

THE NIGERIAN COPYRIGHT ACT AND CRIMINAL LIABILITY

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INTRODUCTION

The Nigerian Copyright Act has made some provisions that call for the attention of legal practitioners and our courts. These provisions in the said Act which will be elaborated upon in parts of this paper not only created criminal liability for certain infringements of the provisions of the Act but also cast the burden of proof of innocence on the offender. This type of legislation should attract the attention of practitioners for the simple reason that it is unconventional in criminal prosecution to place the burden of proof of innocence on the accused. The universal practice is to presume an accused not guilty until the contrary is proved.

After taking a deep look at the provisions of the Act, we proffer suggestions as to the sections thereof that need to be amended to bring them in line with the constitutional provision dealing with presumption of innocence in criminal prosecution.

The importance and pre-eminence accorded to copyright in the protection of intellectual property all over the world has made it imperative for us to have a look at our own local legislation to enable us see whether we are moving with the realities of the modern commercial world. It is an old saying that "no man is an island".

In this season of "Vision 2010", it is appropriate to call the attention of the law makers to this piece of legislation to enable them have another look at the provisions of the Act.

According to the Copyright Act Cap 68 Laws of the Federation of Nigeria 1990¹ (hereinafter referred to as the Act) the word Copyright "means copyright under this Act". In more homely language, copyright can be defined as the title which an author has to the protection of his

intellectual property. It delimits the uses and how a third party can use the title an author has in his work.

HISTORICAL ORIGIN

The formalisation of the protection of copyright is a by-product of the medieval period. It was born out of the general rise of monopolies in various fields from which patents and trade marks were born. The main difference between copyright and the aforementioned concepts is that whereas patents and trademarks deal with tangible matters, copyright deals with intangible subject.

The first formalized attempt in Nigeria to codify any law relating to copyright was in 1970². Prior to that time, copyright matters were governed by the rules of Common Law and the provisions the Copyright Act 1911³. Sections 16 and 18(1) of the Copyright Decree of 1970 expressly provided for the exclusion of the rules of Common Law dealing with Copyright and the repeal of the United Kingdom Act of 1911 in so far as it applied to Nigeria.

Decree No. 61 of 1970 has nineteen sections and three schedules.

It must be noted that there are two principal Conventions in the world that govern copyright namely; the **Berne Convention** and the **Universal Copyright Convention** to which Nigeria was a signatory.

The above was **the position** of our law on the topic of copyright before the promulgation of the Copyright Act⁴. The Act expressly repealed the 1970 Copyright Decree and sections of the Criminal Code.

We shall now examine in passing the provisions of the Act for a better understanding of the remedies available to a breach of its provisions.

GENERAL OVERVIEW OF THE COPYRIGHT ACT

Section 1 deals with and set out the works that are eligible for copyright which the Act sets out as:

- (a) " Literary works;
- (b) Musical works;
- (c) Artistic works;
- (d) Cinematography films;
- (e) Sound recordings; and
- (f) Broadcasts".

Section 2 deals with the subject of copyright by virtue of nationality or domicile. Copyright by reference to the country of origin is dealt with in section 3, section 4 deals with the creation of copyright in works of Government, State Authorities and International bodies. Section 5 deals with the general nature of copyright. Sections 6, 7 and 8 deal with the general nature of copyright created in sound recording, broadcast and cinematography film respectively.

In section 9, provisions are made for the vesting of copyright created under sections 2 and 3 of the Act in the initial author of the work. Section 10 makes it possible for a copyright to be transmissible by assignment, testamentary disposition or by operation of law as movable property.

The right of the owner to claim authorship is provided for in section 10. The right of authors of graphic works, three dimensional works and manuscripts to have a share in the proceeds of the sale of their work through public auction or other method of sales is preserved in section 12. Section 13 casts a duty on publishers, printers, producers or manufacturers of works in which copyright subsists to keep a register of all the works produced by them.

Section 14 sets out the circumstance under which an infringement of a copyright could be said to have been committed.

