

COPYRIGHT INFRINGEMENT AND THE EXCEPTIONS/DEFENCES THERE TO: A PRIMER

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INTRODUCTION

In a sentence, the thrust of this paper is to expound on the infringement of copyright and the exceptions and defences that would avail one who is accused of copyright infringement. We should start by pointing out that rudimentarily, the right conferred on the copyright owner is a "negative right" as its essence is the prevention of unauthorized exploitation of the work by another person or at least to secure compensation where such unauthorized exploitation occurs. Copyright would therefore be infringed where another who is not the copyright owner exploits the copyrighted works without recourse to the owner and *dehors*¹ the provisions of the Copyright Act.² It is proper for our discussion to take off with an understanding of the nature of the rights which the copyright owner enjoys. It is from such a vantage position that we can better appreciate acts which would then be considered as infringement of copyright. We shall thereafter go into detail to analyse copyright infringement. Of course, the Act limits the rights of the owner in certain instances and accommodates exploitation of the copyrighted work without recourse to the owner: this is the purview of the exceptions and defences to copyright infringement and would form the third major plank of the paper.

¹ Means "outside of", "besides" or "other than"

² CAP C28 LFN 2004 ("Act"). "copyright is infringed by any person, who not being the owner of the copyright, and not having obtained leave, permission, licence or authority of the owner, does or authorizes another person to do any of the acts reserved under copyright." in *Okedeji v. Osanyin*, Suit no. FHC/IB/12/90 cited in J. O. Asein, *Nigerian Copyright Law & Practice*, (Second Edition) Books and Gavel Ltd. 2012 p. 168

THE RIGHTS OF THE COPYRIGHT OWNER

It should be stated forthwith that the Act recognizes only six categories of subject matter as eligible for copyright protection viz:³

- a. Literary works
- b. Musical works
- c. Artistic works
- d. Cinematograph films
- e. Sound recording; and
- f. Broadcasts

The Act also states that for a work to be protected, it must be original and fixed in a definite medium of expression from which it can be perceived, reproduced or otherwise communicated either directly or with the aid of any machine or device.⁴ Once these requirements are met, the work enjoys copyright protection

LITERARY OR MUSICAL WORKS

By section 6 (1) (a) of the Act, the copyright owner of a literary or musical work has 9 broad rights which are the exclusive rights to do and authorize the doing of any of the following acts:

- (a) Reproduce the work in any material form;
- (b) Publish the work;
- (c) Perform the work in public;
- (d) Produce, reproduce, perform or publish any translation of the work;
- (e) Make a cinematograph film or a record in respect of the work;
- (f) Distribute copies of the work to the public, for commercial purposes, by way of rental, lease, hire, loan or similar arrangement;
- (g) Broadcast or communicate the work to the public by a loud speaker or any other similar device;

³ See section 1(1) of the Act

⁴ Section 2 (a) (b) of the Act

- (h) Make any adaptation of the work;
- (i) Do in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in (a) and (b) above

ARTISTIC WORKS

As provided under section 6 (1) (b) of the Act, the copyright owner in an artistic work has the exclusive right to do or authorize the doing of any of the following acts:

- (a) Reproduce the work in any material form;
- (b) Publish the work;
- (c) Include the work in any cinematograph film;
- (d) Make any adaptation of the work;
- (e) Do in relation to an adaptation of the work any of the acts specified in (a) to (c) above.

CINEMATOGRAPHIC FILMS

Section 6 (1) (c) of the Act provides that in relation to cinematographic films, the copyright owner has the exclusive right to do and authorize the doing of any of the following acts:

- (a) Make a copy of the film;
- (b) Cause the film, in so far as it consists of visual images to be seen in public, in so far as it consists of sounds, to be heard in public;
- (c) Make any record embodying the recording in any part of the sound track associated with the film by utilizing such sound track;
- (d) Distribute to the public, for commercial purposes, copies of the work, by way of rental, lease, hire, loan or similar arrangement.

By virtue of section 6 (2) of the Act, the right of the owner of literary/musical works or cinematographic films to control the doing of any of the above mentioned activities extend to the whole or a substantial part of the work either in its original form or in any form recognizably derived from the original. In the case of a work of

architecture (an artistic work) the right also includes the exclusive right to control the erection of any building that reproduces the whole or a substantial part of the work derived from the original. The right of control, however, does not include the right to control the reconstruction in the same style as the original of a building to which the copyright relates.⁵

SOUND RECORDING

The copyright owner in a sound recording is under section 7 of the Act clothed with exclusive right to control in Nigeria:

- (a) The direct or indirect reproduction, broadcasting or communication to the public of the whole or a substantial part of the recording either in its original form or in any form recognizably derived from the original
- (b) The distribution to the public for commercial purposes, of the copies of the work by way of rental, lease, hire, loan, or similar arrangement.

BROADCAST

Section 8 (1) and (2) of the Act which provides for this is worded as follows: "(1) Subject to this section, copyright in a broadcast shall be the exclusive right to control the doing in Nigeria of any of the following acts, that is:

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

⁵ section 6(3) of the Act

(2) The copyright in a television broadcast shall include the right to control the taking of still photographs from the broadcast."

