

LIMITS OF COPYRIGHT PROTECTION IN CONTEMPORARY NIGERIA: RE-EXAMINING THE RELEVANCE OF THE NIGERIAN COPYRIGHT ACT IN TODAY'S DIGITAL AND COMPUTER AGE*

Abstract

Since the beginning of the 20th century, the world has witnessed astronomical advancement in scientific and technological innovations which have changed the face of modern society, leading many thinkers to term this present civilization 'the jet age'. This technological advancement has had enormous impact on the world's legal systems, disrupting traditional modes of protection of intellectual property, and has left the law completely in a state of flux, due to the ever changing forms of innovations; such as computers including palmtops and hi-tech phones, satellite and cable receivers/signals, facsimile transmissions and the perpetually growing internet. In Nigeria, the Copyright Act purports to protect intellectual property including digital innovations. Notwithstanding, the country remains the largest piracy destination and market in the world. This article examines the Nigerian Copyright Act with the view of identifying the inadequacies which account for the inability of the Act to accord adequate protection to digital inventions in the country. Attention is particularly paid to the problem of the skeletal nature of the Act with respect to the rights of innovators of digital technology and other shrewd and manifests ambiguities and contradictions contained in it. This article also reveals the technological shortcomings which have made it possible for infringers of digital inventions to assail the technology with impunity, and therefore make it impossible for our Copyright Act to live up to its mandate. Thus, in the fight against piracy and copyright infringements of digital innovations, this article strongly recommends extra-legal measures, such as administrative, social, judicial and technological, to tame the tide of an otherwise purely socio-legal problem.

If we never do anything which has not been done before, we shall never get anywhere, the law will stand still whilst the rest of the world goes on and that will be bad for both.

Lord Denning¹

Introduction

It is a truism that the greatest heritage of a nation remains the creativity of its citizens, and therefore one of the primary functions of law is to protect the ingenuity, resourcefulness and innovation of the citizenry. Thus, the dictum of Belgore J. in **Oladipo Yemitan v. The Daily Times Nigeria Ltd**² is very apt when he said that:

The right of a man to that which he had originally made is an incorporeal right and must be protected.

Nigeria has joined the league of nations that have enacted domestic legislations to protect the incorporeal rights and creativity of its citizens against any undue infringement. The principal legislation in this regard is the Nigerian Copyright Act,³ which is hinged on the eighth commandment,⁴ 'thou shall not steal'.⁵

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¹ **Packer v. Packer** [1984] 2 All E.R.15 at p.32

² [1980] FHCR (Federal High Court Reports) 186 at 190.

³ Cap C. 28, Laws of the Federation of Nigeria 2004

⁴ See Exodus 20: 15 of the **Holy Bible** [New King James Version]

⁵ Per Lord Atkin in **Macmillan & Co. Limited v. Copper** [1923] 40 TLR 186, at 188.

Since the beginning of the 20th century, the world has continued to experience astronomical advancement in scientific and technological innovations which have changed the face of modern society, leading many thinkers to term this present civilization ‘the jet age’. This technological advancement has had enormous impact on the world’s legal systems, disrupting traditional modes of protection of intellectual property, and has left the law completely in a state of flux, literally gasping to catch pace with the ever changing forms of innovations. In Nigeria, the life of every average citizen now revolves around one or more of these technologies, such as computers including palmtops and hi-tech phones, satellite and cable receivers/signals, facsimile transmissions and the perpetually growing internet.

Over the years, since the country achieved independence, Nigeria has benefited immensely from the magnanimity of copyright related products. Section 1(1) of the Copyright Act⁶ provides protection and confers copyright status on the following innovative products: (a) literary works (b) musical works (c) artistic works (d) cinematograph films (e) sound recordings, and (f) broadcasts. The spectrum of these products implicitly covers digital innovations like computer software,⁷ satellite and cable broadcasts, and reprographic transmissions. Thus, as at 2008, the totality of copyright based industries operating in the country contributed just about ₦1.2 trillion to the Nigeria gross domestic income,⁸ a figure publicly made known by Adebambo Adewopo during the 50th anniversary of the Nigerian Copyright Commission.⁹

Notwithstanding the above, and especially the enormous benefits which the country has derived from copyright related products, Nigeria still remains the largest piracy destination and market in the world invariably in the same products ostensibly protected by the Copyright Act,¹⁰ particularly computer software.¹¹ This is due to a number of factors, essentially bordering on the obsolescence and inability of the Act to meet contemporary challenges in the protection of copyrights of particularly new genres of innovations within the above broadly provided products. Also, though Nigeria is signatory to various international conventions on copyright protection,¹² these conventions are hardly enforceable in Nigeria owing to the fact that they have

⁶ *Op. cit.*, note 3.