The right to bring an action for the infringement of a copyright was provided for in section 15 by the owner, assignee or an exclusive licensee of the copyright at the

Federal High Court⁵.

Section 16 vests the ownership of any material that is designed to infringe a copyright in the owner, assignee or exclusive licensee of the copyright. Section 17 elevates an infringement under section 9 of the Act to a breach of a statutory duty. For its importance the section reads.

"17.(1) An infringement of the rights conferred by section 9 of this Act is actionable as a breach of statutory duty owned to the person entitled to the right.

(2) In proceedings for infringement of the rights conferred by the said section 9 of this Act, the person whose rights have been infringed shall be entitled to an award of damages, injunction and any other remedies as the court may deem fit to award in the circumstance".

Section 18 makes very copious provisions for criminal liability under the Act. Section 19 deals with situation where the offending person is a body corporate. It sets out the penalty for such bodies and its managers. Penalties for making false entries by those expected to keep registers under the Act are provided for in section 20.

Section 21 abolishes the Common Law rule that while a person is standing trial for a criminal offence, he cannot be made to face a civil suit until the conclusion of the criminal trial. That section allows the simultaneous prosecution of the criminal case and a civil one in matters of infringement of copyright⁶.

In section 22 the right of an applicant in an action for the infringement of copyright to approach the Court vide an ex-parte application to enter upon the premises where the offending act is been committed was provided for.

In part two of the Act, the Act makes provisions for what is commonly known as **neighbouring rights**.

Section 23 preserves the right of a performer and in section 24 the right is protected for a period of **fifty years** from the end of the year that the performance first took place.

In section 25, the circumstances under which a performer's right can

be said to have been infringed are set out. Section 26 provides for the reliefs that may be awarded in favour of a performer whose copyright was infringed.

Section 27 provides for the criminal liability of anyone that contravenes the provision of section 25 of the Act. Section 28 protects the right of the expressions of folklore and section 29 provides that anyone that uses an expression of folklore without the permission of the **Nigerian Copyright Council** will be liable to the Council in damages, injunctions and any other remedies the Court may make.

Part III of the Act deals with the creation of statutory bodies that are to administer the provisions of the Act.

The establishment of the Nigerian Copyright Council is provided for in section 30, while section 31 provides for the functions of a Governing Board for the Council.

The appointment of a Director and other staff of the Council are provided for in section 32. In part IV of the Act various matters are provided for as miscellaneous.

Section 33 gives the Minister responsible for copyright matters the power to extend the protection of the provisions of the Act to citizens of other countries. In section 34 the validity of an affidavit affirming that copyright exists in any work is sanctified. Section 35 of the Act provides for presumptions as to the existence of a copyright in a work, the ownership of the copyright by the plaintiff and such other matter.

Section 36 provides for restriction on the importation of any published literary, artistic, musical or sound recording.

The power to make regulations for the purpose of carrying the provisions of the Act into effect is vested by section 37 in the Minister responsible for copyright matters. The exclusive jurisdiction of the Federal High Court to deal with all cases on copyright is provided for in section 38, while section 39 is the interpretation section. Section 40 repeals the Copyright Decree of 1970 and sections 49(1), 49(2) and 49(3) of the first schedule of the Criminal Code Act. Section 41 is the short

title of the Act. In all, there are 5 schedules in the Act.

In 1992 vide the **Copyright Amendment Decree No. 98 of 1992**, the Act was amended. The sections of the Act affected by the amendment are sections 5, 6, 7, 11, 12, 14, 17, 18, 30, 32, and 39. The most far reaching of the amendments was the one made to section 32 in which subsections A, B and C; were added among others.

Section 32(A) makes provision for the appointment by the **Council of Copyright Inspectors**, section 32(B) creates **Collecting Society**, while 32C makes provisions for the imposition of levies on copyright materials. Both the third and fourth schedules to the Act were equally amended.

