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 the world experiences greater advancement in technology, more emphasis is placed on innovative and

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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.

Statistics obtained from studies conducted by the World Intellectual Property Organization (WIPO) on the economic contributions of copyright-based industries in Singapore, Brazil, China and United States indicate that the contributions of copyright based industries to the annual Gross Domestic Product (GDP) of each of the countries range between 5.5 percent and 10 percent.[3] Although the Nigerian Copyright Commission in collaboration with WIPO, is still conducting surveys on the contributions of Nigerian Copyright-based industries, preliminary observations indicate that creative industries have the potential to account for at least 5 percent of GDP. The copyright industries also account for significant generation of employment, which cascades from the production sector to the downstream distribution sector.[4]

The Nigerian Copyright Act provides a basic framework for safeguarding rights of creators and ensuring investments in the creative sector are made profitable.[5] However, it has been a great challenge harnessing this legislation's provisions to the positive advantage of creators and investors in the creative industries. This has made it difficult for Nigerian creative industries to optimize their potential and deliver economic returns on levels comparable to their global counterparts.

Many factors account for this state of affairs, including; non-prioritization of the creative industries in the national economic agenda; inadequate funding of regulatory and enforcement activities in the creative sector; rising level of piracy vis-à-vis the impact of digital and communication technologies; insufficient public awareness of the importance of respecting rights of creators; poverty (leading to patronage of cheap pirate products); unsatisfied demand for copyright works; poor distribution networks for original creative works; high cost of production; and poor organization in the creative sector. To address these lapses and optimize the potentials of our creative industries, a fundamental re-orientation and re-conceptualization of the economic value of our creative assets should be consciously pursued by individuals, groups, and government.[6] This article examines the Nigerian Copyright Act with the view of identifying the inadequacies which account for the inability of the Act to accord adequate protection to digital inventions in the country. Particular focus is on the lack of rights for innovators of digital technology as well as manifestations of ambiguities and contradictions within the Act. This article also reveals the technological shortcomings which have made it possible for infringers of digital inventions to assail the technology with impunity, and therefore make it impossible for the Copyright Act to live up to its mandate.

[2] Olufunmilayo B. Arewa, *The Rise of Nollywood: Creators, Entrepreneurs, and Pirates*, University of California – Irvine (2012) p 4

[3] Nigerian Copyright Commission, 'Medium Term Corporate Plan and Strategy 2012- 2014' (2012).

[4] ibid

[5] Section 13, Copyright Act, Cap C28 Laws of Federation of Nigeria (LFN) 2004

[6] ibid

This article evaluates the Copyright Bill and compares it, when relevant, to existing copyright law in Nigeria. In doing so, the article discusses whether the Bill addresses the shortcomings of the current applicable law. Moreover, reference is made to international copyright law to demonstrate whether the Bill is in line with the internationally agreed upon minimum mandatory standards of copyright protection such as the Berne Convention or the Agreement on Trade Related Aspects of Intellectual Property (TRIPS).

In light of the above, this article is divided into five parts. Apart from this introduction, which forms this first part, part two considers the development of Nigerian Copyright law. Part three examines the history of copyright law reform and formation of the Nigerian Copyright Commission (NCC). Part four provides a more substantial overview of the text of the Bill with a focus on main areas of difference between the Bill and the existing law. It also analyzes the current structure in place for protection of copyright in the digital environment, highlights the provisions of the Copyright Bill, makes general observations about the deplorable state of protection of digital inventions in Nigeria, and identifies challenges facing the Nigerian legal system in the fight against piracy. Finally, part five contains the conclusion.

2. NIGERIAN COPYRIGHT LAW: THE BEGINNING

The history of copyright in Nigeria can be split into two periods: namely; the pre-colonial or aboriginal society period, and the classical intellectual property period featuring colonial law, which has since been maintained by post-independence intellectual property statutes.[7]

The pre-colonial/indigenous society period was a period where customs and practice were the system of governance. It was the period before the advent of colonialism. The customs were unwritten but were well-known by all members of the community and administered by traditional rulers. The different tribes were actively involved in and were well-known for certain activities and particular creations, such as cloth-weaving. Each community had its folk songs, clay pot moulding, sculptures, designs, textiles, bead-making, and tribal marks among other things which would have been eligible for intellectual property protection in the classical period.[8]