It should be pointed out at this juncture, that apart from the above outlined instances of direct infringement, Section 15(1) of the Act recognizes indirect infringement of copyright as it makes a blanket provision on infringement of copyright which would apply to all copyrightable works no matter the type in question. The sub-section is worded thus-

"(1) Copyright is infringed by anyone who without the license or authorization of the owner:

- A. Does, or causes any other person to do an act, the doing of which is controlled by copyright
- B. Imports into Nigeria, otherwise than for private or domestic use, any article in respect of which copyright is infringed under paragraph (a) of this subsection.
- C. Exhibits in public any article in respect of which copyright is infringed under paragraph (a) of this subsection.
- D. Distributes by way of trade, offers for sale, hire or otherwise or for any purpose prejudicial to the owner of the copyright, any article in respect of which copyright is infringed under paragraph (a) of this subsection.
- E. Makes or has in his possession, plates, master-tapes, machines, equipment or contrivances used for the purpose of making infringed copies of the work.
- F. Permits a place of public entertainment or a business to be used for a performance in the public, of the work where the performance constitutes an infringement of the copyright in the work, unless the person permitting the place to be used was not aware, and had no reasonable ground for suspecting that the performance would be an infringement of the copyright.
- G. Performs or causes to be performed for the purposes of trade or business or as supporting facility to a trade or business, any work in which copyright subsists."

To conclude this aspect of the paper, it must be stated that the rights of the copyright owner as identified above are not immutable but are subject to the various exceptions and defences provided under the Act.⁶

INFRINGEMENT OF COPYRIGHT

As identified in the preceding section, the exclusive rights of the copyright owner include reproduction, publishing, recording, distribution, performance, communication, broadcasting, adaptation and translation amongst others. When any of these exclusive rights of the owner is violated, copyright infringement occurs. This infringement could be civil or criminal in nature. We shall discuss the two, one after the other.

CIVIL INFRINGEMENT OF COPYRIGHT

Civil infringement of copyright is subdivided into primary and secondary civil infringement. Basically, primary civil infringement of copyright relates to the direct infringement under sections 6, 7 and 8 of the Act as discussed earlier. On the other hand, secondary civil infringement of copyright is in relation to the indirect infringement under section 15 of the Act which we have also earlier on stated.

PRIMARY CIVIL INFRINGEMENT OF COPYRIGHT

We must begin by noting that by the very wordings of sections 6, 7 and 8 of the Act, this category of infringement is specific in its provisions. However before we appreciate primary civil infringement based on the six categories of subject matter, we shall identify on a general level, some important points to note as per primary civil infringement⁷ :

- A. Although primary civil infringement involves the direct dealing with the copyright work, it does not necessarily have to involve

⁶ The defences and exceptions are extensively considered elsewhere in this paper

⁷ On this section, see generally, Asein. Op. cit pp. 172-175

the infringer or the work directly for it may well be that the infringer acted through the agent.

- B. Infringement may be committed by one or more persons either jointly or severally and where this is the case, the plaintiff has the choice of proceeding against any or all of them as it's the rule in civil suits.
- C. The law on infringement of copyright is akin to the rule of Strict Liability in Law of Torts. Hence, to establish liability for infringement of copyright, it is not necessary to pin the infringer with any particular motive, or that he knows that his action would amount to copyright infringement. In this respect, the following are not defences to infringement:
 - D. That the alleged infringer intended to promote the sale of the plaintiffs work⁸;
 - E. That the infringer acted under a misapprehension of the real copyright owner and hence obtained authorization from a wrong person⁹
 - F. That the infringing work was not sold or read¹⁰
 - G. Liability is not necessarily measured by the volume of the infringing activity. One infringing copy is enough as the prominent consideration is the proof of two vital elements viz: i. sufficient objective similarity and; ii. A causal link between both works. We should point out that while the first element is objective, the second element is subjective¹¹.

We now turn our attention towards expounding the specific provisions of sections 6, 7 and 8 of the Act. For the sake of better comprehensibility and brevity, we shall jointly discuss literary works, musical works and artistic works.

⁸ *Performing Rights Society Ltd v Harlequin Record Shops Ltd* [1979] 2 All E.R. 828

⁹ *Plateau Publishing co. Ltd v. Adophy* (1986) 4 NWLR (Pt. 34) 295

¹⁰ *IPC Magazines Ltd. V MGN Ltd* [1988] FSR 43

¹¹ *American Motion Picture Export (Africa) Inc v. Sounds of Music Ltd* (Suit No. FHC/L/40/81)

LITERARY WORKS, MUSICAL WORKS AND ARTISTIC WORKS REPRODUCTION

Section 6 (1) (a) (i) for literary and musical works which is exactly worded as section 6 (1)(b)(i) for artistic works makes it an infringement for another person to "reproduce the work in any material form" without the authority of the copyright owner. Section 51 of the Act¹² defines reproduction as "the making of one or more copies of a literary, musical or artistic work, a cinematographic film or sound recording". Apparently, the plank of this definition is the making of copies. The same section defines "copy" as "a reproduction in written form, in the form of a recording or cinematographic film, or in any other material form, so however that an object shall not be taken to be a copy of an architectural work unless the object is a building". From the definition of copy, it is also apparent that the act is concerned with expression of the infringement not much as the mode of that expression hence the use of "any material form". The material complained of as an infringing copy must necessarily be based on or derived from the copyright work. If we understand that copyright does not exist to protect ideas but the expression of those ideas, we would then appreciate the fact that independent expression of ideas would not amount to copyright infringement since it could as well be that both works could have a common source of idea or the worst, a coincidence. We should also keep in mind the provisions of section 6 (2) which is that the reproduction must be in respect of the whole or a substantial part of the work either in its original form or in any form recognizably derived from the original. Two important points emerge from this subsection which we shall borrow the words of Diplock L.J to identify: "... it is well established that to constitute copyright infringement in any literary, dramatic or musical work, there must be present two elements. First, there must be sufficient objective similarity between the infringing work and the copyright work or a substantial part thereof... Secondly, the copyright work must be the

