

INFRINGEMENT OF NIGERIAN CULTURAL AND ARTISTIC HERITAGE (FOLKLORE): ARE THEIR PROTECTION AND REMEDIES UNDER NIGERIA COPYRIGHT ACT?

By

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1.1 Introduction

The Copyright Act¹ is the law enacted in Nigeria for the protection of intellectual creations from being exploited by others without the authorization or consent of the author or owner of the work. The first autochthonous copyright law was promulgated in Nigeria by the military government in 1970.² Hitherto, it was the English Copyright Act of 1911 that was made applicable in Nigeria by an Order-in-Council, 1912.³ Under the 1970 Copyright Act, no provisions were made for the protection of Nigeria Cultural and Artistic Heritage (folklore), performers' right and administrative body responsible for administering copyright and related rights in Nigeria inter alia.

Thus, the said Act was subject of criticisms⁴ and as such there was a call for its reform.⁵ Infact, Akinola Aguda called for a new Copyright Act to be promulgated, "not a patching-up amendment law"⁶ in his keynote address at a seminar. Thus in 1988, after series of seminars/workshops organized on copyright, another Copyright Decree⁷ was promulgated which not only repealed the 1970 Copyright Degree but also strengthened the hitherto inadequate provisions of copyright law in Nigeria.⁸ The 1988 Decree was renamed an Act in 1990⁹ following the revision of all Federal Laws. In 1992,¹⁰ the Act was amended¹¹ in order to provide enabling environment for the administration of copyright. In 2004, as a consequence of the revision of all Federal Laws in Nigeria, the Copyright Act is in the Laws of the Federation of Nigeria 2004.¹² In 2012, a Bill¹³ was presented to the National Assembly for the review of the Copyright Act Cap C28, LFN, 2004.

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¹ Cap C 28 Laws of Federation of Nigeria, 2004.

² Decree No. 61 of 24th December, 1970

³ No. 912 of June 24, 1912.

⁴ T. Akinola Aguda (Ed) *The Challenge of the Nigerian Nation* (Ibadan: Heinemann Educational Books (Nigeria) Limited, 1985) p. 165

⁵ By Performing Musicians Association of Nigeria (PMAN) etc. *Ibid*

⁶ T. Akinola Aguda "The Nigerian Copyright Law and its relevance to Social Change" in E. E. Uvieghera *Essays on Copyright Law and Administration in Nigeria* (Ibadan: Y-Books 1992) p. 11. There were also many other People that called for the outright promulgation of a New Copyright Law for Nigeria.

⁷ No. 47 of 1988

⁸ Peter A Ocheme. *The Law and Practice of Copyright in Nigeria* (Zaria: Ahmadu Bello University Press, 2000) p.14

⁹ Cap 68 Laws of Federation of Nigeria, 1990

¹⁰ By Copyright (Amendment) Decree No. 98 of 1999

¹¹ There was another, amendment in 1999 by Decree No. 42 of 1999.

¹² As Cap C28 Laws of the Federation of Nigeria, 2004.

¹³ www.a Bill for Act to amend the Copyright Act Cap C28 Laws of the Federation of Nigeria 2004- Nigerian Copyright Commission ncc.htm accessed on 10th, August 2014.

The Copyright Act is divided into three parts as follows: Part with deals on copyright, part two deals with neighbouring rights which are performers rights and protection of expressions of folklore. Part three deals with administration of copyright. This paper is concerned with the protection of expressions of folklore which is also referred to as Nigeria Cultural and Artistic heritage in this paper. Section 1(1) of the Copyright Act lists out works that are eligible for copyright, while it also provides for conditions to be satisfy before they will be granted copyright protection. However, Nigeria cultural and artistic heritage (folklore) is group-oriented works which pass orally from generation to generation and as such not fix in any form as required by the Copyright Act.¹⁴ In the light of the above, can the Act be said to protect cultural and artistic heritage in Nigeria? This is the question, this paper seeks to answer.

The paper is discussed in these segments namely: definitions of key words such as: cultural, artistic, heritage, folklore, infringement and remedies. The paper analysis relevant provisions of the Copyright Act/dealing with, where protection of expression of folklore will be discussed infringement and remedies if the rights are infringed. The paper also deals with the limitation of the Copyright Act together with conclusion, observations, and finally recommendations.

1.2 Definitions of Terms

The terms culture, art and folklore have been defined variously. We shall look at a few of them.