The classical intellectual property period can be traced back to the long historical and political connection between Nigeria and Great Britain. Nigeria is a former colony of Great Britain. Thus, a discussion of the development of intellectual property in Nigeria without mention of English influence would be incomplete. The introduction of intellectual property law into Nigeria was through Britain's colonial legal development proliferated in Africa, Asia and Latin America.[9] The Order-in-Council of 24th June 1912 extended the Copyright Act of 1911 of England to the Southern Protectorate and remained in force after the amalgamation. In 1970, the Copyright Act was enacted as the first post- independence copyright statute, repealing the 1911 Copyright Act. Almost two decades after the enactment of the 1970 Act, there was a great clamour for review by the copyright industry, especially from publishers and musicians. There had been a record of huge losses attributable to growing incidence of piracy. Thus, in 1988, pressure for an amendment to the copyright law brought about the enactment of the

[7] Adebambo Adewopo, 'According To Intellectual Property: A Pro-Development Vision of the Law and the Nigerian Intellectual Property Law and Policy Reform in the Knowledge Era' (2012) NIALS 12.

[8] Bankole Sodipo, *Piracy and Counterfeiting: GATT, TRIPS and Developing Countries,* Kluwer International Law (London, 1997) p 20

Bankole Adekunle Akintoye Sodipo, 'Piracy and Counterfeiting: The Freedom to copy *v* Intellectual Property Rights', Thesis Submitted in the Undertaking the degree of Ph.D. at the University of London Queen Mary and Westfield College, 1995.

[9] F Shyllon, 'Intellectual Property Law In Nigeria' (2003) 21 IIC Studies in Industrial Property & Copyright Law 27.

Copyright Act 1988 and repeal of the 1970 Act. The 1988 Act was amended in 1992 and 1999.[10]

Nigeria is also a signatory to numerous international treaties and conventions such as the Berne Convention; TRIPS Agreement; WIPO Copyright Treaty; WIPO Performances and Phonograms Treaty;[11] and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations.[12]

3. NIGERIAN COPYRIGHT LAW REFORM

The first attempt at IP reform began in the early 80's. Born out of the bane of piracy, the music and book publishing industries led the movement to reform the Copyright Act. In 1988, the Copyright Act was promulgated and amended twice, first in 1992 and later in 1999. There were also efforts, albeit unsuccessful, to review the Trademarks Act of 1965 and the Patents Act of 1970. One of such attempts, the 1991 draft Industrial Property Bill, was made to consolidate the trademarks, patent, and designs laws into one industrial property law under the control of an industrial property office.[13] The intent was to upgrade the two Acts in accordance with present commercial and technological development as well as intellectual property at the international level. The 1991 Report of the Nigeria Law Reform Commission was produced with the intention of reforming the industrial property law which had become crucial for the trademark and patents regimes to evince the significant changes in commercial terrain as well as the protection of inventions and new technologies respectively.[14]

In September 1999, WIPO and the Nigerian government organised a workshop on teaching intellectual property to the African region. At the opening, the Nigerian federal government announced the restructuring of their intellectual property administration with the inauguration of an Intellectual Property Commission. This announcement was followed by creation of a committee comprised of delegates from various agencies governing intellectual property as well as relevant stakeholders. They were saddled with the responsibility of working out requirements for creation of an intellectual property agency. The agency would oversee activities of the Copyright and Industrial Property regimes and carry the responsibility of making recommendations for review of current intellectual property laws. This policy never proceeded beyond pronouncement.[15]

In late 2006, the previous Industrial Property Bill was built upon by a draft Nigerian Intellectual Property Commission (NIPCOM) Bill. The NIPCOM bill was made by the executive to compliment the Federal Government's Reform Agenda. In 2007, the NIPCOM Draft bill was prepared to cover all the subject matter of intellectual property rights in Nigeria including copyright, trademarks, service marks, patents and designs; however, the results were unsuccessful. These unsuccessful attempts led to another attempt for the amendment of the Copyright Act by another Copyright Law Reform group. They drafted a Copyright (Amendment) Bill 2010 in an attempt to amend the copyright law to reflect the budding technological and digital environment. However, there has been no passage of the Bill into Law.[16] The Director General of the Nigerian Copyright Commission (NCC) on the 6th of September, 2012, announced that the NCC had set in motion

[10] Which is now contained in Cap C28 Laws of the Federation 2004.