¹² Section 51 is the interpretation section of the Act

source from which the infringing work is derived"¹³. It is important to reiterate that infringement does not have to be in respect of the whole copyrighted work as a substantial part of the work would suffice. Hence, what would constitute substantial copying comes to issue. Asein notes that the determination of what would qualify as a substantial part of a work is not based solely on the length or quantity of the material copied but more on the value of quality: "one writer might take all the vital part of another's book, though it might be but a small proportion of the book in quantity. It is not only quantity, but value, that is always looked to"¹⁴

PUBLICATION

Section 6 (1) (a) (ii) for literary and musical works which is exactly worded as section 6 (1) (b) (ii) for artistic works makes it an infringement for another person to "publish the work" without the authority of the copyright owner. Section 51 (2) of the Act provides that "The following provisions shall apply with respect to publication, that is to say-

- (a) A work shall be deemed to have been published if copies of it have been made available in a manner sufficient to render the work accessible to the public;
- (b) Where in the first instance, a part only of a work is published, that part shall be treated for the purposes of this Act as a separate work;
- (c) A publication in any country shall not be treated as being other than the first publication by reason of an earlier publication elsewhere if the two publications took place within a period of not more than 30days."

The interlining element in publication is the making of the work available to the public¹⁵. Moreover, from the wordings section 51(2), identification of the place of publication is essential and to that

¹³ held in *Francis Day & Hunter Ltd v. Bron* [1963] Ch. 587

¹⁴ Per Lord Cottenham in *Bramwell v. Halcomb* (1836) 3 Myl & Cr. 737

¹⁵ *Adenuga v. Ilesanmi Press & Sons* [1991] 5 NWLR 82 cited in Asein p. 184

extent it must be taken that the place of publication is the place where the copies are made available to the public¹⁶. However, it would seem that mere importation of material bearing the copyright work would not amount to "publishing".¹⁷

PUBLIC PERFORMANCE AND BROADCASTING OR COMMUNICATION TO THE PUBLIC:

This head relates only to literary and musical works and not to artistic works. Public performance is treated with broadcasting or communication to the public because the two have fundamental similarities as would be seen shortly. Section 6 (1) (a) (iii) makes it an infringement for another person to "perform the work in public" without the authority of the copyright owner while section 6 (1) (a) (vii) makes it an infringement to "broadcast or communicate the work to the public by a loudspeaker or any other similar device". There is no definition of "performance" or "public" under section 51 of the Act. However, under the Copyright Act 1911, performance was defined as "any acoustic representation of a work and any visual representation of any dramatic in a work, including such representation made by means of any mechanical instrument".¹⁸

Section 48(1) of the English Copyright Act 1956 defined performance to include delivery, in relation to lectures, addresses, speeches and sermons, and includes any mode of visual or acoustic presentation, including any such representation by the operation of wireless telegraphy apparatus, or by the exhibition of a cinematograph film, or by use of a record, or by any other means. On the other hand, section 52 (1) the Nigerian Copyright Act defines "communication to the public" to include "in addition to any live performance or delivery, any mode of visual or acoustic presentation, but does not include a broadcast or rebroadcast". It follows therefore that the Nigerian Copyright Act intends that

¹⁶ *British Northrop Lt v. Texteam Blackburn Ltd* [1973] FSR 241

¹⁷ *Infabrics Ltd v Jaytex Shirt Co. Ltd* [1981] F.S.R. 261

¹⁸ Section 35(1) of the Copyright Act 1911

public performance should exclude broadcast or communication by a loudspeaker or any other similar mechanical device.¹⁹ The prohibition in either case relates to public dissemination of the work and would not include a private or domestic performance or communication of same even if it is by a loudspeaker. What is "public" was not defined by the Act but the courts have recognized that public performance must necessarily be a question of fact with no fixed criteria.²⁰ However, the controlling element which the courts usually consider is the protection of the value of the work thereby making such factors as the making of profit; the size and character of the audience; the venue of the performance and its impact on the copyright owner key factors.²¹

In the United States, there is the so-called Aiken exemption which was derived from the case of *Twentieth Century Music Corporation v. Aiken*²² as codified in section 110 (5) of the US Copyright Act. The Aiken exemption is to the effect that small establishments using receiving apparatus of a kind normally used in private homes are exempted from copyright liability. According to Aiken,²³ "The reception must be for the benefit of their patrons and there must be no direct charge for the enjoyment of the broadcast. Nevertheless, the courts in determining infringement may be persuaded to view such use by a defendant as insignificant thereby arriving at the same conclusion"

¹⁹ This distinction is however, not usually drawn by the Nigerian courts. To buttress this point, Asein at p. 185 cited *Musical Copyright Society of Nigeria v. D.P. Lekki Ltd* (Suit No. FHC/L/168/90) where the plaintiff was held to have established that its musical works "were publicly performed through hired bands and by means of mechanical devices"

