

DEVELOPMENT, CONCEPT AND SCOPE OF COPYRIGHT PROTECTION IN NIGERIA: AN OVERVIEW*

Abstract

The development of copyright protection regime has an inexorable link with economic development and growth. This is so because as the economy of a nation advances, so the creative industry grows; and so also does the need for access to the products of this industry on the part of the public grow. This brings with it the risk of a rise in the unjustified exploitation of copyright works to the disadvantage of rights owners. Thus, it is imperative to constantly review particular copyright systems to determine conformity with basic global standards. This forms the aim of this paper which focuses essentially on basic issues relating to the development, concept and the scope of protection afforded copyright in Nigeria. The paper finds that the scope of copyright protection in the Nigerian legal system is quite extensive as it complies with basic global best practice. It recommends that for a more complete meaning of the concept 'copyright,' focus should not only be on the creators but on owners of the work. It also suggests a way for more effective administration of folklore protection.

Key words: *Copyright Protection; Intellectual Property; Performing Rights; Folklore.*

1. Introduction

From the first copyright statute to present day statutes both at the local and international levels, copyright has consistently stood at the interstices of emergent developments with far reaching socio-economic, cultural, technological and even political dimensions.¹ Societal growth and development also brings with it the increasing need for pleasure on the part of members of the society, the resultant effect of which is the search for materials that give pleasure; most of which are found in the creative industry. There is even a greater need, namely, the exploitation of these materials for economic gain, which often happens at great loss to the creators. Thus, the need to protect these creators from indiscriminate and unrestrained exploitation of the products of their creativity in order to preserve their right to benefit from their labour cannot be over emphasised. These creators include poets, writers, artists, painters, broadcasters, performers, musicians, composers, etc., and their products are the books, poems, paintings, songs, films, etc., which they create.

Copyright, which is a genre of Intellectual Property,² developed out of this need. The exact scope of protection appears open-ended just as the means of exploitation by members of the society keeps growing in sophistication and in dimensions. In the same vein, the concept of copyright does not appear fully appreciated because, as has been argued, save for the frequent usage of the term by many to describe an imitation of music, not much can be said of it by those understanding it as such.³ This is so because the word, "copyright" does not readily command the necessary imagery that should aid the understanding of an ordinary man.⁴ Even so, copyright is attaining some form of prominence within the Nigerian jurisprudence, with the growth and development of the creative industry. There exists a local legal mechanism providing individual and institutional framework for the regulation and enforcement of copyright. This mechanism is enshrined in the Copyright Act⁵ which has over time been amended to conform to international standards on copyright protection.

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¹ A Adewopo, *Nigerian Copyright System: Principles and Perspectives* (Lagos: Odade Publishers, 2012) xxxi; A Adewopo, *Intellectual Property: A Pro-Development Vision of the Law and The Nigerian Intellectual Property Law and Policy Reform in The Knowledge Era*, (Abuja: NIALS Press, 2012) p.2; M Ouma, "The Role of Copyright in Economic Development: A Review from Kenya," *NIALS Journal of Intellectual Property*, (2012) Vol. 1, No. 2: p.65.

² Intellectual property is the umbrella term that describes the creations of the mind like inventions, literary and artistic works, symbols, names and images often used in commerce. It includes within its scope copyright, patent, industrial design, trademarks, etc. See Adewopo, *Intellectual Property* (n.1), p.10.

³ Adewopo, *Copyright System* (n.1), p.6.

⁴ Ibid.

⁵ Cap C28, Laws of the Federation of Nigeria, 2004.

The concern in this paper is to examine the development and scope of copyright protection in Nigeria. The aim is to determine how far the Nigerian copyright system has grown in line with global best practice. To this end, reliance shall be placed on relevant statutes, judicial authorities and scholarly texts and articles from both within and outside Nigeria. This work has thus been divided into five parts, the first of which is the introduction. The second part looks at the development of copyright law in Nigeria, while the third part discusses the concept of copyright. The scope of copyright protection in Nigeria will form the focus in the fourth part, while the fifth part shall contain the conclusion and recommendations.

2. The Development of Copyright Law in Nigeria

The body of laws relating to copyright in Nigeria developed over time and is still developing. There are two views on how this body of law developed in Nigeria. The first view traces it to the influence of foreign political and economic forces. By this, reference is made to the extension of the English Copyright Act 1911 to Nigeria under colonial government. The other view has it that copyright is part of our traditional concept and has been in existence for as long as the culture of the people. The proponents of this view draw their support from the practice where dancers and singers pay tribute to their predecessors in the trade before they commence performance.⁶ It seems, however, that the first view enjoys more support as the authorities point more to the fact that Nigerian copyright law has its roots in England.⁷ Thus, a discourse of this type must of necessity start with the development of the law in England.

The first copyright law was a censorship law. It was not about protecting the rights of authors, or encouraging them to produce new works. Authors' rights were in little danger in Sixteenth Century England and the arrival of the printing press was if anything energising to writers. The English government then became concerned about too many works being produced by the writers. The new technology was making seditious reading material widely available for the first time and the government urgently needed to control the flood of print matter, censorship being as legitimate an administrative function then as building roads.⁸ For this purpose, the English Crown found a formidable ally in the guild of "Stationers" and the censorship law was in the form of a Charter granted to the stationers by the Crown.⁹

In the early days, the stationers had through their practices developed certain usages and customs which were made to ensure exclusivity of rights over books they had acquired from authors, in order to prevent copying by persons who were not members of their guild.¹⁰ Thus, in 1534, the Stationers secured protection against the importation of foreign books and in 1556, Mary Tudor, with her acute concern about religious opposition, granted the Stationers' Company a charter. This gave a power, in addition to the usual supervisory authority over the craft, to search out and destroy books printed in contravention of statute or proclamation. The company was enabled to organise what was in effect a licensing system by requiring lawfully printed books to be entered in its register. The right to make an entry was confined to company members, this being germane to the very purpose of the charter.¹¹

⁶Adewopo, *Copyright System* (n.1), p.4.

