

## FORMALITIES AND ADMINISTRATION OF COPYRIGHT IN NIGERIA: ENFORCEMENT OF COPYRIGHT

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### INTRODUCTION

Accessible, sufficient and adequately funded arrangements for the protection of rights are crucial in any worthwhile intellectual property system. There is no point in establishing a detailed and comprehensive system for protecting intellectual property rights and disseminating information concerning them, if it is not possible for the right-owners to enforce their rights effectively in a world where expanding technologies have facilitated infringement of protected rights to a hitherto unprecedented extent. They must be able to take action against infringers in order to prevent further infringement and recover the losses incurred from any actual infringement. They must also be able to call on the state authorities to deal with counterfeits.<sup>1</sup>

This paper seeks to explore the enforcement of copyright in Nigeria and some other jurisdiction. Before we delve into the crux of this write up, however, it is pertinent that we have a brief background on the subject of copyright.

Copyright is a part of Intellectual Property: which refers to the creation of the human mind. Intellectual Property rights protect the interest of the creators by giving them property rights over their creations.<sup>2</sup> According to the Black's Law Dictionary,<sup>3</sup> Copyright

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<sup>1</sup> "WIPO Intellectual Property Handbook: Policy, Law and Use" retrieved from [www.wipo.int/treaties](http://www.wipo.int/treaties) on 9 April, 2013, (WIPO Handbook)

<sup>2</sup> "Understanding Copyrights and Other Related Rights" WIPO Publication No. 909€ retrieved from [http://www.wipo.int/freepublications/en/intproperty/909/wipo\\_pub\\_909.html](http://www.wipo.int/freepublications/en/intproperty/909/wipo_pub_909.html)

<sup>3</sup> Bryan A. Garner, (ed.) Black's Law Dictionary 8 Edition p. 361

means the right to copy, specifically a properly right in an original work of authorship (including literary, musical, dramatic, choreographic, pictorial, graphic, sculptural and architectural works, and sound recordings) fixed in any tangible medium of expression, giving the holder the exclusive right to reproduce, adapt, distribute, perform and display the work".

Copyright relates to artistic creations, such as books, music, paintings and sculptures, films and technology-based works such as computer programs and electronic databases. In most European languages other than English, copyright is known as author's rights. The expression copyright refers to the main act which, in respect of literary and artistic creations, may be made only by the author or with his authorization. That act is the making of copies of the work.

The expression author's rights refer to the creator of the artistic work, its author. It thus underlines the fact, recognized in most laws, that the author has certain specific rights in his creation which only he can exercise (such as the right to prevent a distorted reproduction). Other rights (such as the right to make copies) can be exercised by other persons, such as a publisher who has obtained license from the Author.<sup>4</sup>

## **THE NIGERIAN COPYRIGHT COMMISSION**

In Nigeria, the body saddled with the responsibility of administering/enforcing copyright is the Nigerian Copyright Commission (NCC). The Commission was established in August 1989 as the Nigerian Copyright Council by the Copyright Decree No.47 of 1988.<sup>5</sup> It is a body corporate with perpetual succession and a common seal; and can sue and be sued in its corporate name.<sup>6</sup> Following the copyright amendments of 1992 and 1999, the

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<sup>4</sup> Ibid p. 3

<sup>5</sup> Now codified as the Copyright Act, Cap. C28 Laws of the Federation of Nigeria (LFN) 2004.

<sup>6</sup> See Section 34 of the Copyright Act *ibid.* see also Sections 34-37 for the mandate of the Commission and the establishment of its governing Board.

statutory mandate of the Commission was expanded to include the administration, enforcement, protection, promotion and regulation of copyright in Nigeria.<sup>7</sup>

## **ENFORCEMENT OF COPYRIGHT**

As stated above, enforcement of copyright is as important as the law of copyright itself; because, there will be no need for the law if it cannot be enforced against infringers. Enforcement, by definition could mean compulsion to obey a law or regulation. Hence, enforcement of Copyright refers to the act of giving legal strength to the copyright of individuals. The need to be dramatic in the enforcement of copyright is strengthened by the fact that technological development have made it possible for easy copy of otherwise protected products; and the increasing economic importance in the international market of the movement of goods and services.<sup>8</sup>

What then are the measures put in place, both nationally and internationally to enforce or protect the copyright of right owners? It is the answering of this question that this paper concerns itself with. The World Intellectual Property Organisation (WIPO) identifies five (5) enforcement mechanisms that can be found in national legislations as:

Conservatory or provisional measures; civil remedies; criminal sanctions; measures to be taken at the border; and measures, remedies and sanctions against abuses in respect of technical devices.<sup>9</sup> We shall discuss the mechanisms in light of the foregoing.