²⁰ *Russell v. Smith* (1848) 12 Q.B 217

²¹ See *Harms Ltd. & Chappell Ltd. v. Martans Club* [1921] 1 Ch. 526. See also *Performing Right Society Ltd. v. Hawthorns Hotel Ltd* [1933] Ch. 855

²² 422 U.S. 151, 186 USPO 65 (1975)

²³ *Ibid.* p 192

ADAPTATIONS, TRANSLATIONS AND CINEMATOGRAPHIC FILMS OR RECORD IN RESPECT OF THE WORK/INCLUSION IN CINEMATPGRAPHIC FILMS

The Act prohibits unauthorized making of adaptations of literary, musical and artistic works²⁴. An adaptation is the modification of a pre-existing work from one genre of work to another and consists in altering the work within the same genre to make it suitable for different conditions of exploitation, and may also involve altering the composition of the work. The prohibition in respect of translations relate to literary and musical works only as it obviously would not fit for an artistic work. Simply put, translation means reproducing a copyrighted work in a different language. Unauthorized translations of literary and musical works are prohibited under the Act²⁵. In relation to literary and musical works, the Act also makes it an infringement to, without the authorization of the owner, "make any cinematographic film or record in respect of the work"²⁶. In respect of artistic works, Section 6 (1) (b) (iv) prohibits unauthorized inclusion of artistic works in a cinematographic films. It should be stressed that the inclusion would have to be of the whole or a substantial part of the work. Obviously, the prohibition would not extend to the inclusion in a film of an artistic work situated in a place where it can be viewed by the public or the incidental inclusion of an artistic work in a film²⁷

DISTRIBUTION

This applies to literary and musical works but not artistic works. Section 6 (1) (a) (vi) of the Act makes it an infringement to, without the authorization of the owner "distribute to the public, for commercial purposes, copies of the work, by way of rental, lease, hire, loan or similar arrangement." Since copyright is essentially

²⁴ Section 6 (1) (a) (viii) of the Act for literary and musical works. Section 6 (1) (b) (iv) of the Act for artistic works.

²⁵ Section 6 (1) (a) (iv) of the Act makes it an infringement to without the copyright owners authority "*produce, reproduce, perform or publish any translation of the work*"

²⁶ Section 6 (1) (a) (v) of the Act

²⁷ Schedule 2, paragraph (c) and (d) of the Act

property right with economic value, it would be unfair to allow a person apart from the copyright owner take advantage of the economic benefit without authorization of the owner.²⁸ There is a deemed authorization granted to distributors and retailers for the purpose of sale but this does not extend to commercial lease, rent, hire and loan of the work to the public. The commercial factor is vital for lending and borrowing in libraries is not an infringement since it is hardly commercial. However, the video rental shops operation could pose some questions.

CINEMATOGRAPHIC FILMS

Section 6 (1) (c) of the Act makes it an infringement for a person other than the copyright owner, and not acting under the copyright owner's authority, to do, in relation to cinematographic works, any of the following acts:

- (a) Make a copy of the film;
- (b) Cause the film, in so far as it consists of visual images to be seen in public and, in so far as it consists of sounds, to be heard in public;
- (c) Make any record embodying the recording, in any part of the sound track associated with the film by utilizing such sound track;
- (d) Distribute to the public, for commercial purposes, copies of the work, by way of rental , lease, hire, loan or similar arrangement.

By virtue of section 6 (2) of the Act, the right of the owner of cinematographic films to control the doing of any of the above mentioned activities extend to the whole or a substantial part of the work either in its original form or in any form recognizably derived from the original.

²⁸ Asein, op.cit p193

SOUND RECORDING

By the provisions of section 7 of the Act, in respect of sound recording, the following would amount to infringement if done by another person without the authorization of the owner:

- (a) The direct or indirect reproduction, broadcasting or communication to the public of the whole or a substantial part of the recording either in its original form or in any form recognizably derived from the original
- (b) The distribution to the public for commercial purposes of the copies of the work by way of rental, lease, hire, loan, or similar arrangement.

It is important to clarify that the provisions of section 7 applies to sound recording²⁹ and not live performance. Asein³⁰ points out that an infringement of the right in the sound recording occurs only where the work had been fixed in a format although it would still amount to an infringement even where the illicit reproduction is made from a broadcast of the sound recording as against a live broadcast.

BROADCAST

Section 8 (1) and (2) of the Act makes it an infringement for a person other than the copyright owner, and not acting under the copyright owner's authority, to do, in relation to broadcast, any of the following acts:

- (a) The recording and re-broadcasting of the whole or a substantial part of the broadcast;
- (b) The communication to the public of the whole or a substantial part of a television broadcast, either in its original form or in any form recognizably derived from the original

²⁹ Section 51 of the Act defines "sound recording" as "the first fixation of a sequence of sound capable of being perceived aurally and of being reproduced but does not include a sound track associated with a cinematographic film"

³⁰ Asein op. cit. p.207

- (c) The distribution to the public for commercial purposes, of copies of the work, by way of rental, lease, loan, hire or similar arrangement.
- (d) The taking of still photographs from the broadcast.

There are five basic exceptions to this provision³¹:

- a) Fair dealing;
- b) Use in educational institutions for educational purposes;
- c) Use under government authority, by public libraries, by non-commercial documentation centers and other scientific or prescribed institutions;
- d) News of the day publicly broadcasted or communicated;
- e) Communication in a public place without admission fee by a not-for-profit club.