⁷ See s. 51 of the Copyright Act which defines literary works to include computer software

⁸ Tosin Ajirere “The Anniversary of the Nigerian Copyright” [WWW document], (created 2008) available at URL://<http://www.ndunigeriadailynews.com> (Visited 25th April 2010)

⁹ The Director General of Nigerian Copyright Commission, see Tosin Ajirere, *ibid.*

¹⁰ Akinjide and Co. “Nigerian Computer Software Protection in Nigeria” [www document], (Created 2007), available at URL: <http://www.lawedit.co.UK/viewarticle> (visited 25 April 2010)

¹¹ *ibid.*

¹² This includes the **Berne Convention for the Protection of Literary and Artistic Works 1886**, opened for signature 4 May 1886, ATS 1972 No 13 (entered into force 5 December 1887) (‘Berne Convention’), the **Agreement on Trade-related Aspects of Intellectual Property Rights (‘TRIPS Agreement’)**, opened for signature 15 April, 1994, 1869 UNTS 299 (entered into force 1st January, 1995). This Agreement sets minimum standards for intellectual property protection in signatory countries, the **World Intellectual Property Organization (‘WIPO’) Copyright Treaty**, opened for signature 20th December, 1996, 36 ILM 65 (entered into force 6th March, 2002), the **WIPO Performances and Phonograms Treaty**, opened for signature 20th December, 1996, 36 ILM 76 (entered into force 20th May, 2002), and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.

not been domesticated.¹³ Thus, for instance, unlike the United States of America which has recognized the need to accord special protection to ‘digital works’ (a new species of traditional innovation that straddle sound and picture electronic signals) by the enactment of several legislations including the Digital Millennium Act of 1998,¹⁴ Nigeria has only succeeded in recopying the 1990 Copyrights Act into the 2004 version of the Laws of the Federation of Nigeria.

In the light of this foundation, this article seeks to examine the Nigerian Copyright Act with the view of identifying the inadequacies which account for the inability of the Act to accord adequate protection to digital inventions in the country. Attention would particularly be paid to the problem of the skeletal nature¹⁵ of the Copyright Act with respect to the rights of innovators of digital technology and other shrewd and manifests ambiguities and contradictions contained in the Act. This article also reveals the technological shortcomings which have made it possible for infringers of digital inventions to assail the technology with impunity, and therefore makes it impossible for our Copyright Act to live up to its mandate. Thus, in the fight against piracy and copyright infringements of digital innovations, this article strongly recommends extra-legal measures, such as administrative, social, judicial and technological, to tame the tide of an otherwise purely socio-legal problem, after all every “technological poison comes with a technological antidote”.¹⁶

Having said the above, this article is divided into five parts. Apart from this introduction, which forms the first part, part 2 considers preliminary matters such as the definition and meaning of copyrights, and the nature of digital products subject to copyright protection.¹⁷ Part 3 examines generally copyright protection of digital innovations, with particular attention to protection at the international level, especially

¹³ In the application of international law in domestic jurisdiction, the majority of nation states require that international obligations entered into by the executive arm of government must be subjected to ratification by the popular will of the people through the legislative arm of government. In Nigeria, the 1999 constitution provides for this position in s.12 (1). see William M. Carter, Jr., “Treaties as Law and the Rule of Law: The Judicial Power to Compel Domestic Treaty Implementation”, *Maryland Law Review*, Vol. 69, No. 2, 2009 (discussing the US “self-executing” and “non-self-executing treaty doctrine” and its implication in the incorporation of international law in US municipal jurisdiction,); see also Tom Ginsburg, Svitlana Chernykh & Zachary Elkins, “Commitment and Diffusion: How and Why National Constitutions Incorporate International Law”, 2008 *U. ILL. L. REV.* 201, 204-05 (2008) (concluding that in the Netherlands, Italy, Austria and France, treaties are directly applicable as domestic law); Hon. Thomas Buergenthal, “Modern Constitutions and Human Rights Treaties”, 36 *COLUM. J. TRANSAT’L L.* 211, 217 (1997) (All human treaties ratified by Spain receive constitutional status). For a very comprehensive overview of the treaty-making process and domestic effect of treaties in different countries, see Oona Hathaway, “Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States”, 117 *YALE L.J.* 1236, 1362, **Appendix B.** (2008).

¹⁴ See Detail solicitors “Newsletter” April 2009 Edition (WWW document), available at: URL:<http://www.detailsolicitors.com/newsletter> (visited 20th March 2010).

¹⁵ The Act is made up of only 55 sections, and none of them significantly address the issue of digital inventions. Note that the Act was enacted at a period when digital technology was at its infant stage in the country.

¹⁶ See Ayo Ayemi, “Why Legal Framework for Broadcasting Industry may be Strengthened Now”, (created Oct. 5th 2009), [WWW document], available at: URL: <http://www.allafrica.com/12009...html> (visited 27th April, 2010).

¹⁷ Particular attention will be paid to digital broadcast by cable and satellite, format rights, computer software.

international conventions which Nigeria is signatory,¹⁸ and then protection under the Nigerian Copyright Act.¹⁹ Part 4 makes some observations generally about the deplorable state of protection of digital inventions in Nigeria and identifies the challenges facing the Nigerian legal system in the fight against piracy. Finally, part 5 contains the recommendations and part 6 the conclusion.

Preliminary Matters

The meaning and nature of copyright

It is an indisputable fact that copyright is a monopoly of limited duration,²⁰ but unlike most monopoly, it is a legitimate monopoly created by the law and enjoyed by the author of an original work. According to the **Black's Law Dictionary**,²¹ copyright is

The right of literary property as recognized and sanctioned by positive law. An intangible incorporeal right granted by statute to the author or originator of certain literary or artistic productions whereby he is vested for a limited period, with the sole and exclusive privilege of multiplying copies of the same and publishing and selling them.