⁷Ibid.

⁸K Fogel, "The Surprising History of Copyright and the Promise of a Post-Copyright World," <<http://questioncopyright.org/promise>,> accessed on 10 March, 2014.

⁹ Ibid

¹⁰ Ibid

¹¹ W Cornish and D Llewelyn, *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights* (London: Sweet and Maxwell, 2007) p.375; D L Zimmerman, "It's an Original! (?): In Pursuit of Copyright's Elusive Essence," *Columbia Journal of Law and Arts*, Vol. 28 (2005): p.187; J Ginsburg, "'Une Chose Publique'? The Author's Domain and the Public Domain in Early British, French and US Copyright Law," (Public Law and Legal Theory Working Paper, No. 06-120, 2006) p.1-4; B Kaplan, *An Hurried View of Copyright* (New York: Columbia University Press, 1967) p.4-5.

This system continued until 1662 but lapsed in 1679. King James II revived it for seven years in 1685 until 1694 when Parliament finally refused to renew the charter.¹² The Stationers, who had argued forcefully against their loss of protection, were left with such claim to “copy-right” as they could make out of their own customary practices surrounding registration. As they also lost their search and seizure powers, and equity had not yet begun to grant injunctions to protect any interest they might establish, their only hope was common law and this they put to no decisive test.¹³ Thus, the stationers needed definite substantive rights and effective procedures to enforce them. So they approached parliament and offered the then novel argument that authors had a natural and inherent right of ownership in what they wrote, and that furthermore, such ownership could be transferred to other parties by the contract, like any other form of property. This argument paid off and saw the birth of the first recognisable modern copyright law¹⁴ and in fact the first Intellectual Property Law¹⁵- the Copyright Act of 1710 also known as the Statute of Anne.

Interestingly, the Act was concerned with interest in books and other writings.¹⁶ It granted sole right and liberty of printing books to authors and their assigns, but this right stems nonetheless from commercial exploitation rather than literary creation.¹⁷ Enforcing the right depended upon registering the book’s title before publication with the Stationers’ Company and this was enforceable by seizures and penalties.¹⁸ The right has a life span of 14 years subject to extension for another 14 years if the author was alive at the time of the first expiration.¹⁹ Soon after the passage of the Act, other creative arts started yearning for protection of their works, particularly the visual arts. Protection was first extended to engravings in 1735-1777; sculptures in 1798-1814; and paintings, photographs and drawings in 1862; performing rights in 1833-1842. In the early twentieth century, parliament saw it fit to bring all these measures into a single code since they all deal with the same subject – copyright, hence the enactment of the Copyright Act, 1911.²⁰ The 1911 Act was also influenced by international concerns regarding copyright – need for foreign works to be afforded protection outside their shores and the need to set some form of international standards. The result of this was the Berne Convention of 1886 under which either the personal connection of the author with a Member State, or first publication in a Member state, was to secure copyright in others, under the principle of national treatment. At the Berlin revision of the Convention in 1908, Britain was obliged to accept the majority consensus on two matters: protection was to arise out of the act of creation itself, without any condition of registration or other formality – which obliged Britain to abandon the traditional requirement of Stationers’ Company registration before suing; and the period of protection for most types of work was put to at least the author’s life and 50 years.²¹

Being a colony of Britain, and in order to protect the interests in creative products from Britain, Britain extended the 1911 Act to Nigeria through Order-in-council No. 912 of 24 June, 1912 which was made under section 25 of the 1911 Act.²² It is significant to note that although a new Copyright Act was passed in England in 1956, Nigeria still continued to apply the 1911 Act until 1970 when the first indigenous Copyright Act was promulgated as Decree No. 61 of 1970, ten years after independence.²³ According to Adewopo,

¹²Ibid

¹³Ibid

¹⁴ Fogel (n. 8).

¹⁵ Adewopo, *Intellectual Property* (n. 1), p.9

¹⁶A Baron, “Copyright Law and the Claims of Art,” *Intellectual Property Quarterly*, No. 4 (2002): p.368

¹⁷ Cornish and Llewelyn (n. 11), p. 376

¹⁸ Ibid

¹⁹ Ibid

²⁰ Ibid

²¹ Ibid

²² O F Babafemi, *Intellectual Property: The Law and Practice of Copyright, Trade Marks, Patents and Industrial Designs in Nigeria* (Ibadan: Justinian Books, 2006) p.5

²³Babafemi (n. 22), p.5; Adewopo, *Copyright System* (n.1), p.5

The impact of the (1911 Act) was limited probably due to what many described as the paucity of facility to generate copyright materials. Moreover, it did appear that the modern concept of individual proprietary right forged by the new Act was at variance with the traditional notion of communal ownership and free access.