Culture: Culture represents living functional traditions which are passed on orally.¹⁵ It has also been defined as “the entire web of social practices, rules, beliefs and ways of doing things that constitute and structure a group’s understanding of itself as a group”.¹⁶ Culture “consists of the ideas, customs and art produced by a particular society”¹⁷. Cultural is an adjective of culture and it means relating to a particular society and way of life or relating to the arts generally.¹⁸

Art: Simply, art is anything that is man-made.¹⁹ “Art is the making of paintings, drawing and sculpture which are beautiful or which express an artist’s idea”²⁰ Aside from painting and sculpture, art also includes building, furniture, automobile, cities and garbage dumps. Every change that human activity has wrought upon the face of nature is art whether it is good or bad, beautiful or ugly, beneficial or destructive.²¹ On the other hand, anything that is not man-made no matter how beautiful or aesthetic qualities the object may have is

¹⁴Section 1 (2)(b)

¹⁵*Commission on Intellectual Property Right, Integrating Intellectual Property Rights and Development Policy. A Report* (London: Commission on Intellectual Property Rights September, 2002) p. 11

¹⁶“Resume, Justice between Culture” (1995) 29 University of British Colombia Law Review 117 at p.119 (Qtd EIPR vol. 29 issue 9).

¹⁷*BBC English Dictionary* (London: Harper Collins Publishers, 1992) p.276

¹⁸*ibid*

¹⁹ *Encyclopedia Britannia Micropedia*, vol.2 (Chicago: Encyclopedia Britannia Inc. 1981) p.40

²⁰*BBC English Dictionary* op cit p.57

²¹ *Encyclopedia Britannia*, opcit

not an art.²² According to Karlen's statement, anything that is not man-made is not art. He said,

When the flush of a new-born sunfell on Eden's garden and gold,
our father Adam sat under the tree and scratched with a stick in the
mud. And the first made sketch that the world had seen was joy to
the mightyheart, till the devil whispered behind the leave, it's
pretty, is it Art?²³

What is clear from the foregoing is that, art stands in contradiction from nature. This does not however mean that an artist may not assemble natural objects such as driftwood or shells and create a work. What is paramount is that, the person or artist must have designed what he assembled.

Karlen ²⁴defines art "as a sphere of human activity dedicated to the expression of the aesthetic experience as substantiated in the creation of works of arts". Black's law Dictionary²⁵ defines art simply as "creative expression". Oxford Advanced Learner's Dictionary²⁶ defines art as "the use of imagination to express ideas or feelings, particularly in painting, drawing, sculpture". Artistic which is an adjective of art means relating to art or artist²⁷.

Heritage consists of all old buildings, monuments and the qualities and traditions that have continued over many years especially when they are considered to be of historical importance²⁸. From the above definitions of culture, cultural, art, artistic and heritage, Nigeria cultural and artistic heritage, is the sum total of traditions, customs, paintings, sculpture, way of life, beliefs of the people, of the various communities in Nigeria which evolved over time and passes from generation to generation orally or which are unwritten.

As stated earlier, cultural and artistic heritage in this paper means folklore and as such the terms or concepts will be used interchangeably in this paper.

Folklore: This is described by an Archeologist, W. J. Thompson as "the wisdom of the people".²⁹ Folklore is also known as "cultural expressions of indigenous peoples". It means "indigenous intellectual property" and "traditional knowledge"³⁰. It has been defined as "a living phenomenon, which evolves overtime, a basic element of our culture which reflect the human spirit. It is a window of a community's culture and social

²² See Hegel G. *Aesthetics, Lectures on Fine Art* (T. Knox trans 1975) pp. 1-3, 29-30, 35-37

²³ Kalen P. H "What is Art? A sketch for Legal Definition" in the *Law Quarterly Review* vol.94, July 1987, p.383

²⁴ *Ibid* p.404

²⁵ Garner B. A., *Black's Law Dictionary* (8th Edn.) (St. Paul Minnesota: Thompson West, 2002), p.118

²⁶ Welmeier S. (Ed) *Oxford Advanced Learners Dictionary of Current English* (7th Edn.) (Oxford: Oxford University Press, 2005) p.69

²⁷ *BBC English Dictionary opcit.* P.58

²⁸ *Ibid* p.543

²⁹ St. Palethorpe and St. Verhulst, *Report on the International Protection of Expressions of Folklore under Intellectual Property Law*, University of Oxford, 2000. P.61

³⁰ See M. Blackeney "Intellectual Property in the Dream time-protecting the creativity of Indigenous peoples" <http://www.oiprc.ax.ac.uk/EJWP.11.99.html> accessed on 20th August, 2014.

identity whose standards and values are transmitted orally by imitation and other means”³¹

There is no universally acceptable definition of folklore and there are many definitions of the term folklore. For every ethnic group, folklore is its identity. For a country, it is the root of the nation’s cultural tradition and nation’s civilization, for all mankind. It is the rich and varied but non-regenerative resources as well as the incomparable valuable heritage of human society.³² To Theodore Gastor, folklore is that part of a people’s culture which is preserved consciously or unconsciously in beliefs and practice, customs and observance of general currency in myths, legends, and tales of common acceptance and in arts and crafts which express the temper and genius of a group rather than of an individual.³³

Folklore is “essentially of the people by the people and for the people”.³⁴ Folklore is defined by the Nigeria Copyright Act³⁵ as:

A group-oriented and tradition based creation of groups or individual reflecting the expectation of the community as an adequate expression of its cultural and social identity, its standards and values are transmitted orally, by imitation or by other means including:

- (a) Folklore, folk poetry, folk riddles;
- (b) Folk songs and instrumental, folk music; folk dances and folk plays;
- (c) Production of folk arts in particular, drawing, paintings, carvings, sculpture, pottery, terracotta, mosaic, woodwork, metal ware, jewelry, handicrafts, costumes and indigenous textiles.