The above mentioned right which is known as 'copyright' can be "licensed, transferred and/or assigned by the author of the work".²² This position has been adopted judicially in a host of cases including **Corelli v. Gray**,²³ **Jerrold v. Houston**,²⁴ and **Rees v. Melville**²⁵ where Lord MacCoughton defined copyright as a negative right (because it restricts others from doing a particular act).

In Nigeria under the **Copyright Act**,²⁶ the term 'copyright' is not expressly defined, but on a broader perspective, the meaning of the term can be appreciated in the provisions of section 6 of the Copyright Act, which provides that:

Copyright in Nigeria of an eligible work is the exclusive right to control, to do or authorise the doing of any of the acts restricted to the copyright owner.

The totality of the above attempts to define copyrights can be harmonized to best describe the nature of the term. Thus, copyright is a form of protection provided by the laws of a state or international instruments, to the creators of original works²⁷

¹⁸ For the list of international treaties and conventions which Nigeria is signatory, see *op. cit.*, note 12.

¹⁹ *Op. cit.*, note 3.

²⁰ See Ethan drone **A Treatise on the Law of Property in Intellectual Productions**, (2nd ed. London, Butterworths publishers, 1992), p.44

²¹ Bryan .A. Garner, **Black's Law Dictionary**, (8th edition: West Publishers: N.Y.), p.361.

²² Wikipedia the free encyclopedia "Meaning of Copyright" [WWW document], available at: URL: <http://www.wikipedia.org/wiki-copyright> (visited 30th March, 2010).

²³ [1913] 39 TLR 570 at 571.

²⁴ [1857] Mac G Cop 117

²⁵ [1914] 3 K. & J. 703.

²⁶ *Op. cit.*, note 3.

²⁷ Thomson Reuters, "Introduction of Copyright", (created 2009), [WWW document], available at: URL: <http://www.findlaw.com/copyright/8456/html>.

which in Nigerian jurisprudence operates to include musical works, literary works, cinematograph films, artistic works, sound recordings, and broadcast.²⁸ The protection offered by copyright is available to both published and unpublished works of authors.

Once conferred with copyright in Nigeria, the author of the work would be vested with the exclusive right to do the following;²⁹ reproduce the work, prepare other works based upon the work (that is derivation work³⁰), distribute other copies of the work by sale or other transfer of ownership or by lease, perform the work publicly, display the copyrighted work publicly and authorise others to do all the above. Copyright only covers the particular form or manner in which ideas or information have been manifested 'the form of material expression'. It does not cover the actual idea or techniques contained in the copyright work.³¹

The nature of digital works subject to copyright

Having looked at the meaning of copyright, on the other hand, the term 'digital' emanates from the Latin word "*digitus*" meaning fingers used for discrete counting.³² Digital works is simply all those technologies that make use of information transmitted by means of discrete values using the binary system (combination of 1 and 0) rather than at continuous range.³³

As previously stated, section 1 (1) of the Copyright Act has listed out works eligible for copyright protection in Nigeria to include (a) Literary works (b) musical works (c) artistic works (d) cinematograph (e) sound recordings and (f) broadcast. The effect of this categorisation is multifarious, so that when any of these copyrighted products includes or uses information which is automatically a combination of discrete values rather than continuous value, it results in a digital innovation for the purpose of protection under the Act. This is why broadcast in any form or method is likely to fall under the category of works eligible for protection, including broadcast by satellite and cable. More so, the Copyright Act³⁴ in section 51 classifies digital computer software as literary works for the purpose of eligibility for protection.³⁵

Thus, though digital technology in the varied forms known to us today was not expressly contemplated for protection under the Nigerian Copyright Act, most of the new digital innovations can be accommodated in some form under the Act if they approximately fall under any of the above six genres protected under the Copyright Act. For instance, take satellite and cable broadcast and computer software, how would certain digital products derived from these innovative technologies relate to the protected genres under the Act? We shall consider this question in part 3, however, in this part we shall briefly analyse the nature of these two forms of digital technology.

²⁸ s. 1 (1) of the **Copyright Act**, Cap. C. 28 LFN 2004

²⁹ See s. 10 (1) of the **Copyright Act**, *ibid.*

³⁰ Layman Rays Patterson, "A Law of User's Right", (created 1998, Jan. 10th), [WWW document], available at: URL:<http://www.Libunc.edu/1998...htm> (visited 2nd April, 2010).

³¹ *Ibid*

³² See Computer Desktop Encyclopedia, "Meaning of Digital System", (created 2010), [WWW Document] available at: URL:<http://www.answers.com/topic/digital> (visited 4th March 2010).

³³ Null Linda et al, **The Art of Digitalization** (2nd ed. Cambridge University Press, 2006), p. 471.

³⁴ S. 51 of the Act.

³⁵ See s. 1(1) of the Act.

(a) Satellite and cable broadcast

Satellite broadcasting involves the transmission of signals by wireless or electromagnetic means (consisting of discrete values), which when received by a suitable apparatus, is converted into sounds and visual images perceivable by humans.³⁶ It involves transmitting signals through installations in the earth's orbit,³⁷ which serves as aerials to boost or transmit the signals back to earth. The effect is that the signals are receivable by many other countries known as footprint.³⁸ The term 'satellite' on its own is a man-made object fired into the space (earth orbit) to travel round the earth for certain purposes (i.e. weather forecasting, transmission of broadcast, telecommunication or defence) and which make use of discrete values.