This now brings us to a consideration of the remedies available under the Act for any unlawful infringement of a copyright.

AVAILABLE REMEDIES UNDER THE ACT

Broadly speaking, there are two types of remedies that are provided for under the Act, namely penal and civil. That is, criminal remedies and civil remedies.

CRIMINAL LIABILITY

Section 18 of the Act provides for three categories of criminal culpability. To fully comprehend the section, it is necessary to quote **in-extenso** the provisions of subsections (1), (2) and (3) of the said section which run thus:

"18(1) Any person who

(a) makes or causes to be made for sale, hire, or for the purposes of trade or business any infringing copy of a work in which copyright subsists; or

(b) imports or causes to be imported into Nigeria more than two infringing copies of such work; or

(c) makes, cause to be made, or has in his possession, any plate, master tape, machine, equipment or contrivance for the purposes of making any infringing copy of any such work; shall unless he proves to the satisfaction of the court that he did not know and had no reason to believe that any such copy was not infringing copy of any such work, or that such plate

master tape, machine, equipment or contrivance was not for the purpose of making an infringing copies of any such work, be guilty of an offence under this Act and shall be liable on conviction to a fine of an amount not exceeding N1,000 for every copy dealt with in contravention of this section or to a term of imprisonment not exceeding five years, or to both such fine and imprisonment.

(2) Any person who-

(a) sells or lets for hire or for the purposes of trade or business, exposes or offers for sale, or hires any infringing copy of any work in which copyright subsists; or

(b) distributes for the purposes of trade or business any infringing copy of any such work; or

(c) has in his possession other than for his private or domestic use, any infringing copy of any such work;

shall, unless he proves to the satisfaction of the court that he did not know and had no reason to believe that any such copy was an infringing copy of any such work, be guilty of an offence under this Act and shall be liable on conviction to a fine of ₦100 for every copy dealt with in contravention of this section, or to a term of imprisonment not exceeding two years or in the case of an individual to both such fine and imprisonment.

(3) Any person who, without the consent of the owner, distributes, in public for commercial purposes, copies of a work in which copyright subsists by virtue of section 5(1)(a)(vi), 5(1)(c)(vi), 6(1)(b) or 7(1)(c) of this Act by way of rental lease, hire, loan or similar arrangement, shall be guilty of an offence under this Act, and shall be liable upon conviction to a fine of ₦100 for every copy dealt with or imprisonment for six months or to both such fine and imprisonment."

The significant point in subsection (1) and (2) is that the onus of the proof of innocence is cast on the accused person. This is

against the provisions of the Constitution of the Federal Republic of Nigeria 1979⁷. Section 27(1) of the same Act provides for the criminal liability of anyone that infringes the performer's right in the following language:

"27.(1) Notwithstanding the provisions of section 25 of this Act, a person who does any of the acts set out in the said section 25 shall, unless he proves to the satisfaction of the court that he did not know that his conduct was an infringement of the performer's right be liable on conviction:

(a) in the case of an individual, to a fine not exceeding ₦10,000;

(b) in the case of a body corporate, to a fine of ₦50,000.

(c) In all other cases, to a fine of ₦100 for each copy dealt with in contravention or to imprisonment for twelve months or to both such fine and imprisonment."

Section 19 provides for the criminal liability of bodies corporate; but significantly only the directors, secretaries or other officers of such bodies that know of the infringement will be liable to the punishment prescribed in section 18 and 27 of the Act.

In section 20 anyone that fails to keep a register as required under section 13 of the Act is also criminally liable upon conviction but only to a maximum fine of ₦10,000.00.

Any person that gives false information under section 22 dealing with order for inspection of premises where infringing materials are found is liable upon conviction to a fine of ₦1000.00.

On the other hand a conviction under the provisions of section 18 and 27 of the Act for anyone convicted may earn a jail term of between 12 months and 5 years and a fine of between ₦100.00 to ₦1000.00 or to both such imprisonment and fine.

