

## EXPANDING THE FRONTIERS OF NIGERIAN COPYRIGHT LAWS IN THE AGE OF SOCIAL MEDIA\*

### Abstract

*The social media is an avenue which promotes intellectual creativity and a minefield of ideas which can be deployed into important works. The Copyright Act (Cap C28, LFN 2004), lists the works which are eligible for copyright protection. Works in digital format may or may not fit into these protected categories. Multimedia works obscure the clear cut distinction of categories of works as they combine works of different kinds. They are also not static as they evolve with technology. It has been recommended that the different categories of works be protected according to their distinct features. We opine that this is untidy and does not make for uniformity. Also, the concept of fixation (on a stable material or medium) seems difficult to sustain as a pre-requisite for the qualification of a creation as a copyright work since intangibility and a transitory nature are common features of works placed on the internet. Sequel to the above, it is imperative to fix certain duties on online service providers just like other countries have done; duty to give notice of illegal activities and duty of identification of infringers upon request of the investigative authorities. Infringers should also be made to account for profits while the infringing contents were up. Finally, due to the potential for commercial exploitation of user-generated contents on social media sites, they should use effective content identification technology to eliminate from their services all infringing user generated contents.*

**Key words:** *Copyright, Multimedia, Fixation, User- Generated Content, Social Media, Internet, Online Service Providers*

### 1. Introduction

The social media is an avenue which propagates intellectual creativity and a minefield of ideas which can be developed into important works. It is about freely sharing knowledge and information. It is a collection of online communication channels which allow people to create, share, exchange information, ideas in virtual communities. The social media is a powerful tool in today's world, arguably, more powerful than the traditional media. Perhaps, a statement which highlights this is accredited to Malcolm X, who opines that the media is the most powerful entity on Earth; they have the power to make the innocent guilty and to make the guilty innocent, because they control the minds of masses. Nevertheless, it is also a cheap avenue for copyright infringement. It is cheap in the sense that infringement is very easy, less tasking, instantaneous, simultaneous, and it defies easy control and regulation. Information in digital form is intangible and can be copied with no loss of quality.

Since the beginning of the 20<sup>th</sup> Century, there has been continuous exponential advancement in science and technology. The world wakes up to innovations daily. These technological innovations have had enormous impact on the world's legal systems, disrupting traditional modes of protection of intellectual property, and have left the law completely in a state of flux, literally grasping to catch pace with the ever changing forms of innovations.<sup>1</sup> From the 'Gutenberg galaxy' to cyberspace, from the invention of printing to the digital environment, from the development of reproduction techniques to technological convergence, the evolution of copyright has always been closely linked to technological development.<sup>2</sup> Copyright laws therefore ought to be at par with these technological developments. They should keep pace with digital technology; they need to adapt to consumer demand and cultural practices in this global economy built on ideas and innovation.<sup>3</sup> Herein, we discussed the various infringement

---

\*By **Nkem ITANYI, LL.M., LL.B., BL**, Lecturer in the Department of Commercial and Property Law, Faculty of Law, University of Nigeria. E-mail: [nkem.itanyi@unn.edu.ng](mailto:nkem.itanyi@unn.edu.ng) and,

<sup>1</sup> H. P Faga, 'Limits of Copyright Protection in Contemporary Nigeria: Re- Examining the Relevance of the Nigerian Copyright Act in Today's Digital and Computer Age', *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, Vol. 2 (2011), pp. 211 – 225 at p. 212 available at <http://ajol.info/index.php/naujilj/article/view/82405> (last accessed on 15 March, 2016).

<sup>2</sup> P. Totcharova, 'Copyright in the Digital Environment' available at [www.accu.or.jp/appreb/10copyr/pdf\\_ws0605/c2\\_1pt.pdf](http://www.accu.or.jp/appreb/10copyr/pdf_ws0605/c2_1pt.pdf) (last accessed on 15 March, 2016).

<sup>3</sup> Article 19, 'The Right to share: Principles on Freedom of Expression and Copyright in the Digital Age' available at <https://www.article19.org/data/files/medialibrary/3716/13-04-23-right-to-share-EN.pdf> (last accessed on 15 March 2016).

mechanisms that crop up as a result of technological advancement, the shortcomings of our substantive law and offered suggestions, by way of recommendations which will no doubt pervade the lapses and give a fillip to the development of law in these areas.

