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## INFRINGEMENT OF COPYRIGHTS UNDER THE NIGERIAN COPYRIGHTS LEGISLATION: A DIAGNOSTIC EVALUATION

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### ABSTRACT

Incidences of copyright infringement, such as reproducing, publishing, performing in public, making adaptation and broadcasting the work of another abounds worldwide and Nigeria in particular. This has been of great concern and interest to the comity of nations, for it has so adversely affected the economy of these nations. The spate of copyrights infringement in Nigeria is worrisome, hence this paper attempts to look at civil and criminal infringement of copyrights, the remedies for, civil infringement, the punishment for criminal infringement and how to curb or eradicate copyrights infringement.

*Keywords:* Copyrights, Infringement, Juridical Review, punishment, Remedies.

### 1. INTRODUCTION

Infringement of copyrights occurs when a person does or causes any other person to do any of the acts reserved to the copyright owner under the Act without the license, consent or authorization of the copyright owner. These reserved acts are those acts set out in sections 6, 7 and 8 of the Copyrights Act. It is only the copyrights owner that has the exclusive right to control these reserved acts subject to exceptions. These acts vary from one type of work to another, but generally include reproduction, publication, performance, adaptation, commercial distribution, public performance and broadcasting. Infringement in relation to the foregoing acts is referred to as a primary or direct infringement.

Other activities, which are mainly of commercial nature, such as importation of infringing copies into Nigeria, exhibition in public, distribution, making or possession of infringing contrivances, permitting performance in place of public entertainment, performance to promote business done without the permission and consent of the copyright owner, are described as secondary or indirect infringement. Hence anyone who does any of the acts restricted by copyrights, both primary and secondary infringements without the licence or permission of the copyright owner, violates copyrights.<sup>1</sup>

<sup>1</sup> D I Bainbridge (1999) *Intellectual Property*, 4<sup>th</sup> edn, London: Financial Times Pitman Publishing, p 120.

## 2. CONCEPTUAL FRAMEWORK

### 2.1 Meaning Of Copyrights Infringement

Copyright infringement is the unauthorized or unlicensed use of another's copyright work in such a way that the owner's right is jeopardized. To Garner,<sup>2</sup> infringement of copyrights is the act of violating any of the copyright owner's exclusive rights granted by the Federal Copyrights Act. The exclusive rights include; reproducing the work; preparing derivative works based on the work; distributing the work; for certain kind of works to perform or display the work publicly; for sound recordings to perform the work publicly and to import the work. Further, copyright infringement involves a violation of the exclusive rights of the copyright owner.<sup>3</sup>

### 2.2 Civil Infringement

Illuminating on the infringement of copyrights, the Copyrights Act<sup>4</sup> provides that copyrights is infringed by any person who without the licence or authorization of the owner of copyrights –

- a) Does or causes any person to do an act, the doing of which is controlled by copyrights;
- b) Imports or causes to be imported into Nigeria any copy of a work which, if it had been made in Nigeria, would be an infringing copy under this section of the Act;
- c) Exhibits in public any article in respect of which copyrights is infringed under paragraph (a) of this subsection;
- d) Distributes by way of trade, offers for sale, hire or otherwise or for any purpose prejudicial to the owner of the copyrights, any article in respect of which copyrights is infringed under paragraph (a) of this subsection;
- e) Makes or has in his possession plates, master tapes, machines, equipment or contrivances used for the purpose of making infringed copies of the work;
- f) Permits a place of public entertainment or of the business to be used for a performance in the public of the work, where the performance constitutes an infringement of the copyrights in the work, unless the person permitting the place to be so used was not aware and had no reasonable ground for suspecting that the performance would be an infringement of the copyrights;
- g) Performs or causes to be performed, for purposes of trade or business or as supporting facility to a trade or business, any work in which the copyright subsists.

From the foregoing discuss and provisions of the Copyrights Act one can surmise that infringement of copyrights could be direct<sup>5</sup> or indirect.<sup>6</sup> The direct infringement is also known as primary infringement, while the indirect infringement is also known as secondary infringement.

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<sup>2</sup> B A Garner (1999) *Black's Law Dictionary*, 7th edn, St Paul Minn: West Group, p 785

<sup>3</sup> Farlex, The Free Dictionary (Online) Available at: [legal.dictionary.thefreedictionary.com/copyrights+infringement](http://legal.dictionary.thefreedictionary.com/copyrights+infringement)> accessed 23 April, 2015.

