exhibits in the public any article in which copyright is infringed; distributed by way of trade, offer for sale or hire for any other purpose prejudicial to the owner of any article in which copyright is infringed; makes or possess equipments used for making infringed copies of work; and performs or cause to be perform for the purpose of trade or business any work in which copyright subsist.

This means that with respect to all the other acts of infringement stated in these paragraphs they have no defence whatsoever except where they fall under the permitted acts contained in section 14(2) of the Second or Third Schedule to the Act. This defence is therefore very limited in scope as it is available only in respect of innocent permission to use a place of public entertainment for the performance and not in respect of any of the other acts contained in section 14(1) of the act. The case of PRS v Ciryale Theatrical Syndicates Ltd.¹² is illustrative of the scope of this defence where it was held that a proprietor of a place of public entertainment is not responsible for the unwarranted performance of an independent contractor which resulted in



infringement of the work. In this case, the plaintiffs claimed that the defendants without the consent either authorised the performance or permitted the use of their theatre by a band for the performance of copyright music of the plaintiffs. The defendants successfully contended on appeal that they were not liable for the unwarranted performance on the ground that the band was an independent contractor. But it is to be noted that the position would have been different if the band were the servants of the proprietor in which case the copyright owners would have successfully proceeded against the proprietor vicariously for the infringement¹³

The Act has not defined what is meant by the expressions "place of public entertainment" and "place of business." While the latter expression will not present a problem as it can easily be described as a place where business is transacted, the former may not be that easy to ascertain. For instance, does the expression include a private place? The answer seems to be in the positive, as it has been described to include premises which are occupied mainly for other purposes (including private purposes) but are from time to time made available for hire for the purpose of public entertainment.¹⁴ Examples include schools, exclusive clubs, etc. this presupposes that the place must have been used for public entertainment, and it is immaterial whether or not the permission was granted gratuitously. By implication, it will be a defence under this provision if the place is used for public entertainment only once because it will require more than an isolated performance to render the premises a place of public entertainment¹⁵.

2.2.2 Archival Materials.

One of the exclusive rights conferred on a copyright owner is reproduction of his literary, musical and artistic works¹⁶ and any reproduction of the work without his consent will ordinarily amount to an infringement of his copyright in the work. But section 14(2) provides a complete defence where the reproduction is that of a copyrighted archival material stored in the National Archives or any state public record kept pursuant to any law in force. It is to be noted that this defence does not avail a defendant who makes or supplies to another person of any reproduction of the work for commercial purposes or in any manner other than in pursuance of the Public Archives Act or any other applicable law.



2.2.3 Absence of Knowledge of subsistence of copyright in the work.

Section 15 (3) of the Act provides a defence where the knowledge of the subsistence of copyright in the work is lacking on the part of the defendant. It states thus:

where in an action for infringement of copyright, it is proved or admitted that an infringement was committed but that at the time of the infringement, the defendant was not aware and had no reasonable grounds for suspecting that copyright subsisted in the work; the plaintiff shall not be entitled under this section to any damages against the defendant in respect of the infringement....

One obvious fact of this provision is that an innocent infringer is not totally absolved from civil liability. He is only exonerated from paying damages which is just one of the relief the copyright owner is entitled to where the infringement is intentionally committed. The defence under this provision is therefore extremely limited and it is only capable of alleviating the civil liability of the innocent infringer.

To successfully establish this partial defence, the infringer must satisfy the court that he was not aware that copyright subsisted in the work at the time of the infringement. This defence, in spite of its very limited scope may be difficult to establish because copyright accrues as soon as a copyright work is created by the author without any formality and without any reference to anybody's knowledge. Nonetheless it is not impossible to prove. A hypothetical example will illustrate this. A is the author of a literary work. The news of his "death" on a particular date was given a lot of publicity in Nigeria as B was leaving for further studies in America. Two days after he had left, the family of A refuted the news to the effect that A was only in coma and not dead yet. A actually died two years later. B was not aware of these later developments. Years later, B calculated the duration of the subsistence of copyright in the work and concluded that the duration had expired and the work had gone into the public domain when in the actual fact, the work was two years away from that point. He then acted a film on the literary work without authorisation. In the circumstances the defence of innocence of the fact that copyright was still subsisting in the work at the time of the infringement will avail B. This is slightly different from a defence that the



infringer was not aware that copyright ever subsisted in the work. In this case the defence will be near impossibility to establish taking into account the nature of copyright itself.