The 1970 Decree came into force on 24 December of that year. It was however found to be very defective in many aspects. For instance, under the Decree, copyright for literary, musical and artistic works, cinematograph films and photographs lasted for only 25 years after the end of the year in which the author died.²⁴ In the area of administration, there was no effective structure under the Decree and there was also no Copyright Licensing Panel. The Decree only made provisions for civil suit at the instance of the copyright owner with regards to enforcement and the criminal sanction was very minimal as the maximum penalty was N0.05K (Five kobo) per item seized up to a maximum of N10 (Ten Naira), with a possible prison sentence of 2 months for a second offence.²⁵ In essence, enforcement was largely left in the hands of rights owners. It was these lapses and more that led to the promulgation of the Copyright Decree No. 47 of 1988. That Decree, now an Act has been amended twice in 1992 and 1999.²⁶ Observers have described the present Copyright Act as the most progressive in our legislative effort and the reason is not unconnected with the fact that the Act was fashioned after the World Intellectual Property Organisation (WIPO)²⁷ Tunis model which has incorporated standard provisions reflecting current trends in global copyright legislation.²⁸ Specifically, under the new Act there is now a body known as the Nigerian Copyright Commission with a governing board serving as the institutional framework for administration and regulation of copyright in Nigeria. There is also established a copyright licensing Panel under the Act and a stronger regime for criminal sanctions.²⁹ While retaining the mechanism for civil enforcement by individual right owners, the Act makes provisions for the licensing of Copyright Collective Societies for the collective management and enforcement of copyright on behalf of right owners.³⁰ This Act will form the basis of further discussion in the remaining part of this work. Unless where the circumstance otherwise permits, we shall refer to it as “the Act”.

3. The Concept of Copyright

The Act does not seem to proffer a definition for the term ‘copyright.’ It merely provides in section 51 that the term “means copyright under the Act” and in section 6 that the copyright in a work shall be the exclusive right to control the doing in Nigeria of the acts listed in the section. Essentially, the Act adopts a descriptive approach to definition of the term³¹ thereby leaving the proper definition of the term out of the Act. The British Lawmakers adopted a different approach in this regard. They defined Copyright as a property right in certain works.³² Even though this approach is salutary, it is our view that it does not place the concept in proper perspective as it leaves open the definition of property for the purpose of protection under the Act.

No one better captures the traditional connotation of the concept than Macaulay in his 1841 speech in the English House of commons when he said,

The principle of copyright is this: It is a tax on readers for the purpose of giving a bounty to writers. The tax is an exceedingly bad one; it is a tax on one of the most innocent and salutary of human pleasures but it is desirable that we should have a supply of good books; we cannot have such a supply unless men of letters are

²⁴ Babafemi, *ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ WIPO was founded in 1967 to encourage creativity and to promote the protection of intellectual property throughout the world. It currently has 187 member states and it is one of the specialised agencies of the United Nations Organisation. See <www.wipo.int>, accessed on 10 March, 2014.

²⁸ Adewopo, *Copyright System* (n.1), above.

²⁹ Copyright Act, ss. 34, 35, 36 and 37.

³⁰ Copyright Act, s. 39.

³¹ See ss.1, 6, 7 and 8

³² Copyrights, Designs and Patents Act, 1988, s. 1(1)

literally remunerated and the least objectionable way of remunerating them is by means of copyright.³³

This statement raises the assumption that copyright is all about protecting and promoting the right of writers. But it has been argued elsewhere that copyright from its origin has never been about the right of the writer but that of the distributors (business men) of the books.³⁴ The essence of this argument may find support in the ancient times, in Britain, before the advent of legislations in the copyright realm. But it is doubtful if it will find support in the face of modern trends as far as copyright protection is concerned. Moreover, in civil law countries, copyright is seen as a child of the French Revolution and considered an inalienable right of the author, a human right in other words.³⁵ That being said, Cornish and Llewelyn see copyright as the right given against copying. According to them, copyright is a right given against the copying of defined types of cultural, informational and entertainment productions.³⁶ The authors appear to concede that the concept of copyright goes beyond protection from copying as the development of other copyrighted works means the protection from other unauthorized use of such works.³⁷ One point should be made and it is that copyright, as seen from the tenor of relevant legislations does not inhere in the creator of the work alone. This right can be enjoyed by the actual creator of the work; a person who, though not the actual creator, commissioned the creation of the work (and got the copyright vested in him via an agreement with the creator); an assignee or licensee of the interest in the work as the case may be.³⁸ Thus, it is our view that a proper definition of the concept should not center on the creator alone. It should also accommodate those who, at any point in time, can be viewed in the eyes of the law as owners of the work. So, it will be best, to our mind, if 'owner' is used instead of 'creator'. Adewopo's definition seems to agree with this view when he said,

From some provisions of the Act, copyright could be said to be the exclusive right to control the doing in Nigeria, of certain acts in relation to the work in which the right subsists. The owner therefore enjoys the right to make copies of his work, the right in the use, reproduction, and exploitation of his created work.³⁹

Ola's definition is similar with Adewopo's save that he introduced the idea of limitation and exceptions, which rightly gives the impression that the right is not absolute. To him, copyright can be described as the exclusive right of the owner to control the exploitation of his work and to grant authorisation to others in this regard, subject to certain limitations and exceptions.⁴⁰ Another definition of copyright sees it as an industrial right that allows key cultural industries, such as book and musical publishing, record production, computer software programming and film production to develop and grow.⁴¹ On his part, Hoorebeek views copyright as a property right that subsists in certain works. It is a statutory right giving the copyright owner certain exclusive rights in relation to his work, such as the right to make copies of the work, sell these copies to the public or the right to give a public performance of the work.⁴² Story sheds more light on this point thus:

³³ Cited in Z Chafee, "Reflections on Copyright law," *Columbia Law Review*, (1945) Vol. 45: p.503.

³⁴ Fogel, (n.8).