<sup>4</sup> Copyrights Act Cap C28 Laws of the Federation of Nigeria 2004, s.15(1)(a) – (g).

<sup>5</sup> *Ibid*, s. 15(1)(a).

<sup>6</sup> *Ibid*, s. 15(1)(b) – (g).

### 3. PRIMARY OR DIRECT INFRINGEMENT

Primary infringement of copyrights is that provided under section 15(1)(a) of the Copyrights Act and they include: Reproduction, publication, performance in public, and, translation and adaptation.

#### 3.1 Reproduction

Any person who, without the licence or permission of the copyrights owner reproduces or causes any other person to reproduce any literary, musical or artistic work, or cinematograph film or sound recording or broadcast shall be deemed to have infringed on the copyrights owners right. Hence the Act defines reproduction to mean the making of one or more copies of a literary, musical or artistic work, cinematograph film or sound recording.<sup>7</sup> Following from the definition, the question that comes to fore is what is 'copy'. Copy means a reproduction in written form, in the form of a recording or cinematograph film or in any other material form, that an object shall not be taken to be a copy of an architectural work unless the object is a building or model.<sup>8</sup>

Significantly, a copy need not be a verbatim duplication of the original. For a work to be treated as a copy, it must of necessity, have been based on the copyright work. This point is crucial since copyrights tolerates coincidence. It does not forbid the independent expression of the same idea by different persons. For an allegation of copying to be sustained, there must be a substantial objective similarity between the copyright work and the alleged infringing work, so much so that there is a reasonable inference that the infringing work derived substantially from the copyright work. Fundamentally, there must be a connection between the alleged infringing work and the copyright work. In *Hawkes & Sons (London) Ltd v Paramount Film Service Ltd*<sup>9</sup> the court held that the issue of substantial similarity is not determined by the word for word comparison of the two works in issue, but it depends on whether the alleged similarity is substantial. In *Francis Day & Hunter Ltd. & Anor v Bron & Anor*<sup>10</sup> the court in determining the issue of reproduction held, *inter alia*, that in order for an act to constitute reproduction within the meaning of the Act, there must be:

- A sufficient degree of objective similarity between the two works
- Some causal connection between the plaintiff's and the defendant's work.

Also, that where there is a substantial degree of objective similarity, it only affords *prima facie* evidence of a causal connection and not an irrebuttable presumption of infringement. However, the issue of substantial similarity is a question of fact. Proof of copying may often have to be based on circumstantial evidence, except in the very rare cases, where the defendant admits the allegation. It is however of relevance to prove that the defendant had access to the plaintiff's work, otherwise the possibility of copying becomes impossible.

A reproduction of a copyright work may be in the form of direct or indirect copying of the substantial part of the work. For instance, a reproduction of two dimensional drawings in three dimensional form constitutes infringement of the copyrights in the two dimensional drawings. The case of *Merchant Adventurers Ltd v M.Grew & Co Ltd*,<sup>11</sup> is illustrative wherein the court held that the copyrights in two dimensional drawings could be infringed by a three dimensional reproduction if the drawings were sufficiently clear for a person of reasonable and

<sup>7</sup> *Ibid*, s. 51(1).

<sup>8</sup> *Ibid*

<sup>9</sup> [1934] Ch 593.

<sup>10</sup> [1963] 1 Ch 587.

<sup>11</sup>[1972] Ch 242.

average intelligence to visualize what a three dimensional object made from them would look like.

### 3.2 Publication

A work is deemed to have been published, if copies of it have been made available in the manner sufficient to make it accessible to the public.<sup>12</sup> Suffice it to say that publication involves not merely reproduction, but also making it available to the public. Therefore any person who makes available to the public a work without the consent or permission of the copyrights owner is infringing on the right of the copyrights owner. In *Maurice Ukaoha v Broad-Based Mortgage Finance Ltd & Anor*,<sup>13</sup> the plaintiff constructed a 17 Storey architectural model during his student days at the University of Lagos and lent it out to the defendants to display temporarily in their conference room. Thereafter, he traveled to Kano where he saw the architectural model in newspapers. The defendants had appended in the newspapers that the model was their proposed headquarters in Abuja. This he did without the plaintiff's permission. They further attributed the model not to the plaintiff but to one Goni and Associates. The court per Jinadu J. held, *inter alia*, that:

From the totality of evidence adduced by the plaintiff, I find and hold that copyrights exists in the model work Exhibit C which is an artistic work of art made and constructed by the plaintiff, a qualified person under the provisions of section 2(1)(a) of the Copyrights Act, Cap. 68, LFN, 1990 ... I hold that copyrights exists in the model ... All these actions of the defendants were done without the consent, authorisation or licence of the plaintiff, the owner of the copyrights in Exhibit C. This shows that the defendants have infringed the copyrights of the plaintiff in Exhibit C under the provisions of sections 14(a)(c) and 17(1) of the Copyrights Act, Cap 68, Laws of the Federation of Nigeria, 1990.

The learned judge also went further to grant an injunction restraining the defendants from further act of infringement and awarded ₦250,000 general damages in favour of the plaintiff.

### 3.3 Performance in Public

A performance in public of any literary or musical work or cinematograph film without the permission or license of the copyright owner is an infringement of the work. The list of what consists performance in public is exhaustible and necessarily a question of fact with no fixed criteria. In *Eastern Microwave Inc. v. Doubleday Sports Inc.*<sup>14</sup> the court held that to perform a work publicly means to render it at a place or at any place where a substantial number of persons outside the normal circle of family and its social acquaintance are gathered.

As a guide, the courts have used such factors as profit, the size and character of the audience, its relationship to the copyright owner and the kind of place where the performance took place as criteria for determining whether a given performance is a public performance or not. In *PRS v Hawthorns Hotel (Bournemouth) Ltd*<sup>15</sup> the court held that a performance by an

<sup>12</sup> Copyrights Act, *op cit*, s. 51(2); *I. J. Adenuga v Ilesanmi Press & Sons (Nig) Ltd* [1991] 5 NWLR (Pt. 189) 92.

<sup>13</sup> (1997) FHCL, 477; *Ifeyanyi Okoye & Anor v Prompter Quality Services* (1996) FRCR, 814.

<sup>14</sup> 534 F. S4 533, 216 USPQ 206.

<sup>15</sup> [1933] Ch. 855.

orchestral trio at an unlicensed residential hotel for the entertainment of some guests and two other persons was held to be public performance. In *PRS v Camelo*<sup>16</sup> the court held that performance in a private room made audible in an adjoining public restaurant was a public performance. In *PRS v Harlequin Record Shops*<sup>17</sup> it was held that a musical vibration rendered in the defendant's record shop for the sole purpose of promoting sales constituted performance in public.

A performance in public for the purpose of entertainment, which is done free of charge is not a public performance. This is in line with the Paragraph *O* of the Second Schedule of the Copyrights Act, which provides that communication to the public of a work, in a place where no admission fee is charged in respect of the communication, by any club whose aim is not profit making is not public performance. The case of *Duke v. Bates*<sup>18</sup> is also illustrative. Here, the defendants without the consent of the proprietor of the copyrights in a drama presented the dramatic piece free of charge in a room of a hospital for the entertainment of the nurses' attendants and others connected with the hospital. The court held that the performance, in all intents and purposes is not a public performance. A performance in public for the purpose of raising funds for charity is not a public performance.<sup>19</sup>

### 3.4 Translation and Adaptation

Translation is the reproduction of a work in a language different from the one in which the original is issued. The right to translate a work vests in the copyright owner. Therefore whoever does that without the license or authorization of the copyright owner is infringing on the owner's copyrights. Adaptation is the modification of pre-existing work from one genre of work to another and consists in altering work within the same genre to make it suitable for the different conditions of exploitation, and may also involve altering the composition of the work.<sup>20</sup> Any adaptation of a copyright work without the permission or license of the copyright owner is an infringement. Adaptation may take the form of transforming a novel story into a drama or reducing a piece of drama into poetry etc. Having had an insight into the different acts of primary infringement, it is now trite to x-ray secondary or indirect infringement.

