

# REMEDIES FOR INFRINGEMENT OF COPYRIGHT: A CONTEMPORARY PERSPECTIVE.

By

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## ***Abstract***

*To every breach, there must be a remedy. Part of the purpose of the law is to ensure that, no one is pained or made to suffer from the actions or inactions of another person. The scope of this paper is to attempt a discourse of the remedies available for the infringement of copyright in a work, even as technology leaps globally. We have provided several definitions of copyright, both statutory and case law, to give a deeper insight into what the concept 'copyright' is. Also, the rationale behind the whole idea of copyright has been considered in the paper in the objectives of copyright. Furthermore, an attempt has been made to lay the background of what constitutes an infringement of copyright in a work before giving detailed expression of the remedies available to such infringement whether in civil or criminal proceedings. The curtain was drawn on the discourse as it reflects that, both common law and equity have put in place appropriate measures to remedy the loss that may be suffered by a creator of work because of the infringing act of another person 'who eat or attempt to eat where he has not sowed'. The paper has, in general, succinctly establish the maxim, 'ubi jus ibi remedium' meaning 'where there is a wrong, there must be a remedy'.*

**Keywords:** Copyright, damages, entertainment, infringement, protection, remedies.

## **Introduction**

It is unarguably correct to state that 'copyright is a property right'<sup>1</sup>. It is one of the three most important forms of intellectual property right, with the others being; Patent and Trademark. Copyright subsists in practically every form of original written work whether recorded on paper or in a computer or otherwise; also, in artistic works, photographs, films and videos or broadcasts. Computer programs and databases are also covered. Musical works (the actual composition, symphony) also gets copyright protection. The main Statute dealing with the subject of copyright in Nigeria provides rather vaguely that, '*copyright means copyright under this Act*'<sup>2</sup>.

However, an examination of relevant provisions of the Act provides a clearer picture of the copyright concept. For instance, **S.6** of the **Copyright Act** under the 'general nature of copyright' provides that copyright in a work shall be the exclusive right to control the doing in Nigeria of certain acts in relation to the work. Such acts include:

- 1) Reproducing the work in a material form.
- 2) Publishing or performing the work in public
- 3) Translating, adapting, distributing or communicating the work to the public.

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<sup>1</sup>See S.1 of the *Copyright, Designs and Patents Act, 1988 (CDPA)*

<sup>2</sup> Nigerian Copyright Act Cap. C28, LFN, 2004- S. 51 (here in after referred to as Copyright Act).

This description of the nature of copyright is in accord with definitions proffered by learned writers as examined below.

- 1) *Copinger and Skone James* described copyright as ‘one of the three main branches of intellectual property law which gives the owner the exclusive right to authorize or prohibit certain uses of his work by others’<sup>3</sup>.
- 2) *Leaffer* on his part, commences with the literal definition of ‘Copyright’ as ‘the right to make copies’<sup>4</sup> but proceeds to acknowledge that, technological leaps and the realities of modern day options for creativity and the exploitation of creative works have, overtime necessitated the expansion of the scope of copyright both in terms of the nature and subject matter of protection.
- 3) *Whale* frowns at attempts to narrowly restrict the scope of copyright and attempts its definition by stating what it is not<sup>5</sup>. In his view, the first thing to understand about copyright is that, it is not merely the right to copy and accordingly, the word copyright is a misnomer which has obscured the moral basis of the right, in his view.
- 4) *Bainbridge* on his part aptly describes copyright as a property right which subsists in various works for instance, literary works, artistic works, musical works, sound recordings, films and broadcasts<sup>6</sup>.

From the above definitions, it is quite apparent that, beyond the making of copies, copyright is more akin to a proprietary right which confers exclusive rights to authorize or prohibit a wide range of activities relating to qualified subject-matter. These activities include; the performance, adaptation, translation, publication and other forms of use or exploitation of protected works<sup>7</sup>. This way, the law can provide legal recourse for the creator of a work against those who copy, might want to copy, or otherwise, appropriate the work without lawful permission.

### **Objectives of Copyright.**

The Objectives of copyright include:

1. Protecting the rights of the works fixed in materials or other definite form, and not ideas<sup>8</sup>. Thus, a mere intellectual or mental conception of an idea is not protected by copyright until the idea has been expressed in a material form such as by writing, printing, recording or any other definite form. Hence, the statement ‘copyright does not protect ideas, but the expression of ideas’.
2. Protecting both economic and moral rights. Economic right aims at securing the financial interest of the author by conferment of an exclusive right to exploit the work commercially. While, moral rights protect the author’s honor and reputation about the work.