A 'cable' on the other hand is a conductor for transmitting electrical or optical signals, or electric power.³⁹ A cable broadcast is therefore, a transmission of information in the form of electronic or optical signals, transmitted through a cable or over a cable directly to a receiver.⁴⁰

(b) Computer software

The computer electronic device is one of the devices that makes use of a vivid combination of 1 and 0.⁴¹ The computer device is basically divided into two basic components, which are the computer hardware and computer software.⁴²

Whereas the computer hardware (which is the physical interconnections and devices of a computer set⁴²) is a subject for protection by the law of patent, the computer software is a subject for protection by the law of copyright⁴³ (as epitomized by the copyright Act of Nigeria). Computer software on the other hand is actually incapable of any precise definition. It is a general term primarily used for digitally stored data such as computer programmes and other kinds of information read and written by computers usually in an intangible form.⁴⁴ It will be right to add that whereas the computer hardware represents the skeleton of the computer, giving it form and structure, the computer software is simply the blood that gives life to the computer without which the computer becomes a mere vegetable devoid of probative and commercial value.

³⁶ International Bureau of WIPO "The New Communication Technologies Copyright", WIPO/PO/ACAD/E/98/28.

³⁷ The lowest altitude at which satellites can be put into orbit round the earth is an issue that is debatable by scientists, the views are varied. For some this lowest orbital distance above sea level is 83 km, while others consider it to be 100km. for a very discussion of this, see Gbenga Oduntan, "The Never Ending Dispute: Legal Theories on the Spatial Demarcation Boundary Plane between Airspace and Outer Space", *Hertfordshire Law Journal*, **1(2)**, 2003, 64-84, at pp. 69-74

³⁸ International Bureau of WIPO, *Op. cit.*, note 36, p.26.

³⁹ International Bureau of WIPO, *ibid.*, p. 89.

⁴⁰ Arc Dictionary, "Meaning of Cable Broadcast", (created 2006), [WWW document], available at: URL:<http://www.arcdictionary.com/cablebroadcast.html>

⁴¹ *Ibid.*

⁴² See Free online Dictionary, "Meaning of Computer", (created 2008), [WWW document], available at: URL:<http://www.freeditonary.com/computer>.

⁴² *Ibid.*

⁴³ See s. 51 of the Copyright Act, *Op. cit.*, note 3.

⁴⁴ Dictionary Unabridged, "Software" (n.d), (1.1) (retrieved 2007) [WWW document], available at: URL:<http://dictionaryreference.com/browse>

Having looked at the nature of both satellite and cable broadcast and computer software, in the next part below, we shall examine the copyright protection of these innovations both from an international perspective and Nigerian standpoint.

Copyright Protection of Digital Innovations

Protection at the international level

A lot of instruments have been put in place at the international level for the protection of copyright in digital innovations and other technologies. For a greater understanding of the Nigerian position with respect to the subject matter of this article, it is pertinent to look at the position of those instruments in relation to broadcasting by cable and satellite, format rights and finally computer software.

(a) Cable and satellite broadcast

At the international level, many conventions and treaties have been adopted to accord protection to digital broadcast by satellite and cable. These include the Berne convention of 1886,⁴⁵ the WIPO copyright treaty,⁴⁶ the TRIPS Agreement,⁴⁷ and the Rome Convention of 1961.⁴⁸ These conventions grant the right to broadcast or rebroadcast diverse works by any means of wireless diffusion of signs, sounds or images.⁴⁹ This by implication includes digital broadcast of various works or programmes.

Article 11 Bis (Para 111) of Berne Convention authorizes the authors of an original work to broadcast the same by any means whatsoever including satellite or cable and to authorize others either for consideration or not to broadcast or rebroadcast their works or programmes. This position is at tandem with the TRIPS Agreement,⁵⁰ the WIPO Copyright Treaty⁵¹ and the Rome convention.⁵² Consequently any doing of the acts stipulated above without the author's permission is an infringement of the author's copyright.

The Berne convention⁵³ also authorises the authors of an original work to prohibit the recording of the sound or visual broadcast except with the authors' express permission. This prohibition formed the fulcrum of the argument in **BBC Enterprises Ltd v. Hi-Tech Xtravision Ltd**⁵⁴ decided under the provisions of the Broadcasting Act 1990 of the United Kingdom, which was made in furtherance of the provisions of the Berne convention of 1886. In this case, the defendant who was an authorized distributor of the plaintiff's decoder owned a separation satellite television service known as BBC TU Europe, and without further authorization, made copies of the plaintiff's decoders and sold them at a lower rate, to air the BBC TU Europe

⁴⁵ As amended on Sept. 28 1979. See WIPO, "The Berne Convention", (created 2008), [WWW document], available at: URL:<http://www.WIPO.Int/trt.001.html> (visited 18th March 2010).

⁴⁶ Adopted in Geneva on December, 20th 1996.

⁴⁷ Came into force on January, 1st 1995.

⁴⁸ Made on 26th October 1991.

⁴⁹ See art. 11 bis of Berne Convention, art. 6 of WIPO Copyright treaty, art. 12 of the TRIPS Agreement and art. 3 of Rome Convention

⁵⁰ See art. 14 of the TRIPS Agreement.