## 4. SECONDARY OR INDIRECT INFRINGEMENT

The various acts of secondary infringement of copyrights can be distilled from the provisions of section 15 (1) (b) – (g) of the Copyrights Act. They are: Importation of Infringing Copies into Nigeria; Exhibition in Public; Distribution; Making or Possession of Infringing Contrivances; Permitting Performance in Place of Public Entertainment; and, Performance to Promote Business.

### 4.1 Importation of Infringing Copies into Nigeria

Any person who without the licence or authorisation of the copyrights owner imports or causes to be imported into Nigeria any copy of a work which, if it had been made in Nigeria, would be an infringing copy under the Act, is infringing on the right of the copyrights owner.<sup>21</sup> The importer of a pirated or counterfeit copies of a work into Nigeria is caught by this provision, if those copies would have constituted infringement of copyrights had they been

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<sup>16</sup> (1936) 3 ALL ER 855.

<sup>17</sup> (1979) FSR 233.

<sup>18</sup> [1884] 13 QBD 843.

<sup>19</sup> Copyrights Act, *op cit*, Second Schedule, paragraph (o).

<sup>20</sup> *Ibid*, s. 51(1)

<sup>21</sup> *Ibid*, s. 15(1)(b).

made in Nigeria.<sup>22</sup> Consequently, it is an infringement for one to import pirated works, which if made in Nigeria would be infringing copies.

It is crucial to note that the importation of copies of a work, though lawfully made from its country of origin, into Nigeria would still constitute an infringement of copyrights if given our local circumstances, it would have been infringing copies if they were made in Nigeria. Also, it is an infringement of copyrights where a Nigerian places an order of pirated copies from another country for consignment to a third country. This is well illuminated in Article 16(1) of the Berne Convention for the Protection of Literary and Artistic Works which provides that infringing copies of a work shall be liable to seizure in any country of the union where the work enjoys legal protection. The foregoing provisions also extend to reproductions coming from a country where the work is not protected.<sup>23</sup>

#### 4.2 *Exhibition in Public*

Exhibition in public of any article in respect of which copyright subsists amounts to an infringement of copyrights.<sup>24</sup> It is immaterial whether the public exhibition of the article is by way of trade or any other similar arrangement. It is sufficient to establish that the said exhibition was done in public and without license or authorization of the copyright owner. Thus, in *Fenning Film Services Ltd v Wolverhampton, Walshall and District Cinemas Ltd*,<sup>25</sup> exhibition of a certain cinematograph film in an unauthorized place was held to be an infringement of copyrights in the plaintiff's film.

#### 4.3 *Distribution*

Infringement may also occur where any person without the licence or authorisation of the owner of the copyrights in the work is distributed by way of trade, offers for sale, hire or otherwise, or for any purpose prejudicial to the copyright owner any article in respect of which copyrights is infringed.<sup>26</sup> There is no doubt that this covers both commercial and gratuitous distribution, so long as the purpose of such distribution is prejudicial to the copyright owner.

#### 4.4 *Making or Possession of Infringing Contrivances*

This provision is used to assist right owners who may not be able to prove actual infringement and discourage infringers and free riders. It is an infringement to make or have in ones possession plates, master tapes, machines, equipment or contrivances used for the purpose of making infringing copies without the licence or permission of the right owner.<sup>27</sup> To actually succeed under this provision, the right owner must prove by direct evidence that the master tapes, plates, machines or equipments, or other contrivances found in possession of the alleged infringer, were really used for making infringing copies of his work, otherwise the allegation fails. The mere fact that such devices are capable of being used for making infringing copies is not sufficient proof. In any event, circumstantial or similar facts evidence may be used to prove such infringement, depending on how cogent and compelling such evidence is. This is well illustrated in *Mood Music Publishers Co Ltd v Dewolfe Ltd*.<sup>28</sup>

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<sup>22</sup> *Island Records Ltd v John Holts Shipping Services Ltd* ( Unreported) Suit No. FHC/L/1/85, ruling delivered on 26/1/1985 at the Federal High Court Lagos Division.

<sup>23</sup> Berne Convention for the Protection of Literary and Article Work, Article 16(2)

<sup>24</sup> Copyrights Act, *op cit*, s. 15(1)(c).

<sup>25</sup> [1914] 3 KB 1171.

<sup>26</sup> Copyrights Act, *op cit*, s. 15(1)(d).

<sup>27</sup> *Ibid*, s. 15(1)(e).