Ghanaian law defines folklore as:

All literary, artistic and scientific works belonging to the cultural heritage of Ghana which were created, preserved and developed by ethnic communities of Ghana or by unidentified Ghanaian

³¹ Puri Kanwal, (Qtd) C.A. Berryman “Towards more Universal protection of intangible cultural property” (1994) *Journal of Intellectual Property Law*.293.

³² *Ibid*

³³ Theodore H. Gastor “Definitions of folklore” in Maria Leach (Ed) and Wagnalls *Standard Dictionary of Folklore, Mythology and Legend* 255-264 (1959) p. 255

³⁴ *Ibid*

³⁵ Cap c 28 LFN 2004 section 31 (5). See M. Blakeney’s Definition of Folklore in his Research Seminar Paper of 9th November, 1999 <http://www.oiprc.ax.ac.uk/EJWP.1199.html>. accessed on 20th August, 2014 which is similar to the definition of folklore in the Nigeria. Copyright Act, 2004.

authors, and any such work designated under the law to be the work of Ghanaian folklore.³⁶

It is evident from the statutory definitions of folklore that the scope of the rights in folklore can be determined only with reference to the customary practices of specific communities. The term folklore is the label given these aspects of heritage which Daes³⁷ defines as “all kinds of literary and artistic work such as music, dance, song, ceremonies, symbols and designs, narratives and poetry”.³⁸

According to the World Intellectual Property Organization (WIPO) Interpretation, traditional cultural expressions or expressions of folklore can be described as works consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community or by individuals reflecting the traditional artistic expectation of that community.³⁹

From the various definitions of folklore, it is evident that folklore belongs to communities and not individuals per se and it is disseminated by word of mouth. According to Niedzielska,⁴⁰ “folklore is passed by word of mouth, from memory or visual, from generation to generation within a specific social group which is at once, its user and carrier”.

Expressions of folklore are divided into four depending on the form of expression:

- a) Verbal expression such as folk stories, legends and poetry
- b) Musical expression such as folk songs and instrumental music
- c) Expression by action, such as popular dances, plays and shows and
- d) Tangible expressions such as production of folk-art, especially drawings, paintings, Sculpture, pottery, jewelry, musical instruments as well as architecture works.⁴¹

Infringement: Simply put, infringement is the violation of the right of another. Thus, infringement of Nigeria cultural and artistic heritage (folklore) is the violation of a community's right in them. Such as the right of production without the consent of the individual or the community owner or stealing, moving or transporting them in case of tangible folklore e.g. sculpture without the consent of the owner(s).

³⁶ Copyright Law (Ghana) 53 March, 21 1985 reprinted in 21 Monthly Review World Intellectual Property Organization 423, 435 (1985). See definitions of Folklore in Laws of Central Africa Republic, Republic of Congo, Cameroun, Burundi and Mali. Under the said laws, folklore is defined in similar terms.

³⁷ Daes Erica-Irene, Special Rapporteur of the Sub-commission on the Prevention of Discrimination and Protection of minorities and Chairperson of the working groups on Indigenous people *op cit*.

³⁸ Joseph Githaiga “Intellectual Property Law and the Protection of Folklore and Knowledge” (Current Development, June, 1998) www.mudrdoch.edu/au/e/aw/issues/vsnz/githiga52.html accessed on 22nd July, 2014.

³⁹ *Intellectual Property and Traditional Cultural Expressions/ Folklore*, WIPO Booklet p.1

⁴⁰ M. Niedzielska, “The Intellectual Property Aspects of Folklore Protection” 16 Copyright Monthly Review, World Intellectual Property Organization, 125, 126, 1980 at pp. 339, 341.