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<sup>3</sup> Garnett K, Davies G and Harbottle G. *Copinger & Skone James on Copyright* (15<sup>th</sup> ed.) London, 2005, Sweet & Maxwell @ p.1

<sup>4</sup> Marshall Leaffer - ‘Understanding Copyright Law’ (3<sup>rd</sup> Ed. New York: Matthew Bender, 1999) p. 2

<sup>5</sup> R.F. Whale, *Copyright* (Longman 1971) p.1; see also Folarin Shyllon ‘Intellectual Property Law in Nigeria’ (Max Planck Institute for Intellectual Property, Munich, 2003), Vol. 21, pp. 4 &31

<sup>6</sup> David Bainbridge- ‘Intellectual Property’ (6<sup>th</sup> Ed. Essex: Pearson,2007) p.5

<sup>7</sup> See W. Cornish, D.Llewelyn and T.Aplin: ‘Intellectual Property’ (7<sup>th</sup> Ed.) Sweet & Maxwell, 2010: London, p.441

<sup>8</sup> F.O. Babafemi: ‘Intellectual Property’ (1<sup>st</sup> ed.) - Justinian Books Ltd, 2007, Ibadan, p.7; see also S. 51 Copyright Act

3. Granting exclusive right to the creator of an eligible work upon fixation of the work in any definite medium of expression automatically, so, he requires no registration or compliance with any other formality. This is in line with the Berne Convention<sup>9</sup> which provides for the recognition of copyright in a work upon its creation without the need for compliance with any formalities. This differentiates copyright from other Intellectual Property Rights where registration is a pre-requisite to legal protection.
4. Protecting public interest in the free dissemination of and access to copyright works for educational, research and other beneficial purposes. This is achieved through the exceptions or limitations to the exercise of copyright in form of *Fair dealing and Compulsory Licensing*.<sup>10</sup>
5. Meeting the twin objectives of safeguarding private ownership rights of creators of works and public interest of users of the works.

The unauthorized doing of any of the acts which are within the exclusive rights of a copyright owner constitutes an infringement of copyright. In this vein, it is only the original creator of a work that has the exclusive right to perform, translate, adapt, publicize or exploit the work and so, anyone that does any of the acts without the authorization of the creator, is said to have infringed such work. The question left to be asked therefore is, what constitutes infringement of copyright in a work?

### Copyright Infringement

In a protected work, right of a copyright owner will be deemed to be infringed by any person who, without license or authorization of the owner of the copyright does any of the following.<sup>11</sup>

1. Doing or causes another person to do an act (copying of another's work), without requisite permission or consent of the owner of copyright, the doing of which is controlled by the Act. In *CBS Inc. & Ors v. Inter-magnetic Co. Ltd & Anor*,<sup>12</sup> it was held that, since the burden of proof of infringement had been discharged by the Plaintiff, the burden now shifts on the defendant to prove no similarity in the alleged copied work. The Defendant could not do this.
2. Imports into Nigeria aside for his private or domestic use, any article or work in respect of which copyright is infringed or causes to be imported, any work which if it had been made in Nigeria would be an infringing copy under this section of the Act. In *Compact Disc Technologies Ltd & 2 Ors v. Musical Copyright Society of Nigeria LTD/GTE (MCSN)*<sup>13</sup> where, the Appellants were charged with action for infringement of copyright in respect of an unauthorized importation, recording, reproduction, distribution of some copyright works.
3. Exhibit in public any article or work in respect of which would be an infringing copy if it had been made in Nigeria and would be infringing the right of the copyright owner. In

<sup>9</sup>Article 5(2) of the Berne Convention (Switzerland) for the Protection of Literary & Artistic Works, 1886

<sup>10</sup> See 2<sup>nd</sup> and 4<sup>th</sup> Schedule to the Copyright Act.

<sup>11</sup> See Copyrights Act S.15 (1); see also J.O. Asein- 'Nigerian Copyright Law & Practice' (2<sup>nd</sup> Ed.)- Books & Gavel Ltd., 2012, Abuja, p.168

<sup>12</sup>(1977-89) 2 *IPLR* 351/(1987) F.H.C.L. 150; see also *Kabushiki Kaisha Sony Computer Entertainment Inc. V. Ball* (2004) *E.C.D.R.* 33 (Ch.D), J.O. Asein, *op. cit* @ p. 177

<sup>13</sup>(2008-2011) 6 *IPLR* 198

*Peter Obe v. Grapevine Communication Ltd*<sup>14</sup> where, the photographs taken by the Plaintiff during the Civil War were published in a magazine without authorization. It was held that, it constituted an exhibition of work in public.