[11] WIPO Performances and Phonograms Treaty adopted in Geneva 20 December 1996, entered into force on March 6 2002 36 ILM 76. Hereinafter (WPPT).

[12] "Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations." October 26, 1961. 496 U.N.T.S. 43.

[13] Draft Industrial Property Decree of 1991, Part 1(1991).

[14] Nigerian Law Reform Commission 'Working Paper on the Reform of Industrial Property Law' (1990) 1.

[15] Adewopo op cit (n 8) p.49.

[16] ibid p.50.

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, none has yielded any positive returns and it is evident that the present copyright law regime is very much behind. As such, there is an urgent need for a new regime. Although the Copyright Act seems to be the luckiest of the three major intellectual property legislations in Nigeria, with the most recent amendment in 1999, the major technological developments and advancements recorded in the 21st century demands a thorough overhaul of this Act to bring it up to date.

A. THE NIGERIAN COPYRIGHT COMMISSION

(i) Establishment of the Commission and Initial Mandate

The Nigerian Copyright Commission (NCC), as it is currently known, was established as Nigerian Copyright Council under the supervision of the then Federal Ministry of Information and Culture, pursuant to the provisions of Decree No. 47 of 1988.[18] The functions of the Council under the law were at the time, limited to administrative functions as encapsulated in section 34 (3) of the Copyright Act.

(ii) Amendments to the Copyright Act and Expansion of Mandate

The establishing statute of the Commission, the Copyright Act has since undergone two amendments, via the Copyright (Amendment) Decree No. 98 of 1992, and Copyright (Amendment) Decree No. 42 of 1999. By these amendments, the responsibilities of the Commission were expanded to include regulatory and enforcement functions. Section 38 enables the Commission to appoint Copyright Inspectors, whose powers include the prosecution of criminal infringements of copyright law as well as general police powers of investigation and arrests in relation to copyright offences. The implication of this development is that the Commission has transformed from an ordinary administrative agency to a regulatory and enforcement agency.

The commission in exercising its powers and while waiting for this epoch reform of the extant Copyright Act of 1999, issued several regulations to take care and fill the lacuna in the Act. Instances of the regulations are as follows: Copyright (Reciprocal Extension) Regulation 1972; Copyright (Security Devices) Regulation 1999; Copyright (Video Rental) Regulations 1999; Copyright Notification Scheme; Copyright (Optical Disc) Regulation 2006; Copyright (Collective Management Organisation) Regulations 2007; Copyright (Levy on Materials) Order

[17] Nigerian Copyright Commission, 'Nigerian Copyright Commission to Reform Copyright System....DG Seeks Stakeholders' Collaboration' <www.copyright.gov.ng/index.php/news-and-events/117-nigerian-copyright-commission-to-reform-copyright-system-dg-seeks-stakeholders-collaboration> accessed 18 April 2018.

[18] Later codified as Copyright Act, Chapter 68, Laws of the Federation of Nigeria 1990.

2012. To a great extent, these regulations have been integrated into the draft Copyright Bill.

4. REFORMING NIGERIAN COPYRIGHT LAW IN AN AGE OF DIGITAL TECHNOLOGY

The current structure in place for the protection of copyright can be said to be awfully below required standards for this time and age. It has been 20 years since the last amendment of the Copyright Act in 1999. This Act has become outdated and needs to be fine-tuned in order to meet developing technological standards. Some of the major problems of the copyright regime stem from the age of the statute. Furthermore, there is the issue of enforcement of existing copyright legislation, particularly the enforcement of laws in respect of copyright piracy. This problem has made Nigeria a hub of piracy. The nature and scope of rights governed by the law do not reflect contemporary developments of this time and age. It marks failure on the part of the law reforms administration to formulate reform policies and inability to link intellectual property with the environment.[19] Against this backdrop agreement, NCC and stakeholders took the bold step to reform the Copyright Act.

Policy Considerations

The preparation of the draft Copyright Bill was guided by an underlying policy objective, inter alia:

i. To strengthen the copyright regime in Nigeria;

ii. To enhance the competitiveness of its creative industries in a digital and knowledge-based global economy;

iii. To effectively protect the rights of authors to ensure just rewards and recognition for their intellectual efforts while also providing appropriate limitations and exceptions to guarantee access to creative works, encourage cultural interchange, and advance public welfare;

iv. To facilitate Nigeria's compliance with obligations arising from relevant international copyright treaties; and

v. To enhance the capacity of the Nigerian Copyright Commission for effective administration and enforcement of the provisions of the Copyright Act.