⁴¹ *Intellectual Property Needs and Expectations of Traditional Knowledge Holders*, WIPO 2001, p. 22

Remedies: Remedy simply means any of the methods, available for the enforcement, protection or recovery of rights or for obtaining redress for their infringement.⁴² A remedy is a successful way of dealing with a problem.⁴³

1.3 Analysis of Relevant Provisions of the Copyright Act.

Section 1(1) of the Copyright Act list out works that are eligible for copyright protection. They are literary works, musical works, artistic works, cinematograph films, sound recordings and broadcasts.⁴⁴ The section further provides the conditions that the first three eligible works must satisfy before they can be accorded copyright protection. For avoidance of doubt, the section provides:

A literary, musical or artistic work shall not be eligible for copyright unless sufficient effort has been expended on making the work to give it an original character and the work has been fixed in any medium of expression now known or later to be developed, from which it can be perceived, reproduced or otherwise communicated either directly or with the aid of any machine or device.⁴⁵

The above conditions must be satisfied by an eligible work before it can be granted copyright protection. Nigeria cultural and artistic heritages (folklore) original works of communities in Nigeria e.g. song. They are not fixed in any medium of expression as required by the Copyright Act. The question is, can they be protected by the Act bearing in mind that copyright does not protect ideas but the manner of expression?⁴⁶ Both requirements must be satisfied by an eligible work and not satisfying one and leaving the other.

The requirement of fixation presupposes that, the medium in which the work is to be fixed should be permanent to some extent and not transient or evanescent.⁴⁷ Permanence in this regard does not mean everlasting in the strict sense of the word. In *Hollinrake v. Truswell*,⁴⁸ the House of Lords stated that copyright is confined to the expression of such ideas, and if such expression is not copied, then copyright is not infringed. Sections 31 to 33 of the Copyright Act are devoted to expressions of folklore.

⁴² Elizabeth A. Martin *Oxford Dictionary of Law* (6th edition) (Oxford: Oxford University Press, 2006) p. 454.

⁴³ BBC English Dictionary *opcit* p. 977

⁴⁴ Section 1(1)(a)-(f) of the Copyright Act. Cap C.28, LFN, 2004

⁴⁵ Section 1(2)(a) and (b) *ibid*

⁴⁶ See *Donoghue v. Allied Newspapers* (1938) 1 Ch. 106, *Walter v. Lane* (1900) A.C. 539, *Evans v. Hulton* 1923-28 Mac. C.C.51, *Leah v. Two Worlds Publishing Co. Ltd.* (1951) Ch. 395; *Express Newspapers Plc. v. News U. K. Plc.* (1991) F.S.R. 36 etc.

⁴⁷ John O. Asein *Nigerian Copyright Law and Practice* (Nigeria: Nigeria Copyright Commission, 2004) P. 60

⁴⁸ (1894) 3 Ch. 420. See R. G. Lawson *Advertising Law* (Estover: Macdonald and Evans Limited, 1978) pp. 112-113.

1.4 Protection of expressions of folklore

In the past decades, it has become apparent that cultural matters and their protection is the concern not only of a people and sovereign nations but of the international community.⁴⁹ Protection of cultural and artistic heritage has taken on growing importance and urgency for indigenous people worldwide. The very concept of “indigenous” embraces the notion of distinct and separate culture and way of life which are fundamentally connected to a specific territory. Indigenous people cannot survive, or exercise their fundamental human rights as distinct nations, societies and peoples without the ability to conserve, revive, develop and teach the wisdom they have inherited from their ancestors.⁵⁰ The protection of traditional cultural expressions has been discussed for many years but still remains a challenging issue the world over, Nigeria inclusive. This matter has become glaring with the advent of new technologies, raising not only legal but political concerns in the context of international organization.⁵¹

The World Intellectual Property Organization (WIPO) captures the essence of folklore (communal artistic heritage's) protection thus:

Every nation claiming to be part of a civilized world is proud of its cultural heritage. Folklore is probably the most important and well acclaimed component of the cultural heritage of a nation...Technological development in 1980's especially in the fields of sound and audio visual recording, broadcasting, cable television and cinematography posed a global problem. Expressions... of folklore were subjected to wide-scale commercial exploitation without any economic benefit flowing to the community who were the creators and preservers of folklore (communal artistic heritage)⁵²

It is not in doubt that expressions of folklore have sacred cultural and other social relevance, but the essence is the realizable economic gain, more so now that “knowledge of all kinds is increasingly coming to be dealt with in market terms”.⁵³

Section 31(1) provides that expressions of folklore are protected against reproduction, communication to the public by performance, broadcasting, distribution by cable or other

⁴⁹ Hoffman, Barbara (ed). *Art and Cultural Heritage: Law, Policy and Practice* www.Cambridge.org/us/catalogue.asp?isbn=0521857643 accessed-3rdAugust,2014.

⁵⁰ Daes, Erica-Irene *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples UNESCO Commission on Human Rights, Sub-commission on Prevention of Discrimination and Protection of Minorities 45th Session, Item 14 of the Provisional Agenda* www.unhchr.ch/...nsf/08eg7ee60cde380se8025677400469978?