³⁵ D J Gervais, "Collective Management of Copyright and Neighbouring Rights in Canada: An International Perspective (Report Prepared for the Department of Canadian Heritage, August 2001) p.3. Note that the notion of copyright as human right finds expression in Article 27 of the United Nation's Declaration on Human Right as follows: (1) Everybody has the right freely to participate in the cultural life of the community, to enjoy the arts to share in scientific advancement and its benefit. (2) Everyone has the right to the protection of the moral and material interest resulting from any scientific, literary or artistic production of which he is the author.

³⁶ Cornish and Llewelyn (n.11), p.8

³⁷ Ibid, p.9.

³⁸ Copyright Act, ss. 10, 11 and 39

³⁹ Adewopo, *Copyright System* (n.1), p.6

⁴⁰ R O Ola, "Operation and regulation of Copyright Collective Administration in Nigeria: Important Lessons for Africa" (LLM diss., University of South Africa, 2012) p.4

⁴¹ Gervais (n.35), p.5

⁴² M V Hoorebeek, *Nutshells: Intellectual Property Law* (London: Sweet and Maxwell, 2009), p.79.

...what is often forgotten is that copyright, as a property right, operates in many of the same ways as do the ownership and exclusive use of private real or personal property, such as land, buildings or corporate shares. Copyright expresses a power relationship *between persons* and represents not only the state's grant of sovereignty to a private party but also *power OVER other people*. In other words, deciding and enforcing laws such as who can legally enter on to a private land and, conversely, who is a trespasser, are legal decisions of the same order as the power to decide who can use a book or proprietary software and who cannot;...⁴³

Finally, we must draw attention to a very interesting argument. Roy, while recognizing the basic features of the concept of copyright, goes on to posit that it is a colonial doctrine as it is eurocentric in nature. He, thereby questions movement towards universality of copyright principles in this post-colonial era. Hear him:

Copyright (like other forms of intellectual property) is not a *natural* right, but instead embodies a particular set of values and assumptions – such as the need to commodify ideas, and also the expression of those ideas. As a product of the European Enlightenment, the concept of copyright has been infused with the ideals of the liberal legal tradition, and these ideals – such as ‘private property’, ‘authorship’ and ‘possessive individualism’ – are not universal principles of property law, but instead are *Western* ones. Consequently, the supposedly universally-shared view of copyright law embodied in international agreements such as the Berne Convention and the TRIPS Agreement are not simply ‘agreements’, but rather are multifaceted projects (or dominant narratives) which are laden with values stemming from particular cultural traditions, and which have evolved from particular historical moments in Western history. However, while these values have been packaged and exported around the globe based on their apparent universality, it is significant to note that copyright remains a foreign concept in many cultures. Indeed, a number of societies take a radically different view as to ‘what constitutes property or what may rightfully be the subject of private ownership.’ Several cultures also consider ‘copying’ or sharing ideas within a community as a sign of respect and recognition – not as piracy, or a violation of private property rights.⁴⁴

Agreed that copyright is western in origin and “colonial” as Roy may have put it, however it seems to be forgotten that the world has now become a global village and with this comes with it some implications regarding international commerce – it is now possible to see the world as a single market. Moreover, the global reach of copyrighted works is a strong rationale for some universality in copyright principles. However, we concede that room should be allowed for peculiar local cultures in the exploitation of copyrighted works. This to our mind can simply be taken care of by local legislations on the subject. The next part of this work will consider the extent to which copyright is protected in Nigeria under the Act.

4. The Scope of Copyright Protection in Nigeria

Scope here refers to the extent to which the law affords protection to the copyright in a work. This clarification is necessary because of the difficulty in ascertaining the property right of individual copyright holders. According to Ghosh, the boundaries of copyright are far from clear and difficult to discern as copyright law lacks analogous limits on the scope of the copyright owner's property interest,

⁴³A Story, “Don't Ignore Copyright, the ‘Sleeping Giant’ on the TRIPS and International Educational Agenda,” in *Global Intellectual Property Rights: Knowledge, Access and Development*, ed. Drahos and Mayne (New York: Palgrave Macmillan, Hampshire (GB), 2002), p.125-143.

⁴⁴ A Roy, “Copyright: A Colonial Doctrine in a Post-Colonial Age,” *Copyright Reporter*, (2008) Vol. 26, No. 4: p.112.

except for the boundaries imposed by the limits of fair use, misuse, and express statutory exceptions.⁴⁵ But, statute can highlight specifically what the right includes. Thus, even though it may be difficult for the purpose of quantification to determine the exact extent of copyright owners' property interest, the extent of the right protected by law can be deciphered from the law itself. For instance, section 6 of the Copyright Act provides:

- (1) Subject to the exceptions specified in the Second Schedule to this Act, copyright in a work shall be the exclusive right to control the doing in Nigeria of any of the following acts, that is-
 - (a) in the case of a literary or musical work, to the and authorise the doing of any of the following acts-
 - (i) reproduce the work in any material form;
 - (ii) publish the work;
 - (iii) perform the work in public;
 - (iv) produce, reproduce, perform or publish any translation of the work;
 - (v) make any cinematograph film or a record in respect of the work;
 - (vi) distribute to the public, for commercial purposes, copies of the work, by way of rental, lease, hire, loan or similar arrangement;
 - (vii) broadcast or communicate the work to the public by a loudspeaker or any other similar device;
 - (viii) make any adaptation of the work;
 - (ix) do in relation to a translation or an adaption of the work, any of the acts specified in relation to the work in sub-paragraphs (i) to (vii) of this paragraph.⁴⁶