CIVIL REMEDIES

Any person who has a copyright in any of the specified items under the Act reserves the right to initiate civil action at the Federal High

Court for any infringement of his copyright.

The remedies that the Federal High Court can award where the action is successful are award of damages, orders of injunction, or order for account. In addition to the above, the copyright owner will be entitled to account. In addition to the above, the copyright owner will be entitled to all the copies of the infringing materials that the Court may so find. The above matters are covered by section 15 and 16 of the Act.

It is also noteworthy that the owner of an infringed copyright has the right if the Court so orders, under an *ex-parte* order to go onto the premises where the infringement has taken place to take possession of the offending article with the assistance of a police officer not below the rank of an Assistant Superintendent of Police, under Section 22(1) of the Act.

Section 21 abolishes the common law rules as to the simultaneous prosecution of criminal and civil actions in the same cause. It provides *inter alia* as follows:

"21. Notwithstanding the provisions of any law to the contrary, it shall be permissible for both criminal and civil action to be taken simultaneously in respect of the same infringement under this Act"⁸.

Section 26 replicated the provisions of section 15(1) & 16 in a condensed manner with respect to the entitlement of the right of copyright owner to orders of damages, account, injunction and conversion with respect to performer's right.

It is still debatable or a moot point whether the various remedies under the Act are enough to assuage the injury that is inflicted on a copyright owner whose right has been breached.

RECOMMENDATIONS

In order to make the provisions of the Act more beneficial to the objects of the law, we call on Government to further amend the Act in the following terms:

- (a) The penalties provided for infringement of copyright under the Act should be stiffer. Anyone

that infringes a copyright is like a robber and should be treated with some measure of penal seriousness.

- (b) A corporate body that infringes a copyright should be made to pay a very heavy fine upon conviction and its operating documents suspended for a specific number of years.

- (c) There should be specific provisions in the Act for the award of exemplary and aggravated damages for flagrant infringement of copyright by individual or corporate bodies.

- (d) A vigorous machinery for the enforcement of the provisions of the Act should be set into motion and this should include representatives of the direct beneficiaries of the Act, and other professional bodies.

- (e) All the sections that cast the onus of proof of innocence on an offender under the Act should be repealed since the provisions appear to be unconstitutional.

CONCLUSION

In the modern world, it is now the vogue for each country to make laws to protect her citizens' intellectual property from unwarranted assault by unauthorized persons. This is the underlying principle for the promulgation of the Copyright Act. As laudable as this law appears to be, lack of proper enforcement is a bane for its effectiveness. Government and all those who are concerned with the scheme of the Act are called upon to see to the effective implementation of the provisions of the Act. Moreover, there is the need to have another look at the sections of the Act that deal with remedies for infringement of a copyright.

If Government implements some of the recommendations suggested above, it is our view that the Act will become more effective.

All said and done, the beneficiaries of the Act must act in concert to assist Government to see to the full implementation of the provisions of the Act.

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1. Volume 5 Revised Edition, Law of the Federation of Nigeria, 1990, Cap. 68.
2. Copyright Decree No. 1 of 1997.
3. Copyright Act of United Kingdom 1911.
4. Caps 68 of 19th December 1988. It was promulgated as a Decree in 1988 but made into an Act by the Laws of the Federation, 1990.
5. See generally Decree No. 107 of 1993 which amended Section 230 (1) of the Constitution of the Federal Republic of Nigeria 1979 dealing with the jurisdiction of the Federal High Court.
6. Generally this abrogates the rule in *Smith v. Selwyn* (1914) 3 K.B. 98. See the Nigerian cases of:
 - (a) **Veritas Insurance Company Ltd. v. Citi: Trust Investment** (1993) 3 NWL (pt 281) 349 at 365.
 - (b) **A.G. Federation v. Dawodu** (1995) 2 NWLR (PT 380) 712 AT 723.
7. See Section 33 of the Constitution of the Federal Republic of Nigeria 1979 as amended.
8. See footnote 6 *infra*.