⁵¹ Art. 8, of the WIPO Copyright Treaty

⁵² Art. 5 of Rome Convention

⁵³ Art. 12 of Berne Convention

⁵⁴ (1990) Ch. 609

programmes. It was held that the unauthorised airing of the plaintiff's programmes and sale of their decoder was a violation of the plaintiff's broadcasting right.

Article 7 of the Rome Convention (which is the same as Article 15 of TRIPS Agreement) vests on broadcast organizations the right to authorize or prohibit the following acts: (1) The rebroadcasting of their broadcast (as in **Fraser v. Jones TV Ltd**⁵⁵ where an injunction was granted to prohibit the rebroadcasting of the respondent's television show by the plaintiff who published the same in a cinema show without authorization.); (2) the fixation⁵⁶ of their broadcast; (3) the reproduction of such fixations (like where it is stored in a DVD, or the multiplication of such broadcast in a DVD by another person) and (4) the communication to the public of their television broadcasts.⁵⁷

Despite the position of the various instruments on the protection of digital broadcast, there are still some circumstances that these instruments did not specifically or adequately provide for. It is notably true that even though a country may be a signatory to a particular convention, such may not apply as a local law until it is domesticated.⁵⁸ Therefore, because most of these conventions are yet to find their way as local enactment in most countries, it becomes an uphill task to enforce them. The implication of this situation is intriguing particularly in the light of the fact that the world is just one global village, therefore a product made in china for instance, can be marketed in Nigeria and access to otherwise copyrighted product would be granted. This scenario paints a gloomy picture of illicit global access and raises a large number of legal problems of considerable interest to the copyright field. Some of these problems can be summed up as follows:

- (i) Where there is a transmission from one country to another country by broadcast, (with one country domesticating the position of these international instruments and the other feigning blind eyes to the provisions) what becomes the way out?
- (ii) What if the law of a country where a broadcast is being transmitted from differs from the law of the receiving country and there is a clash of provisions?
- (iii) What becomes the case in the issue of multiple ownership of a particular broadcasting organization, with the owners coming from different legislative backgrounds, with different ideals, royalties and legislative provisions?

All these problems amongst many are the complexities facing the copyright system in respect to digital broadcast at the international level.

(b) Broadcasting and format rights

Currently, at the international level there is no provisions relating to format rights (that is the right associated with the programmes in a broadcast which is in broadcasting language called format rights⁵⁹). This position is hinged on the fact that

⁵⁵ (1984) 1 Q.B. 434.

⁵⁶ Meaning the fixing of such broadcast in medium.

⁵⁷ If such broadcasts are made in places accessible to the public, upon payment of an entrance fee.

⁵⁸ For an elaborate discussion of this see, *Op. cit.*, note 13.

⁵⁹ See David .I. Bainbridge, *Intellectual Property Law*, (2nd ed. London, Pitman Publishing Co,1996)

once such show is broadcasted or published it becomes public, and because the law of confidence⁶⁰ is weak in the extreme the rights associate with it before it is copyrighted is dissipated. In the case of **Green v. Broadcasting Corporation of New Zealand**⁶¹ for instance, the dramatic format of a television show failed to attract Copyright protection.

(c) **Computer software**

Since most intellectual works are meant to be disseminated beyond national frontiers,⁶² the need for copyright protection of computer programmes has necessitated a lot of bilateral and multi-lateral agreements, treaties and conventions between various member nations of different international organizations. The following is a rundown of the most important multilateral instruments that have accorded protection to computer software at the international level.

1. The TRIPS Agreement
2. The Berne Convention
3. The WIPO Copyright Treaty

The TRIPS agreement was the first international treaty to explicitly include computer programmes within the illustrative list of copyright works.⁶³ The agreement adopted articles 1 - 21 of the Berne convention for her members and stipulates protection of computer programmes whether in source or object code.⁶⁴ This position is in total agreement with the provisions of Article 4 of WIPO Copyright treaty and within the meaning of the protection adopted in Article 2 of Berne convention as literary work. Article 14 of WIPO treaty enjoins member nations to cooperate to ensure enforcement of rights conferred by the WIPO treaty.

Nigerian position of copyright protection of digital innovations

The Nigerian Copyright Act accords certain protection to digital innovations in the country. For a complete understanding of these protections as contained in the Copyright Act, this paper will first of all examine the protection accorded to satellite and cable broadcast before looking at format rights and computer software.

In the case of satellite and cable broadcast, Section 51 of the Copyright Act⁶⁵ defines broadcasting to include satellite or cable programmes as well as a re-broadcast. This section is further accentuated by section 8(1) of Copyright Act⁶⁶ which stipulates that copyright in a (satellite or cable) broadcast shall be the exclusive right to control the doing in Nigeria of any of the following acts:

⁶⁰ This is a common law doctrine that stipulates that a work must be kept confidential until the conferment of copyright, see Lord Calf, **Attorney General v. Guardian Newspapers Ltd (No 2)** [1990] A.C 109

⁶¹ [1989] RPC 700.

⁶² Shahid Alikhan, "International Dimension of Copyright Protection", **The Global Perspectives: Essays in Copyright Law and Administration in Nigeria**, (Nigeria, 1992, Spectrum Publishers), p. 19.