4. Distributes by way of trade, offer for sale, hire or otherwise or for any purpose prejudicial to the owner of the copyright, any article in respect of which is controlled by copyright. In *Nigeria Copyrights Commission v. Vitalis Ikukoha*<sup>15</sup>, the case illustrated distribution right. The Defendant offered for sale and distribution for trade, infringing copies of a text book to which copyright subsisted.
5. Makes or has in his possession, plates, master tapes, machines, equipment or contrivances used for making infringed copies of the work. In *Okilo v. Dick Francis & Anor*,<sup>16</sup> the Plaintiff duplicated the master tape of a musical work and sent them to his friends in Holland and England without authorization. This constitutes an infringement under this heading as he must have had in his possession plates, machines, equipment and other items to carry out the said act.
6. 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 that permitted the place to be used was not aware and had no reasonable ground for suspecting that the performance would be infringing the right of a copyright owner or would be an infringement of the copyright. In *Fonovisa Inc v. Cherry Auction Inc*,<sup>17</sup> an operator of a flea market was held vicariously liable for its vendor's sale of counterfeit goods. The market is a public place for business and the operator failed to check the products sold by those under his control which infringed the copyright of the original product. It was held that, the defense in S.15(1) (f) of the Copyright Act was only accruable in respect of performance of works not sale or other acts as in this case.
7. Performs or causes to be performed for the purposes of trade or business or as a supporting facility to a trade or business any work which is protected by copyright. In *Yemitan v. Daily Times Nigeria Ltd & Anor*,<sup>18</sup> the literary work of Plaintiff was, without authorization, published in the Defendant's daily which was for sale and support. It was held that, such publication amounted to an infringement of the copyright in the work.

The Copyright Act provides for both civil and criminal actions for infringement of copyright and both actions may be taken simultaneously in respect of the same infringement<sup>19</sup>. A civil action in respect of infringement of copyright in a work is usually instituted by *Right Holders*, while criminal infringement actions are usually undertaken by *The State (through the Nigerian Copyrights Commission)*<sup>20</sup>.

It is commonly said that, '*to every wrong, there is a remedy*'. It must be noted that, the wrong caused the creator of a work, because of the infringement of copyright in his work, is not without remedies. To vest requisite *locus*, only legally authorized or accredited owners<sup>21</sup> can seek redress

<sup>14</sup>(2003-2007) 5 IPLR 354

<sup>15</sup>(2008-2011) 6 IPLR 57

<sup>16</sup>(2003-2007) 5 IPLR 243

<sup>17</sup> (76F. 3d 259 (1996)

<sup>18</sup> (1980) FHCR 186 (1977-1989) 2 IPLR 11

<sup>19</sup> S. 24 Copyright Act

<sup>20</sup> F.O. Babafemi, op. cit @ pp.67 & 80; see also S. 38(2) Copyright Act

<sup>21</sup> Author of the work himself, the assignee or the licensee

for infringement of copyright as held in *M.C.S. Ltd/GTE v. Adeokin Records & Anor*<sup>22</sup>. How then can an infringement of copyright be remedied?

In an action for infringement of copyright, it is the claim of the plaintiff that determines jurisdiction. The Constitution of the Federal Republic of Nigeria, 1999<sup>23</sup> confers exclusive jurisdiction on the Federal High Court. This was reverberated by the court in *Microsoft Corporation v. Franike Associates Ltd*<sup>24</sup>.

### **Remedies to Copyright Infringement**

The provisions of S. 16(1) of the Act<sup>25</sup> provides that:

“... infringement of a copyright shall be actionable at the suit of the owner, assignee or an exclusive licensee of the copyright, as the case may be, in the Federal High Court exercising jurisdiction in the place where the infringement occurred, and in any action for such infringement, all such relief by way of damages, injunction, accounts or otherwise shall be available to the Plaintiff as is available in any corresponding proceedings in respect of infringement of other proprietary rights”.

Both civil and criminal remedies are available for the infringement of a copyright work as this paper extensively discussed below.