<sup>28</sup> (1976) 1 Ch 119.

#### 4.5 Permitting Performance in Place of Public Entertainment

Copyrights is infringed by any person who without the license or authorization of the copyright owner permits a place of public entertainment or business to be used for a performance in the public of the work, where the performance constitutes an infringement of the copyrights in the work, unless the person permitting the place to be so used was not aware, and had no reasonable ground for suspecting that the performance would be an infringement of the copyrights.<sup>29</sup> The permission stated here need not be granted for value. Permission given gratuitously is an infringement *mutatis mutandis*. Further, in this provision, it is a defence for an owner or proprietor of a place of public entertainment or business to plead and prove innocence of the infringing work.

#### 4.6 Performance to Promote Business

Section 15(1)(g) of the Copyrights Act prohibits the performance of copyrights works for the purposes of trade or business, any work in which copyrights subsists. It then follows from this provision, that the acts of banks and other business set-ups that play other peoples music and cinematograph films for the entertainment of customers without permission of the right owners, constitute copyright infringement.

### 5. CRIMINAL INFRINGEMENT AND LIABILITY

The infringement of copyrights also attracts criminal liabilities. It is the law<sup>30</sup> that any person who –

- a) Makes or causes to be made for sale, hire or for 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 a copy of any work 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 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 exceeding ₦1,000 for every copy dealt with in contravention of this section or to a term of imprisonment not exceeding five years or to both fine and imprisonment.<sup>31</sup>

Furthermore, any person who –

- a) Sells or lets for hire or for the purpose of trade or business, exposes or offers for sale or hires any infringing copy of any work in which copyrights 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 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,

<sup>29</sup> Copyrights Act *op cit*, s. 15(1)(f)

<sup>30</sup> Copyrights Act *op cit*., s. 20(1)

<sup>31</sup>*Ibid.*

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 reason to believe that any such copy was an infringing copy of any such work, guilty of an offence under this Act and 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.<sup>32</sup> The case of *Nigerian Copyrights Commission v Oba Okechukwu*<sup>33</sup> is instructive, wherein the accused was charged for being in possession (other than for private use) and for the sale of 126 infringing copies of cinematograph films and musical works in DVDs, VCDs and CD formats in breach of s. 20(2)(a&c) of the Copyrights Act. The Federal High Court sitting in Abuja convicted the accused and sentenced him to three (3) months imprisonment and a fine of 12,600. Also ordered that the infringing copy be handed over to the Nigerian Copyrights Commission (NCC) for destruction in accordance with s.20(5) of the Copyrights Act.

Similarly any person who, without the consent of the owner of copyrights distributes in public for commercial purposes, copies, of a work in which copyrights subsists, by way of rental, lease, hire loan or similar arrangement shall be guilty of a criminal offence and liable on conviction to a fine of ₦100 for every copy dealt with or imprisonment for six months or to both such fine and imprisonment.<sup>34</sup>

Suffice it to say that an infringer under section 20 of the Copyrights act can rely on the defence of innocence. However, the court in determining the defence of innocent infringement shall have recourse to the number of copies of the infringing work found in the possession of the accused. Also reference to ‘person’ under the said section includes both natural and artificial persons. It is still the researcher’s view that the penalty for criminal infringement under section 20(2) and (3) of the Act is too small and lenient, that it may scarcely act as a deterrent.

## 6. ANTI-PIRACY MEASURES

Under the Copyrights Act, certain anti-piracy measures have been provided.<sup>35</sup> The Nigerian Copyrights Commission has powers with the consent of the Minister to prescribe any design, label, mark, impression or any other anti-piracy device for use on, in, or in connection with any work in which copyrights subsists.<sup>36</sup> Any person who sells, rents, hires or offers for sale, rent or hire any work in contravention of the prescription will be deemed to commit an offence and liable on conviction to a fine not exceeding ₦100,000 or imprisonment for a term not exceeding twelve months or to both such fine and imprisonment.<sup>37</sup>

In addition, any person who without the permission of the commission imports into Nigeria or has in his possession any anti-piracy device prescribed under this section or any machine, instrument or other contrivance intended for use in the production of the anti-piracy device, will also be deemed to commit an offence and liable on conviction to a fine not exceeding ₦500,000 or imprisonment for a term not exceeding five years, or to both such fine

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<sup>32</sup> *Ibid*, s. 20(2).