## 2. New Infringement Mechanisms in the Digital Era

The internet has been hailed as the most revolutionary development since the printing press. Hence, it has proved to be very useful and has come with a lot of advantages. However, it also brings new challenges for copyright enforcement. Undoubtedly, works could be manipulated before the advent of digital technology but manipulations of works were not as easy, fast and unrestricted as it is today. Digital infringement could impugn on both the author's economic and moral rights. Economic rights are at risk since a user equipped with a computer and an internet connection, can illegally reproduce, communicate, adapt and distribute works and their contents. With just a few clicks, users can download copyrighted music, software, videos, computer programs and even stream movies online, which cause a huge loss to the copyright owners. In *United States v La Macchia*,<sup>4</sup> the defendant, a 21 year old student set up an electronic bulletin board which he called Cynosure. He then encouraged people to upload copyrighted software applications and computer games to the board, which he subsequently transferred to another encrypted address called Cynosure II, where the software could be accessed and downloaded freely by anyone with access to the Cynosure password. This scheme was alleged to have cost over one million dollars to copyright holders.<sup>5</sup> Game of Thrones is officially the most pirated TV Show on the Internet for the fourth year running. An estimated 14.4 million downloads via Bit Torrent of the 2015 season finale places the series at the top of the piracy list.<sup>6</sup> Sequel to the above, modern technology enables the retrieval of already existing works by the use of search engines and web pages. This makes it easy for works to be manipulated or tampered with. The development of digital technology caused a shift from a society based mostly on physical assets to an information society where intellectual property is a much more valued asset.<sup>7</sup> In certain cases, most authors do not have control over how and when their works are placed on the internet. Other times, when they do, they cannot control the manipulation that might occur when users decide to tamper with the work to give a distorted view of the author. There may be inaccuracy in attribution of authorship or content, which may harm the author's moral right of identity, the public interest in knowing who the author is and the public interest in accurate information.

It has been controversial whether 'linking' amounts to copyright infringement. Linking usually occurs where a hypertext link is put on a first site directing readers to the second site. Linking to a third party site could involve, amongst other things, reproduction of the material on that site and therefore, potentially, copyright infringement. In *Shetland Times v Wills*,<sup>8</sup> the plaintiff filed a suit against the publisher of The Shetland News, whose web site included hyperlinked headlines of The Shetland Times, which gave access to the stories on The Shetland Times web site. Since readers got access to the stories of The Shetland Times without accessing the front page of its web site, the Shetland Times was not able to sell much advertising space on that front page. The Shetland Times obtained its interim interdict (the Scottish equivalent of an interlocutory injunction) for copyright infringement. Lord Hamilton's decision was based on the finding that the newspaper headlines were protected by copyright and that there was arguably copyright infringement when the headlines were electronically copied or incorporated in a cable programme. Subsequently the two publishers settled their dispute. The Shetland News was granted permission to link to The Shetland Times' headlines, but must label individual articles as 'A Shetland Times Story' and feature a button with The Shetland Times' logo that links to the newspaper's home page.

---

<sup>4</sup> 871 F Supp. 535.

<sup>5</sup> Available on <http://digital-law-online.info/lpdi1.0/treatise29.html> (last accessed on 10 May, 2016).

<sup>6</sup> Available on <http://www.obs.coe.int/en/-/online-copyright-enforcement-policies-and-mechanisms> (last accessed on 18 May, 2016).

<sup>7</sup> *Realizing the Information Future - The Internet and Beyond*, RENAISSANCE Committee, Computer Science and Telecommunications Board, Commission on Physical Sciences, Mathematics and Applications, National Research Council; (National Academy Press: Washington D.C., 1994) p. 160 available on <http://www.nap.edu/nap-cgi/skimchap.cgi?recid=4755&chap=160-165> (last accessed on 18 May, 2016).

<sup>8</sup> 1997, F.S.R 604 (1997).

However, in 2014, the Court of Justice of the European Union ruled that linking does not amount to copyright infringement. In *Svensson v. Retriever Sverige AB*,<sup>9</sup> the defendants were an internet-based subscription service that indexes links to articles that can be found elsewhere online for free. The problem came when Retriever published links to articles published on a newspaper's website that were written by Swedish journalists. The company felt that it did not have to compensate the journalists for simply linking to their articles, nor did it believe that embedding them within its site amounted to copyright infringement. The journalists, on the other hand, felt that by linking to their articles Retriever had 'communicated' their works to the public without permission. In the belief they should be paid, the journalists took their case to the Stockholm District Court. They lost their case in 2010 and decided to take the case to appeal. From there the Swedish Court of Appeal sought advice from the European Union Court. The court held that:

In the circumstances of this case, it must be observed that making available the works concerned by means of a clickable link, such as that in the main proceedings, does not lead to the works in question being communicated to a new public... Therefore, since there is no new public, the authorization of the copyright holders is not required for a communication to the public such as that in the main proceedings.