The draft Copyright Bill also takes into account the basic objective of the reform initiative, as well as the identified concerns of Nigeria's copyright community, expressed either through written submissions, or through interventions during elaborate stakeholders' consultations between 2012 and 2013.[20]

A. OVERVIEW OF THE COPYRIGHT BILL

Among other measures introduced, the bill 'domesticated' the anti-circumvention provisions as provided in the Article 11 and 12 of the WIPO Copyright Treaty. These articles of the WIPO Copyright Treaty provide against the circumvention of technological protective measures (TPMs) and rights management information (RMIs) put in place to protect copyright works.

Among other things, the draft provisions set out which works are and are not eligible for copyright protection, and various exceptions. They cover issues of ownership, transfers, and licences for protected works; set out penalties for infringements and provide for criminal liability for copyright offences. Another feature of the draft Bill bars circumvention of technological protection measures and alteration or falsification of electronic rights management information.

The draft Bill, unlike the extant Copyright Act, contains provisions for issuing and carrying out take-down notices

[19] Adewopo (n 7) 16.

[20] Nigeria Copyright Commission Draft Copyright Bill (NCC Abuja, 2015) [hereinafter Draft Copyright Bill].

for infringing material as well as suspending the accounts of repeat infringers. It addresses internet service provider liability for copyright breaches and permits blocking of access to content in some cases.

The draft bill also provides protections for performers and folklore rights; provides for the establishment and approval of collective management organisations, including extended collective management; and for levies for private copying.

Another feature of the Bill deals with compulsory licences for public interest. It aims to tackle certain 'peculiar circumstances' where government intervention might be needed to curtail an abuse of monopolies or certain unfair practices. Clause 38(9) which creates criminal liability for failure to pay royalties, is intended to deter 'flagrant' refusals to pay accrued royalties, particularly in the case of collectively managed rights.

B. HIGHLIGHTS OF THE DRAFT COPYRIGHT BILL

The Draft Copyright Bill has 88 sections divided into eleven parts.

Part I. Copyrightable subject matter

The list of works recognized as copyrightable subject matter in the Bill are largely similar to those of the Copyright Act with a few exceptions. It makes provisions for works eligible for copyright protection; qualification for protection; and the nature of rights conferred on authors of such works. The part also identifies subject matters which are not eligible for protection. The draft Bill repeats the wording of Article 9(2) of the TRIPS Agreement regarding exclusion from copyright protection of 'ideas', 'procedures', 'processes', 'methods of operation', 'concepts', and 'principles', while seemingly venturing into the realm of patent law by also excluding 'discoveries.'[21]

Part II. Exceptions from Copyright Control

The existing Copyright Act provides for Limitations and exceptions in the Second Schedule of the Act.[22] However, under the draft bill it is provided for in the body of the Bill and not as a Schedule.[23] The existing law on copyright allows quotations from published works for 'literary, scientific, technical, or educational' purposes and for 'criticism or praise.'[24] Moreover, not-for-profit public libraries, publication archives, and scientific and educational institutions can copy published works for the purposes of their activities in the numbers necessary.[25] Furthermore, the Second Schedule of the Copyright Act deems copying for private and non- commercial purposes permissible.

One central and most important suggestion is that the Copyright Bill should have opened its proposed fair dealing clause in Sec. 20 to be applicable to any purpose, for instance by including the words 'such as' before the list of approved purposes that may be considered an instance of fair dealing.

Section 20(1)(a) reflects a salutary recognition of the benefits of flexible copyright limitations and exceptions. By 'flexible,' it refers to exceptions that apply to multiple purposes based on a generally applicable balancing test (also known as a proportionality test). Such an exception is provided in Sec. 20(1)(a), which enumerates a five-factor test for evaluating the fairness of uses of protected content 'for purposes of research, teaching, education, private use, criticism, review or the reporting of current events.'

[21] ibid, Clause 2(a).

[22] Copyright Act, Cap C28, Laws of Federation of Nigeria, (LFN) (2004) [hereinafter Copyright Act 2004].