⁵¹ Dinonyssia, Kallinikou, paper Presented for the Conference *“Can Oral History make Objects Speak?”* <http://www.icme.icom.museum> accessed on 24th July,2014

⁵² “A Study of the Protection of Expressions of Folklore” (WIPO Geneva 2002) P.1. www.wipo.int/tk/en/studeis/cultrualexpressions/study/kutty.pdf accessed on 2ndAugust,2014.

⁵³ Anthony Seager, *“Ethnomusicology, Archives, Professional Organizations, and the shifting Ethics of Intellectual Property”* Year book for Traditional Music vol. 28 (1996) p.87.

means, adaptations, translations and other transformations, when such expressions are made either for commercial purposes or outside their traditional context.⁵⁴ Notwithstanding these provisions, Nigeria cultural and artistic heritage (folklore) nay that of other jurisdictions has been violated or infringed. This brings us to infringement:

1.5 Infringement

There are two types of infringement of folklore viz: civil⁵⁵ and criminal. Infringement is “an act that interferes with one of the exclusive rights of a patent, copyright or trademark owner”⁵⁶ Infringement of Nigeria cultural and artistic heritage/folklore is therefore the violation or interference of/with the cultural and artistic heritage of indigenous communities and people of Nigeria by another person or other persons. Section 31(1) of the Copyright Act list out activities or things against which expression of folklore is protected.⁵⁷ Other activities/things prohibited with regard to expressions of folklore are failure to indicate in all printed publications, and in connection with any communications to the public, of any identifiable expressions of folklore, its source(s) in appropriate manner and in conformity with fair practice by mentioning the community or place from which the expression utilized has been derived.⁵⁸

Thus, where any person or group of persons does any of the above stated acts without the authorization of the Nigerian Copyright Commission,⁵⁹ he/she /they shall have infringed or violated the expressions of folklore of the community concerned. Section 32 provides for civil infringement even though the word “civil” is not used. It states that any person who, without the consent of the Nigerian Copyright Commission, uses an expression of folklore in a manner not permitted by section 31 of the Copyright Act is in breach of statutory duty.

There is no gainsaying the fact that, folklore is an integral part of the cultural heritage of a nation such as Nigeria and indeed other nations globally. It is an essential means of social identity especially for a developing country such as Nigeria. The exploitation of folklore is extensive and diverse. Many designs in clothes, rugs, works of art, carving etc, are derived from folklore of one community or the other.⁶⁰ So also many musical and film works have their root in folklore. It is regrettable that such reproductions/commercial appropriation or exploitation are carried out by people who have no connection whatsoever with the communities that own them or to which they belong, and without permission of the Nigerian Copyright Commission which is the body

⁵⁴ Section 31(1)(a)-(c). *opcit*.

⁵⁵ Although, the Copyright Act does not use the word civil infringement

⁵⁶ Bryan, A. Garner *op.cit* p. 796

⁵⁷ See Note 53 above where they are listed in the text of this paper

⁵⁸ Section 31(3) *opcit*

⁵⁹ Section 31(4) and 32 *ibid*

⁶⁰ Adebambo Adewapo, *Protection and Administration of Folklore in Nigeria*

<http://www.law.ed.ac.uk/ahrc/scripts-ed///vol.3-/editorial.asp> accessed on 10th September, 2014.

designated as the competent authority for the management and administration of folklore in Nigeria by the Copyright Act.⁶¹

It is sad to note that most often, indigenous communities never enjoy the economic benefit⁶² or share in the returns from such unauthorized exploitation or reproduction of expressions of folklore by aforesaid persons. Another disheartening thing in this regard is the fact that, such unauthorized exploitation offend their religious beliefs as well as the fact that little or no respect is shown to the custodians of expressions of folklore in the commercialization process by the way they use expressions of folklore which is degrading, insulting and or culturally offensive.⁶³ In *Milpurrurru v. Indofurn Property Limited and Others*,⁶⁴ the aboriginal artist artwork which was based on dreaming themes and incorporating sacred images was reproduced on carpets where people walked on. This greatly trivialized their religious and spiritual meaning.

Infact, Antecio Lopez,⁶⁵ summarized the most complaint by third world countries of the appropriation and distortion of their folklore thus:

Persons who have no connection with our people's write, and records and sing songs, legends and tales for commercial purposes with no concern for the Copyright of the peoples affected. As a first step, it is urgently necessary to put an end to this appropriation, which is virtually legalized in many countries, and for the governing body of intellectual property, namely WIPO itself, to introduce an international legal standard for the preservation of indigenous knowledge.⁶⁶

The theft of the folklore of indigenous people is regarded by them as the final blow to their civilization from "invaders"⁶⁷. It is an extension of the plunder mentality. It signifies that culture is open to pillage in the same way as that aboriginal lands and resources have been for over two hundred years (200). Globally, survival for indigenous peoples is not merely a question of physical existence, but depends upon maintaining the spiritual links with the land and communities.⁶⁸

Although, these comments are made with regards to the Aboriginal Folklore, it is not less true with regards to Nigeria folklore. Infact, it has been stated that, there is no discipline

⁶¹ Section 31(4) *opcit*

⁶² See Article 27(1) of the Universal Declaration of Human Rights, 1948.