However, the Court went on to state what would amount to a new public and thus a copyright infringement:

Where a clickable link makes it possible for users of the site on which that link appears to circumvent restrictions put in place by the site on which the protected work appears in order to restrict public access to that work to the latter site's subscribers only, and the link accordingly constitutes an intervention without which those users would not be able to access the works transmitted, all those users must be deemed to be a new public

In summary, if content is already freely available after being legally published and is not already subject to restrictions such as a subscription or pay wall, linking to or embedding that content does not communicate it to a new audience and is therefore not a breach of EU law.<sup>10</sup>

The most neglected part of this copyright war is that which takes place every day on social media. The internet has radically changed the possibilities of creation, reproduction and distribution. For instance, Article 9 (1) of the Berne Convention acknowledges the fact that reproduction could take any manner or form. These days, it is more digital than physical. Also, virtual distribution only requires sharing on a website, a blog or a social networking platform. Consequently, individual users naturally want to harness the endless possibilities of the internet to access, use and disseminate information. Technology has responded to this demand by creating technological tools to meet these needs.<sup>11</sup> User-generated contents<sup>12</sup> are often made use of with little or no acknowledgment. These contents have an increasing economic value, are a source of innovation and an important avenue for self-expression. For example, Wikipedia is a result of successful user-generated content project as it continues to rely on the participation and content creation of its users.

Recently, during the fuel scarcity phase, a twitter user (@Dikachim) tweeted 'I parked near a filling station and now 4 cars are behind me because they think it's a queue. Me that I'm buying Indomie'.

---

<sup>9</sup> ECLI: EU: C: 2014:76.

<sup>10</sup> Available on <https://torrentfreak.com/hyperlinking-is-not-copyright-infringement-eu-court-rules-140213/> (last accessed on 18 May, 2016).

<sup>11</sup> Gervais D.J, 'The Tangled Web of UGC: Making Copyright Sense of User Generated Content', *Vanderbilt Journal of Entertainment and Technology Law* (2009), pp 845-869 at p. 851 available at [https://works.bepress.com/daniel\\_gervais/17/](https://works.bepress.com/daniel_gervais/17/) last accessed on 18 May, 2016.

<sup>12</sup> Any form of content such as blogs, wikis, discussion forums, posts, chats, tweets, podcasts, digital images, video, audio files, advertisements and other forms of media that was created by users of an online system or service, often made available via social media websites.

This fetched more than a thousand retweets.<sup>13</sup> Indomie Nigeria, saw the tweet and felt it was a good marketing strategy, thereafter made the tweet into a photo and used it for advertisement without acknowledging the author. On seeing the advertisement, the twitter user contacted Indomie Nigeria.<sup>14</sup> Indomie responded and scheduled a meeting and the ensuing dispute was settled. This was a case that ended amicably.

Perhaps the biggest issue in the context of user-generated content on social media sites is the potential for commercial exploitation of user contents. Popular blogger, Linda Ikeji is always accused of taking people's contents without recourse to the original owner. Sometime in 2014, after a heated war by twitter users (@sugabelly and @ayedee), Google shut down her blog. Google's Manager for Communications and Public Affairs, Anglo-Phone West Africa, Taiwo Kolade-Ogunlade, in an interview, explained why the blog was taken down.

Google as an organization takes issues of copyright seriously and belongs to a group of digital companies that respect copyrights. Let's respect other people's rights and intellectual property. Making money off other people's content without permission is wrong. Although the Internet is inanimate, it is the content on it that gives it life... People should also understand that copyrights does not only apply to text, but also extends to literary works, images and photographs, music files and MP3s, movies, movie trailers and videos as well as software.<sup>15</sup>

The blog was up few days later. One wonders why the matter was not followed to a logical conclusion. The enterprises that run these sites are not left out in this exploitation feast. Social media sites recognise that the user who posts her own content on the site retains ownership of the copyright of that work.<sup>16</sup> Reading further down the line their terms of service, they grant themselves the right to exploit users' contents. Facebook states:

For content that is covered by intellectual property rights, like photos and videos (IP content), you specifically give us the following permission, subject to your privacy and application settings: you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook (IP License). This IP License ends when you delete your IP content or your account unless your content has been shared with others, and they have not deleted it.<sup>17</sup>

Twitter grants itself even more extensive rights. Its terms of service provide:

You retain your rights to any Content you submit, post or display on or through the Services. By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods (now known or later developed). You agree that this license includes the right for Twitter to provide, promote, and improve the Services and to make Content submitted to or through the Services available to other companies, organizations or individuals who partner with Twitter for the syndication, broadcast, distribution or publication of such Content on other media and services,

---

<sup>13</sup> A retweet is a reposting of someone else's Tweet.

<sup>14</sup> <https://twitter.com/Dikachim/status/719486898998231040/photo/1>.

<sup>15</sup> Available on <http://dailypost.ng/2014/10/09/respecter-persons-comes-copyright-google-explains-shut-linda-ikejis-blog-2/> (last accessed on 18 May, 2016).

<sup>16</sup> Facebook, Statement of Rights and Responsibilities, available at [http://www.facebook.com/terms.php?ref=pf&\\_rdr](http://www.facebook.com/terms.php?ref=pf&_rdr) (last accessed on 22 May, 2016); YouTube, Terms of Service, available at <http://www.youtube.com/t/terms> (last accessed on 22 May, 2016).