[23] Draft Copyright Bill (n 19), Clause 20(1)(a)(i, ii, iii, iv, v) (b, c, d, e, f, g, h, i, j, (i, ii, iii) (k, l, m, n, op, q, r, s, t) - (2)(a, b, c)(i, ii).

[24] Copyright Act Cap C28 LFN, 2004

[25] Copyright Act 2004 (n 21) Second Schedule

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]

The most important reason to include an open and flexible exception in the law is to provide a mechanism for the law to adapt to gaps in coverage of users' rights that may be necessary to accommodate unforeseen uses of protected material that benefit society without harming the interests of the copyright owner. An open and flexible exception prevents the copyright law from pre-deciding that all unforeseen uses are prohibited.

The inclusion of an open flexible exception would assist meeting some needs that can be immediately foreseen, based on experiences in other countries. For instance, filmmaking is an industry that is dependent on limitations and exceptions for their creative activity. Documentary filmmakers routinely incorporate brief audio-visual clips (or still images) into their new work as illustrations. Thus, for instance, a documentary about gun violence in Chicago might include excerpts from news broadcast, or headlines from newspapers, to illustrate the extent of the problem. A similar practice might be followed in narrative film production, to illustrate or evoke the real historical setting in which a fictional story takes place. More broadly, contemporary creators of all kinds frequently make highly selective quotations of copyrighted material to illustrate an argument or make a point. In many cases, licenses permitting such uses would be practically impossible or prohibitively expensive to obtain. In the U.S., such uses are routinely analyzed, and frequently approved, as fair uses.[29]

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[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, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

[27] Peter Jaszi, Michael Carrol and Sean Flynn, 'Comments of US Copyright Schools on Draft Copyright Bill 2015' (Nigeria Copyright Commission, American University Washington College of Law, Program on Information Justice and Intellectual Property, Washington DC, 2015).

[28] See, e.g., Australian Law Reform Commission, 'Copyright and the Digital Economy' <www.alrc.gov.au/publications/copyright-report-122> accessed 28 May 2019.

[29] See Peter Jaszi, 'Copyright, Fair Use and Motion Pictures' at <http://epubs.utah.edu/index.php/ulr/article/viewFile/23/17> and see, e.g., Anthony Falzone and Julie Ahrens, 'Lennon v. Premise Media' at <http://cyberlaw.stanford.edu/our-

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]

In addition to representing questionable copyright policy, the absence of a provision allowing quotation for purposes of illustrative or artistic purposes in the Copyright Bill also may pose a question of Berne compliance, which Nigeria is a signatory to. Flexible and open exceptions also have been key to the development of other industries. Software and hardware industries in the U.S. have thrived, in part, because of court decisions recognizing that copying protected software for the limited purpose of reverse engineering to achieve interoperability constitutes fair use. This kind of pro-competitive activity, which ultimately harms no one, but increases the size of the market for all, is another instance of an activity that the draft Copyright Bill would not cover.[32]

An even more contemporary instance, also drawn from the field of technology, is that of mass digitization for new purposes such as search and text or data mining (sometimes referred to as 'non-consumptive' or 'computational' research). New technologies offer consumers, students, researchers, and others the promise of being able to scan large numbers of texts looking for keywords or significant patterns. However, these socially and culturally valuable activities are possible only if the texts in question first have been converted, as a body, into machine-readable digital formats. On account of fair use in the United States, this kind of mass digitization can and does occur, at no cost to rights-holders but enormous benefits to civil society at large.[33]

In the United States, libraries and museums make images of documents and artworks in their collections available online for public use. Scholars and students who cannot travel to the places where these materials reside

work/cases/lennon-v-premise-media> and *Faulkner Literary Rights v. Sony Picture Classics Inc.*, 952 F.Supp.2d 701 (N.D. Miss. 2013). But in the NCC draft such uses appear to fall between the flexible fair dealing provisions, on the one hand, and its specific exceptions, on the other.

[30] Peter Jaszi, Michael Carrol et al (n 28).

[31] See Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Rights: 1 The Berne Convention and Beyond* (2nd ed, 2006) 788–789

[32] Peter Jaszi, Michael Carrol et al (n 28).

[33] See, e.g., *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014).