### **Civil Remedies to the Infringement of Copyright**

The civil remedies available for the infringement of copyright in a work include:

1. Damages
2. Account of Profit
3. Delivery up
4. Conversion rights
5. Injunction
6. Anton-Pillar Order

### ***Damages***

Infringement of copyright amounts to an injury to the copyright owner. The damages suffered may have affected his pecuniary interest in the infringed work. Therefore, damages as a remedial award aims at restoring the plaintiff to the original position he ought to have been before the violation of his copyright. The award for damages entails the payment of monetary compensation as recompense for the harm suffered from an act of infringement. Damages may be calculated based on loss incurred by the copyright owner because of the act of infringement by the other party. In the case of *Sutherland Publishing Co. Ltd v. Caxton Publishing Co. Ltd*,<sup>26</sup> the court stated that the normal measure of damages for copyright infringement is the amount by which the value of the copyright as a chose in action has depreciated.<sup>27</sup>

<sup>22</sup> (2007) 13 NWLR (pt.1052) 616

<sup>23</sup> See S.251 (1) (f); see also S. 46 of the Copyright Act, Cap. C28 LFN 2004

<sup>24</sup> (2012) 3 NWLR (pt.1287) 301; see also *Ayman Ent. Ltd v. Akuma Ind. Ltd* (2003) 13 NWLR (pt. 836) 22

<sup>25</sup> *Cap C28, LFN 2004*

<sup>26</sup> (1936) 1 ALL ER 177

<sup>27</sup> Per Lord Wright

Being a monetary form of compensation, it is usually most often than not granted or pleaded by the Plaintiff. In *Oladapo Yemitan v. The Daily Times of Nigeria Ltd*,<sup>28</sup> the court was able to establish the fact that the damages accruable to a copyright owner as remedy for the infringement of his work, may be

1. General Damages.
2. Special Damages.
3. Exemplary or Punitive Damages.
4. Nominal Damages.

A type of or combination of any of the above type of damages may be awarded a right holder depending on the facts of the case, the proof of infringement and the nature or degree of the infringement.

**General damages** are the damages that naturally flow from the Defendant's conduct and its quantum need not be pleaded or proved as it is generally presumed by law.

**Special damages** on the other hand are damages which are not presumed by law therefore must be specifically pleaded and proved. The trial judge in awarding special damages must act strictly on the evidences before him which he accepts as establishing the amount to be awarded.<sup>29</sup>

**Exemplary, Punitive or Aggravated damages** are not awarded merely to compensate the plaintiff but to punish the defendant and to deter him and others from similar behavior in the future.

**Nominal Damages** are awarded in those cases where the Plaintiff establishes a violation of his rights by the Defendant, but he is unable to show that he suffered any actual damage because of the Defendant's wrong doing. It may also be awarded where, damage has been proved but no evidence of same has been given as to its extent for assessment of possible compensation.

In the case of *Masterpiece Investment Ltd v. Worldwide Business & 2 Ors*,<sup>30</sup> the defendants published an article for commercials in the December edition of Business Magazine in 1989. This article was like a previous article published in the same magazine in October of the same year. In an action for infringement of copyright, the court held that the defendants were liable. The plaintiffs claimed to have suffered general damages of N300,000.00, special damages of N200,000.00 and exemplary or punitive damages of N500,000.00 making a total of N1,000,000.00 damages. In awarding damages, the Court presided by **Odunowo J**, took into consideration the loss of clients which the plaintiffs had suffered in their business occasioned by the injury, the embarrassment and degradation suffered in the industry, emotional pains and loss of respect from professional colleagues. The sum of N300,000.00 was awarded as general damages, N200,000.00 for special damages and exemplary damages of N100,000.00. On a claim for exemplary or punitive damages, the court may award additional damages for such matters as the author's reputation of

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<sup>28</sup> (1980) FHCLR 186

<sup>29</sup> Dumes Nig Ltd. V. Ogboli (1973) 3. SC 196,204

<sup>30</sup> (1997) F.H.C.L.R 496.

feeling, the vulgarization of the work, economic loss because of the act of infringement of the defendant.