That being said, the Act specifies works that come under its protection and these works form the scope for our present consideration. For the purpose of clarity, the Act defines "work" to include translations, adaptation, new versions, or arrangements of pre-existing works, and anthologies or collection of works which, by reason of the selection and arrangement of their content, present an original character.⁴⁷ Specifically, the works under protection are listed in section 1, part I of the Act and in sections 26 and 31 in part II of the Act. The rationale for highlighting these works in different parts of the Act is unclear. What is clear, however, is that the Act follows the pattern in the now defunct 1956 Copyright Act of Britain. This trend has since been jettisoned under the current British Act on the subject – that is the Copyrights, Designs, and Patents Act, 1988.⁴⁸

Under section 1 of the Act, literary works; musical works; artistic works; cinematograph films; sound recordings; broadcasts and works of architecture⁴⁹ fall within copyright protection. While broadcast is defined as sound and television broadcast by wireless telegraphy or wire or both by satellite or cable programmes including re-broadcast, sound recording is defined as the first fixation of a sequence of sound capable of being perceived aurally and of being reproduced, but does not include a soundtrack associated with a cinematograph film. And a cinematograph film is defined to include the first fixation of a sequence of visual images capable of being shown as a moving picture and of being the subject of reproduction including the records of a sound track associated with it. Furthermore, musical works mean any musical composition, irrespective of musical quality and includes works composed for musical

⁴⁵ S Ghosh, "Market Entry and the Proper Scope of Copyright," *International Journal of the Economics of Business*, (2005) Vol. 12, No. 3: p.348

⁴⁶ It should be noted that these rights are subject to statutory exceptions as enshrined in the 2nd and 3rd Schedule to the Act. The provisions can be grouped into six-heads as follows: fair dealing; Parody, Pastiche or caricature; ephemeral use of artistic works; use for educational purposes; use for other public interest; and use for archival purposes.

⁴⁷ Copyright Act, s. 51

⁴⁸ Cornish and Llewelyn (n.11), p.412

⁴⁹ Work of architecture is included here because of the provision of section 6(3) of the Act which provides that "Copyright in a work of architecture shall also include the exclusive right to control the erection of any building which reproduces the whole or substantial or a substantial part of the work either in its original form or any form recognizably derived from the original, but not the right to control the reconstruction in the same style as the original of a building to which the copyright relates"

accompaniment, while artistic works include, irrespective of quality, paintings, drawings, etchings, lithographs, woodcuts, engravings and prints; maps, plans, and diagrams; works of sculpture; photographs not comprised in a cinematograph film; etc. More still, literary work is defined to include novels, stories, poetic works, plays, stage directions, film scenarios, broadcasting scripts, choreographic works, computer programmes, etc.⁵⁰

We should make the point here that the major concern of copyright in these works is not the idea but the manner in which the idea is represented. In other words, copyright does not protect ideas but the manner in which the ideas are represented.⁵¹ It should also be noted that protection extends to works irrespective of their content, length, purpose, form or even quality. But copyright cannot be ascribed to a single word. This principle was upheld in the English case of *Exxon Corp v. Exxon Insurance Consultant*.⁵² In that case, the claimants objected to the use by the defendant of “Exxon” as part of their corporate name. They secured relief against passing off; but on the claim for infringement of copy right in the word, they failed before the court of first instance and on appeal to the Court of Appeal, the court held, per *Stephenson L.J.*, relying on a section in the repealed English Copyright Act 1956 similar to section 1 of our Act, as follows,

...that for which protection is sought in the instant case does not appear to me to have any of the qualities which common sense would demand. It conveys no information; it provides no instruction; it gives no pleasure that I can conceive; it is simply an artificial combination of four letters of the alphabet which serves a purpose only when it is used in juxtaposition with other English words, to identify one or other of the companies in the claimant group.⁵³

Part II of the Act introduced a different class of works falling under copyright protection. These works are termed neighbouring rights. According to Adewopo, neighbouring rights concept was imported into the Nigerian copyright law in keeping with the international intellectual property architecture in the context of extending protection to related rights such as live performances. The protection of these rights was already captured in international instruments such as the Rome Convention for Protection of Performers, and Producers of Phonograms and Broadcasting Organisations⁵⁴ and WIPO/UNESCO initiative on protection of folklore.⁵⁵

Specifically, the work of performers and folklore forms neighbouring rights under the Act. One point must be made, though, these rights are not copyright properly so called. They are rights so closely related to copyrighted works that need some form of protection,⁵⁶ hence they are called neighbouring rights. Of performing rights, Agbakoba stated,

⁵⁰Copyright Act, s. 51

⁵¹Cornish and Llewelyn (n.11), p.417

⁵²[1981] All E.R. p.241.

⁵³ However, see the case of *Express Newspapers v. Liverpool Daily Post* (1985) 3 All ER, p.680 where a sequence of five letters was held by the English court to be fit for copyright protection.