⁶³ See Kuek Chee Ying Protection of Expressions of Folklore/Traditional Cultural Expressions: To What Extent is Copyright law the Solution?

<http://www.commonli.org/my/journal/jmal/2005/2html>.accessed on 10th September,2014, *Journal of Malaysian and Comparative Law*.

⁶⁴ (1994) 30 Intellectual Property Report 209. It is also known as the Carpet Case.

⁶⁵ Then President of the Naguana Association in Panama

⁶⁶ WIPO, Initiative for the Protection of Traditional Knowledge, Indigenous People and Local Communities, Geneva, WIPO July, 1998.

⁶⁷ Adebambo Adewapo *op.cit*

⁶⁸ Christine Haight Farley "Protecting Folklore of Indigenous People: Is Intellectual Proeprty the Answer? Connecticut Law Review Vol. 3o Fall 1997 No. 1, p.8

that is more concerned with linking us to the cultural heritage from the past than folklore.⁶⁹ The discussions so far is to enable us appreciate the gravity of infringement of folklore.

Although the drafters of Nigeria Copyright Act have legislated on folklore generally and infringements in particular, there are still more infringements or violations of folklore of Nigeria especially having regards to the emergence of new technologies and globalization. For instance, a person may go to a community during new yam festivals such as Leboku, Yala, Obudu New Yam Festivals all in Cross River State of Nigeria, with his or her handset or digital camera and may record, video and take snapshots of all the cultural activities like folk music, folksongs, folkdance, folktales, rhymes, rituals, myth etc and reproduce them for commercial purposes without the required consent and mentioning of the community or place where it is derived⁷⁰ or use it outside its customary or traditional context e.g. sending abroad and willfully misrepresent the source of the aforementioned cultural activities.

In the face of all these, nothing may be done either because the Nigeria Copyright Commission or community is unaware of such infringing acts or is aware, but for one reason or the other is not able to enforce the provisions of the Act on the issue. Another example is the commercial use of expressions of folklore to promote consumer products, which when undertaken by others, often deny traditional communities their future use. Use in the “traditional context”⁷¹ means, the way of using an expressions of folklore in its proper artistic framework based on continuous usage by the community. For example, use of ritual dance in its traditional context means to perform it in the actual framework of the respective rite. Use within the “customary context” means, the utilization of expressions of folklore in accordance with the practice of everyday life of the community like the usual ways of selling copies of tangible expressions of folklore by local craft men. A customary context may develop and change more rapidly than the traditional one.⁷² It is sad to note that notwithstanding the wide spread of violations of Nigeria folklore, there are hardly decided Nigeria cases on the subject.⁷³ Thus, regards will be had to some cases of infringement of expressions of folklore which are not Nigeria cases.

In *Yumbulu v. Reserve Bank of Australia*⁷⁴, there was an attempt by the representatives of the Galpu Clan to prevent the reproduction by the Reserve Bank of the design of a “morning star pole” on a commemorative 1998 Ten Dollar Bank Note. The pole had been created by a member of the clan, Aboriginal artist, Terry Yumbulul, who had obtained authority and knowledge to create the pole through initiation and revelatory ceremonies. The Galpu asserted that the communal obligation of the artist was such that he owned an obligation to the clan to prevent the design of the pole from being used in any way which

⁶⁹ Williams A. Wilson, The Deeper Necessity: Folklore and the Humanities. *Journal of American Folklore* 101:4000, 1988

⁷⁰ See subsection (3) of section 31

⁷¹ Stephen Palethorpe and Stefaan Verhulst *op.cit.* p.14

⁷² See WIPO Intellectual Property Reading Material Geneva, March, 1998 p.56.

⁷³ However there are some cases on infringement of copyright in Nigeria

⁷⁴ (1991) 2 Intellectual Prospect Reports 481 at p. 490.

was culturally offensive. Although sympathetic to this argument, the trial judge French, J. considered that the artist who had created the pole had successfully disposed of his intellectual property rights in it through a legally binding agreement, he lamented that "Australian" Copyright Law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin. Nigeria Courts may made similar comment like the one made by the judge in the aforesaid case if such case is brought before it.⁷⁵

Section 33(1) of the Copyright Act also makes provisions for criminal infringement. It provides that:

- (a) Any person who does any of the acts set out in Section 31 of the Copyright Act without the consent or authorization of the Nigeria Copyright or
- (b) Does not comply with the requirements of subsection (4) of section 31 of the Act (Consent of Nigeria Copyright Commission) or
- (c) Wilfully misrepresents the source of an expression of folklore or
- (d) Wilfully distorts an expression of folklore in any manner prejudicial to the honour, dignity or cultural interests of the community in which it originates.
- (e) Is guilty of an offence under the Act.