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<sup>7</sup> Nigerian Copyright Commission 2012 Annual Report: retrieved from [www.copyright.gov.ng](http://www.copyright.gov.ng) on 26 April, 2013.

<sup>8</sup> Ibid at P.14

<sup>9</sup> See WIPO Hand Book ibid

### **Conservatory or Provisional Measures**

These measures are available to prevent acts of infringement and the seizure of infringing copies, reproducing equipment and other implements that could be used for (further) infringements, constitute essential evidence and could disappear if not brought under the control of the court.<sup>10</sup> This involves the granting of injunctions to prevent the committing or continuation of infringement. It also entails the order of a Court for a search of an environment suspected to be harbouring infringing activities; and the temporary seizure and impoundment of such infringing materials and implements/machineries used in such activities. This mechanism for enforcement is usually on an *ex parte* application as giving the Defendant notice may be counterproductive. Barbosa refers to these as 'preliminary measures'.<sup>11</sup>

This mechanism is present in much national legislations such as: Nigeria, the United Kingdom, the United States of America, France and Germany.

In Nigeria, for instance, The Copyright Act provides:

In any action for infringement of any right under this Act, where an *Ex parte* Application is made to the Court, supported by affidavit, that there is reasonable cause for suspecting that there is in any house or premises any infringing copy or any plate, film or contrivance used or intended to be used for making infringing copies or capable of being used for the purpose of making copies or any other article, book or document by means of or in relation to which any infringement under this Act has been committed, the court may issue an order upon such terms as it deems just, authorizing the applicant to enter the house or premises at any reasonable time by

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<sup>10</sup> Ibid p. 15

<sup>11</sup> Roberto Garza Barbosa, *International Copyright and Litigation: A Mechanism for Improvement* Marquette Intellectual Property Law Review (vol. 11:1) 2007 retrieved from [www.law.marquette.edu/ips/barbosa.pdf](http://www.law.marquette.edu/ips/barbosa.pdf) on 13 April, 2013.

day or night accompanied by a police officer not below the rank of an Assistant Superintendent of Police, and  
Seize, detain and preserve any such infringing copy or contrivance;

Inspect all or any documents in the custody or under the control of the defendant relating to the action."<sup>12</sup>

From this, it can be seen that Provisional measures/mechanism for enforcement are well covered by the Nigerian Act. This is the premise upon which an Anton Piller Injunction<sup>13</sup> may be issued where necessary.

In the United States, the Conservative measures are also recognized; empowering the Court to grant preliminary and permanent injunctions geared towards the prevention of infringement or restraining same. Section 502(A) of 17 U.S.C. provides thus:

"Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of section 1498 of title 28, grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright."<sup>14</sup>

In the United Kingdom and France, Preliminary measures are not different from the ones above as it involves injunctions to stop infringing activities and the confiscation of infringing copies.<sup>15</sup> In Germany, an injured party can obtain a preliminary injunction even where the infringement is only eminent and has not yet taken place.<sup>16</sup>

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<sup>12</sup> Ibid Section 25(1) of the Nigerian Copyright Act, LFN 2004

<sup>13</sup> The principle was derived from the case: *Anton Piller K.G V. Manufacturing Process Limited* (1976) CH.D 55: see also the application of the Injunction by Nigerian Courts in- *Ferodo Limited v. Unibros Stores* (1980) F.S.R. 489; and *Oluwanishola Development Co. v. Guines Insurance Co. Ltd* (1980-(1986) Vol. 2 Nigerian Shipping Cases 275, where some distinction were made between the decision in England and the application in Nigeria.