<sup>17</sup> *Ibid.*

subject to our terms and conditions for such Content use. Such additional uses by Twitter, or other companies, organizations or individuals who partner with Twitter, may be made with no compensation paid to you with respect to the Content that you submit, post, transmit or otherwise make available through the Services.<sup>18</sup>

These provisions grant the social media sites express, non-exclusive licenses to exploit users' content in a very broad arena by a broad array of methods. For instance, each of the above provisions contemplates the social media site taking users' images or videos and incorporating them in the site's television advertising.<sup>19</sup> This advertising activity would obviously add to the site's revenue stream. These provisions specify that the license is royalty-free; the content-creating user will not be compensated. The only limitation or expiration of this license ends when the user deletes the content or deletes his/her account.

### 3. Limitations of the Copyright Act in our Digital Era

#### Definitional Problems

Today, all categories of works can be stored in a digital format. In Nigeria, copyright is granted to certain categories of works. These categories as provided in Section 1 of the Copyright Act are exhaustive.<sup>20</sup> Works in digital format may or may not fit into these protected categories. The question would then arise as to which of the works in digital format will fit into the categories. Multimedia works obscure the clear cut distinction of categories of works as they combine works of different kinds. For example, video games usually combine artistic works, computer programs, cinematograph film, sound recordings, etc. For some countries, video games are predominantly computer programs, due to the specific nature of the works and their dependency on software. Whereas in other jurisdictions, the complexity of video games implies that they are given a distributive classification. Finally, few countries consider that video games are essentially audiovisual works.<sup>21</sup> The Supreme Court of Italy dealt with a case<sup>22</sup> involving the circumvention of technological protection measures by mod chips installed in video game consoles. During the proceedings of the case, the court observed that video games, although containing a computer program, are not to be confused with it, as the computer program was only a 'necessary precondition to get to the crucial and central part of the video game', which was more of an audiovisual character. The court went on and defined video games as single 'complex 'multimedia' works'. The French *Cour de cassation* recognises video games as multimedia works but inconsistently grants each part of that work individual copyright because French law does not recognise multimedia works as a category of work protectable under copyright.<sup>23</sup> Multimedia works are often said to be ambiguous as they combine different works under its umbrella and because it is not static as it evolves with technology. It has been recommended that the multimedia work be divided into different parts and each part should be protected according to their distinct features. This would mean that the different components of a multimedia work would be under different systems of protection, which would not be practical for dealing commercially with the multimedia work.<sup>24</sup> In addition, we opine that this is untidy and does not make for uniformity.

---

<sup>18</sup> Twitter Terms of Service, available on <https://twitter.com/tos?lang=en> (last accessed on 22 May, 2016).

<sup>19</sup> W.J. Clark, 'Copyright, Ownership, and Control of User-Generated Content on Social Media Websites' p.13 available at <http://www.kentlaw.edu/perritt/courses/seminar/papers%202009%20fall/Jerry%20clark%20final%20Copyright,%20Owners%20and%20Control%20of%20User-Generated%20Content%20on%20Social%20Media%20Websites.pdf> (last accessed 22 May, 2016).

<sup>20</sup> Cap C28 LFN 2004. Literary, artistic and musical works, cinematograph films, sound recordings and broadcasts.

<sup>21</sup> Retrieved from [http://www.wipo.int/copyright/en/activities/video\\_games.html](http://www.wipo.int/copyright/en/activities/video_games.html) (last accessed on 22 May, 2016).

<sup>22</sup> Nintendo & 2 ors. v. PC Box, C-355/12, ECLI: EU: C: 2014:25.

<sup>23</sup> Duisberg, A., et al., *Recht der Computer- und Videospiele – The Law of Video and Computer Games*. Berlin, quoted in J. Stein, 'The Legal Nature of Video Games- Adapting Copyright Law to Multimedia, *Press Start Journal*: (2015) Vol.2, Issue 1, pp. 44- 55 at p. 53, available at <http://press-start.gla.ac.uk/index.php/press-start/article/view/25/11>, (last accessed on 6 October, 2016).

<sup>24</sup> P. Akester, '*International Copyright and the Challenges of Digital Technology*' PhD Diss., Queen Mary College, University of London, 2002, p. 143 available at <http://ethos.bl.uk>, (last accessed on 15 March, 2016).