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 suppose enactment of a flexible copyright exception, when open or closed, would violate it. Thus, the three-step test need not be incorporated into domestic legislation to assure treaty compliance.[35]

Even in this setting, its proper interpretation is a matter of intense, unresolved controversy. This is, at least in part, because it is key terms, including 'normal exploitation,' 'unreasonable prejudice,' and 'legitimate interests,' are undefined. One thing, however, is clear: The three-step was never intended to be applied, on a case-by-case basis, in private disputes between rights-holders and users, and there are no reliable sources of guidance about how it could be so applied.[36] It is recommended that 20(1)(1)(v) be removed.

Part III. Ownership, Transfers and Licenses

This part deals with issues of ownership, transfers and licenses in respect to protected works.

With the exception of a number of additions, the material interests of the creators of copyright - protected works set out by the Bill are similar to those already recognised by the 1970, 1992, and 1999 legislations. The Bill, however, categorises and defines the rights more clearly and, in doing so, combines and integrates the provisions of those Acts. Provision is also made for compulsory licenses. These include compulsory license for translation and reproduction of certain works;[37] license to produce and publish works for certain purposes;[38] license for domestic broadcasting organisation;[39] and compulsory licenses for public interest.[40]

Part IV. Copyright Infringement

This part makes provisions for infringement of rights and remedies to such infringements.[41] The Copyright Bill expands on guarantees and remedies available in the Copyright Act of 1999. Key additions to the law are the introduction of customs enforced measures,[42] increased fines, longer imprisonment terms,[43] and a clear and categorised distinction between primary and secondary infringements.[44] Therefore, the Bill delivers on stronger enforcement mechanisms for better protection of the interests of right-holders, which is regarded as one of the main rationales for the copyright law reform.

[34] See Association of Research Libraries, 'Code of Best Practices in Fair Use for Academic and Research Libraries' Principle 19-20, <www.arl.org/storage/documents/publications/code-of-best-practices-fair- use.pdf>

[35] See Christophe Geiger, 'From Berne to National Law, via the Copyright Directive: The Dangerous Mutations of the Three-Step Test (2007) 29(12) E.I.P.R. 486-91 <www.pijip.org/wp-content/uploads/2016/01/geiger2007.pdf>.

[36] See Christophe Geiger, Daniel Gervais, and Martin Seftleben, 'The Three- Step-Test Revisited: How to Use the Test's Flexibility in National Copyright Law' (2014) 29(3) Amer Univ Int'l L Rev 581 <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1816&context=auilr>.

[37] Draft Copyright Bill (n 19), S. 27.

[38] ibid, S. 28.

[39] ibid, S. 29.

[40] ibid, S. 31.

[41] Draft Copyright Bill (n 19), S.32 to S.37.

[42] ibid, S.32

[43] ibid, Clause 32 (S.32(1)(a)).

[44] ibid, Clause 38, (S.38).

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 anti-piracy measures. In particular, provisions are made to prohibit circumvention of technological protection measures adopted by owners of copyright;[49] and falsification, alteration or removal of electronic rights management information.[50] Actions for circumvention of technological protection measures and right management information are also provided for.[51] The bill, like other international copyright instruments, domesticated the anti-circumvention provisions as provided in the Article 11 and 12 of the WIPO Copyright Treaty, which provides against the circumvention of Technological Protective Measures (TPMs) and Rights Management Information (RMIs) put in place to protect copyright works.[52]

Part VII. Takedown of Infringing Online Content.

This part includes provision for issuance of Notice for take down of infringing content,[53] and procedures for effecting a takedown of such content as well as suspension of accounts of repeat infringers.[54] The part provides for limitation of liability of Internet Service Providers (ISP) with respect to information residing on systems or networks at direction of users,[55] and use of information location tools,[56] and provision for blocking access to infringing content.[57]

Section 47(2)(e) of the Bill can be referred to limitations and exceptions in relation to service provider liability. For instance, in the U.S., the courts have recently clarified the proposition that a copyright owner's obligation in providing a 'takedown notice' to an internet service provider entails a duty to consider whether the unauthorized use of protected material in question may be non-infringing, and therefore lawful, under an application of an exception such as fair use.[58] This principle helps assure that notices are not employed in ways that will unnecessarily compromise the balance between regulated and permitted uses that is struck in the statute itself.

Similarly, 17 years of U.S. experience with a statutory provision, similar to that proposed in Part VII of the draft,

[45] ibid, SS 38 -41.