Perhaps because of the increasing importance of copyright to economic development and national advancement, certain kinds of copyright infringement are greatly frowned at by the court in its enforcement of copyright. Exemplary and Punitive damages are usually awarded where the infringement is a flagrant one. In the case of *Senora Gentil v. Tabansi Agencies Ltd*,<sup>31</sup> the court described 'flagrancy' as implying scandalous conducts, deceit as well as deliberate and calculated copyright infringement. *S. 16(4)*<sup>32</sup> states that:

“Where, in an action..., an infringement of copyright is proved or admitted and the court in which the action is brought, having regard (apart from all other material considerations) to –

- (a) the flagrancy of the infringement; and
- (b) any benefit shown to have accrued to the defendant by reason of the infringement,

is satisfied that effective relief would not otherwise be available to the plaintiff, the court, in assessing damages for the infringement, shall have the power to award such additional damages by virtue of this sub-section as the court may consider appropriate in the circumstances.”

Damages will not be available to a plaintiff where the defendant proves or admits that at the time of the infringement he was not aware and had no reasonable ground to suspect that copyright existed in the work.<sup>33</sup> It should be noted that innocence is not a defense for infringement of copyright.<sup>34</sup> Rather, a successful proof of innocence has a bearing only on the form of relief being limited to account of profits as well as other necessary reliefs such as injunction and delivery up but not damages.

### **Account of Profits**

This is a remedy granted as an alternative to the award of damages. The objective of this remedy is to strip the defendant of his improperly made profit and prevent unjust enrichment of the defendant.<sup>35</sup> Where an author, musician, artiste, filmmaker or broadcaster etc, discovers that his work has been infringed on and has sufficient evidence to prove that profits has generated against his own pecuniary interest, he can institute a suit against the alleged infringers and ask the court for the remedy of accounts of profit rather than the award of damages. *S. 16(3)* of the *Copyright Act* is material in determining whether account of profits is applicable in an action for infringement. It states as follows:

“Where, in an action for infringement of copyright, it is proved or admitted that 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

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<sup>31</sup> (1977) NCLR 344.

<sup>32</sup> Copyright Act

<sup>33</sup> S. 16(3), *ibid*

<sup>34</sup> *Mansell v. Valley Printing Co.* (1908) 2 Ch 441

<sup>35</sup> *Potton Ltd v. Yorkclose Ltd* (1990) F.S.R. 11

of the infringement, but shall be entitled to an account of profits in respect of the infringement, whether or not any other relief is granted under this section.”

The implication of the above provision is that the court can only award account of profits if the infringement was committed by the defendant without knowledge of subsisting copyright in the work or the infringer had no reasonable suspicion that the copyright subsisted in the work to which the action relates. The state of the mind of the infringer is immaterial in the determination of the issue whether there had been infringement or not<sup>36</sup>. In the case of *Plateau Publishing Co. Ltd v. Chief Chuks Adophy*,<sup>37</sup> the Supreme Court held that the remedy of account of profits was inapplicable to the case as the respondents were not innocent infringers. Therefore, the damages of N25, 000 which they were asked to pay by the Court of Appeal was accordingly affirmed by the Supreme Court. Unlike ordinary damages, account of profits is available regardless of the defendant’s knowledge as to whether copyright subsisted in the work.

### ***Delivery Up***

Upon application by the copyright owner, a court may order that infringing copies or articles designed or adapted for making copies of the copyright owner's work, are delivered up to him or such other person as the court may direct. Delivery up is available where a person holding a copyright can prove that, the person who infringed on his right:

1. Has an infringing copy of the work in his possession, custody or control in the course of a business or;
2. Has in his possession, custody or control of an article specifically designed or adapted for making copies of a copyright work.
3. Knows or has reasons to believe that the article has been or is to be used to make infringing copies.

The time limit for the application for the delivery up corresponds with the limitation of action which is six years from the time the infringing copy or article was made. It may however, be extended if the copyright owner has been under a disability for instance, where he is a minor or a person of unsound mind.<sup>38</sup>

Aside the court making an order that the infringing copies or articles be forfeited to the copyright owner or destroyed, or dealt with as the court thinks fit, the court will consider whether other available remedies would be adequate to compensate the copyright owner and protect his interest. If more than one person has an interest in the copy or articles, the court may order that the copy or articles be sold, and the proceeds shared accordingly. In *American Motion Pictures Export Co. Nig Ltd v. Minnesota Nig Ltd*,<sup>39</sup> the plaintiff sought among other remedies, delivery up of the infringing copies of the articles which were the subject matter of the action. The court ordered the delivery up of the items to prevent the copyright violator from benefitting from the illegal action.