SECONDARY CIVIL INFRINGEMENT OF COPYRIGHT

The main point to note is that the essential difference between primary and civil infringement is that while in primary infringement, the infringement is directly on the copyright work, in secondary infringement it is basically exploitation of those infringing copies. A further distinction is that whereas for primary infringement, the Act is specific to the kind of work, in secondary infringement, it is a blanket provision. The common essential however, is that the offending action must necessarily be against the work. The acts of secondary infringement prohibited by section 15 (1) of the Act are as follows:

- A. Importing into Nigeria, otherwise than for private or domestic use, any article in respect of which copyright is infringed under (a) above;
- B. Exhibiting in public, any article in respect of which copyright is infringed under (a) above;
- C. Distributing by way of trade, offering for sale, hiring or otherwise or for any purpose prejudicial to the owner of the

³¹ Section 8 (3) of the Act in cross reference with the Second schedule of the Act

- copyright, any article in respect of which copyright is infringed under (a) above;
- D. Making or having in his possession, plates, master-tapes, machines, equipment or contrivances used for the purpose of making infringed copies of the work.
 - E. Permitting a place of public entertainment or a business to be used for a performance in the public of the work where the performance constitutes an infringement of the copyright in the work, unless the person permitting the place to be used was not aware, and had no reasonable ground for suspecting that the performance would be an infringement of the copyright.
 - F. Performing or causing to be performed for the purposes of trade or business or as supporting facility to a trade or business any work in which copyright subsists.

CRIMINAL INFRINGEMENT OF COPYRIGHT

Both the Criminal and the Penal Code provides for criminal offences relating to copyright³². Under both statutes, it was an offence for any person to knowingly:

- (a) Make for sale or hire any infringing copy of a copyright works
- (b) Sell or let for hire any infringing copy of a copyright³³
- (c) Distribute infringing copies of a copyright work for the purposes of trade or to such extent as to affect prejudicially the owner of the copyright; or
- (d) By way of trade, publicly exhibit in public any infringing copy of a copyright work

It was also an offence to make or possess any plate for the purpose of making infringing copies of a copyright work, or to knowingly cause any such work to be performed in public without the consent of the owner of the copyright. Section 20 of the Act now provides

³² These are the Criminal Code (sections 491 -493) for the Southern States and Penal Code (sections 426-427) for the Northern States

³³ Under the Criminal Code the offence also included exposure or offering for sale or hire.

for criminal infringement and while the Act expressly repealed the Criminal Code it does not mention the Penal Code. This is an oversight and it is safe to assume that the provisions of the Penal code are also repealed impliedly. Under the Act, any person who does the following with the requisite mens rea is guilty of an offence viz:³⁴

- (a) Making or causing to be made for sale, hire or for the purpose of trade or business any infringing copy of a work in which copyright subsists;
- (b) Importing or causing to be imported in Nigeria, a copy of any work which if it had been made in Nigeria would be an infringing copy;
- (c) Making, causing to be made, or being possession of any plate, master tape, machine equipment or contrivance for the purpose of making any infringing copy of any work.

It is good defence to any of the foregoing offences that the accused person did not know and had no reason to believe that the copy concerned was an infringing copy of any such work, or that such plate, master tape, machine, equipment or contrivance was not for the purpose of making infringing copies of any such work. The liability provided for this offence is a fine of an amount not exceeding N1, 000 for every copy dealt with in contravention of the section or to a term of imprisonment no exceeding five years, or to both such fine and imprisonment. Section 20(2) provides for secondary criminal infringements, i.e. the offence of dealing in infringing copies. Under that sub-section, a person is guilty of an offence if he:

- (a) Sells or lets for hire or for the purposes of trade or business, exposes or offers for sale or hire any infringing copy of any work in which copyright subsists; or
- (b) Distributes for the purpose of trade or business any infringing copy of any such work;

³⁴ Copyright Act, section 20(1) (a) – (c)

- (c) Has in his possession other than for his private or domestic use, any infringing copy of any work; or
- (d) Has in his possession, sell, let for hire or distribution for the purpose of trade or business or exposes or offers for sale or hire any copy of a work which if it had been made in Nigeria would be an infringing copy.

Where any offence under the Act has been committed by a body corporate, the body corporate and every person who was in charge of the body corporate at the time the offence was committed, would be held liable for the offence. By section 22(1), it is a good defence that the offence was committed without his knowledge or at least that he exercised all due diligence to prevent its commission. On the corollary, where the person (such as the director, partner, secretary, manager etc) consented or connived to the commission of the crime, such a one shall be prosecuted accordingly. Under section 20(5) of the Act, the court is allowed, at the instance of the Attorney-General of the Federation or the copyright owner, make an order for the destruction or delivery up of, or other dealing with, any seized article in connection with which a offence has been committed. Whereas the Act does not provide any special procedure for institution of criminal proceedings for copyright infringement, same is therefore to be governed by the Criminal Procedure Act.³⁵ In addition, a Copyright Inspector may prosecute and sign the charges as Prosecutor.³⁶

EXCEPTIONS AND DEFENCES TO COPYRIGHT INFRINGEMENT

In the introductory section of this work, we mentioned that a rudimentary point of note is that the right conferred on the copyright owner is a "negative right" as its essence is the prevention of unauthorized exploitation of the work by another person or at least to secure compensation where such unauthorized exploitation

