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**THE ROLE OF THE JUDICIARY  
IN THE ENFORCEMENT OF COPYRIGHT IN NIGERIA**

*Document prepared by the Hon. Justice M.B. Belgore, Chief Judge,  
Federal High Court, Lagos*

Copyrights Law is now well established in our statutes book, having had two Copyrights Act; the first home baked one being in 1970 which was repealed and substituted for by the current Law of 1988. One can say that except an idea the current Copyright Law embraces all imaginable works of literary and artistic works. Section one of the 1988 Copyright Act gives the list of those items that would be eligible for copyright as:-

- (a) literary works;
- (b) musical works;
- (c) artistic works;
- (d) cinematograph films;
- (e) sound recording; and
- (f) broadcasts.

Apart from this list, there is right for Performer and Folklore. The performer's right embraced performing, recording, broadcasting live, reproducing in any material form, adaptation of the performance. And a performance includes, a dramatic performance, a musical performance and a reading or recitation of literary act or any similar presentation which is or so far as it is, a live performance given by one or more individuals.

This together with Folklore are new innovation which is much over in this Country. This is so especially in respect of folklore which had been pirated and adaptable by modern novel writers.

The qualification on these subjects are that any of them would not be eligible for copyright unless -

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

The first qualification appears not to insist on originality; by regarding 'sufficient effort'<sup>as</sup> to give it an original character. This suggestion was described in Oladipo Yemitan v. Daily Times of Nigeria decided under 1970 Laws as "work, labour or taste". While the second limitation is not to give idea a copyright unless expressed or put into contract form.

When I talk of the Law of Copyright being well established in the Country by the 1970 and 1988 legislation, I do not mean to imply that the law of copyright was only introduced in Nigeria in 1970. I was only referring to Law which I called home baked, that is those laws made by the legislative authorities of the Nigeria by the Nigerians.

The copyright, infact is very old in the Country. There was Copyright Ordinance of 1918 extending the United Kingdom, the Imperial Copyright Act of 1911 to Nigeria.

The Imperial Act as might be accepted applied to the importation into Nigeria of works made outside Nigeria, in a word it was a Law made to protect foreign intellectual or industrial property. The Ordinance was virtuely dormant as there

was no need for its use. Invariably, what was being resorted to was for criminal prosecution under the Criminal Law such as Sections 491 to 493 of the Criminal Law of the Nigeria then.

What was being infringed in early days of colonial reign in Nigeria was Trade Mark. Breach of Trade Marks was very rampant as each foreign manufacturers were copying one another in respect of names or labels of goods that was first introduced in the Country and well known. In most of these cases the right to Trade Marks and Copyright were very thin. For Trade Mark is a mark used by a manufacturer or trader to distinguish his products or services from those of others. It might be by symbolic, design or mere words. Whereas claiming the right in copyright the owner of trade mark has a right to challenge another person for using the mark.

As Romer J. said:-<sup>1</sup>

"It is the law - that no man is entitled to carry on his business in such a way as to represent that it is the business of another, or it is any way connected with the business of another".

As far back as 1923, the Nigeria Court protected a Trade mark in the case John Walkden & Co. Ltd. v. Jacob Akinyemi Oshodi & Others.<sup>2</sup>

The copyright case is not so early in Court and until 1970 there is hardly any case of copyright reported.

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1. Joseph Rodgers & Son Ltd. v. W.N. Rogers & Co. 1924  
4 R.P.C. 270 at 291
  2. 1923 N.L.R. 105.

But before we examine the role of the judiciary in the enforcements of copyright, we must first know what is the nature of the right, who can invoke it and what are the legal tools to enforce the rights before we know/<sup>how</sup>the courts' use to the tools. The owner of copyright has exclusive right to do and to control and authorise others to do certain acts may be literary or musical work, to reproduce such in any material form, or to publish it, perform it in any way, produce, reproduce, perform or publish any translation of such work. Or he can make any cinematograph film, distribute to public for commercial purpose of the work. The same right applies to copyright owner of an artistic work, and in relation to sound recording, television and broadcast. The owner of the copyright has the right to claim authorship of his work and to object to any other person claiming such right. Above all he has right to the proceeds of sale of such work.