<sup>33</sup> (Unreported) Suit No FHC/PH/128C/99, ruling delivered on 3/2/2000 at Federal High Court, Port-Hacourt

Division.

<sup>34</sup> *Ibid*, s. 20(3).

<sup>35</sup> *Ibid* s. 21.

<sup>36</sup> *Ibid*, s. 21(1).

<sup>37</sup> *Ibid*, s. 21(2).



and imprisonment.<sup>38</sup> Similarly, any person who without the permission of the commission is in possession of or reproduces or counterfeits any anti-piracy device prescribed under this section is guilty of an offence and is liable on conviction to a fine not exceeding ₦50,000 or imprisonment not exceeding five years or to both such fine and imprisonment.<sup>39</sup>

## 7. OFFENCE BY CORPORATE BODIES

Corporate entities or bodies here includes a firm or other association of persons, and director in relation to a firm includes a partner in the firm.<sup>40</sup> Where an offence under this Act has been committed by a corporate entities and every person who at the time the offence was committed was incharge of, or was responsible to the corporate entities for the conduct of the business of the corporate entities shall be deemed to be guilty of such offence and liable to be proceeded against and punished accordingly.<sup>41</sup>

It is a defence in this subsection for any body to prove that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.<sup>42</sup> Also where an offence under this Act has been committed by a corporate entities with the consent or connivance of any director, manager or secretary, such person shall also be guilty of that offence and be proceeded against and punished accordingly.<sup>43</sup>

## 8. PENALTIES FOR MAKING FALSE ENTERIES

Section 14 of the Copyrights Act imposes a statutory duty on publishers, printers, producers or manufacturers of works in which copyrights subsists to register all works produced by them, showing the name of the author, title, year of production and quantity produced. Failure to do this is an offence under section 23 of the Copyrights Act, and which said section provides thus: Any person who-

- a) Fails to keep a register required under section 14 of this Act; or
- b) Makes or causes to be made a false entry in such register; or
- c) Produces or tenders, or causes to be produced or tendered as evidence any such entry or writing knowing the same to be false, is guilty of an offence under this section and liable on conviction to a fine not exceeding N10,000.

However, an action for copyright infringement can be brought by the owner, assignee or an exclusive licensee. This is illustrated in *Jobela (Nig.) Enterprises Ltd v Taiwo Kupolati & Ors*<sup>44</sup> wherein the court held that infringement of copyrights is actionable where the party is either the owner, assignee or an exclusive licensee of the copyrights. It is pertinent to note that civil and criminal actions in copyrights infringement can be taken simultaneously. This is clearly and aptly illustrated in the Copyrights Act<sup>45</sup> where it provides that “notwithstanding the provisions 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 the Act.

Nevertheless, from decided cases and provisions of the Copyrights Act, it can be surmised that infringement can be civil or criminal. The civil infringement can be primary or secondary. Most of the criminal penalties are stringent, while a few are soft. Despite these stringent criminal provisions and penalties in our legal system and the arresting, prosecution

<sup>38</sup> *Ibid*, s. 21(3).

<sup>39</sup> *Ibid*, s. 21(4)

<sup>40</sup> *Ibid*, s.22(3)

<sup>41</sup> *Ibid*, s. 22(1)

<sup>42</sup> *Ibid*.

<sup>43</sup> *Ibid* s.22(2)

<sup>44</sup> [2005] ALL FWLR (pt 268) 1736; Copyrights Act, s. 16(1).

<sup>45</sup> Copyrights Act, *op cit*, s. 24.

and summary convictions of pirates by the Nigerian Copyrights Commission, piracy of books, films, music, tapes and records still abound.

If we are serious as a nation about stamping out piracy from our society, the government both at the national and state levels should be more proactive and committed towards the achievement of this noble goal. The State should prosecute immediately those who are arrested. The individual whose work is being infringed should also take the infringer to court, without minding the legal cost.

## 9. REMEDIES FOR INFRINGEMENT OF COPYRIGHTS

Remedies are the reliefs available to the plaintiff in a civil action for the infringement of copyrights. "All such reliefs 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."<sup>46</sup> Specifically, the available remedies are Damages, Injunction, Anton Pillar Order, Account of Profit, Conversion, and Fair Compensation.