³⁵ *Nigerian Copyright Commission v. Nigerian America Merchant Bank* (Suit no. FHC/118C/2003) cited in Asein p.235

³⁶ Section 38 (3) of the Act

occurs. Stretching this rudimentary character further, it becomes apparent that this right of the owner would need to be balanced with the general public interest of freer exploitation of copyrighted works. In this connection, the major point for exceptions and defences as per copyright infringement is the mitigation of the effect of unqualified protection for the owner for the benefit of the general public. It is noteworthy that the need to strike the afore-stated balance has been acknowledged all through the evolution of Copyright and was given special mention during the negotiations leading up to Berne Convention³⁷ hence the provisions to limit the rights of the author in certain circumstances³⁸. Copyright Law therefore, admits of several exceptions or limitations. The exceptions are basically concessions whereby the right of the owner is subjugated in the general public interest. These exceptions are provided under the Second Schedule and Third Schedule of the Nigerian Copyright Act ("the Act")³⁹ whereby despite granting protection to a work, acts which would otherwise constitute infringement on those rights are excused in specified instances. Whereas section 6 of the Act makes provisions in respect of the nature and scope of the protection, the Second Schedule provides exceptions thereto. The exceptions provided in the Third Schedule are more restrictive because they relate only to sound recording of musical works.

SCHEDULE TWO EXCEPTIONS

Whereas section 6 of the Act provides for the general nature of Copyright, Schedule Two provides for exceptions thereto. There are a total of 15 exceptions under the Schedule two. We shall attempt to identify these exceptions.

³⁷ Berne Convention for the Protection of Literary and Artistic Works (1886)

³⁸ J.O. Asien, *Nigerian Copyright: Law and Practice*, 2nd ed. (Abuja, Books and Gavel, 2012) p.246

³⁹ Cap. C28, *Laws of the Federation of Nigeria 2004*

FAIR DEALING

Paragraph (a) of schedule two is worded as follows: "the doing of any of the acts mentioned in the said section 6 by way of fair dealing for purposes of research, private use, criticism or review or the reporting of current events, subject to the condition that, if the use is public, it shall be accompanied by an acknowledgement of the title of the work and its authorship except where the work is incidentally included in a broadcast". Fair dealing is "perhaps the most significant and the most venerable limitation on the copyright holder's prerogatives".⁴⁰ Asein⁴¹ explains that this is because of the potentially wide application of this exception and its high dependencies on the opinion of the judge. It is essentially, a codification of a long standing common law principle permitting the "fair use" of a work either for the purposes of illustration, review or criticism, presumably on the understanding that the portion taken would not unreasonably prejudice the interests of the copyright owner. It is germane to appreciate that the paragraph (a) of the schedule two can be conveniently broken into three parts viz: i. what fair dealing entails; ii. The permitted purposes for fair dealing; and iii. the caveat on acknowledgement for public use. The Act did not define the term "fair dealing". Asein⁴² reports that there is no clear consensus on the rules to be adopted in determining fair dealing under the Nigerian Law. The futility of attempting a definition of fair dealing was noted by Lord Denning, MR, in *Hubbard v. Vasper*⁴³ who suggested that instead of attempting a definition of fair dealing, a general approach can at least in the case of review/criticism would be to consider some factors such as a. number and extent of the quotation b. use made of the quotation c. proportions of the quotation. The tripartite factor of determining what amounted to fair dealing as expounded by the learned authors of Laddie, Prescott and Vitoria, *Modern Law of Copyright and*

⁴⁰ A. Latman, et al., *Copyright in the Nineties* 3rd edn., cited in Asein, op. cit.

⁴¹ Ibid, p256

⁴² Ibid, p251

⁴³ [1972] 2 Q.B 84

Designs, 3rd edn., received judicial endorsement in *Ashdown v. Telegraph Group Ltd*⁴⁴ viz:

- i. Whether the alleged fair dealing is in commercial competition with the owners exploitation of the work;
- ii. Whether the work has already been published or otherwise exposed to the public;
- iii. The amount and importance of the work which has been taken

In the case of *CCH Canadian Ltd. v. Law Society of Upper Canada*,⁴⁵ the Canadian Supreme Court established six principles to consider when evaluating fair dealing viz:

- i. purpose of dealing (whether the purpose of the dealing is statutorily recognized);
- ii. Character of dealing (was it a single or multiple copying? Wide or limited distribution? Copies destroyed after use?);
- iii. Amount of dealing (how much of the original work was used?);
- iv. Alternatives to the dealing (was the dealing reasonably necessary?);
- v. nature of the copyrighted work (published or unpublished);
- vi. Effect of the dealing on the copyright work (would the dealing effect the market of the copyrighted work).

Of course, the Canadian court recognized the list is not exhaustive and appreciated that particular cases would require particular factors. There are only four recognized or statutorily permitted purposes of fair dealing under the Nigerian Copyright law regime. We must note that whereas the definition of what entails fair dealing would be liberally approached, the categories of purposes recognized are closed and would be strictly interpreted. However, the question of whether an alleged infringing act falls under any of the permitted purposes would also be liberally approached. The four recognized purposes are research, private use, criticism or review and reporting of current events.