But this defence will not avail an infringer where he knows that copyright subsists in the work but makes a mistake as to the owner of the copyright. For this assertion we seek refuge in the decision of the Supreme Court in the case of Plateau Publishing Co. Ltd. and Ors. v. Chief. Chucks Adophy¹⁷. In this case the plaintiff/respondent filed an action against the defendants/appellants claiming, inter alia, damages for infringing his copyright in an article titled "After Tarka what Next? Special Tribute" which he sent to the 1st defendants/appellant for publication which it subsequently published under another person's name as the author without his authorisation. The 1st defendant sought the defence of absence of knowledge that the copyright in the article resided in the plaintiff/respondent at the time of the publication. While holding that the defence of innocence did not avail them, the Supreme Court had this to say:

"A person who, knowing or suspecting that copyright exists makes a mistake as to the owner of the copyright and under that mistake obtains authority to publish from a person who is not in fact the owner, is liable under an action for the infringement of copyright".¹⁸

In spite of the diminutive immunity absence of knowledge of subsistence of copyright affords as a defence, it has been argued by Ochame that considering the way and manner copyright in any work comes into being, the law ought to presume the defendant to know the existence of the copyright without granting him any reprieve as to damages, because providing as the law has done is excusing his ignorance of the law. In his words.

... This legislative immunity is uncalled for, copyright by its nature would exist and crystallise in a work upon its creation without regard to anyone's knowledge, and certainly not for the defendant to know. The law ought to presume the defendant to know, otherwise his ignorance of this law is being excused.¹⁹

We beg to disagree with the learned author because it is our respectful view that he missed the point. It is the presumption of the law that the defendant



at the time of the infringement was aware that copyright subsisted in the work. This is why the onus of rebutting this presumption is always on the defendant and this he discharges by proving his innocence. Furthermore, what is being excused by this partial defence is the ignorance of the fact that copyright subsisted in the work and not the defendants' ignorance of the law regarding copyright generally. Take for instance the hypothetical example we gave earlier; in the example B was not ignorant of the law regulating copyright or that copyright ever subsisted in the work but of the fact of the continued subsistence of copyright in the work. It is our humble view that in such a rare situation, it is only fair that the innocent infringer be relieved of damages while he remains saddled with the other remedies available to the copyright owner. Besides, as stated earlier, the defence is not easy to establish and it is limited in scope. This perhaps explains why innocence is not generally regarded as a defence in an action for copyright infringement. For instance, the Supreme Court quoted with approval paragraph 938 of volume 9 of the 4th Edition of Halsbury's Laws of England in the case of Plateau Publishing Co. Ltd. v Adophy (supra) thus:

In general, any invasion of a right of property gives a cause of action to the owner against the person responsible for the invasion, whether it is intentional or not. Consequently innocence is no defence to an action for infringement of copyright or for the conversion or detention of an infringing copy or a plate.

Nonetheless the learned authors agree that an innocent infringer be absolved from liability as to damages. In their words:

Where, however, it is proved or admitted in an action for infringement that an infringement was committed, but that at the time of the infringement the defendant was not aware and had no reasonable grounds for suspecting that copyright subsisted in the work ... the plaintiff is not entitled to damages...

Its limitations as a defence notwithstanding, it is our respectful view that, it is a defence all the same, albeit partial. In other words, to the extent of



its scope, it is a defence.

2.2.4 Absence of Knowledge that a Copy was an Infringing copy

Section 18 relates to a criminal liability of a person who without the consent of the author makes or causes to be made for sale, hire or for the purpose of trade or business; or who imports or cause to be imported into Nigeria or deals generally with or has in his possession an infringing copy of a work in which copyright subsists or equipment for making the infringing copy of such a work. Any person who does any of the foregoing acts shall be guilty of an offence under the Act. But it is a defence to criminal liability under this provision if the infringer is able to prove to the satisfaction of the court that:

*"... he did not know and had no reason to believe that any such copy was an infringing copy of any work or that such equipment or contrivance was not for the purpose of making infringing copies of any such work."*²⁰

This defence is similar to that provided by section 15(3) of the Act in that the two defences border on innocence and like the former, this defence is also limited but broader in scope. This is so because under certain situations, it is no defence at all. In all cases contained in section 18(1) and (2) a successful plea of innocence of the fact that copy is an infringing copy or that the equipment, machine or contrivance, etc was for the purpose of making infringing copy seems to operate as a complete defence to any criminal liability. In the case of Federal Republic of Nigeria v Asika²¹, the accused persons were charged for selling or having in their possession infringing copies of literary work. They sought refuge in the defence of ignorance of the fact that the copies were infringing copies. The court held that it had not been proved beyond reasonable doubt that the accused persons knew that the books they were selling or had in their possession were pirated books, or had been printed by unauthorized person. They were then discharged and acquitted. However the court may order the destruction or delivering up to the owner of the copyright all the infringing copies or the machines, equipment, contrivances etc.