### 9.1 Damages

Damages are the fundamental remedy for copyright infringement. They are monetary satisfaction awarded by the court to the copyright owner in compensating financial loss occasioned by infringement of his/her copyright work by the defendant. The primary motive of damages is to restore the right owner back, as much as possible, to the position he/she would have been had the infringement not occurred. Damages could be general, special, exemplary, punitive or nominal.

#### (a) General and Special Damages

These are many types of compensatory damages. General damages are losses which flow naturally from the defendant's conduct and its quantum need not be pleaded or proved as it is generally presumed by law. However, evidence which will assist the court must be given if the plaintiff is to obtain substantial damages under this head of claim.<sup>47</sup> Special damages are not presumed by law, they must be specifically pleaded and proved.

#### (b) Exemplary or Punitive Damages

Exemplary or Punitive Damage is an aggravated type of pecuniary compensation that is intended to punish the defendant and deter him from similar behaviour in the future. In *Masterpiece Investments Ltd & Anor v Worldwide Business Media Ltd & Ors*<sup>48</sup> the court on a claim for exemplary or punitive damages stated that it may award additional damages for such matters as the author's reputation or feeling, the vulgarization of the work, economic loss, unjust enrichment by the defendant as a result of the act of infringement, the conduct of the defendant and the means of the parties etc. nonetheless, the amount to be awarded must not necessarily be excessive.

In my view and Babefemi's<sup>49</sup> too, with greatest respect the above decision of the court is erroneous; it is also far from the intendment of the Act in section 16(4) where it provided for additional damages. If the Act intended exemplary damages it could have stated so.

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<sup>46</sup> *Ibid*, s. 16(1).

<sup>47</sup> B O Babafemi (2007) *Intellectual Property*, Ibadan : Justinian Books, p 108

<sup>48</sup> (1997) FHCR, 496 at 511; *UBN Ltd v Odusote Bookstores Ltd* (1996) 9 NWLR (pt 421) 588.

<sup>49</sup>B O Babafemi *op cit*

However, in *Belloff v Pressdram Ltd & Anor*<sup>50</sup> the court stated categorically, and rightly too, that copyrights is now exclusively a creature of statute and governed by statute and that section 17(13)<sup>51</sup> is a code of damages which are additional without providing a place for additional exemplary or aggravated damages outside the subsection. The substantial result is that the subsection excludes exemplary damages for infringement of copyrights and replaces any aggravated damages that might otherwise have been obtainable for infringement of copyrights.

- Flowing from the above decision, the court states that exemplary damages cannot be imputed from the provision on additional damages and the researcher agree completely with it. However, in cases of copyright infringement, damages are always at large and it is not unlikely that exemplary damages could be awarded in deserving cases, but definitely not under the framework of section 16(4). Section 16(4) of the Copyrights Act provides thus – “Where in an action under this section, an infringement of copyrights is proved or admitted and the court in which the action is brought, having regard to –
- The flagrancy of infringement; and,
- Any benefit shown to have accrued to the defendant by reason of infringement, is satisfied that effective relief will not otherwise be available to the plaintiff... the court shall have the power to award such additional damages.”

### (c) Nominal Damages

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 damages as a result of the defendant’s wrongdoing.<sup>52</sup> They may also be awarded where damages have been proved but no evidence has been given as to its extent, so that the assessment of compensatory damages is impossible.<sup>53</sup>

## 9.2 Injunction

Injunction as a remedy is provided for under s.16(1) of the Copyrights Act. In copyright infringement, it is granted by the court to prevent the infringer from continuing the infringement. It is also possible to obtain an injunction to prevent the commission of a threatened infringement.<sup>54</sup>

## 9.3 Anton Piller Order

Anton Piller Order is an order made in special circumstances to permit the owner of a work to enter into the infringers premises to inspect and remove any infringing copies or contrivances, material to the substantive action. The Act<sup>55</sup> is instructive on this, wherein it provides that: “In any action for infringement 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 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 purposes of making copies

<sup>50</sup> (1973) 1 ALL ER 241, 266.

<sup>51</sup> The English Copyrights Act in *pari materia* with Section 16(4) of our Copyrights Act.

<sup>52</sup> F O.Babafemi, *op cit*, 110.