⁴⁴ [2002] Ch. 149

⁴⁵ en.m.wikipedia.org/wiki/fair_dealing. Accessed at 9:00am on 21-04-2013.

RESEARCH:

Research is the "systematic investigation into and study of material and sources in order to establish facts and reach new conclusions"⁴⁶

The Act did not differentiate between private and commercial research so it is safe to assume that commercially driven research comes within the purview.

PRIVATE USE:

In contradistinction with public use, private use would suggest a more personal use. Under the English Act, the purpose is private study. Obviously, "private use" under the Nigerian Act is wider than "private study" under the English Act

CRITICISM OR REVIEW

Criticism means to analyse or judge a work whereas review is a formal assessment or examination of a work. Obviously, the two are related. This purpose is in relation to the constitutionally guaranteed freedom of speech and hence so that free speech is not stifled, a critic or reviewer acting in good faith is permitted to use copyrighted materials to advance his criticism or review. What is more, the act does not specify that the review/criticism must be in relation to the work exploited; hence it would be safe to say that this protection would extend and cover one who exploits a copyright work to criticize/review a different work. In *Prosiben Media v Carlton UK Television*,⁴⁷ the English Court of Appeal advocated that criticism of a work could include criticism of the ideas to be found in the work, its socio-moral implications as well as criticism of style.

REPORTING OF CURRENT EVENTS

The English Court of Appeal held in *Hyde Park Residence v. Yelland*⁴⁸ that fairness has to be judged by the objective standard whether a

⁴⁶<http://www.google.com/search?tbm=nws&hl=en&source=mog&hl=en&gl=us&client=ms-rim&tab=wn&q=research%20define&sa=N>

⁴⁷ [1999] FSR 610

⁴⁸ [2011] Ch. 143 cited in Asein 262

fair minded and honest person would have dealt with the copyright work in the manner that the infringer did, for the purpose of reporting the relevant common events. This purpose would relate to general current events as well events of a special knowledge

ACKNOWLEDGEMENT IF FOR PUBLIC USE.

The proviso in paragraph (a) of the second schedule stipulates that where the use of the work is public, there should be accompanied therewith an acknowledgement of the title of the work and its authorship except where the work is incidentally included in a broadcast. This proviso though straightforward, can be better appreciated when broken down:

- A. The proviso only applies if the use sought to be excluded is in public
- B. Acknowledgement of both title of the work and the author should accompany such public use
- C. An incidental inclusion in a broadcast without such acknowledgement as in (b) above is not contrary to the proviso

It should be appreciated that a strict approach to requirement of acknowledgement would work difficulty. Hence, courts would do well to adopt a liberal spirit for as in *Johnstone v. Bernard Jones Publication Ltd.*⁴⁹

PARODY, PASTICHE OR CARICATURE

Paragraph (b) of the second schedule excludes parodies, pastiches and caricatures from copyright infringement. A parody is "an imitation of the style of a particular writer, artist, or genre with deliberate exaggeration for comic effect".⁵⁰ A pastiche is "a work of art, literature, film, music or architecture that closely imitates the work of a previous artist, usually distinguished from parody in the sense that it celebrates rather than mocks the work it imitates."⁵¹ A

⁴⁹ [1938] Ch. 599

⁵⁰ en.m.wikipediaorg/wiki/parody. Retrieved at 3pm on 25-04-2013

⁵¹ en.m.wikipediaorg/wiki/pastiche. Retrieved at 3pm on 25-04-2013

caricature is a simple "image showing the features of its subject in a simplified or exaggerated way"⁵². This exception applies to literary, musical and artistic works as well as cinematographic films but not to sound recordings and broadcasts. The general justification for these exceptions is that the light-hearted use of the work is not presented to the audience as an original but as deriving from another work which is often identified or well known to the audience. Secondly, there is little threat that the derived work would threaten the market of the original work. By and large, the court in balancing the satirical value of the light-hearted work against the copyright interest of the owner would be mindful of any threat that a strict enforcement of copyright claims may pose to the art of creating humour.

EPHEMERAL AND INCIDENTAL USE OF ARTISTIC WORK

This category covers situations where the work in question is not the primary object of the use. It was held in *The Football Association Premier League v. Panini UK Ltd*⁵³ that what constitutes an "incidental" inclusion depends on the circumstances of the case but that it does not mean "unintentional". The following are the ephemeral or incidental use of artistic works that would not constitute copyright infringement under the Act:

- I. The inclusion in a film or broadcast of the work situated in a place that is viewable by the public.
- II. The reproduction and distribution of copies of the work permanently situated in a place viewable by the public;
- III. Incidental inclusion of the work in a film or broadcast.

USE FOR EDUCATIONAL PURPOSES:

Some of the exceptions under the Act can be broadly categorized as educational or institutional in nature and they include:

- i. Paragraph (f) permits the inclusion of copyright works in a collection of literary or musical work provided it does not

⁵² en.m.wikipediaorg/wiki/caricature. Retrieved at 3pm on 25-04-2013

⁵³ [2003] E.C.D.R 36

exceed more than two excerpts from the work. The collection must also bear a statement that it is designed for educational use and include an acknowledgement of the title and authorship of the work;

- ii. Paragraph (h) permits the broadcasting of a work if the broadcast is approved by the broadcasting authority as an educational use;
- iii. Paragraph (h) permits any use of the work in an approved educational institution for the purpose of the institution provided that the resultant work must be destroyed before the end of the period to be prescribed by the Minister or where no such prescribed period, then within twelve months after it was made. No period has been prescribed under this paragraph.