The example given above with regards to a person going to a new yam festival, in a community and recording, videotaping of songs, rituals etc also applies here and amounts to criminal infringement.

Before concluding on infringement, it is necessary to say that there are exceptions to acts against which expressions of folklore⁷⁶ are protected. This range from fair dealings with those acts for private and domestic use, but where the use is public, it shall be accompanied by an acknowledgement of the title of the work and its source, to utilization for purposes of education; utilization by way of illustration in an original work of an author, as far as the extent of such utilization is compatible with fair practice or the borrowing of folklore for creating an original work of an author and the incidental utilization of expression of folklore. Expressions of folklore used as stated above will not be regarded as violations or infringements.

1.6 Remedies:

Where there is a wrong there is a remedy which is expressed in latin as *ibi ius ibi remedium*. Thus, In the event of infringement of expressions of folklore, where the

⁷⁵ Other cases on infringement of expressions of folklore are: *Bancroft v. Dolina*, *Forster v. Mountford*, *Bulun Bulun & Anor v. R & T. Textiles Property Limited*, *Akpovi H. Athanase v. Kidjo Anglique*

⁷⁶ Section 31(2)(a)-(b) *opcit*

infringers are found liable just like in other cases of infringements, remedies are available to the owners. The Nigeria Copyright Act makes provisions for civil and criminal remedies in the event of violations/infringement of expressions of folklore in Nigeria.

It provides that:

Any person who without the consent of the Nigeria Copyright Commission, uses an expression of folklore in a manner not permitted by section 31(1) of this Act, shall be in breach of statutory duty and be liable to the Commission in damages, injunctions and any other remedies as the court may deem fit to award in the circumstances⁷⁷.

It is the Federal High Court exercising jurisdiction in the place where the infringement occurs, that has the exclusive jurisdiction to try offences or disputes under the Copyright Act⁷⁸. Section 16 of the Copyright Act provides that infringement of copyright is actionable at the suit of the owner or assignee or an exclusive licensee and relief such as damages, injunction, accounts or otherwise shall be available to the plaintiff as is available in any corresponding proceedings in respect of infringement of other proprietary rights.

From the foregoing, infringement of expressions of folklore shall be actionable at the suit of the Nigeria Copyright Commission⁷⁹, and the same remedies awarded in other infringement actions are available in actions for infringement of expressions of folklore. Thus, in a successful action for infringement of expressions of folklore, the Nigerian Copyright Commission may be awarded damages and/or injunction, accounts of profit etc as the case may be.

A person convicted of any of the above listed act under section 33(1) of the Copyright Act is liable on conviction as follows,⁸⁰ (a) If an individual, to a fine not exceeding One Hundred Thousand Naira (N100,000) or to imprisonment for a term of twelve (12) months or to both such fine and imprisonment. (b) If a corporate body, to a fine of five hundred thousand Naira (N500,000)

Another remedy available to the owner of expressions of folklore, in this case the Nigerian Copyright Commission is delivery up of the infringing of offending article. In this regard, section 33(3) of the Copyright Act provides that, a court before which an offence under the said section is tried may order that the infringing or offending article be delivered to the Commission.

⁷⁷ Section 32 of the Copyright Act *opcit*.

⁷⁸ Section 46

⁷⁹ Section 31(4) *Opcit*

⁸⁰ Section 33(2) of the Copyright Act

1.7 Limitation of the Copyright Act in the Protection of Nigeria Cultural and Artistic Heritage (Folklore)

The Copyright Act does not adequately protect Nigeria cultural and artistic heritage because, the latter has its peculiarities. Due to these peculiarities, it is unable to satisfy the requirements for eligibility for copyright protection under the Act. Some of which are: originality, fixation requirements, duration for protection, individual authorship or ownership, lack of consistent definition of folklore and lack of express right of the community to sue for infringement.

i. Fixation Requirement

As indicated earlier, cultural and artistic heritage of Nigeria (folklore) passes from generation to generation by word of mouth and thus does not satisfy the fixation requirement even though it satisfies that of originality as both requirements must be satisfied and not one leaving the other.

ii. Requirement of Duration

It has no duration for protection for the above reason of passing from generation to generation orally.

iii. Ownership is communal⁸¹ and not individual.

iv. There is no consistent definition of folklore as has been indicated earlier as there are various definitions ascribed to it.

v. The community has no right to sue in the event of infringement of their cultural and artistic heritage. Rather it is the Nigerian Copyright Commission which is designated as the competent authority to sue for breach. The above issues are some of the limitations that hinder Nigeria cultural and artistic heritage (folklore) from being adequately protected by the Copyright Act.