⁵⁴ Adewopo, *Copyright System*, (n.1) p.10

⁵⁵ In 1982 the United Nations Educational, Scientific and cultural Organisation (UNESCO) and the World Intellectual Property Organisation (WIPO) made initial efforts to put in place a set of norms for the protection of expressions of folklore against illicit exploitation and other prejudicial actions. Even though the attempt was to have an international treaty, it could achieve only an enunciation of general principle in wide and ambiguous terms for the guidance of legal systems. The model provision for National laws on the protection of Expression of folklore encouraged nations to make provision for such protections. Such provision could either be a new law or an extension of its intellectual property law. It was made flexible so that nations could adapt it to their local realities. See A Adewopo, Protection and Administration of Folklore in Nigeria,” *Journal of Scottish Center for Research in Intellectual Property and Technologies*, Vol. 3, Issue 1 (2006) p.1

⁵⁶ Cornish and Llewelyn (n.11), O Agbakoba, “Enhancing and Enforcing Performing Rights as Copyright” (Unpublished Paper Presented at the National Seminar on Performing and Mechanical Rights)

Performing rights are beyond copyright because performers cannot readily show their work in permanent form. A performance by, say, Fela, is not fixed unless recorded. So, it is difficult to attribute and imbue it with copyright. ... the possibilities of infringement of performing rights have become complex because performance is too ephemeral a phenomenon for it to be easy to gain copyright capable of enforcement.⁵⁷

Even though performers engage in activities which are more immediately artistic and creative than those of entrepreneurs who enjoy copyrights in sound recordings, films and broadcast,⁵⁸ it took so long, in most jurisdictions, for performing rights to gain any form of protection. For instance, it was not until 1958 that performers were allowed the right to some civil action against infringers of their right through the Performers Protection Act of that year in United Kingdom.⁵⁹ The reason for this according to Cornish and Llewellyn was that it was claimed that performers were protected indirectly by the entrepreneurial rights; that those financially responsible were best placed to pursue imitators; and that to give copyright to all performers in a play, a film or an orchestra would lead to quite unnecessary complexity.⁶⁰

The Rome Convention influenced the protection of performers' rights in Nigeria. By virtue of the Act, a performer in Nigeria shall have the exclusive right to control, in relation to his performance, the performing; recording; live broadcast; reproduction in any material form; and adaptation of the performance.⁶¹ Performance for this purpose includes a dramatic performance (which includes dance and mime); a musical performance; and a reading or recitation of literary act or any similar presentation which is or so far as it is, a live performance given by one or more individuals.⁶²

Owing to the influence of the WIPO/UNESCO initiative, the Act further protects expressions of folklore. Folklore is defined under the Act to mean a group-oriented and tradition-based creation of groups or individuals reflecting the expectation of the community as an adequate expression of its cultural and social identity, its standards and values as transmitted orally or by imitation or by other means and it includes folklore, folk poetry, folk riddles, folk songs and instrumental music, folk dances and folk plays, etc.⁶³ This definition to our mind is descriptive and also not clear enough for a proper understanding of the term. Kuruk also adopted similar approach to defining the term when he posited that:

Descriptions of the amorphous term "folklore" tend to emphasize its diverse nature, consisting of, for example, the "traditional customs, tales, sayings, or art forms preserved among a people." In this sense, the term applies not only to ideas, or words, but also to physical objects. Its oral nature, group features, and mode of transmission through generations of people are other equally important identifying characteristics. To avoid a pejorative connotation to practices common to marginal groups or lower strata of society, the term "folk life" is sometimes preferred.⁶⁴

But WIPO/UNESCO defines it as the totality of traditional-based creation of a cultural community, expressed by a group of individuals and recognized as reflecting its cultural and social identity; its

⁵⁷ Agbakoba, *ibid*

⁵⁸ Cornish and Llewellyn (n.11), p.553

⁵⁹ *Ibid*

⁶⁰ *Ibid*

⁶¹ Copyright Act, s. 26 (1) (a-e).

⁶² Copyright Act, s. 26(2) (a-c). see also A Adewopo, "The Nigerian Copyright Act: A New Profile for Performer's Right," *Lagos State University Law Journal*, Vol. IV (1996/1997): p.49.

⁶³ Copyright Act, s.31(5) (a-d)

⁶⁴ P Kuruk, "Protecting Folklore under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States," *American University Law Review*, (1999) Vol. 48, Iss. 4: p.776

standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.⁶⁵ This definition, it has been observed, unnecessarily limited folklore to verbal expression, musical expression, expression by action and tangible expression leaving out important items like folk medicine, agriculture, techniques of manufacture, designs, etc.⁶⁶ Perhaps a better definition is that proffered by Puri when he defined it as a living phenomenon, which evolves overtime; A basic element of our culture which reflects the human spirit through a window of a community's cultural and social identity, its standard and values transmitted orally, by imitation and other means.⁶⁷ This definition appears to enjoy some legislative approval as it seems to accord in terms of approach with the definition in section 51 of Ghanaian Copyright Act, 1985, which regards folklore as all literary, artistic and scientific work belonging to the cultural heritage of Ghana which were created, preserved and developed by ethnic communities of Ghana or by unidentified Ghanaian authors, and any such works designated under this Law to be works of Ghanaian folklore.⁶⁸

Specifically, expressions of folklore are protected against reproduction; communication to the public by performance, broadcasting, distribution by cable or other means; adaptations, translations and other transformations, when such expressions are made either for commercial purposes or outside their traditional or customary context.⁶⁹ However, this right shall not prevent someone from reproducing or adapting, etc, the folklore by way of fair dealing for private and domestic use, subject to the condition that, if the use is public, it shall be accompanied by an acknowledgement of the title of the work and its source; or from utilising the folklore for purposes of education; or for illustration in an original work of an author provided that the extent of such utilisation is compatible with fair practice; or from borrowing of expressions of folklore for creating an original work of an author provided that the extent of such utilisation is compatible with practice of fair use; and does not also prevent the incidental utilisation of folklore.⁷⁰

The duty of administering folklore in Nigeria is placed on the Nigerian Copyright Commission (NCC). The body has the right to authorise usage of folklore in Nigeria.⁷¹ But given the fact that the law ascribes certain rights incidental to authorship/ownership (as in the case of acknowledgement) to the source communities, it is obvious that the NCC acts only as a representative of those communities.⁷² Despite these provisions of the law, scholars have raised concerns about the difficulty in enforcing the protection of folklore. These concerns are centred on the very nature of folklore as distinct from other copyrighted works. According to them, there are inherent difficulties in fitting folklore into certain accepted notions of intellectual property relating to ownership, originality, duration, fixation, inventiveness and uniqueness.⁷³ Even so, the fact that folklore has found statutory expressions shows that these difficulties can be surmounted. What is required is a purposeful administration of the system by the body empowered to so do. Attempts at having a collection of these folklores, especially the intangible ones, may be a way towards achieving effective administration. But the concern here would be whether such collection will not make them lose their folklore character.