Pursuant to Section 1 (2) of the Copyright Act,<sup>25</sup> a work shall not be eligible for copyright unless 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. Traditionally, fixation stood for a permanent and stable form. It implies something more than a transient or evanescent projection, the medium must allow for some sustained existence of a permanent form.<sup>26</sup> Similarly, a work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phone record, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.<sup>27</sup> Fixation goes hand-in-hand with a medium and the medium must allow for some sustained existence of a permanent nature. So a work is fixed if it is downloaded on to a floppy disc or it is printed, since these mediums are of a permanent nature. Douglas Mason contends that the concentration on physical manifestation can lead to some unfair results. For example, a compilation of minimal creativity would be protected so long as it was in writing while a more creative and socially valuable work of authorship such as an improvisation or unrecorded choreographic work would not be protected unless it was recorded.<sup>28</sup>

Digital technology has rendered the fixation concept obsolete. Today works can be created without being fixed in a permanent form. Intangibility and a transitory nature are common features of works which are placed on the internet. In *Canadian Admiral Corp. v. Rediffusion*,<sup>29</sup> the court considered that for copyright to exist in a work, it must be expressed to some extent at least in a material form, capable of identification and having a more or less permanent endurance. In this case, the court found that there was insufficient fixation in the live broadcast, telecast or display of a spectacle on its own is not sufficient to be fixed. At least, it must be simultaneously recorded in some fashion to be fixed. This 'workaround' option of simultaneous transmission creates a legal fiction that (especially when considering infringement) 'fixation occurs before the transmission'.<sup>30</sup>

Digital works presented two different problems for fixation, one of technological literacy and one of categorical characterisation.<sup>31</sup> The courts have tried to decide the question of tangibility. In the case of *Data Cash Systems, Inc. v. JS&A Group Inc.*,<sup>32</sup> it was held that a computer program could not be fixed in memory because the memory was analogous to a playback device, not a tangible medium of expression. However, a year later, it was held that memory media were adequate media of fixation.<sup>33</sup> On the other hand, in *Williams Electronics, Inc. v. Artic International, Inc.*,<sup>34</sup> the plaintiff, the producer of a video game 'Defender', sued another producer for replicating the game. The courts were called upon to decide whether an inherently changeable work could be fixed. It was held that it was fixed for purposes of copyright protection; while the presentations were generated anew from computer memory each time, they followed set patterns and therefore were always the same expression and the player was interacting with copyrighted art and sound in set patterns determined by copyrighted instructions. Today, information can be accessed and retrieved on-demand,<sup>35</sup> interactively and independently of any

<sup>25</sup> Cap. C28, LFN 2004.

<sup>26</sup> J. O Asien, *Nigerian Copyright Law & Practice* 2<sup>nd</sup> Edition; (Abuja, Nigeria: Books and Gavel Ltd., 2012), p. 83.

<sup>27</sup> 17 United States Code, Section 101.

<sup>28</sup> H.R. REP. No. 1476, 94th Cong., 2d Sess. 47, 52 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5665 at 52, quoted in D. J. Mason, 'Fixation on Fixation: Why Imposing Old Copyright Law on New Technology Will Not Work', *Indiana Law Journal*: (1996) Vol. 71: Iss 4, Article 10, pp. 1050 – 1066 at p.1054, available at <http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1808&context=ilj>, (last accessed on 6 October, 2016).

<sup>29</sup> (1954) Ex. CR 382, 20 CPR 75.

<sup>30</sup> *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg LP*, 808 F. Supp. 2d 634, 637 (S.D.N.Y. 2011), quoted in M. Carpenter and S. Hetcher, 'Function over Form: Bringing the Fixation Requirement into the Modern Era', *Fordham Law Review*: (2014) Vol. 82, Issue 5, Article 11, pp. 2223 -2269 at p. 2256, available at <http://ir.lawnet.fordham.edu/flr/vol82/iss5/11>, (last accessed 6 October, 2016).

<sup>31</sup> E. Brown, 'Fixed Perspectives: The Evolving Contours of The Fixation Requirement In Copyright Law', *Washington Journal of Law, Technology & Arts*, Vol. 10, Issue 1, Summer 2014, available at <http://digital.lib.washington.edu/dspace-law/handle/1773.1/1388> (last assessed on 14 May, 2016).

<sup>32</sup> 480 F. Supp. 1063.

<sup>33</sup> *Tandy Corp. v. Pers. Micro Computers, Inc.*, 524 F. Supp. 171, 173.

<sup>34</sup> 685 F.2d at 870.

<sup>35</sup> The user may choose the time and place to access the information.

material support.<sup>36</sup> Consequently, the concept of fixation on a stable material/ medium seems difficult to sustain as a prerequisite for the qualification of a creation as a copyright work. This requirement can only be maintained if we are prepared to agree that a computer memory is adequate fixation.

Concern has been raised about the fixation status of user-generated contents and whether the short length of updates on social networking sites such as Facebook and Twitter would prevent this matter from being copyrightable. In the absence of any statutory guidelines or requirements as to the length of a work in order to be copyrightable, it is reasonable to conclude that tweets and status updates are protectable as literary works. A tweet or status update will fulfil the originality requirement fairly easily, provided that it has not been copied or resent from another author.<sup>37</sup> The fixation requirement is contentious but because some courts<sup>38</sup> have held that software programs and computer files permanently stored on hard disk are fixed because they may be perceived with the aid of a machine or device (the computer itself and its display), we may conclude that tweets will meet the fixation requirement since they are stored on a central server. This, of course, has been controversial.