Infact, Posey acknowledged these limitations, when he said that, there are inherent difficulties in fitting folklore into accented notions of intellectual property relating to ownership, originality, duration, fixation, inventiveness and uniqueness.⁸²

1.8 Findings, Recommendations and Conclusion

Findings

The following findings are made:

- i. Cultural and artistic heritage (folklore) of Nigeria are not expressed in any fix or tangible form which will entitle them to protection under the Copyright Act. It passes from generation to generation by word of mouth.

⁸¹ See *Yumbulul v. Reserve Bank of Australia (Supra) Bulun Bulun & Anor v. R & T. Textiles Property Limited.* (supra).

⁸² D. Posey "Protecting Indigenous Diversity 38/3 Environment" (1996) at P.7. Also, see WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources Traditional Knowledge and Folklore. The Protection of Traditional Cultural Expressions/Expressions of Folklore: Collation of Written Comments on the List of Issues at the Eleventh Session, Geneva, July 3 to 12, 2007 Annex P.2 WIPO. GRTKF/IC/11/4@

- ii. Cultural and artistic heritage just like other intellectual property and tangible properties needs to be protected from unauthorized exploitation.
- iii. Expressions of folklore do not have limited duration and individual ownership.
- iv. Nowhere in the Act or sections 31, 32 and 33 thereof are the communities mentioned to have the right to manage, control and sue for breach of their expressions of folklore or their share in any monetary award made by the court in favour of the Nigerian Copyright Commission which is designated the competent authority to sue for breach/infringement.
- v. The imprisonment term of twelve (12) months for infringement of expressions of folklore and the fine of One Hundred Thousand Naira (N1000,000) for individual offender and five hundred thousand Naira (N500,000) for corporate offender is inadequate having regards to the importance of cultural and artistic heritage (folklore) to the community, in particular, and Nigeria in general. The fact that, infringement is on the increase and the penalty is not commensurate with the present day realities in Nigeria is something to wrong about.
- vi. The Copyright Act is silent on whether or not the delivery up order in the event of infringement of folklore is to be made in addition to the fine or/and imprisonment imposed by section 33 (2) of the Act or, is to be made as an alternative to criminal remedy.
- vii. Notwithstanding infringement of folklore in Nigeria, there is no single reported case on it.
- viii. The Copyright Act does not adequately protect Nigerian Cultural and artistic heritage (folklore) as it was demonstrated above.

Recommendations

The Nigerian Copyright Commission which is the designated authority in respect of Nigeria cultural and artistic heritage(folklore) should brace up to identify infringements of the said heritage and violations of the provisions of the Act in respect of folklore and sue for such violations and infringements.

Members of the community should report any acts of infringement committed against their cultural and artistic heritage to the Nigerian Copyright Commission which will then sue.

The Nigerian Copyright Commission should organize public hearing that stakeholders will attend and make contributions towards adequate protection of the cultural and artistic heritage of Nigeria from infringement.

Such hearing should be held in each state or at least at local government levels to enable adequate participation of stakeholders and members of the public.

There should be provision in the Copyright Act the sharing formula in a way that the community whose culture and artistic heritage is infringed should share in any monetary award made by the court.

A adumbrate the concept of *Sui generis* approach should be adopted which will not require originality and fixation as prerequisites for protection. Also, there should be no limit as to the duration of protection and protection should also be communal in nature and not individual as is the case under the Act presently.

The Nigeria Copyright Act should be amended to incorporate the adumbrate the concept of *Sui generis* approach or it could be made as a separate law.

The Copyright Act should be amended to reflect increase of term of imprisonment to three (3) years and increase of fine from one hundred thousand Naira (N100,000) to five hundred thousand Naira (N500,000,00) for individual offenders and from five hundred thousand Naira (N500,000) to two million Naira (N2,000,000.00) (N2m)for corporate offenders.

Conclusion

This paper examines the provisions of the Nigeria Copyright Act with regards to infringement of Nigeria cultural and artistic heritage (folklore) and remedies for such infringement. The paper acknowledges that it is the Copyright Act of Nigeria that provides protection for the said Nigeria cultural and artistic heritage. Three sections (31, 32 and 33) of the Act are devoted to expressions of folklore. This notwithstanding, acts against which the expressions of folklore are protected are carried out, without the consent of the Nigerian Copyright Commission being sought and obtained, and no acknowledgement of the source (community) from which this heritage is derived.

This paper further notes that although, expressions of folklore satisfy the requirement of originality, it does not satisfy the fixation requirement and other issues such as duration, individual ownership etc. Thus, it concludes that the Copyright Act has some limitations that hinder it from according adequate protection to the Nigeria cultural and artistic heritage (folklore).