The breach of any of the rights of owner of copyright is known as infringement of it. And this infringement gives right to the owner to come to Court for redress. The infringement of such a copyright is actionable at instance of the assignee or an exclusive licensee. The claimant in court will be entitled if he can prove his claim, to damages, injunction, accounts or destruction of the infringed matters. Such an infringement of rights of the claimant is also actionable as a breach of statutory duty owned to the person entitled to the right.

Apart from right of civil claim by the owner against whoever infringes his rights, there is a criminal liability on the infringer. In respect of criminal prosecution for infringement, subsection (5)

of Section 18 of Copyright Act of 1988 is worthy of note. It says:-

"(5) Where an article has been seized by a Police officer or an author -----".

This places responsibility of prosecution for infringement of copyright on the Police or an authorised officer, this to me is not fair enough. When criminal measures are necessary for infringement of copyright, the right to prosecution should not be the responsibility of public enforcement agencies alone but it should extend to that of the author. He has a right to a private prosecution of his right. It might be argued that the right of any citizen to a private prosecution is available to him, but realising the stringent measures rendering a private prosecution a near impossible task specific facility should be given to the owner of copyright in private prosecution of his right. The advocate for right of an author for private prosecution of infringement of his works realises that both civil and criminal action could be taken together as the Provision of Section 21 of the Act allows. It says:-

"Notwithstanding the provision of any law to the contrary, it shall be permissible for both criminal and civil actions to be taken simultaneously in respect of the same infringement under this Act".

Before dealing with the actual cases decided, I think it is very pleasing to note that two provisions of the 1988 Act makes proof of owners of a copyright easier than in the previous Law. These are the provision of Sections 34 and 35. Section 34 allows an affidavit sworn before a Commissioner for

Oath or Notary Public anywhere in the world to be admissible in Court in Nigeria to prove certain specific things. This is a big relief of calling witness from far place to testify on a simple matter. While Section 35 give a presumption in favour of the author claimant, placing the onus of disproving the presumption on the infringer. It is presumed that the Plaintiff is the author of the work he is suing on, and that his right of copyright subsists.

I will like also to make a further comment on Criminal Prosecution. As stated earlier on the responsibility for Criminal Prosecution for breach of infringement of copying of section 18 of the 1988 Act, especially Subsection 5 of it seems to place responsibility on Attorney-General or authorised officer and I understand authorised officer to <sup>mean</sup> a member of Nigeria Copyright Council. I can say with reasonable assurance that neither the Attorney-General nor the Copyright Council, to my knowledge has ever institute any Criminal Prosecution under Copyright Act before the Federal High Court where it should be instituted. I am sure none has been issued in Lagos Division of the Court. While I agree that Civil Litigation is the one that should, and actually really interested individual artist, the Society is more concerned with the Criminal aspect. Since it has been said that thieves are punished not only because they had stolen, but also so that other might not steal. A particular interest of an individual in the society is very often interest of the Society at large.

Now coming to Civil Litigation both under 1970 and 1988 Act where the Court endeavoured to stop and protect the interest of copyright owners by rewarding them for infringement of the right, forbidding further infringement, making it easy for them to prosecute

this right within the ambit of the law and at times awards them robust reward for the frigrant infringement. As I said earlier, since the 1970 Act many cases of infringement came to Court but only very few representative of different aspects of the two Acts will be mentioned in this paper. The cases may not be chronological in date of decision nor numerical according to the Sections of Acts. But it is hoped they would be intelligent to bring out the points they are meant to highlight.

The first starting point is how would an infringement a Copyright occuring before 1988 Act came into force should be instituted or decided after 1988. Would it be under the 1970 Act which was in force when the infringement occured or under the 1988 which is in force when the action was instituted in Court? The issue came up in Court in the case of Liberty Records Incorporated & Others v. M. Owotutu Enterprises Nig. Ltd. The Court rely on Section 21 of the 5th Schedule of the 1988 Act which states:

"subject to this paragraph proceedings under Section 25 of this Decree for infringement of Copyright may be taken nothing that the alleged infringement occured before the commencement of this Act".