USE FOR LITERARY ENJOYMENT AND DOCUMENTATION

This head comprises of the normal non-prejudicial enjoyment of copyright works by members of the society and are as follows:

- i. Paragraph (j) allows the reading or recitation in public or in a broadcast by any person of any reasonable extract from a published literary work if accompanied by a sufficient acknowledgement and provided that such reading or recitation is not for commercial purposes
- ii. Paragraph (k) allows any use made of a work by or under the direction or control of government, or by such public libraries, non-commercial documentation centres and scientific or other institutions as may be prescribed. Also excepted are uses in public interest, where no revenue is derived therefrom and no admission fee is charged for the communication of the work.
- iii. Paragraph (l) allows the making or supply of a reproduction of a copyright work or reproduction of any such work which is in the National Archives or the public records of a state.
- iv. Paragraph (q) allows the making of not more than 3 copies of a book (including a pamphlet, sheet music, map, chart or plan) by or under the direction of the person in charge of a public

- library for use of the library where such book is not available for sale in Nigeria;
- v. Paragraph (r) allows the reproduction for the purpose of research or private study of an unpublished literary or musical work kept in a library, museum or other institution to which the public has access;
 - vi. Paragraph (s) allows the reproduction of published works in Braille for the exclusive use of the blind and sound recordings made by the institutions or other establishments approved by government for the promotion of the welfare of other disabled persons for the exclusive use of such blind or disabled persons

NEWS AND PUBLIC INTEREST BROADCASTS

This category includes:

- i. Paragraph (m) permits the broadcasting of a work already lawfully made accessible to the public and subject (without prejudice to the other provisions of the Schedule) to the condition that the owner of the broadcasting right in the work would receive a fair compensation determined, in the absence of an agreement, by the court;
- ii. Paragraph (n) permits news of the day publicly broadcast or publicly communicated by any other means;
- iii. Paragraph (o) permits the communication to the public of a work, in a place where no admission fee is charged in respect thereof, by any not-for-profit club;
- iv. Paragraph (l) permits the reproduction of a work by or under the direction or control of a broadcasting authority where the reproduction or any copies thereof is intended exclusively for a lawful broadcast provided that such copies be destroyed before the end of the period of six months immediately following the making or such longer period as may be agreed with the copyright owner

OFFICIAL USE

This includes:

- i. Paragraph (p) permits the use made of the work for the purpose of judicial proceeding or of any report of such proceeding;
- ii. Paragraph (i) exempts the making of a sound recording of a literary or musical work, and the reproduction of such sound recording by the maker or under license from him, where the copies thereof are intended for retail sale in Nigeria or abroad.

SCHEDULE THREE EXCEPTIONS

Schedule three of the Act contains elaborate provisions on special exceptions in respect of sound recordings of musical works which by section 6(4) are to apply to musical works in addition to the other exceptions generally available in the second schedule. Under the third schedule, copyright in a musical work is not infringed by a record producer, who makes a recording or an adaptation of a work in Nigeria, if:

- A. Records of the work, or as the case may be, of a similar adaptation of the work, have previously been made in, or imported into Nigeria for the purpose of retail sale, and were so made or imported by, or with the license of, the owner of the copyright in the work;
- B. Before making the recording, the record producer gave to the owner of the copyright the prescribed notice of his intention to make it;
- C. The record producer intends to sell the record by retail, or to supply it for the purpose of its being sold by retail by another person, or intends to use it for making other records which are to be sold or supplied;
- D. In the case of a record which is sold by retail, the record producer pays the owner of the copyright in the prescribed manner and at the prescribed time, a royalty of an amount ascertained in accordance with the provisions of the schedule.

Subject to the provisions contained in the schedule, the royalty is an amount equal to a percentage of the ordinary retail selling price of the record calculated in the prescribed manner. Reference to "prescribed" in the schedule means a prescription by the Nigerian Copyright Commission. The exception provided in the second schedule does not authorize the importation of records which could otherwise not have been lawfully imported. It is also expressly provided that the determination of whether the making of a record outside Nigeria would have constituted an infringement of copyright if it had been made in Nigeria should not be influenced by the provision of the schedule.

OTHER GENERAL DEFENCES

Aside the above identified statutory defences, a defendant may avail himself of other general defences such as trade or custom, limitation of time, acquiescence, estoppels as are available in general civil actions. Asein,⁵⁴ while aligning with the English court's decision in *Hyde Park v Yelland*⁵⁵ as per section 171(3) of the English Copyright Designs and Patents Act 1988⁵⁶, advocated that Nigerian courts would do well to consider public policy or public interest despite the absence of a specific provision thereto in the Nigerian Act.

CONCLUSION

This paper has proceeded from the general understanding of the rights conferred on the copyright owner under the Act to a vivid understanding of copyright infringement. In so doing we have identified and discussed civil and criminal infringements of copyright. Finally, we discussed the various exceptions and defences to a claim for infringement of copyright.

⁵⁴ Ibid p. 277

⁵⁵ [2001] Ch. 143

⁵⁶ The subsection is worded as follow: "*nothing in this Part affects any rule of law preventing or restricting the enforcement of copyright, on grounds of public interest or otherwise*"

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