### **Obligation Problems**

Most often than not, cyberspace infringers cannot be identified. The online service providers (OSPs)<sup>39</sup> are more visible. So in a case where a person's work has been illegally put on a random website, it is easier for the online service provider to fish out the infringer than the author. It therefore accords to common sense that this obligation of identifying infringers is fixed on them. In several decided cases, online service providers have been held liable for direct, contributory or vicarious copyright infringement of their end users. In *A & M Records, Inc. v. Napster, Inc.*,<sup>40</sup> record companies and music publishers brought a copyright infringement action against Napster, an internet company that facilitated the upload and download of MP3 files by its users. Napster allowed its users to make MP3 files stored on their own personal computers available for copying by other Napster users, who were able to search and download MP3 files stored on other users' computers. This process was carried out by use of Napster's MusicShare software, available on the Napster's website. The trial court ruled in favour of the plaintiffs. On appeal, the Ninth Circuit agreed that Napster users infringed at least the rights of reproduction and distribution of the copyright holders. The uploading of file names to the search index for other users to copy infringed the distribution right, and the downloading of files containing copyright material infringed the reproduction right. The Court held that Napster had materially contributed to direct infringement. In addition, Napster's failure to police their site combined with the financial benefits gained from it led to the imposition of vicarious liability. In *Sega Enterprises Ltd. v. Maphia*,<sup>41</sup> a video game manufacturer brought an action against an electronic bulletin board service operator for copyright infringement, trademark infringement, trade name infringement and unfair competition. The court found that the users who downloaded or uploaded unauthorised games to the bulletin board directly infringed copyright, that the operator knew that his users were copying games, that the operator facilitated the infringing conduct and that the operator actively solicited users to upload unauthorised games. The court held that the operator was liable for wilful contributory infringement of copyright as it had knowledge of the activity and failed to take steps to prevent it. The court awarded a permanent injunction.

Concern has been raised on whether the online service providers' obligations include filtering all internet contents to forestall copyright infringement. This question was answered in the case of *S.A.B.A.M v. Scarlet*.<sup>42</sup> The plaintiff, the Belgian Society of Authors, Composers and Publishers (SABAM) had in 2004 applied for an interim relief against the defendant ISP Scarlet, alleging that

---

<sup>36</sup> P. Akester, *op.cit.*, p. 147.

<sup>37</sup> S. Mudau, 'The Copyright Protection Of Online User-Generated Content' PhD Diss., University of Cape town, 2014, p.36 available at [https://open.uct.ac.za/bitstream/item/13319/thesis\\_law\\_2014\\_mudau\\_s.pdf?sequence=1](https://open.uct.ac.za/bitstream/item/13319/thesis_law_2014_mudau_s.pdf?sequence=1) (last accessed 22 May, 2016).

<sup>38</sup> *Stenograph L.L.C v. Bossard Assoc. Inc.* 144 F.3d 96, 101-02 (D.C. Cir. 1998).

<sup>39</sup> Also referred to as Internet Service Providers.

<sup>40</sup> *Supra.*

<sup>41</sup> 948 F.Supp. 923 (N.D. Cal. 1996).

<sup>42</sup> [2007] E.C.D.R. 19.

Scarlet knowingly permitted the infringement of its members' protected works through peer-to-peer (P2P) file sharing over the ISP network. In particular, SABAM sought an order requiring the filtering and blocking of SABAM's repertoire being downloaded or shared over the defendant's network without permission. The trial court, satisfied with the submissions by SABAM ruled against Scarlet rejecting the defendant's argument that the order would impose a general obligation on it to monitor all traffic and result in losing the benefit of the mere conduit exemption under Article 12 of the Electronic Commerce Directive.<sup>43</sup> Scarlet appealed to the Court of Appeal to set aside the lower court's judgment and make a fresh ruling on the original claims. Before rendering its judgment, the Court of Appeal then forwarded two questions to the European Court of Justice seeking a preliminary ruling. In November, 2011, the ECJ ruled that the contested system will have to filter all communication traffic in order to block infringing files which will constitute a general obligation to monitor. Consequently, it will also place restrictions on the right to respect for the privacy of communications and the right to protection of personal data, both of which are protected under the Charter of Fundamental Rights.