This means and the Court held it to mean infringement committed before 1988 would be deemed to have been committed under 1988 Act. The Court Odunowo J. showing his aversion to retrospective law referred to Wright J. in Re: Athlunny 1989 2 Q.3 547 where it was stated:

"Perhaps no rule of constitution is more firmly established than this - that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards a matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment.

If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be considered as prospective only".

The Court held that retrospective effect applied to proceeding under Section 25 only and not any other provisions of the Act, such as Criminal Prosecution. Section 25 deals only with infringement of performers' right to "Life performance". But it must be remembered that "Life Performance" is not a right capable of being infringed or being prosecuted under 1970 Act and to that effect cannot find full justification to Section 2(1) of the Schedule remembering what Willis J. said in Phillips v. Eyre<sup>3</sup> that:

"Retrospective laws are no doubt prima facie of questionable policy and contrary to the general principle that legislation by which the conduct of mankind is to be regulated, ought when introduced for the first time, to deal with future Acts, and right not to change the character of past transactions carried on upon the faith of their existing Law"<sup>3(a)</sup>

Another innovation of the 1988 Act which is a welcoming improvement upon 1970 Act and which Court applied very often to get ownership evidence which had hampered proceeding under 1970 Act is the provision of Section 34 of the 1988 Act where affidavit evidence is allowed, where a Copyright owner might be far away outside the jurisdiction of the Court and to call him to give oral evidence in court might involve a colossal expenses and time consuming. Now Section 34 allows affidavit evidence to establish ownership and this affidavit can be made by the owner or on his behalf. In series of cases that provisions were applied making the proving of ownership much easier than before. In Musical Copyright Society Nig. Ltd.v.Peal Restaurant and Night Clubs Ltd. The affidavit evidence of corporation

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3. Phillips v. Eyre 1870 L.R. 6 Q.B. 1  
3A. at p. 22

of the Company and affidavit evidence of deed of assignment of Copyright were admitted in evidence. The same provision was involved in the case of Liberty Record cited earlier.

As a Plaintiff, especially, a foreign Plaintiff has an obstacle in suing for an infringement of his right as a person or through his Attorney in Nigeria or in a Nigeria Court? Virtually there is no hinderance as Section 31 (1) of the 1979 Nigeria Constitution lays it down that in the determination of his Civil Rights and obligation, including any question or determination by or against any Government or authority a Person shall be entitled to a fair hearing! with a reasonable time by a Court. It is to be noted that the words 'a person' were used and not 'a Citizen'. This has been interpreted in the case of Brian Anderson V. Federal Minister of Internal Affairs and Attorney-General of the Federal Republic of Nigeria where the Court says:

"The words 'any person in Section 4 of the 1979 Constitution means what it says and does not limit it to Nigeria Citizens alone but it means any person who is lawfully present or resident in Nigeria".

The only restriction sometimes to be encountered is by giving of guarantee before prosecuting the action as the foreign individual or Company might not have assets in the Court to satisfy the judgement that might be adjudicated against him. This was the case in Island Record Ltd. & Ors V. Anbas Trading Co. and Lagos on Niger Shipping Agency where the guarantee asked for by the defendant was required from the Plaintiff before prosecution. The guarantee was duly supplied and the trial went ahead.

Another pre-trial condition the Defendant often put forward was that Nigeria Government was not a party to Treaty on Copyright. Such opposition was put up in the case of American Motion Picture Export Co. (Nig.) Ltd. v. Minnesota Nigeria Ltd. where the plaintiff Company was combination of Avco Embassy Pictures, Bhen Vista, Columbia Pictures MGM, Paramount Pictures,

20th Century Fox, United Artistic, Universal Pictures and Warner Bro. The defendant was relying on Section 11 of 1970 Copy-Right Act, the need to prove that Nigeria was a party to treaty on Copyright, but the Court allowed the Plaintiff to sue on the ground of Section 14 dealing with reciprocal extension protection. The case went on trial and the Court found that salesman of the Defendant to infringe the Copyright of the Plaintiff. This case also established that employer can be vicariously liable for the infringement of his employee once it is established that the employee derives profit for the infringement of his employee. The case of employer and employee brings to mind of incident of casual connection between the work in issue in the infringement and the author of the work infringed material. The connection is with the work however casual and it has nothing to do with the infringer's knowledge of the author, this was the reasoning in the case of CBS Inc. and 6 Others V. Intermagnetic Co. Ltd. & another.<sup>4</sup>