[46] ibid

[47] NCC, 'Roundtable on Evaluation of Copyright Regulations Related to Software in Nigeria's Laws' (September, 2016)

[48] Draft Copyright Bill (n 19), Clause 38, (S. 38 (2)).

[49] ibid, S. 44.

[50] ibid, S. 45.

[51] ibid S. 46.

[52] WIPO Copyright Treaty, art 11, 12, adopted Dec. 20, 1996, 36 I.L.M. 65 [hereinafter WCT] (to which Nigeria is a party and has domesticated).

[53] ibid, Clause 47, (S. 47).

[54] ibid, Clause 48 and 49 (S. 48 & S. 49).

[55] ibid, S. 51.

[56]ibid, S. 52.

[57] ibid, S. 54.

[58] See Lenz v. Universal Music Corp., 815 F.3d 1145 (9th Cir. 2016).

has shown that service providers need legal encouragement to defend user rights of individuals who rely on them for internet access by refusing to take down, or agreeing to restore unconditionally, legitimate postings that nevertheless have been the subject of takedown notices. In these cases, ISP's desire to avoid risk sometimes overwhelms their willingness to stand up for their subscribers. The potential result is that copyright limitations and exceptions are rendered less meaningful in the Internet environment than should be the case as a matter of official copyright policy. Both copyright owners and service providers should be encouraged to take responsibility for assuring that this does not occur.[59]

In this regard, the Copyright Bill, could profit from the U.S. experience. Thus, for instance, Section 47(2)(e), could be extended and clarified to state specifically:

> Section 47(2)(e): '. . . a statement under penalty of perjury that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the owner of copyright or his agent, or the law, including by any limitation or exception under this Act.'

Furthermore, the Copyright Bill may improve on its U.S. counterpart by providing a 'good faith' exception to ISP liability at Section 48(6). It could be made clearer and more certain by adding language to the effect that:

> Section 48(6): '[a] service provider shall not be liable to any person for any action taken under this section in good faith, including those taken in reliance on limitations and exceptions under this Act.'

Part VIII. Rights of Performers

The Part provides for protected performances,[60] restrictions on use of performances,[61] moral rights of performers,[62] and exception to performer's rights, among others.[63] A provision on transfer of rights is also available.[64] Apart from provisions for infringement of performer's rights,[65] the part also provides criminal liability in respect of infringement of performer's rights.[66]

The performers' rights recognised in Part VIII of the Bill are mostly in line with the requirements of the Rome Convention, TRIPS Agreement and WPPT,[67] regarding fixation, broadcasting, reproduction, distribution, and renting of performances.[68]

Part IX. Expression of Folklore

This part provides for the protection of expressions of folklore. Provision is made for infringement of folklore rights,[69] as well as criminal liability in respect of such infringements.[70]

Section 66(2)(A) is on Limitations and Exceptions in Relation to Protection on Expression of Folklore. *Sui generis* protection for expressions of folklore has the potential to chill education, academic commentary, and artist creativity, unless it is appropriately qualified. Therefore, it is important that in addition to providing its own specific limitations and exceptions, Section 66(2) of the draft Copyright Bill imports the flexible provision of Section 20(a)(1) into this new regulatory context – one which falls (strictly speaking) outside the boundaries of copyright.

[59] Peter Jaszi, Michael Carrol and Sean Flynn, 'Comments of US Copyright Schools on Draft Copyright Bill 2015' (Nigeria Copyright Commission, American University Washington College of Law, Program on Information Justice and Intellectual Property, Washington DC, 2015).

[60] Nigeria Copyright Bill, 2015, Clause 56, (S. 56).

[61] ibid, Clause 57 (S. 57).

[62] ibid, Clause 58, (S. 58).

[63] ibid, Clause 60 (S. 60).

[64] ibid, Clause 61, (S. 61).

[65] ibid, Clause 63, (S. 63).

[66] ibid, Clause 65, (S. 65).

[67] Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, October 26, 1961. 496 U.N.T.S. 43; TRIPS Agreement (n 25), and WPPT (n 10).

[68] Nigeria Copyright Bill, 2015, Clause 56- 61 (S. 56- 61)

[69] ibid, S. 67

[70] ibid, S. 68.