### Conflict of Laws Problems

Copyright is a territorial right. Copyright cases in the digital context are not always limited to one country. The traditional importation and exportation of copyrighted works take a different dimension with technology. A problem arises where an infringement which is simultaneous and instantaneous in today's world crosses into another border. This may happen where the infringer is a foreigner and the infringement takes place in another country. What law then becomes applicable and under what jurisdiction can an action be filed? The court then has to decide whether it has jurisdiction, that is, whether it can hear, evaluate and decide the case, if the court finds it has jurisdiction it then has to decide what law is to be applied in trying the case, the domestic law, the foreign law, or both.<sup>44</sup> National laws differ on copyright with regards to subsistence, authorship, ownership so choosing a domestic law to apply will create some problems, for example, a flower arrangement would be protected if the applicable law is the French law but it would not if the applicable law is the Nigerian law. So much juristic ink has been pelted on this issue. A plethora of suggestions have been put forward. For instance, Professor Paul Geller suggests applying the law of the country that affords the greatest protection among all countries having access to the network disseminating the infringing materials.<sup>45</sup> Professor Jane Ginsburg's approach, under which U.S. law will apply whenever the work is infringed in the United States or when the infringer is an American national, resides in the United States or has an effective business or establishment in the country. Professors David Johnson and David Post's cyber law suggest territorial copyright laws be replaced by customary law that aim to balance the interests of rights and holders and users. There are also proposals calling for the application by analogy of satellite broadcasting theories, under which the court will apply the law of the country in which broadcasting signals are sent or are received.<sup>46</sup> However, each of these proposals has its own problems and weaknesses. Even the proponents themselves have conceded the limitations of the solutions.

To determine the substantive law governing the infringement issue, courts in general apply the torts conflict of laws principle of *lex loci delicti* (place of the wrong).<sup>47</sup> Under this principle, the court applies the law of the place where the infringement took place. In *Itar-Tass Russian News Agency v. Russian Kurier Inc.*,<sup>48</sup> the plaintiffs claimed Russian Kurier, a Russian newspaper based in Brooklyn, had unlawfully copied stories from Russian newspapers in violation of United States and Russian copyright law. The court found the Kurier liable for copyright infringement under United States law and the Berne

---

<sup>43</sup> It states that where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, member states should ensure that the service provider is not liable for the information transmitted, on condition that the provider: (a) does not initiate the transmission; (b) does not select the receiver of the transmission; and (c) does not select or modify the information contained in the transmission.

<sup>44</sup> P. Akester, *op.cit.*, p. 229.

<sup>45</sup> Geller, P.E., 'Conflicts of Laws in Copyright Cases: Infringement and Ownership Issues', *Journal of the Copyright Society of the USA- Vol. 51, 2004*, pp. 315 – 393.

<sup>46</sup> Yu P.K., 'Conflict of Laws Issues in International Copyright Cases', available on <http://www.peteryu.com/gigalaw0401.pdf> (last accessed on 19 May, 2016).

<sup>47</sup> Yu P.K., *op.cit.*, p. 3.

<sup>48</sup> 1997 U.S. Dist. Lexis 8297 (S.D.N.Y. 1997).

Convention. The Second Circuit reversed the lower court's decision as to certain plaintiffs and affirmed it as to others. Firstly, the court noted that the principle of national treatment present in international instruments like Berne Convention and the Universal Copyright Convention merely requires that both nationals and foreigners be treated equally in the country in which copyright protection is sought. Most importantly, the Second Circuit established rules for deciding which national law applies to questions of copyright ownership and infringement. The court held that the law of the country with the closest relationship to the work will apply to settle the ownership question and, this will generally mean that the laws of the country where the work originated will apply. The court also stated as regard the infringement laws that the law of the place where the copyright infringement occurs would apply. Based on these rules, the court came to the conclusion that the works in issue were created by Russian nationals and first published in Russia; therefore, it applied Russian law on the matter. As for the infringement issue, since *Kurier* published the unlawfully reproduced articles in New York, the court held that the United States law applied. This reasoning seems to be in line with Article 5(2) of the Berne Convention which provides that '...apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed'.

Some authors have equally suggested that a special court with jurisdiction for cyberspace be created. In the United States, the Virtual Magistrate Project is an online voluntary arbitration system, aiming to provide a quick and easy method of resolving online disputes. Complaints are filed by e-mail, describing the claim and identifying the parties involved. An arbitrator is then randomly selected and the arbitration is conducted through e-mail. The arbitrator hears from the parties and tries to reach a decision within three working days from the day of receiving the initial complaint. The Virtual Magistrate Project does not charge a fee to any of the participants. Parties may be able to enforce the arbitrator's decision in court, since courts have traditionally recognised decisions of arbitration.<sup>49</sup>

#### **4. Recommendations and Conclusion**

The categories of works that are afforded copyright protection under Section 1 of the Copyright Act are exhaustive.<sup>50</sup> Multimedia works obscure the clear cut distinction of categories of works as they combine works of different kinds. For example, video games usually combine artistic works, computer programs, cinematograph film and sound recordings. The copyright in these multimedia works would only be protected if the different components of the work can be protected differently. For example, the artistic features of a video game will be protected as distinct from its sound recording. This is quite untidy and does not allow for uniformity. The need to expand the categories to accept works which combine two or more categories of the already established categories is imperative. It would cure the defect that may arise in years to come as multimedia works evolve with technology.