The next case I will like to touch upon is a curious one, it is Musical Copyright Society of Nigeria Ltd. V. Nigeria Hotels Limited. The claim in the suit is "for the sum of N7,095.68 being the amount of royalty arising from breach of contract for the use of Plaintiff's Copyright Music by the Defendant at its various hotels throughout the Federation of Nigeria from 1976 to date". It was a claim for royalty from the defendant for using the Plaintiff's music, a soft music, in defendant's hotels, at Ikoyi Hotel Lagos, Bristol Hotel Lagos, Central Hotel Kano and Hill. The Court said that it was a proper claim.

The one important step taken by the Court to make the penalty to be paid for infringement heavy was to extend the area of liability. In the case of Island

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4. 1987 F.H.C.L. 150

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Records Ltd. & Ors. v. John Holts Shipping Services. The Court held that the Consignee or which an infringed copyright materials are contained can be sued. Hitherto, the liable was limited to the possessor alone.

What are the likely defence to a suit of infringement of Copyright? It appears the extent the Court can not go in enforcing or punishing infringement of Copyright is in Subsection 5 of Section 15 of 1988 Act which stipulates:-

"No injunction shall be issued in proceedings for infringement of copyright which requires a completed or partly completed building to be demolished or prevents the completion of a partly completed building".

The defence available to a defendant in issues for infringement of copyright appears to be the one provided in subsection 3 of Section 15 which states -

"wherein an action for infringement of copyright it is proved or admitted than as an infringement was committed but that at the time of the infringement the defendant was not aware and had no reasonable grounds for suspecting that copyright subsisted in the work to which the action relates, the plaintiff shall not be entitled under this Section to any damages against the defendant in respect of the infringement, but shall be entitled to an account of profit in respect of the infringement, whether or not any other relief is granted under this Section".

The Court has interpreted this Section strictly in favour of the Plaintiff. In CBS Inc. & Ors. v Intermagnetic Co. Ltd.,<sup>6</sup> the Court observed that -

"where it is proved or admitted that there has been an infringement of the copyright of the plaintiff but the defence is that it was neither aware nor had any reasonable ground to suspect that copyright subsists in the work of the plaintiff under Section 12(2) of the 1970 Copyright Act, - such defendant must not only allege but should also prove that at the time of the alleged infringement, he was not aware nor suspected that copyright subsisted in the work".

This view was also followed in the case of Muri Adejimi v. 3C Promotions and Consultancy Services Ltd. & Others.<sup>7</sup>

I think the greatest help the court gives to copyright owners is to allow him to have a bountiful reward for the infringement of their intellect and Labour by awarding monetary compensation to them. The compensation too is to deter the would be infringer of Copyright and allied rights known as intellectual property. The thief of these properties deserve no less mercy than the thief of material property.

The earliest of case in which heavy damages were awarded was in the case of Oladipo Yemitan v. The Daily Times (Nig.) Ltd. & Others. The Court found that the defendant flagrantly infringed the Plaintiff's copyright in an article published in the defendant's Newspaper, and that the defendant believed that the profit to be realised from the infringement might outweigh any damages resulting from litigation. The defendant was awarded ₦10,000 and an exemplary damages of another ₦15,000.00

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In the case of Chuck Adephy V. Plateau Publishing Co. Ltd. & Others<sup>8</sup> N25,000.00 was awarded as general damages and additional N10,000.00 exemplary damages. While in CBS Inc. & Others V. Intermagnetic Co. Ltd. & Others that had been referred to earlier in this paper after the Court rejected the defence for lack of reasonable ground to suspect the existence of Copyright, the Plaintiff was awarded N27,200.00 as general damages and another N14,000.00 exemplary damages.

In all these cases where damages were awarded, they include always Order of delivering up the infringed material either to the Plaintiff or for destruction and further Order of injunction forbidding the defendant from infringing material again.