⁶³ Art. 10 (1) of TRIPS Agreement

⁶⁴ See art. 5 *ibid.*

⁶⁵ *Op. cit.*, note 3.

⁶⁶ *Ibid.*

- a) recording and broadcasting the whole or a substantial part of the broadcast
- b) communicating to the public of the whole or substantial part of such broadcast, either in its original form or in any form recognisably derived from the original.
- c) the distribution to the public for commercial purposes of the copies of the work by way of rental, lease, hire, loan or similar arrangement.

Flowing from this premise, any television station that transmits or re-transmits a broadcast must consider (if any) two things. Section 8(3) of Copyright Act which stipulates the exception to the copyright created in section 8(1),⁶⁷ contained in paragraphs (a), (h), (k), (n) and (o) of the Second Schedule to the Copyright Act. The implication of section 8(1) (b) and (c) of the Copyright Act is that the consent for the use of copyright works in a broadcast should be obtained before there is a reception by the general public. However, Section 51 of the Act defines communication to the public as including in addition to any live performance or delivery, any mode of visual or acoustic presentation but does not include a broadcast or re-broadcast. That is to say that where a T.V station pirates off the broadcast of another T.V station and re-broadcasts the same to the public, the T.V. station will be exculpated by section 51 of the Copyright Act.

As regards to format rights, our law does not recognize format rights, neither does it mention them by implication in the Copyright Act. However, the law of copyright accords protection to computer software and this is to be found expressly in section 51(1)⁶⁸ of the Copyright Act, which defines computer software or programmes as:

a set of statements or instructions to be used directly or indirectly in a computer to bring about a certain result.

This section further defines computer software as an aspect of literary works.⁶⁹ Consequently, any provision of the Copyright Act applicable to literary works is applicable to computer software. Section 1 (a)⁷⁰ of the Act enumerates works eligible for protection, and two conditions are required for their eligibility, is that sufficient effort must have been expended in the work to give it originality of character, and it must be fixed in a definite medium of expression. With respect to the first limb, the meaning of 'sufficient effort' (as the equitable aphorism "equity is as long as the chancellors feet") will be dependent on the judge.⁷¹ The second limb presupposes that the work must be fixed in a medium which is definite, section 10(1) of Copyright Act stipulates that ownership of a computer software vests on the author first, however this is subject to cases of computer software created as part of an employment duty in cases of contract of employment, as held in **Joseph Ikhudiora v. Campaign Services**

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ That is to say that it belongs to the same category with books, maps, short story *et cetera*.

⁷⁰ Copyright Act, *Op. cit.*, note 3.

⁷¹ Per Peterson J, in **University of London Press Ltd. v. University Tutorial Press Ltd** [1916] 2 ch.604

Ltd and Anor.⁷² where the plaintiff's claim to entitlement to copyright in a work he created in the course of working for the defendant was dismissed by the court and the defendant was held to be entitled to the copyright in the work.

The copyright Act confers the following scope of rights (in relation to computer programmes) on copyright owners:

- (i) The right of reproduction and related rights.⁷³
- (ii) The right to control the distribution of the copyrighted work and issuing of copies⁷⁴ to the public. (this right could be delegated).
- (iii) The right to control the making of adaptations⁷⁵ which have been defined as the modification of pre-existing work from one genre to another and consist in altering work within the same genre to make it suitable for different conditions of exploitation, and may also involve the altering of the composition of the work.⁷⁶

Observations

Nigeria still has a long road to go with respect to the protection of digital broadcast by cable and satellite as well as provide adequate protection for computer software. The lack of adequate legislative incursion in this area,⁷⁷ has led to a dearth of judicial jurisprudence on the subject, which has also accounted for Nigeria recording the highest incidence of piracy of computer programmes and other digital innovations in the whole of Africa.⁷⁸

Without much ado, the following is a run-down of the shortcomings of our copyright system as it relates to digital innovations. With respect to digital broadcast by cable and satellite, the greatest challenge is the effect produced by the skeletal nature of our Copyright Act with regard to copyright regulation in this field. The various forms of piracy of digital broadcast in Nigeria is so digitalized and complicated in nature that it is only a specific legislation that would effectively contain the progressively worsening situation.⁷⁹ A case study is the 'subscriber under-declaration',⁸⁰ which is a situation where cable companies who legitimately subscribe to major satellite stations, or cable operator, do not pay for all the channels they

⁷² [1986] F.H.C.R. (Federal High Court Report), 308

⁷³ s. 6 (1) of **Copyright Act**, *Op. cit.*, note 3.

⁷⁴ s.6 (1) (a) vii, *ibid.*

⁷⁵ s.6 (1) (a) viii, *ibid.*

⁷⁶ s.51 of **Copyright Act**, *ibid.*

⁷⁷ A country like U.S.A. has enacted the Digital Millennium Act specifically to cater for computer software and other Digital innovations protection.