⁶⁵See Adewopo, "Protection and Administration of Folklore in Nigeria," *Journal of Scottish Center for Research in Intellectual Property and Technologies*, (2006) Vol. 3, Issue 1.

⁶⁶ N S Gopalakrishnan, "Protection of Traditional knowledge the Need for a Sui Generis Law in India" *The Journal of World Intellectual Property*, (2002) Vol. 5, No 5

⁶⁷ K Puri, quoted in Berryman C.A., "Towards More Universal Protection of Intangible Cultural Property" *Journal of Intellectual Property Law* (2004): p.293

⁶⁸ In fact, the approach to the definition adopted here enjoys more widespread acceptance as legislations from some other jurisdictions like Burundi, Congo, Mali and Cameroon share close similarity with it. See Kuruk (n.64).

⁶⁹ Copyright Act, s. 31(1) (a-c)

⁷⁰ Copyright Act, s. 31(2) (a-e)

⁷¹ Copyright Act, s. 31(4)

⁷² Adewopo, *Copyright System* (n.11), p.11. See also A Adewopo, "Protection of Folklore," (n.65).

⁷³ See Kuruk, n 64 above; Adewopo, *ibid*; L M Moran, "Folklife Expressions-- will Remedies Become Available to Cultural Authors and Communities," *University of Baltimore Intellectual Property Law Journal* (Spring 1998): p. 2.

4.1. Qualification for Copyright Protection

For a work to be qualified for copyright protection under the Act, it must satisfy certain conditions. These conditions are originality and fixation.⁷⁴ It appears from the provision of the Act already discussed above, that these conditions, particularly that of originality and fixation, do not apply to neighbouring rights. The conditions of originality and fixation are encapsulated in section 1(2) of the Act which provides that a work is not qualified for protection unless –

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

Taking the issue of originality, the Act did not provide any guide as to when sufficient effort will be said to have been expended on a work to give it an original character. In fact, originality is nowhere defined under the Act and sadly, too, there is a paucity of Nigerian cases on the issue. So, we shall rely more on foreign cases along with the few local cases available. There is the case of *Offrey v. Ola*⁷⁵ where the plaintiff designed and put out for sale a school record book known as “New Era Scheme of Work and Record Book.” The plaintiff’s labour in the book consisted mainly in the drawing of several horizontal and vertical lines. He later discovered that the defendants were producing and selling some record books which were materially the same as his own especially at pages 1 to 42. He therefore sued for damages and injunctions. The court, in dismissing the plaintiff’s claim held,

...there was no evidence that the plaintiff had put into its production some substantial amount of labour. The record book merely showed a neat layout of vertical and horizontal columns on pages 1 to 52. Such a layout could not be called an original literary work or an original compilation for giving ready, convenient and accurate information to people who needed such information. The plaintiff had therefore not established that the record book in question is an original literary work or compilation being the result of his labour and skill.⁷⁶

In *Yemitan v. Daily Times*,⁷⁷ the court, in interpreting a similar provision in the defunct Copyright Decree of 1970 held that work, labour or taste are essential elements of originality. From the cases, it appears that there is no objective test to determine the degree of skill and labour for the court to hold that the work is original. The test is left to the court to determine and it is usually on a case by case basis. The American case of *Feist Publications v. Rural Telephone Services* underscores this point more. In that case the court held, while interpreting section 102 of the USA Copyright Act, 1976 (as amended), that for a work to be regarded as original, it must be independently created by the author (as opposed to copied from other works) and it must possess some minimal degree of originality.⁷⁸ The English case of *University of London Press v. University Tutorial Press*⁷⁹ is instructive. In that case, the defendant published papers on mathematics set belonging to the claimant, including criticisms of them and model answers resulting in an action for copyright infringement. The case afforded an opportunity for the English court, through *Peterson J*, to make an elucidation on the meaning of “original”. According to the court,

The word “original” does not in this connection mean that the work must be the expression of the original or inventive thought. Copyright Acts are not concerned

⁷⁴ But see Copyright Act, ss. 2, 3 and 4 which make provisions regarding the status of the author(s) as it concerns his (their) connection to the work.

⁷⁵ Unreported, suit No: HOS/23/68, decided 27th June, 1969.

⁷⁶ See also *Masterpiece Investments Ltd v. Worldwide Business Media Ltd.* (1977) FHCLR p.496.

⁷⁷ (1980) FHCLR, p.186.

⁷⁸ 499 U. S. 340, 363-64 (1991)

⁷⁹ (1916) 2 Ch. p.601

with the originality of ideas, but with the expression of thought, and, in the case of “literary work”, with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work – that it should originate from the author. ... The papers which (the plaintiffs) prepared originated from themselves, and were, within the meaning of the Act, original. It was said, however, that they drew upon the stock of knowledge which is common to mathematicians, and that the time spent in producing the questions was small. These cannot be tests for determining whether copyright exists. If an author, for purposes of copyright, must not draw on the stock of knowledge which is common to himself and others who are students of the same branch of learning, only those historians who discovered fresh historical facts could acquire copyright for their works.