Those who infringe and are caught might be advised to settle out of Court than to fight a losing and expensive battle as these damages enumerated showed that they cannot go lightly. These damages will have to be compared with a case of Ebenezer Obey Musical Company Ltd. V. Oriola Record Stores<sup>9</sup> where the parties agreed to settle out of Court after the Writ has been issued where the Plaintiff agreed to settle for only N5,000.00.

There is an interesting case of Joseph Ikhuoria V. Campaign Services Ltd. & Ors.<sup>10</sup> where Plaintiff claimed the owner of a Copyright in photograph the Court held that when a person commissions the taking of a photograph or the painting or drawing of a portrait or undertake an engraving and pays or agrees to pay for it in money's worth and the work is made in pursuance of that commission, the person who so commissioned the work is entitled to any Copyright in it as an original work. The effect is that the person who so commissioned the work is regarded as first owner of the copyright, in the absence of any agreement to the contrary. But was always held that the plaintiff had

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8. 1986 F.H.C. R. 308

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10. 1986 F.H.C.R. 308

relinquished his right to his employer.

The last issue I will like to touch before ending this paper is the provision of Section 22 of the 1988 Act which reads:-

"In any action for infringement of any right under this Act when 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 place, 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 articles, 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, authorising the applicant to enter the house or premises at any reasonable time by day or night accompanied by a police officer not below the rank of an Assistant Superintendent of Police, and

- (a) seize, detain and preserve any such infringement copy or contrivance,
- (b) inspect all or any documents in the custody or under the control of the defendant relating to the action".

This is codification of the court-made-law in England arising from the case of Anton Piller K.G. v. Manufacturing Processes Ltd. which gives <sup>its</sup> name to what is now known as Anton Piller Order. But Section 22 has gone further than the condition for Anton Piller's order. Our law empowers the entering into house which may not be a business premises once there

is reasonable cause that any infringing material is supposed to be inside. Where is the people's respect for their privacy? When is a reasonable hour of day or night? Even in England the expansion of Anton Piller Order is being resisted as Lord Denning said the invention applied a brake as shown in the case of Rank Film v. Video Centre, where he dissented that part of order requiring incrimination should be excluded. But more so the problem of Anton Piller's order in a statutory law in Nigeria is, can the incriminating evidence be used in a crime arising from the cause of action in respect in which the order was made. Or can an incriminating material obtained be used for general prosecution against the defendant in whose custody the materials were recovered when the statute did not exclude such an extension.

But in the original case of Anton Piller, Ormrod L.J. laid down three conditions under which the order should be issued, firstly that there must be an extremely good prima facie case, secondly the damage, potential or action must be very serious for the Plaintiff and thirdly that there must be clear evidence that the defendant had in their possession incriminating documents or thing and there was a real possibility that defendant might destroy such material before any application inter-parties could be made. Even Lord Denning laid down similar condition to be fulfilled before the order could be made. That in enforcement of the order, Plaintiff must act with due circumspection, that the Plaintiff attend with his Solicitor who was officer of the court; thirdly the defendant must be given opportunity of considering the order and consulting his solicitor and defendant might wish to apply to discharge the order and if the defendant refused entering, the Plaintiff must not force his

way but go back to report.

I went into details of this order and restrictions to see how Section 22 can be interpreted in the light of the conditions laid down under the English Rule. The advantage of judicial decision may be that it is more flexible than words of statute which lays the four walls within which the Court can manipulate. One can compare the easiness in which the order was given under the Court Rule in Ferodo Ltd. v. Unibros Stores<sup>11</sup> and in the one where the order was given under Section 22 in Sonny Kasushix Kaisha v. Shahari & Co. Ltd.<sup>12</sup>

It appears that Section 22 wants to out-do Rousseau in carrying out his social contract to the extent that a defendant's right in copyright matter is to be undly limited by that of the plaintiff and the larger need of the society as a whole. An evidence that in our materialistic world we are tending to give priority to material gain to human right and liberty of individual. Individual' privacy is violated before finding him guilty of any crime or being liable for any misdeed. Since it is not anybody found in possession of infringed material can be found liable of any breach or guilty of any offence after his full explanation, thus the criminal principle of not condemning a person before hearing him is thrown overboard.

These, Distinguished Audience are many ways the Court is helping to protect Copyright Owners and these are the apprehension of expensive protection of it.

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