⁷⁸ Akinjide and Co., *Op. cit.*, note 10. In a report published by the United Kingdom-based Business Software Alliance (BSA) and the US-based International Data Corporations (IDC), Nigeria ranks 84% among countries of the world, and is on the same level with Algeria in the global rate of software piracy. See Palmer, R. (2004): "Software Piracy-Global Increase", (WWW document), available at: www.w3report.com/index.php?itemid=458. See generally, Muhammed Tawfiq Ladan, "The Limits of Legal and Enforcement/Regulatory Frameworks in Consumer Protection against Counterfeit and Pirated Products: The Nigerian Experience", **CALS: Review of Nigerian Law and Practice, Vol. 2 (1) 2008, p.7.**

⁷⁹ Like the US's Family Entertainment Act, governing family related broadcast.

⁸⁰ CASBAA "Piracy Estimates", (created 2008), [WWW Document] available at: [URL:http://www.casbaa.com/report.piracyestimates.html](http://www.casbaa.com/report.piracyestimates.html) (visited 18th April 2010)

rebroadcast to the public. We also have unauthorized cable access⁸¹ where individuals or groups that have high receptive television set tap into lines of legitimate cable T.V companies through signal bleedings, without paying subscription fees.

The nature of these forms of copyright infringement is such that it cannot hopefully be arrested within the realms of our skeletal provisions in the Copyright Act. Even more challenging is the fact that Nigeria recently embraced digital broadcast by satellite and cable and is yet to become independent in this regard (as Nigeria has set apart June 17, 2012 as the switch over date from the current mode of broadcasting to ultra modern digital broadcasting,⁸² the date is 3 years before June 17th 2015, the deadline for the entire world set up by the International Telecommunication Union after its congress in 2009⁸³). Consequently, this poses a problem as every right incidental to copyright in broadcast is exclusively within the domain of Nigeria⁸⁴ and since Nigeria is still depending on other countries' digital broadcast, broadcast transmissions emanating from Nigeria are not accorded protection once outside the Nigerian boundaries even if the receiving country made room for the application of Nigerian Copyright Act.

The complicating face of the ambiguities in some of the wordings of the Copyright Act has not actually helped matters, for example, section 51 of Copyright Act⁸⁵ defines communication to the public to exclude broadcast and re-broadcast; the implication of this is that any broadcasting or re-broadcasting that is an infringement of copyright in a broadcast by satellite and cable will not amount to an infringement once it is a broadcast to the public. Another compelling challenge is the use of the word "recording and re-broadcasting"⁸⁶ in its conjunctive sense. The implication is that where a person or a broadcasting corporation records a broadcast without authorization and another buys it from the person and re-broadcast it, this will not amount to infringement as the act of broadcasting and recording was done by two different persons or legal entities.

With respect to computer software, the following are the challenges identified: Firstly; our Copyright Act stipulates that before a computer programme becomes eligible for protection, it must be subject to the test of originality and fixed in a definite medium of expression.⁸⁷ In considering this provision, some modern innovations may not fit into the requirement, for example, most computer programmes in their technical nature may involve computer language created by different authors distinct from the interface which may be created by another person. It must be noted that as far as our jurisdiction is concerned the creator of a computer language is not entitled to a separate copyright on the language alone under the Copyright Act; this is not so for instance, in the United States.⁸⁸

⁸¹ *Ibid.*

⁸² See Ayemi, *Op. cit.*, note 16.

⁸³ Held in Switzerland in Oct 5 - 9, 2009 see www.confabb.com/conferences.html

⁸⁴ See the opening sentence in s. 8 of the **Copyright Act**, *Op. cit.*, note 3.

⁸⁵ See the Interpretation section in the Act.

⁸⁶ s. 8 (1) (a) of **Copyright Act**, *Op. cit.*, note 3.

⁸⁷ s. 1 (2) of the **Copyright Act**, *ibid.*

⁸⁸ By s. 6 of **Digital Millennium Copyright Act** 1998 of U.S.A., such language is entitled to copyright.

Finally, the manner in which computer works is pirated may not amount to infringements under our Copyright Act. For example, we have a form of copyright infringement of computer software known as re-bundled software which is the assembling of diverse parts of legitimate software components by technical means and re-bundling these different parts manufactured by different companies and giving it the name of a major software company. The aftermath of the whole story is that recent technological advancements have actually exposed the loopholes of copyright protection, especially in Nigeria.

Recommendations

Having examined the shortcomings and challenges facing our copyright legal framework, it is our opinion that something urgent needs to be done to salvage the situation and this has to do with adopting significant measures which would come under five major headings: technological measures, legislative measures, administrative measures, social measures, and judicial measures.

Technological measures

In the area of digital broadcast by cable and satellite transmission, it is our opinion that the various cable operators in the country should adopt any one of the following measures to restrict the unauthorized use of their transmission:

- a) They could adopt the use of digital signature and key encryption, such that only receivers which are legitimate would be given the activation code to decipher the encrypted work.⁸⁹
- b) The Nigerian government should enact a law ensuring that every television set sold in the country must contain a “V-chip”,⁹⁰ currently used in America by virtue of the Satellite Improvement Act of 1999.