The defence is available to both natural and artificial persons. The reference to "person" under Section 18 of the Act includes natural person and body corporate. It has been rightfully postulated that bodies corporate are no longer *doli incapax*.²², notwithstanding the fact that they have no



minds and wills of their own, and thus incapable of forming the necessary mens rea. Situations may arise whereby the minds, wills and knowledge of human agents may be imputed to it.²³ In the same vein, defences to criminal liability are more often than not extended to bodies corporate too.

However, this defence does not extent to any person who, without the consent of the owner, distributes in public for commercial purposes copies of a work in which copyright subsists, by way of rental, lease, hire, loan or similar arrangement.²⁴ Any person who does any of these acts in relation to literary, musical works, cinematography film, sounds recording and broad cast will be guilty of an offence under the Act to which there is no defence.

Section 19(1) of the Act provides a similar defence. It provides that where a criminal infringement of copyright is committed by a body corporate, every person who at the time the offence was committed was in charge of or responsible to the body corporate shall be deemed to be guilty of the offence. However, this provision absolves every such person from criminal liability if he is able to prove that the offence was committed without his knowledge or that he exercised all the due diligence without success to prevent the commission of such offence. The manner of "person" referred to in this provision may be deduced from section 19(2) of the Act to include director, manager, secretary or other officer of the body corporate. And for the purpose of this provision, "body corporate" has been defined to include a firm or other association of persons and "director" in relation to a firm to include a partner in the firm.²⁵

It is to be noted that the defence under Section 19(1) does not extent to the body corporate. It follows therefore that a body corporate charged with an offence under this provision²⁶ will look elsewhere for an escape route.

Innocence is also an answer to criminal liability in respect of infringement of performer's right. Section 27(1) of the Act provides that any person who without the consent of the performer does any of the acts listed in section 25 of the act shall be criminally liable unless he proved to the satisfaction of the court that he did not know that his conduct was an infringement of the performer's right.

2.2.5 Expiration of Copyright

Copyright in a work does not subsist in perpetuity. The adroitness of the protections of the various copyright works are predetermine by the copyright Act, and these are set out in the First Schedule to the Act. When



the duration of a copyright expires as a result of effluxion of time, the work goes into public domain and it will therefore afford a complete defence in an action for infringement of the copyright.²⁷

2.2.6 Exceptions

The Act provides numerous exceptions to copyright control in its Second and Third schedules, the legal effect of which will afford a complete defence if the act complained of falls within the permitted acts in these schedules.²⁸ These exceptions are numerous - there are 19 permitted acts in the Second Schedule to the Act in respect of literary, artistic, musical works, cinematograph film, sound recording and broadcast, while the Third Schedules contains 9 other special exceptions relating to sound recording of a musical work. Because of the numerous nature of the exceptions, we will not be able to discuss each and every one of them in this work. What we intend to do in the circumstance is to briefly discuss those of them that are applicable to virtually all the works in which copyright subsists in Nigeria.

- (a) **Fair Dealing:** The meaning of this phrase has been explained in the case of Hubbard & Anor. v Vosper & Anor.²⁹ Thus

It is impossible to define what is "Fair dealing... if they are used as basis for comment, criticism or view, they may be fair dealing. If they are used to convey same information as the author, for a rival purpose, that may be unfair. Next you must consider the proportions. To take long extracts and attach short comments may be unfair. But short, extracts and long comments may be fair."³⁰

To establish this defence, it must be shown that the dealing in relation to the copyright work is for the purpose of either research, private use, criticism, review or reporting of current events and if the use is public, the title and authorship of the work are sufficiently acknowledged.³¹

- (b) **Inclusion in Collection of Works:** It is also a good defence if the work is included in a collection of any other works, provided that the aforesaid collection bears a statement that is for educational use, accompanied by acknowledgement of the title and authorship of the work.



