

9. NIGERIA COPYRIGHT REFORM AND DIGITAL TECHNOLOGY

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ABSTRACT

This article examines the provisions of the Nigerian Copyright Bill currently pending before the National Assembly. The key objective of the reform is to re-position Nigeria's creative industries for greater growth, strengthen their capacity to compete more effectively in the global marketplace, and enable Nigeria to fully satisfy its obligations under various international copyright instruments, which it has either ratified or indicated interest to ratify. The paper provides a historical perspective on the development of copyright law in Nigeria from the introduction of the first indigenous copyright law to the current copyright legislation. Since independence in 1960, Nigeria has had two indigenous copyright statutes: the Copyright Decree of 1970; and the Copyright Decree 47 of 1988, (later codified as Copyright Act, Chapter C28, Laws of the Federation of Nigeria, 2004, following amendments in 1992 and 1999). The paper highlights the challenges of the first indigenous copyright legislation, discusses some of the provisions of the Act, and the subsidiary legislation. It also examines the role of

the Nigerian Copyright Commission as the agency saddled with the responsibility of administering Nigeria's Copyright laws. The paper concludes with thoughts on the future for copyright in Nigeria and urges the National Assembly to pass the Copyright Bill in order to grow Nigeria's creative industries and harness their contributions to the non-oil sector of the economy.

Keywords: *Nigeria, Copyright reform, copyright law, international copyright law*

1. INTRODUCTION

The emergence of new forms of intellectual property, such as knowledge embedded in new technologies, has brought enormous pressure on existing property rights. These new forms of wealth have not assimilated into dominant property rights' regimes as one would have hoped. As such, problems regarding the appropriateness of those property notions continue to emerge. For instance, developments in information technology have raised questions concerning the capacity of existing copyright laws to protect rights of actors in new technologies, while ensuring that the flow of information is not hampered.¹ As

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Library and Information Science from the University of Ibadan; and a Ph. D in Law from Obafemi Awolowo University, Nigeria. Other teaching and research experience include; Creative Commons and open access systems, International Finance trade and methods of payment, E- Commerce, Law of Banking and Negotiable Instruments. In the course of her teaching duties, she is passionate on mentoring students and promoting gender balance; she has published in both local and International Journals. She was awarded the "Honourable Mention Award for Excellence" by the American Association for the Advancement of Science, (AAASPD) for her oral presentation held at the

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¹ John Perry, Barlow. *The Economy of Ideas: A Framework for Rethinking Patents and Copyrights in the Digital Age*, (1994). 3 *Wired* 83 and Margaret Jane Radin, *Property at the Crossroads: Two Paradigms in Need of Reinterpretation.* Fifth Conference on Computers, Freedom and Privacy, March 1995

knowledge-based products, which have become the new trading commodities. Creative industries are at the heart of these developments.

Nigeria, a nation with large creative capacity is recently witnessing exponential growth in the movie and music industries and is a potential beneficiary of the emerging global economy.² The copyright system provides a framework for generating and managing these innovative products. The process of production and dissemination of creative works involves a considerable amount of financial and human resources. Major recording companies spend millions of Naira on the promotion of artists and their works. Promotion campaigns consisting of events such as music concerts or television shows attract millions of people. These large-scale campaigns would not be possible without the certainty that those who invest in these industries will be able to recoup their investments and be rewarded for their efforts. The orderly acquisition and transfer of rights in various products emanating from the industry guarantees return on investments.

machinery tagged 'Copyright System Reform' which aims to reform the nation's copyright system to reposition the copyright sector for increased economic performance. He stated further that this reform had become long overdue and was necessary in order to bring the copyright system up in line with international treaties and also to boost the sector and the economy.¹⁷

In an attempt to combat computer crime related activities, two Draft Bills were drafted entitled Computer Security and Critical Infrastructure Protection Bill 2005 and the Cyber Security and Data Protection Agency (Establishment, etc.) Bill 2008. The Cyber Security and Data Protection Agency (Establishment etc.) has been passed into law while the Computer Security and Critical Infrastructure Protection Bill has not been passed into law. These two, by criminalising activities related to tampering with access codes or passwords used to protect data stored up in a computer, would have been able to combat activities of circumventing technological protection measures. This would have somewhat impacted intellectual property in the digital environment.

Despite all these attempts at reforms, it

At first glance, this permissible use appears strict and in line with the requirements of the Berne and TRIPS three-step tests regarding flexibilities.²⁶ Flexible exceptions that turn on general balancing tests are useful in allowing the law to adapt to the 'next wave' of developments in culture, technology, and commerce, which often cannot be foreseen. The current formulation of Sec. 20(1)(a) is limited, however, to 'purposes of research, teaching, education, private use, criticism, review or the reporting of current events.' Uses falling outside of this list cannot benefit from the flexible exception even if they are otherwise fair.²⁷

There is a general trend in modern copyright laws providing exceptions that are open as well as flexible. By 'open,' it refers to the ability to apply the flexible exception to purposes not explicitly identified in the statute. Such openness is the hallmark of the U.S. 'fair use' clause, which contains a similar list of illustrative purposes as the Copyright Bill but makes this list open by inclusion of the phrase 'such as' before the explanatory list. Thus, it can be applied in cases of other purposes not foreseen in the original Act, which has been extremely useful in enabling new uses by artists and entrepreneurs alike. Similar open flexible exceptions have been included in recent copyright reforms in the Philippines, Israel, South Korea, Malaysia and Singapore. Open flexible exceptions have also been recommended by the Australian Law Reform Commission and by the South African Department of Trade and Industry, though not yet implemented in either country.²⁸