Fixation means capturing a work in some form of enduring physical expression, be it writing, printing, photography, sound or visual recording, carving, engraving, building, graphic representation or any other appropriate method allowing subsequent identification and reproduction of the author's creation. Fixation goes hand-in-hand with a medium and the medium must allow for some sustained existence of a permanent nature. Today, works can be created without being fixed in a permanent medium/ material, for example, broadcasts. If they are first recorded then aired or simultaneously recorded while being aired, then it is sufficiently fixed. However, the status of live transmissions which do not satisfy any of the two conditions is shaky. In view of this, the concept of fixation (on a stable material or medium) seems difficult to sustain as a pre-requisite for the qualification of a creation as a copyright work. Therefore, we should either establish a fixation requirement for digital works taking into cognizance its features, or maintain the status quo-provided by the Berne Convention, allowing national lawmakers to decide whether works can be protected independently of fixation by disregarding the fixation requirement.

---

<sup>49</sup> P. Akester, *op.cit.*, p.263.

<sup>50</sup> Literary works, artistic works, musical works, cinematograph films, sound recordings and broadcasts.

The Nigerian Copyright Act does not envisage the possibility of cyberspace infringement neither does it fix any duty on online service providers. This creates unmitigated problems as it is extremely difficult for a random author to fish out a copyright infringer. It is because of the pressing importance of this need that other countries such as the United States of America, New Zealand, Canada, etc. have been quick to amend their copyright laws to impose these duties on them. We are not unaware of the fact that the Nigeria Copyright Commission has taken it upon itself to sponsor a Bill at the National Assembly to amend the substantive copyright law. While we salute this pro-activeness, it is important to state that the Bill should not just stop at asking OSPs to take down infringing materials. Consideration should be given to the fact that within the period the infringing contents were up, profits were most likely made. Therefore, the author should at least be entitled to accounts of profits and should not be sent home empty handed because it changes nothing if contents are repeatedly taken down with no damages paid to the copyright owner.

Copyright cases in the digital context are not always limited to one country. The internet is global. It goes beyond regions and nations. Acts carried out online frequently have the capacity to be felt worldwide. It is then problematic when an infringement which is instantaneous and simultaneous in today's world crosses into another border; and since copyright is territorial, domestic laws on copyright (subsistence, authorship, eligibility) differ. In essence, what may be copyright protected in France may not be protected in Nigeria and when these two countries are involved in a copyright dispute, then, we have a conflict of laws problem. It is recommended that the court which should have jurisdiction is the court in which the damage occurred because it is often difficult to determine where the damage arose but not where the damage occurred. This is in line with the letters and spirit of Article 5(3) of the Berne Convention. Another solution may be to create a special cyber-space court for cyber infringements like the Virtual Magistrate Project of America. Sequel to the above, if the court which should have jurisdiction is the court where the damage occurred, it therefore accords to common sense that the applicable law should equally be the laws of the country where the damage occurred.

A review of the various infringement mechanisms obtainable in today's world show that the author's moral right is easily infringed because of the various ways manipulations and reproductions may occur. Digital signatures, which are encryption based, should be used to assure that a work has not been manipulated and then attributed to the original author. Encryption should be used to prevent users from manipulating the work. Another way this could be done is to save the work in a non-editable form and the use of digital watermarks. Perhaps, the most overlooked infringement is that which involves User-Generated Contents on social media sites. The internet has radically changed the possibilities of creation, reproduction and distribution. Creation could be as little as a 140 character update; reproduction could take any form, in fact, it is now more digital than physical while distribution would include sharing on Facebook or retweeting on Twitter.<sup>51</sup> It is not unusual to see updates stolen (without permission from the author) and used for commercial gains. Enterprises that run these sites are not left out. Their terms of service recognise that the user who posts her own content on the site retains ownership of the copyright of that work. Further down the line their terms of service, they grant themselves the right to exploit users' contents. For instance, Twitter grants itself a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such content in any and all media or distribution methods (now known or later developed). The only limitation or expiration of this license ends when the user deletes the content or deletes his/her account, and because it is royalty-free, the content-creating user is not entitled to compensation.

Social media services should therefore, use effective content identification technology to eliminate from their services all infringing user generated contents. Furthermore, there should be a regulatory

---

<sup>51</sup> Concern has been raised about the fixation status of user-generated contents and whether the short length of updates on social networking sites such as Facebook and Twitter would prevent this matter from being copyrightable. In the absence of any statutory guidelines or requirements as to the length of a work in order to be copyrightable, it is reasonable to conclude that tweets and status updates are protectable as literary works. A tweet or status update will fulfil the originality requirement fairly easily, provided that it has not been copied or resent from another author. The fixation requirement will be met since they are stored on a central server.

framework governing social media sites. Their terms of services are quite exploitative and ought to be reviewed to bring them in tandem with international consumer best practices. Users are also advised to read the terms of service of each service provider before accepting. In the meantime, users should keep away their most valued intellectual property from these sites.