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]

5. CONCLUSION

For any nation to progress economically, it must not downplay the development of its intellectual resources. The only way to ensure the protection of original intellectual works is by tightening provisions for the safeguard of copyright products and especially, liberalizing provisions in the extant copyright laws of the country to be able to accommodate products derived from the rapidly growing technology in the world. The copyright law of Nigeria is outdated. It does not provide clear and effective enforcement mechanisms to protect the interests of right-holders. This article provides an overview of the Copyright Bill and argues that the Bill is a good basis for reform and reconciliation of the existing laws. The Bill's clearer and more comprehensive definitions, scope of recognised rights, and remedies for infringement can guarantee a stronger protection of moral and material interests of the author and copyright owners. Furthermore, expanding the permissible uses of copyright

[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).

[77] ibid, S. 76

[78] ibid, S. 79.

[79] ibid, S. 80

[80] ibid, S. 84

[81] ibid, S. 85.

[82] ibid, S. 87

works secures the interests of the users, especially those with disabilities as required by the Marrakesh Treaty to which Nigeria is a party.

The Bill provides a better balance between the interests of right-holders and those of the public. The Copyright Bill, however, requires further analysis and evaluation to ensure its effectiveness if enacted as law. Areas such as the prescribed limitations and exceptions appear to be brief and could benefit from further clarification particularly with regard to permissible acts. The paper thus 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.

BIBLIOGRAPHY

Adewopo A, 'According to Intellectual Property: A Pro-Development Vision of the Law and the Nigerian Intellectual Property Law and Policy Reform in the Knowledge Era' (2012) NIALS 12

Australian Law Reform Commission, 'Copyright and the Digital Economy' <www.alrc.gov.au/publications/copyright-report-122> accessed 28 May 2019

Association of Research Libraries, 'Code of Best Practices in Fair Use for Academic and Research Libraries' Principle 19-20, <www.arl.org/storage/documents/publications/code-of-best-practices-fair- use.pdf>

Barlow JP, 'The Economy of Ideas: A Framework for Rethinking Patents and Copyrights in the Digital Age' (1994) 3 Wired 83

Falzone A and Ahrens J, 'Lennon v. Premise Media' at <http://cyberlaw.stanford.edu/our-work/cases/lennon-v-premise-media>

Geiger C, 'From Berne to National Law, via the Copyright Directive: The Dangerous Mutations of the Three-Step Test' (2007) 29(12) E.I.P.R. 486-91 <www.pijip.org/wp-content/uploads/2016/01/geiger2007.pdf>

Daniel Gervais, and Martin Seftleben, 'The Three- Step-Test Revisited: How to Use the Test's Flexibility in National Copyright Law' (2014) 29(3) American University Int'l L Rev 581<http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1816&context=auilr>

Jaszi P, 'Copyright, Fair Use and Motion Pictures' <http://epubs.utah.edu/index.php/ulr/article/viewFile/23/17>

Carrol M, and Flynn S, 'Comments of US Copyright Schools on Draft Copyright Bill 2015' (Nigeria Copyright Commission, American University Washington College of Law, Program on Information Justice and Intellectual Property, Washington DC, 2015)

Nigerian Copyright Commission, 'Medium Term Corporate Plan and Strategy 2012- 2014' (2012)

'Nigerian Copyright Commission to Reform Copyright System...DG seeks Stakeholders' Collaboration' <www.copyright.gov.ng/index.php/news-and-events/117-nigerian-copyright-commission-to-reform-copyright-system-dg-seeks-stakeholders-collaboration> accessed 18 April 2018

Nigerian Law Reform Commission 'Working Paper on the Reform of Industrial Property Law' (1990) 1.

Radin MJ, 'Property at the Crossroads: Two Paradigms in Need of Reinterpretation' (Fifth Conference on Computers, Freedom and Privacy, March 1995).

Ricketson S and Ginsburg J, *International Copyright and Neighbouring Rights: 1 The Berne Convention and Beyond* (2nd ed, 2006) 788–789.

Sodipo B, *Piracy and Counterfeiting: Gatt Trips and Developing Countries* (London, Kluwer International Law, 1997) 20

'Piracy and Counterfeiting: The Freedom to Copy v Intellectual Property Rights' (Thesis submitted in the Undertaking the degree of Ph.D. at The University of London Queen Mary and Westfield College, 1995)

Shyllon F, 'Intellectual Property Law In Nigeria' (2003) 21 IIC Studies in Industrial Property & Copyright L 27