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<sup>36</sup> E.E. Uvieghara (Ed.) - ‘Essays on Copyright Law & Administration in Nigeria’(Y-Books, Ibadan) 1992 at p.104

<sup>37</sup>(1986) 4 N.W.L.R (pt. 36) 265

<sup>38</sup> as in Limitation Act 1980

<sup>39</sup>(1977-1989) 2 IPLR 169.

### ***Conversion Rights***

Section 18 of the Act provides that the party instituting an action for copyright infringement is entitled to the recovery of possession in respect of the conversion. That is, the subject matter of the infringement as well as every equipment and material used in producing it. The copyright owner must not be indolent in the exercise of this right of action to avoid a situation where the infringing party is given the advantageous options of either destroying the infringing copies or moving it along with the equipment and contrivances out of the jurisdiction of the court.

The remedy of ‘conversion of rights’ ensures that the copyright owner does not suffer a loss from the injurious act of the violator. Practically, the copyright violator’s properties and entitlements in relation to the copyright infringement automatically becomes that of the copyright owner.

All infringing copies of any work in which copyright subsists, or of any substantial part of it, and all plates, master tapes, machines, equipment or contrivances used, or intended to be used for the production of such infringing copies, will be deemed to be the property of the Owner, Assignee or Exclusive Licensee (as the case may be) of the copyright who accordingly may take proceedings for the recovery of the possession, or take proceedings in respect of the conversion. In the case of *Onovowo v. Daily Times of Nigeria*<sup>40</sup>, the Defendant’s News Magazine published the Plaintiff’s article without any authorization to do so. In upholding the conversion right of the Plaintiff, the court held that, though thoughts and words are incapable of conversion, the article itself which contains the thoughts and words is an appropriate object of conversion under the Act (Extant Act). It is pertinent to note also that, the relief of right of conversion is particularly useful in backing up an order of injunction.

Most times, the remedy of conversion rights and delivery up are usually mistaken for each other simply because they both involve the return of some materials to the right holder<sup>41</sup>. To this end, it is necessary to distinguish conversion rights from delivery up. Some of those differing factors include the following:

1. The remedy of conversion rights is statutorily supported by S. 18 of the Copyright Act.
2. All the properties of the infringer practically become that of those of the right holder.
3. The right holder gets the infringed subject matter as well as every equipment and material used during infringement.
4. It is not granted alone but granted to back up an order of injunction unlike the remedy of delivery up which is granted alone and usually where no other remedy will suffice for the loss caused the right holder.

### ***Injunction***

An injunction is an equitable remedy, granted at the discretion of the court. It is an order of the court directing a party to do or refrain from doing an act. An injunction is mandatory where the court orders the defendant to perform an act and prohibitory where he is ordered to refrain from doing it.

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<sup>40</sup> (unreported) Suit No. FHC/L/CS/98/93; *Kotoye v. CBN* (1989) 1 NWLR, pt 98.

<sup>41</sup> ‘Copyright owners & civil remedies for copyright infringements in Nigeria: Sleep no more’ - [www.nigerianlawtoday.com](http://www.nigerianlawtoday.com), last accessed on October 4, 2017

The relief of injunction is usually ‘*prohibitory*’ in intellectual property claims as it aims at restraining a defendant from carrying out infringing acts. Since damages may not always be adequate, an injunction is usually an added remedy. This invariably means that, a right holder may be in addition to damages, granted injunction.

Injunction may be *Interim, Interlocutory or Perpetual*. An interim injunction is granted to preserve the *status quo* until a named date or until an application on notice has been heard. It is granted in situations of extreme urgency and in an *ex parte* application<sup>42</sup>. An interlocutory injunction is granted after all the parties to the suit must have been heard. It lasts during the pendency of the suit. On the other hand, at the end of the civil proceeding and if the alleged infringement is successfully proved, the order may then be made perpetual. In the case of *Yemitan v. Daily Times of Nigeria*<sup>43</sup>, the court granted a perpetual injunction against the defendants from further sale, use or dealing in the plaintiff’s work.

Also, injunction can be obtained to prevent the commission of a threatened infringement. This type of injunction is known as *Quia timet injunction*. *UpJohn L.J* in the case of *Rolland Bricks Ltd v. Morris* stated that, the objective of this type of injunction is to prevent an apprehended legal wrong though none has occurred at present. An interesting case in this line is the case of *Yeni Anikulapo Kuti & Ors v. T. M. Iseli & Ors*<sup>44</sup>. The Court held that, the Plaintiffs need not wait for the actual infringement to be completed before seeking redress.