With respect to computer software, the best measure of protection is by adopting a technology created by a software expert on behalf of his firm **Info Logic Software Incorporation**⁹¹ and modified in 2009. This technology is called the ‘software envelope’,⁹² and refers to a situation where copyright works are transmitted in an encrypted form into a single envelope such that automatic messages are sent to a central authorizing site at regular intervals. Each time a user starts to use copyrighted work, a reply is sent back to the central authorising site for authorization to continue or a denial of authorization.⁹³ By this technology, the central authorizing site would detect when a computer software is about to be used in a manner prejudicial to the right of the copyright owner. This kind of technology would be most appropriate in

⁸⁹ See John. H. Ryder & Smith, “Public key Encryptograph Standards: R.S.A. Data Security”, (Created July 3, 2002) [WWW document], available at: URL: <http://www.org/docs> (visited 25/4/2010)

⁹⁰ This is a circuitry in a television capable of identifying governmental ratings and blocking the view of unauthorized programmes or broadcast which the user did not pay for.

⁹¹ A consulting and software firm in the United States.

⁹² See Gary N. Garisworld, “A Method of Protecting Copyright in Computer Software”, (created July3, 2002), [WWW document], available at: URL:<http://www.chl.org> (created 25th April, 2010).

⁹³ *Ibid.*

Nigeria, even though we are yet to develop the requisite infrastructure that would support such an elaborate detective mechanism.

Legislative measures

Separate legislative measures should be enacted to cater for the increasingly new species of digital innovations. In the process of enactment of these new legislative measures, wide consultations, especially with experts in the fields of information technology, copyright and computer technology should be made, in order to effectively acquire the technical knowledge that would expose the intricacies involved in copyright violation of digital technology.⁹⁴

The enactments should also create more regulatory bodies which would be charged with the responsibilities of ensuring the enforcement of the legislative measure and laws. A body like the National Broadcasting Commission⁹⁵ should be recruited into this fight as well as the National Information Development Agency and the Nigerian Communications Commission. The Nigerian legislature should also domesticate the various international instruments on copyright protection of digital innovations in line with section 12 of 1999 Constitution.

Administrative measures

A good law without effective administrative enforcement mechanism is an effort in futility, consequently because of the fact that enforcement of copyright remains the basis of the protection for the varied hybrid of digital and computer technologies, the Nigerian Copyright Commission should adopt adequate administrative measures for protection of copyright in digital works.

The Nigerian government should work assiduously with various international organizations concerned with digital works like the Business Software Alliance⁹⁶ as well as the market authorities and trade unions to ensure that any infringing copies of computer software and other digital innovations are confiscated and adequate reprisals meted out to all who contributed in the infringement.

Social measures

These measures encompass all those measures to be adopted that involve the populace. The foremost of these measures is enlightenment and awareness campaigns that will be taken down to the grassroot level. This can be achieved through various commercial ringlets and advertisements in radio and television broadcasts in a way that a layman on the street would understand. Emphasis should equally be laid on the

⁹⁴ Nigeria can learn a lot from the more developed jurisdictions on the wide coverage of their copyright Act. For instance, researchers have shown that in 2005 there were 1597 subsections in the Australian Copyright Act, and in 2006 the legislation contained 149 641 words and over 529 pages. It is therefore not a simple Act; it is technical but at least considerably covers the intricacies in the subject matter. See Emma Caine and Andrew Christie, 'A Quantitative Analysis of Australian Intellectual Property Law and Policy-making since Federation' (2005) **16 Australian Intellectual Property Journal** 185, 192; and Emily Hudson, Andrew Kenyon and Andrew Christie, 'Modelling Copyright Exceptions: Law and Practice in Australian Cultural Institutions' in Fiona Macmillan (ed), **New Directions in Copyright Law**, Volume 6 (2007) 244.

⁹⁵ Set up by Decree No. 38 of 1992

⁹⁶ Also known as the International Organization of the World Software Developers.

perils associated with the use of such pirated products as opposed to the benefits that accrue to the users of genuine software and digital works.⁹⁷

The Nigerian Copyright Commission should also establish a social helpline that would enable an ordinary Nigerian to report seemingly cases of copyright infringement and monetary compensation should be attached if the infringement proved at the end of the day.

Judicial measures

Owing to the intricate nature of copyright, the federal government should set up an administrative tribunal or an arbitration panel or even a separate court that would be saddled with the responsibility of discharging urgently issues relating to copyright infringement. An administrative panel would be more appropriate in handling issues concerning copyright, which would also make room for invitation of experts to adjudicate in particular areas of copyright requiring expert knowledge.

Conclusion

Modern nations now rely more on their intellectual property resources as the master key to the realization of their national desire

-Adebambo Adewopo⁹⁸

For any nation to progress economically, it must not play down the development of its intellectual resources. The only way to ensure the protection of original intellectual works is by tightening provisions for the safeguard of copyright products and especially, liberalizing provisions in the extant copyright laws of the country to be able to accommodate products derived from the rapidly growing technology in the world. In Nigeria, the position of the country as Africa's largest market for copyrighted works has given us a bad name in the international community as the major hub of the global digital and software piracy. In this paper, we have examined why Nigeria still retains such bad credentials for copyright protection in spite of having an extant law on the subject matter in the country. We equally recommended measures that could be taken to help reverse the present deplorable state and enforcement of our Copyright Act in the protection of especially digital products with particular emphasis on satellite and cable broadcast and computer softwares.

⁹⁷ See The Business Alliance Software Developers Administrative Objectives (2010), [WWW document], available at: URL:<http://www.ladas.com/BS/Piracy.html> (visited 25th April 2010).

⁹⁸ Tosin Ajirere (2009), *Op. cit.*, note 8.