<sup>53</sup> *Ibid*

<sup>54</sup> *Ibid*, 114.

<sup>55</sup> Copyrights Act *op cit*, s. 25(1).

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 some 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 contrivance; and (b) inspect all or any document in the custody or under the control of the defendant relating to the action.”<sup>56</sup>

An appraisal of the foregoing provision of the Act leaves no doubt that for the applicant to succeed, he must show by affidavit that there is a reasonable cause for suspecting the existence of infringing copies or contrivance used for making infringing copies or contrivance capable of being used for making infringing copies in the house or premises of the defendant. This is actually a codification of the common law remedy of Anton Pillar Order. This principle of law was aptly enunciated in the *locus classicus* case of *Anton Pillar KG v Manufacturing Processes Ltd & Ors.*<sup>57</sup> In *Musical Copyrights Society (Nig) Ltd v Details Nigeria Ltd*<sup>58</sup> the court stated, *inter alia*, that it is now well recognized that interlocutory remedies available in intellectual property action include Anton Pillar Orders.

#### 9.4 Account of Profit

In law, by a claim of account of profit, the plaintiff is seeking for an order of the court directing that the transactions involving the defendant or the accounting party be investigated with a view to ascertaining the amount of money due to the plaintiff from such transactions.<sup>59</sup> There is a statutory approval to account of profit as found in the Copyrights Act,<sup>60</sup> which provides that;

Where, in an action for infringement of copyrights, 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 copyrights 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 profits in respect of the infringement, whether or not any other relief is granted under this section.

#### 9.5 Conversion Right

Conversion right is also available to copyright owner whose right has been infringed. The Act provides that all infringing copies of any work in which copyrights subsists or any substantial part thereof, and all plates, master tapes, machine, equipment or contrivances used, or intended to be used for the production of such infringing copies shall be deemed to be property of the owner, assignee or exclusive licensee as the case may be, of the copyrights, who accordingly may take proceeding for the recovery of the possession thereof or in respect of the conversion thereof.<sup>61</sup>

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<sup>56</sup> *Ibid*

<sup>57</sup> (1976) Ch 55

<sup>58</sup> (1996) FHCLR 473 at 482.

<sup>59</sup> I M Olueze *op cit*, 132

<sup>60</sup> Copyrights Act, *op cit*, s. 16(3).

<sup>61</sup> *Ibid*, s. 18.

## 9.6 Fair Compensation

The broadcasting of a cinematograph film in which a musical work is incorporated entitles the owner of the right to broadcast the musical work a fair compensation from the broadcasting authority.<sup>62</sup> The amount of compensation payable by the broadcasting authority shall be determined by the court in the absence of any agreement.<sup>63</sup>

## 10. CONCLUSION

As stated in the aforesaid discourse, copyright infringements are the unauthorized use of a creator's intellectual work of arts, music, literature, sound recording, cinematograph film and broadcast. in a manner that jeopardises the owner's right.. The rights of the owner jeopardised are the exclusive rights granted under sections 6, 7, and 8 of the Nigerian Copyrights Act.. These rights include, the right to; reproduce in any material form, publish, make adaptations, perform in public, broadcast and distribute the copyright work.. From the provisions of the Copyrights Act and decided cases, one can surmise that infringement of copyrights could be civil or criminal and direct<sup>64</sup> or indirect.<sup>65</sup> Civil infringement attract remedies for infringement while criminal infringement attracts punishment for infringement. The direct infringement is known as primary infringement, while the indirect infringement is also known as secondary infringement. Most of the penalties for criminal infringement are stringent, while a few are soft. The soft penalties as seen in section 20(2) of the Copyrights Act should be amended and increased from N100 for every copy dealt with to N500 and the imprisonment increased to not more than three years. The advocate for an increase in the punishment for infringement is to deter infringers, reduce piracy and possibly assist in making Nigeria a piracy free country.

However, to stamp out piracy from Nigeria, all the stakeholders, which principally are, the government, both at the national and state levels, the individual citizens must join towards the achievement of this noble goal. Those who are arrested for piracy must be promptly prosecuted. Also the individuals whose works are pirated should also take the infringers to court. Aggravated damages should be awarded to the right owners by the court and stringent punishment given to convicted infringers, since criminal and civil proceedings can be commenced simultaneously in copyright infringement matters.

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