²⁶ Berne Convention for the Protection of Literary and Artistic Works, art 9(2), Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979 S. Treaty Doc No. 99-27 (1986) [hereinafter Berne Convention]; Agreement on Trade-Related Aspects of Intellectual Property Rights, art 13, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1994 O.T.S. (L.R.) 14.31(on)-2.illnd0.853s

Likewise, U.S. copyright law has recognized that, within reasonable limits, visual artists, as well as filmmakers, should be permitted to quote one another's protected expression in developing new work of their own. A painter may elaborate an image first drawn or photographed by another, just as a screenwriter may incorporate a well-known line from a novel into a new film script, relying on fair use. No one suffers economic loss as the result of such quotation; instead, but more (and better) work is produced overall, with resulting benefits to both the cultural public and the economy. However, because such creative appropriation falls outside the list of uses subject to fair dealing in the Copyright Bill and is not covered by any specific exception (including that for 'parody, satire, pastiche, and caricature'), it could not be lawful under the Nigeria Copyright Bill.³⁰

Here it is noted that Article 10(1) of the Berne Convention provides:

'It shall be permissible to make quotations from a work, which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.'

Unlike other exceptions provided for in Berne, Article 10(1) generally is considered to impose an obligation to provide an exception for fair quotation. That is, fair quotation is framed as a mandatory provision, as 'something that must be provided for under national laws, rather than as something that may be done at the discretion of national legislators.'³¹

work/cases/lennon-v-premise-media> and *Faulkner Literary* -

physically are nevertheless able to see, read, and analyze them. Again, this practice is enabled by a flexible and open fair use provision and no place for it appears to exist in the Copyright Bill.³⁴

The language derived from the so-called 'three-step test' that originated in Article 9(2) of the Berne Convention, has since found its way into other international agreements related to copyright. It represents an intentionally vague, generalized standard for what kinds of copyright limitations are permissible in national legislation – that is, a point of reference in diplomatic negotiations or (rarely) in state-to-state conflicts adjudicated in international tribunals. Whatever the test's meaning, there is no basis

on which to support

Part V. Provision for criminal liability.

A new feature of the Bill is that apart from creating liability for principal offenders, there is also liability in respect to aiding and procuring the commission of copyright offences.⁴⁵ It expanded the definition of infringements of copyrights in software and the scope of guarantees and remedies available. Regarding infringements, the Bill recognises criminal liability for legal persons and for those involved in organised infringements of rights.⁴⁶ Both of these concepts are currently absent in the Copyright Act 1999 and there has been previously expressed dissatisfaction in this regard.⁴⁷ The Bill also includes measures such as granting an injunction or an order for the disposal of infringing copies as well as the seizure of infringing copies by custom authorities even in the absence of a plaintiff.⁴⁸

Part VI. Circumvention of Technological Protection Measures

The new feature introduced by the draft Bill provides for

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Sec. 66(2)(a) provides that ‘the doing of any of the acts by way of fair dealing for private and domestic use, subject to the condition that, if the use is public, it shall be accompanied by an acknowledgment of the title of the work and its source....’

Although well intended, this wording leaves some confusion in its wake. Specifically, it raises a doubt about whether, so long as the title and source identification requirement are fulfilled, the exception does in fact apply to public commercial uses.

Likewise, unlike Section 20(a)(1), this section fails to specify that the title and source identification requirement applies only ‘where practicable.’ This is a significant omission, since expressions of folklore (or traditional culture) often will be untitled, and in many cases will be associated only conjecturally (if at all) with any group or community.

To resolve these uncertainties, the following revision of Section 66(2)(a) is recommended:

...the doing of any of the acts by way of fair dealing [for private and domestic use], subject to the condition that, if the use is public, it shall be accompanied by an acknowledgment of the title of the work and its source where practicable.

Part X. Administrative Framework

The Part provides for the establishment, membership and functions of the Governing Board of the Nigerian Copyright Commission,⁷¹ and appointment of the Director-General and other staff of the Commission (and Copyright Inspectors).⁷² The part also provides for registration of works,⁷³ establishment and approval of

collective managements organisations,⁷⁴ and levy on copyright materials (also known as private copying levy).⁷⁵

The provision relating to collective management organisations allows for extended collective management.⁷⁶

Part XI. Miscellaneous Provisions

Miscellaneous provisions contained in Part XI include provisions on establishment of a dispute resolution panel;⁷⁷ restrictions on importation of certain works;⁷⁸ powers of the Commission to make regulations;⁷⁹ limitations on suits against the Commission;⁸⁰ the interpretation section;⁸¹ and transitional and savings provisions.⁸²

⁷¹ *ibid*, S. 70.

⁷² *ibid*, SS 71 & 72.

⁷³ *ibid*, S. 73.

⁷⁴ *ibid*, S. 74.

⁷⁵ *ibid*, S. 75.

⁷⁶ *ibid*, S. 74(10).

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