One point that must not escape notice is that a copied work cannot enjoy copyright protection no matter the degree of skill, labour and judgment expended in putting the work together.⁸⁰ However, section 1(4) of the Act must be noted and it provides that a work shall not be disqualified for copyright protection by reason only that the making of the work or the doing of any act in relation to the work involved an infringement of copyright in some other work. To our mind, the implication of this provision is not the vesting of copyright in a copied work but the protection of such work provided it meets the standard of originality as espoused in the cases. In other words, it further underscores the fact that the Act does not insist on novelty. The author of the work which copyright is allegedly infringed may be entitled to claim under the Act for the said infringement. That said, the idea of fixation⁸¹ under the Act means that the work sought to be protected must be in a tangible form. This requirement secures evidential value for the protected work. The kind of fixation required to vest protection is beyond the transient projection. The medium must allow for some sustained presence of a permanent nature.⁸² A broadcast is exempted from this requirement as it may be protected even if it is unfixed in form. For instance, a live broadcast to the public is for this reason not required to be simultaneously recorded in order to gain protection under the Act.⁸³

4.2. Duration of Copyright

A work that qualified for copyright protection does not enjoy such protection in perpetuity. In other words, the author of such work will not enjoy copyright forever. The enjoyment of the right is limited by time. This right usually begins to run from the time of creation of the work, or in some cases the moment in which the work was made public. Under the Berne Convention for the Protection of Literary and Artistic Works, the duration for copyrights is the life of the author and not less than 50 years from his death. The Convention also establishes periods of protection for works in respect of which the duration cannot be based on the life of a single human author, for example, cinematographic works or sound recordings.⁸⁴ This Convention applies, as a guide, to countries who are parties to it.

Under the Act, literary, musical and artistic works have duration of the life of the author and 70 years after the end of the year in which the author dies and in the case of such works authored by government or a corporate body, the duration is 70 years after the end of the year in which the work was first published. For anonymous or pseudonymous works, the duration is 70 years from the end of the year in which the work was first published provided that when the author becomes known, the term of the right will run through the life of the author and for 70 years after the end of the year in which he died. Where the work is under a joint authorship, 70 years will begin to run from the end of the year in which

⁸⁰ See *ICIC (Directory Publishers) Ltd v. Ekko Delta (Nig) Ltd* (1977) FHCLR, p.346.

⁸¹ For an in depth reading on fixation, see Gallia C.R., “To Fix or Not to Fix: Copyright’s Fixation Requirement and the Rights of Theatrical Collaborators,” *Minnesota Law Review*, (2007) Vol. 92: p.231 also available at <www.ssrn.com/abstract%3D1010937>, 10 March, 2014.

⁸² Adewopo, *Copyright System* (n.1), p.20

⁸³ J O Asein, *Nigerian Copyright Law and Practice* (Abuja: Nigerian Copyright Commission, 2004) p.21.

⁸⁴ Adewopo, *Copyright System* (n.1), p.20

the last author died.⁸⁵ For cinematograph films, photographs, sound recordings, the duration is 50 years after the end of the year in which the work was first published, while broadcasts also has 50 years term after the end of the year in which the broadcast first took place.⁸⁶ Performers' right enjoys protection for a term of 50 years from the end of the year in which the performance first took place.⁸⁷ It has been rightly posited that the effect of the term exceeding the life of the author is that the copyright law anticipates and makes allowance for the heirs and successors of an author to derive benefit accruing from the proprietary interest of an author as much as the same way he could have been entitled to enjoying the benefits of inheriting physical property.⁸⁸ We should note that once the term of protection under the Act lapses, the work falls into public domain and therefore allows for free usage.⁸⁹

5. Conclusion and Recommendations

This article tried to establish the scope of copyright protection laws in Nigeria. It traced the origins of such protection from our colonial past- it having its roots in the English copyright system, up until now. The current Nigerian copyright law is presently being influenced by international standards set out in international instruments like the Berne and Rome Conventions, the WIPO Copyright Treaty, etc. In all these, the law still retains its localness, pandering to our local circumstances such as its provision for the protection of folklore, though not copyright in itself but a neighbouring right. This article has found that the scope of copyright protection in Nigeria is quite extensive as has been discussed above in the range of works so protected, qualification for protection and the duration of copyright in Nigeria. A few issues have been pointed out such as the centring of the definition of the concept of copyright on creators of the work and the difficulty in enforcing the protection of folklore. It has been argued as regards to the definition of copyright, that the broader term 'owner' be adopted as it gives a fuller and more complete meaning to the concept of copyright as seen from various legislation, and as regards folklore, that perhaps creating a collection of folklore would ease the difficulty in the enforcement/administration of its protection. It is hoped that these recommendations will be heeded.

⁸⁵ Copyright Act, s. 2, 1st Schedule.

⁸⁶ Copyright Act, 1st Schedule.

⁸⁷ Copyright Ac, s. 27

⁸⁸ Adewopo, *Copyright System* (n.1), p.25.

⁸⁹ Ibid; K D Crews, "The Expiration of Copyright Protection: Survey and Analysis of U. S. Copyright Law for Identifying the Public Domain," (White Paper Prepared in Furtherance of the Digital Musical Literary Project, National Science Foundation, NSF Award No. 9909068), p.1-2.