- (c) **Public Recitation:** It is yet another defence to publicly read or recite a literary work if it is not made for commercial purposes.³³
- (d) **Use for Public Interest:** No copyright in any literary, artistic, musical works, cinematography film, sound recording and broadcast is infringed by any use made of the work if it is made by or on the order or direction or control of the Government or by such public libraries or non commercial centre or scientific institutions for public interest and where no revenue is derived from such use.³⁴
- (e) **Use for Judicial Proceeding or Law Reporting:** Another act which is excepted from copyright control and therefore a defence is the use of the works enumerated in paragraph (d) above for purpose of judicial proceedings or of any report of such proceedings.³⁵ It is to be noted that reporting of judicial proceedings does not confer on the reporter any copyright in the opinion or decision of the court. In Wheaten v Peters,³⁶ the plaintiff, a journalist, had edited and published series of court proceedings. The defendant copied and published the plaintiff's reports without his consent. The court held that no person has any copyright in the written opinions delivered by the court. It follows, therefore, that no copyright can be conferred on a reporter of judicial proceedings in so far as it concerns the written decisions and dicta of the court. However, a law reporter is entitled to copyright in respect of any comment or criticism on the decision or opinion of the court.³⁷
- (f) **Reproduction for Use of Disabled Person:** It will afford a solid defence if it is established that a work is reproduced for the purpose of aiding a disabled person or for the welfare of such person. To establish this defence, it must be proved that the reproduction of a published work in braille is for the exclusive use of the blind, and sound recordings made by institutions or other establishments approved by Government for the promotion of the welfare of the disabled persons, is for the exclusive use of such blind or disabled persons.³⁸

3.3 CONCLUSION

This paper has discussed the various statutory defences including some of the exceptions to copyright and performer's right infringement in Nigeria. The scope of these defences and exceptions were highlighted, illustrating



some hypothetically and some of the others with judicial authorities. The paper has therefore brought collectively to the fore the various copyright defences which were hitherto buried in the obscurity of the various provisions of the statute.



END NOTES AND REFERENCES

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1. Cap. 68 Laws of the Federation of Nigeria 1990 (as amended) (hereinafter referred to as "the Act")
2. Sections 1(1), 23(1) and 28(1) of the Act.
3. Sections 5,6, and 7 Ibid.
4. Sections 14 and 2 Ibid.
5. Ibid
6. Sections 18, 19, 20 and 22, Ibid. It is to be noted that both civil and criminal actions may be taken simultaneously - section 21, ibid.
7. Sections 17 and 26 ibid.
8. Section 9(1) Ibid
9. Section 9(2), (4) and (5) Ibid. Another Instance is where the ownership of the copyright has been transferred either by assignment, testamentary disposition or by operation of law - section 10 of the Act. However, there is no similar express provision in respect of performer's right but it is beyond dispute that like the copyright ownership of performer's right may be similarly transferred.
10. Olueze, I.M: Nigeria Copyright Law, Lagos, Maglink International Ltd., 1998 p. 139
1. Asein, J. O. The Nigerian Copyright Act with Introduction and Notes Ibadan: Sam Bookman Educational and Communication services, 1994. P.62
2. (1924) 1 K.B. 1 cited in Olueze, op. Cit. P. 108
3. PRS v Mitchell & Booker (Pulais De Dause) Ltd. (1924) 1 K.B. 762, Ibid.
4. Dworkin and Taylor, Blackstones Guide to the Copyright Designs and Patens Act, 1988, London Blackstone Press Ltd. 1989 p. 67
5. Asein Op. Cit. P. 53
6. Sections 5 of the Act.
7. (1986)4 NWLR (Part 34) 205



8. Ibid, at p.216. The defence was raised under section 12(2) of the Copyright Act, 1970 which is in puri materia with section 15(3) of the copyright Act. 1988.
9. ¹⁰ Ocheme, P.O. The Law and Practice of Copyright in Nigeria, Zaria A.B.U. press Ltd. 2000. P 96
0. section 18 (1) and (2) of the Act.
1. (Unreported) suit No. FHC/K/2CR/92
2. Mandilas & Kalabari Ltd v C.O.P (1958) WNLR 147
3. Olueze, Op cit, P. 111 See also R. v ICR Haulage Ltd, (1944) K.B. 551
4. section 18(3) of the Act
5. section 19 (3) Ibid
6. Section 19 (3) Ibid
7. Atlas MFG CO. et al v Street and Smith 204 Fed. R. 398 - a U.S. Circuit Court of Appeal decision
8. Section 19 Ibid.
9. ¹¹ Johnson v Bernard Jones publications ltd & Beauchamp (1938) 1 Ch. 599 and Habbard & Anor v Vospert & Anor (1972) 2 Q. 84
0. (1972 2QB 84
1. Ibid, at 98, per Lord Denning, MR
2. Paragraph (a) of the second schedule to the Act.
3. Paragraph (e), (f) and (h) Ibid
4. Paragraph (j) Ibid.
5. Paragraph (k) Ibid.
6. Paragraph (p) Ibid.
7. 33 US (8Peters) 591 (1834)
8. Olueze, op eit. P84
9. Paragraph (S) of the Second Schedule to the Act.