It must be noted that, the Nigerian Copyright Act contains an important limitation to the use of injunctive reliefs as it provides to the effect that, an injunction shall not be issued in proceedings for an infringement of copyright which requires a completed or partly completed building to be demolished or prevents the completion of the partly completed building<sup>45</sup>. This provision is particularly essential when considering infringement actions for artistic works, notable architectural and engineering drawings, designs and models amongst others.

### ***Anton Piller Order***

An Anton Piller order is an order which will enable the Claimant, accompanied by his Solicitors and Law Enforcement Agents, Court Bailiffs to enter the premises where the offending materials and articles are kept and remove them, or have copies made so they can be produced in court as evidence.

It is an order that is given *ex parte* and in camera for the inspection, photographing and delivery up of infringing materials in the possession and control of the infringer. This order was first made in the case of *Anton Piller K.G. v. Manufacturing Processes Ltd*<sup>46</sup>. Furthermore, the Copyright Act<sup>47</sup> specifically provides for the making of an *Anton Piller* order. It states that:

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<sup>42</sup> See *Microsoft Corporation v. Frankie Associates Ltd* (supra)

<sup>43</sup> (supra)

<sup>44</sup> (2003-2007) 5 IPLR 53. Although the court did not expressly mention *quia timet* injunction.

<sup>45</sup> S.16(5) Copyright Act, Cap C28 LFN 2004

<sup>46</sup> (1976) 1 ALL ER 779/(1976) Ch. 55

<sup>47</sup> S. 25 (1)

“In any action for infringement of any right under this Act, where an ex parte application is made to the court, supported by affidavit, that there is reasonable cause for suspecting that there is in any house or premises any infringing copy or any plate, film or contrivance used or intended to be used for making infringing copies or capable of being used for the purpose of making copies or any other article, book or document by means of or in relation to which any infringement under this Act has been committed, the court may issue an order upon such terms as it deems just, authorizing the applicant to enter the house or premises at any reasonable time by 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 infringing copy or contrivance; and
- (b) inspect all or any documents in the custody or under the control of the defendant relating to the action.”

It is imperative to know that the search orders have been advised in the past and for this reason, it has been granted sparingly. Though it is granted at the discretion of the court, such discretion must be exercised judicially and judiciously in the interest of justice to both parties. In the case of *Musical Copyright Society Nigeria Ltd v. Details Nigeria Ltd*,<sup>48</sup> the court dismissed the order obtained *ex parte* on the ground that it was obtained fraudulently as relevant facts were not disclosed to the court before the order was granted. *S. 25(2)* of the *Copyright Act* provides that:

“Any person who knowingly gives false information under this section shall be guilty of an offence and liable on conviction to a fine of N1, 000”.

### **Criminal Liability for the Infringement of Copyright**

Some acts of infringement of copyright go beyond being legal injuries actionable by private right holders to matters of public concern because of their adverse effect on the socio-cultural and economic wellbeing of the populace. These acts frustrate the realization and protection of public interest which is one of the pivotal objectives of copyright as earlier examined in this work.

In the bid to protect the distinctive rights of the innovative minds promoting creativity in Nigeria and combating piracy in the media and entertainment industry as well as other areas of art and gallery, the Copyright Act stipulates instances when a person would be criminally liable for copyright infringement and the sanctions thereto. *Section 20(1)* of the Act provides that:

“Any person who:

- (a) makes or causes to be made for sale, hire or for the purpose of trade or business any infringing copy of a work in which copyright subsists; or
- (b) imports or causes to be imported into Nigeria a copy of any works which if it had been made in Nigeria would be an infringing copy; or
- (c) makes, causes 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,

is, 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 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, guilty of an offence under this Act and liable on conviction to a fine of an amount not

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<sup>48</sup> (1996) *FHCLR*. 473 @ 483

exceeding N1000 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”

From the above, it may be asserted or interpreted that, the provision applies to manufacturers of pirated copies. With the advancement of technology globally, any person can reproduce the original of a work in countless of copies without first obtaining the requisite permission of the author. The internet has given consumers unprecedented tools to reproduce, alter and immediately transmit perfect digital copies of copyrighted works around the world.