<sup>14</sup> Title 17 USC CHAPTER 5 - COPYRIGHT INFRINGEMENT AND REMEDIES 01/03/2012 (112-90)

<sup>15</sup> Ibid Roberto Garza Barbosa p.83

<sup>16</sup> Ibid p.84

## Civil Measures

This also like the Provisional Measures is available through the Court. According to WIPO, the purposes of civil remedies (measures/mechanism) are: to provide compensation for the prejudice caused by infringements; to dispose appropriately of the infringing copies (typically through destruction or other disposal outside the normal channels of commerce); to dispose appropriately of implements used for infringing activities; and to grant injunctions to prohibit further infringements. Such remedies should always be available irrespective of whether the infringement has been committed willfully and/or for profit-making purposes.<sup>17</sup>

Hence, while the provisional measures discussed earlier deal with steps taken at enforcement of copyright prior to the determination of a Court action, the civil measures deal with actions that should be taken when an infringement is established. In Nigeria, Section 24 of the Copyright Act<sup>18</sup> permits the bringing of a civil action for copyright infringement; and this can be done simultaneously with a criminal action for the same infringement in the Act.

The payment of damages and compensation to right owners for violation of their rights is a universal practice. It is recognized in Article 45(2) of the TRIPs Agreement,<sup>19</sup> and this includes the recovery of attorney's fees. This is the case in the United Kingdom, Germany and the United States (even though differences abound in the amount recoverable).<sup>20</sup> It is however, worthy of note that for a right owner to be able to recover attorney's fees in the U.S.A., the work that has been copied must have been registered with the United States copyright office.<sup>21</sup>

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<sup>17</sup> Op. cit WIPO Handbook p. 215

<sup>18</sup> Cap. C28 LFN 2004. See also Section 16 of the Act which permits civil remedies for infringement.

<sup>19</sup> The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) 15 April, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1C, Legal Instruments\_\_ Results of the Uruguay Round, 33 I.L.M. 1125, 1197

<sup>20</sup> Roberto Barbosa, *ibid* p.86

<sup>21</sup> Title 17 United States Code Section 412

### **Criminal Measures for Enforcement**

Criminal sanctions are available to punish infringers, who willfully pirate copyright goods in a commercial scale; and like its civil counterpart, deter the further commission of such infringement. This is usually achieved through substantial Fine and/or imprisonment consistent with the level of penalties applied for crimes of corresponding seriousness.<sup>22</sup> The Court may also order the seizure and destruction of the infringing materials and the equipment used for making such. The TRIPs Agreement contains guidelines and procedure for the implementation of criminal sanction against infringement.<sup>23</sup>

It states: "Members shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. Members may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed willfully and on a commercial scale."

Section 20 of the Nigerian Copyright Act contains detailed provisions on the liabilities of infringers; and punishment range from Fines to imprisonment. The search, seizure, and subsequent destruction of infringing materials is usually done by Copyright

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<sup>22</sup> Understanding Copyright Law *ibid* p. 15

<sup>23</sup> Article 61 of the TRIPs Agreement

Inspectors from the Nigerian Copyright Commission, aided by officers of the Nigerian Police Force.<sup>24</sup>

The trend is common in most national legislations as copyright infringement done willfully and for a profit is seen as crime. For instance, in the United States, Several legislations have been passed over the years to increased and make more stringent criminal sanction for copyright infringement.<sup>25</sup> The Copyright laws of the United Kingdom comply with the TRIPs Agreement and so does the laws of other countries in Europe.<sup>26</sup>

### **Measures to be taken at the Borders**

This mechanism for the enforcement of copyright is different from the three already discussed; in that it does not necessarily concerns itself with the Court. It entails activities by the Customs authority to prevent copyrighted materials from finding its way into the commercial space. This has to do with steps taken by the Customs or other administrative bodies as opposed to the Court. If an owner of copyright material suspects that copyright copies of his material(s) is about being imported or exported out of a country, he may alert the Customs authority which will then impound such items. This is to allow the right owner time to take legal action. In most instances, the copyright owner may have to write undertaking to indemnify the owner of the goods and the customs authority, should it turn out that the goods are not copyright materials.

Several laws at both the international and national levels are in place to ensure the effectiveness of the measure. For instance, Articles 51-60 of the TRIPs Agreement deal with the issue.<sup>27</sup> In Nigeria, the

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<sup>24</sup> Afam Ezekude *infra* note 27. See also Section 38 of the Nigerian Copyright Act which deals with the appointment and duties of a Copyright Inspector.

<sup>25</sup> Irina D. Manta, *The Puzzle of Criminal Sanction in Intellectual Property Infringement* Harvard Journal of Law and Technology Vol. 24, Number 2, Spring 2011 at PP. 483-484 See Also Title 17 U.S.C. Section 506

<sup>26</sup> Andrew Gawer, "Penalties for Copyright Infringement" A consultation paper issued by the United Kingdom Intellectual Property office on behalf of the Minister of State and Innovation Universities and Skills 2006.

<sup>27</sup> WIPO Handbook, *ibid* at Ch. 5



Nigerian Customs Service has been involved in no small way in ensuring that copyright goods do not find their way into the market. This the Service does in collaboration with right owners and the Nigerian Copyright Commission.<sup>28</sup>

### **Measures, Remedies and Sanctions Against Abuses in Respect of Technical Devices**

This is achieved through copy protection or copy management system. It involves action on the part of the copyright owner to make the commodity unusable or make the quality of a very low standard, if copied. This mode of enforcing copyright came to light with the advent of sophisticated technology. In other words, technical devices are used to prevent the making of copies or make the copy so made of a low quality that they are unusable.<sup>29</sup>

However, it is also possible to invent technology to circumvent such measures. Hence, the need for serious penalty for such acts.

This measure of enforcement can also be seen as anti piracy measures as it involves not only efforts to prevent the making of copies, but also technological means of clamping down on persons suspected to be engaging in piracy. The Nigerians Act contains anti piracy measures: 'The Commission shall have power, with the consent of the Minister, to prescribe any design, label, mark, impression or any other anti piracy device for use on, in, or in connection with any work in which Copyright subsist.'<sup>30</sup> The Act further criminalises any act by anyone to circumvent such measures stated above.<sup>31</sup>

Nations of the world also have taken several steps against piracy. In the United States, for instance, a recent measure is the '6 Strikes' anti piracy scheme. This involves a way of monitoring activities on the internet by the Internet Service Providers (ISPs). If an infringement is suspected, the copyright owner informs the ISPs

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<sup>28</sup> Afam Ezekude, *Nigeria's Anti Piracy Drive Yields Results Retrieved from [http://www.wipo.int/wipo\\_magazine/en/2012/03/index.html](http://www.wipo.int/wipo_magazine/en/2012/03/index.html) on 27 April, 2013.*

<sup>29</sup> WIPO Handbook, *ibid* p. 15

<sup>30</sup> Section 21 of the Copyright Act, LFN 2004, *ibid*

<sup>31</sup> *ibid*

which will send alerts to the internet user notifying him of the suspected activities and how to redress it. Offenders will, among other things, watch a video on the effects of piracy and also suffer a reduction of their internet speed. After several warnings, ISPs may then take other repressive steps against continuous or repeated infringement.<sup>32</sup>

## CONCLUSION

We have seen that the enforcement of copyright is an all encompassing business. It involves the Court system, administrative bodies, and the right owners. Generally, copyrights are enforced through Court Actions. However, we have seen that outside the Court, right owners can take certain steps to enforce their rights. Advanced technological development has made it easier for copyright infringement to flourish. But as Barbosa<sup>33</sup> stated, 'just as it has become easier to infringe upon copyright, it must be easier to enforce copyright as well.' Hence, countries of the world and International Bodies have rolled out and are still working on a number of legislation and measures to check the growing acts of infringement upon copyright materials. Infringement of Copyright is a serious offence; this is evident in the amount of Fine and length of prison sentence imposed by national legislations around the world.

The Nigerian Copyright Commission has a lot on its hands as far as tackling piracy in Nigeria is concern. Though the Commission achieved a lot in the year 2012 as revealed in its 2012 Annual Report, the amount of achievement is still far from adequate. I must however, acknowledge that it was an improvement when compared with previous years. Thus, I believe that given the right support in terms of funds, personnel and independence, the Commission will make substantial progress.

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<sup>32</sup> Details can be found at <http://torrentfreak.com/verizons-six-strikes-anti-piracy-measures-unveiled-130111/> available on 27 April, 2013.

<sup>33</sup> Roberto Garza Barbosa, *ibid* P. 79

## RECOMMENDATIONS

More stringent penalties for infringement, especially where such is done willfully for commercial purposes.

Intense and consistent public awareness to enable the people know how to identify copyright materials from the Original ones.

Right owners to ensure the availability of the original products and at reasonable prices. This will discourage purchase of counterfeits.

A procedural mechanism for International Litigation to complement the already existing substantive provisions in existing Treaties; since technology has made it easy to transfer infringing materials over the internet.

Access to justice should be enhanced and fastened.

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