Counterfeits are made in ways that, it becomes difficult to show the difference between the original and a counterfeit. The provision may be held to be laudable as it relieves the State from proving beyond reasonable doubt that the accused (pirate) infringed the copyright of the owner. The burden of proof rests on the accused to prove that he has not committed copyright infringement and so, cannot be subjected to the punishment for such act. Furthermore, *Section 20 (2)* of the *Copyright Act* provides that;

“Any person who:

- a) sells or lets for hire or for purpose 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; or
  - d) has in his possession, sells, lets for hire or distribution for the purposes 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,
- is , unless he proves to the satisfaction of the court that he did not know and had no reasons to believe that any such copy was an infringing copy of any such work, be guilty of an offence under this Act and liable on conviction to a fine of N100 for every copy dealt within 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.”

It may be submitted that the above-mentioned provision applies to retailers who sell or distributes pirated copies of works (literary, musical or cinematograph films). Notably these retailers could also stand in the position of manufacturers. Hence, making and selling counterfeits for personal profit without regards to the impact of such acts on the owner of the work. The number of retailers selling musical and cinematograph films on the streets of Lagos, Kano, Port Harcourt and other cities across Nigeria is beyond human comprehension. It has become a lucrative business to the extent that age restriction is no longer taken into consideration as a seven (7) year old can buy a DVD/Blu-ray (whether it has explicit content or not) and watch.

In the same vein, the profitable business of movie-renting remains unprecedented in Lagos and other metropolitan cities in Nigeria. *Section 20 (3)* of the *Copyright Act* however makes it a crime to rent, lease, hire or loan a work (literary or musical or cinematograph film) without the consent of the owner of the work. It provides thus:

“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 N100 for every copy dealt with or imprisonment for six months or to both such fine and imprisonment”

It can be said incontrovertibly that, most if not all movie-rental shops operate without the requisite permission of the copyright owners of the respective works being rented out. Despite the above-mentioned provision of the law, this unwholesome business remains thriving and unchecked.

### **Conclusion**

It is obvious from our exposition and discussion of the law in this paper that, the exclusive right accruable to a person in his work although, protected by law, can still be stolen by some set of people ‘who harvest or attempt to harvest where they have not sowed and possibly try to free-ride on his (right owner’s) glory without due observation’. It is as a result, that we mentioned a few of those acts that constitute infringement of copyright in a work. In the same vein, several remedial measures have been analyzed to make us understand that, just like any other right, the copyright of a person is also remediable. It must also be emphasized that, infringement of copyright in a work is actionable as a breach of a statutory duty owed to the right holder and not just existing on its own.

Finally, notwithstanding the provisions of the Copyrights Act or any other law, no action for infringement of copyright in search of a remedy can be commenced by the following set of people:

1. Any person carrying on the business of negotiating and granting of licenses.
2. Any person collecting and distributing royalties in respect of copyright works.
3. Any person representing more than fifty owners of copyright in any category of works protected by the Copyright Act,

unless such person or persons operate as a *collecting society* or possesses a duly executed *certificate of exemption* by the Nigeria Copyright Commission.

It is no longer news that, as well polished as the law is about the protection of copyright in a work; it goes nowhere in protection of the interest of the right holders as most of the available laws are not maximally utilized. They only lay in the statutes and textbooks with little or no effect. In the light of this, we make the following recommendations:

1. To be more effective and efficient, the law relating to the protection of copyright in a work must be revised from time to time to meet the rapidly advancing technology, changing economic and social occurrences in the country. After all, the law is dynamic and not static. In line of this, the ridiculously low punishments meted out to infringers in the Copyright Act should be revised to be more impactful and punitive.
2. Special courts should be established to handle intellectual property matters as this will enable the courts exercise maximum expertise in the adjudication of matters brought before them since not all judges of the regular courts are learned or have keen interest in intellectual property affairs.
3. Copyright holders must be circumspect and watch with eagle eyes always to ensure that, nobody gets undeserved gains from their creative work. As soon as they detect any form of infringement, they must take the right steps towards redress. They should be more proactive, gone are the days of ‘*I leave the cheaters on my work to God*’.

4. Most people do not even know they are infringing the rights of others by some of their actions, even as ignorance of the law is no excuse. In the light of this, some form of public awareness may be organized periodically to sensitize and enlighten those members of the public who are stakeholders in intellectual property and allied rights. This will inform, caution and awaken them to the challenges and prospects in the protection of their intellectual property. The right holder deserves to be guarded to enjoy the sweet of his sweat as opposed to the infringers taking undeserved benefit of reaping off the copyright owners.