



**NATIONAL OPEN UNIVERSITY OF NIGERIA**

**SCHOOL OF POSTGRADUATE STUDIES**

**FACULTY OF LAW**

**COURSE CODE: CLL811**

**COURSE TITLE: LAW OF INDUSTRIAL AND  
INTELLECTUAL PROPERTY I**



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## **COURSE INFORMATION**

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| TABLE OF CONTENTS                     | PAGE |
|---------------------------------------|------|
| Introduction                          |      |
| Course Aim                            |      |
| Course Learning Outcomes              |      |
| Working through this course           |      |
| Course Materials                      |      |
| Study Units                           |      |
| Textbooks and Reference               |      |
| Assessment                            |      |
| Tutor Marked Assignment               |      |
| Final Examination and Grading         |      |
| Course Score Distribution             |      |
| Course Overview/Presentation          |      |
| How to get the most from this course. |      |
| Tutors and Tutorials.                 |      |
| Summary                               |      |

## CLL811 – LAW OF INDUSTRIAL AND INTELLECTUAL PROPERTY I

### **COURSE GUIDE**

#### **INTRODUCTION**

Generally, intellectual property law protects the rights of authors, inventors, creators and owners of, and entrepreneurs in, certain innovative and creative products. Intellectual property is broadly divided into copyright (or more loosely referred to as intellectual property in layman's term) and industrial property, which includes patent, designs and trademarks.

Our discussion in this semester will focus on general introduction to intellectual and industrial property, the protection of copyright and related rights; and emerging intellectual property issues, namely protection of traditional knowledge traditional cultural expression and genetic resources, and some of the recurring issues around digitisation and intellectual property.

Nigerian legislation and cases are the primary focus of discussion. However, reference shall be made to relevant international treaties and the law from selected foreign jurisdictions to give the global perspectives and for purposes of comparison.

#### **WORKING THROUGH THIS COURSE**

To complete this course, you are advised to read the study units, recommended books, relevant cases and other materials provided by NOUN. Each unit contains a Self-Assessment Exercise, and at points in the course you are required to submit assignments for assessment purposes. At the end of the course there is a final examination. The course should take you about 11 weeks to complete. You will find all the components of the course listed below. You need to make out time for each unit in order to complete the course successfully and on time.

#### **COURSE MATERIALS**

The major components of the course are.

- a) Course guide.
- b) Study Units.

- c) Textbooks
- d) Assignment file/Seminar Paper
- e) Presentation schedule.

## **MODULES AND STUDY UNITS**

The discussion in this course is broken down to 11 (eleven) study units that are broadly divided into FOUR modules as follows –

### **MODULE ONE: GENERAL INTRODUCTION TO INTELLECTUAL AND INDUSTRIAL PROPERTY**

Unit 1: Meaning, objective and justification of intellectual and industrial property

Unit 2: International and regional frameworks for intellectual property protection

Unit 3: The institutional framework for intellectual property protection in Nigeria

### **MODULE TWO: PROTECTION OF COPYRIGHT IN NIGERIA**

Unit 1: History of copyright protection in Nigeria

Unit 2: Subsistence of Copyright

Unit 3: Authorship, Ownership and Transfer of Copyright

### **MODULE THREE: ADMINISTRATION AND ENFORCEMENT OF COPYRIGHT**

Unit 1: Administration of Copyright

Unit 2: Copyright Infringement and Enforcement

Unit 3: Exceptions to Copyright

### **MODULE FOUR: EMERGING INTELLECTUAL PROPERTY ISSUES**

Unit 1: Traditional knowledge, traditional cultural expression and genetic resources

Unit 2: Digitization and intellectual property

All these Units are demanding. They also deal with basic principles and values, which merit your attention and thought. Tackle them in separate study periods. You may require several hours for each.

We suggest that the Modules be studied one after the other, since they are linked by a common theme. You will gain more from them if you have first carried out work on the law of contract. You will then have a clearer picture into which to paint these topics. Subsequent units are written on the assumption that you have completed previous Units.

Each study unit consists of one week's work and includes specific Learning Outcomes, directions for study, reading materials and Self-Assessment Exercises (*SAE*). Together, these exercises will assist you in achieving the stated Learning Outcomes of the individual units and of the course.

### **REFERENCES / FURTHER READING**

Certain books have been recommended in the course. You should read them where so directed before attempting the exercise.

### **ASSESSMENT**

There are two aspects of the assessment of this course, the Tutor Marked Assignments and a written examination. In doing these assignments you are expected to apply knowledge acquired during the course. The assignments must be submitted to your tutor for formal assessment in accordance with the deadlines stated in the presentation schedule and the Assignment file. The work that you submit to your tutor for assessment will count for 30% of your total score.

### **SELF-ASSESSMENT EXERCISES**

There is a self-assessment exercise at the end for every unit. You are required to attempt all the assignments. You will be assessed on all of them, but the best three performances will be used for assessment. The assignments carry 10% each. Extensions will not be granted after the due date unless under exceptional circumstances.

### **FINAL EXAMINATION AND GRADING**

The duration of the final examination for this course is three hours and will carry 70% of the total course grade. The examination will consist of questions, which reflect the kinds of self-assessment exercises and the tutor marked problems you have previously encountered. All aspects of the course will be assessed. You should use the time between completing the last unit and taking the examination to revise the entire course. You may find it useful to review yourself assessment exercises and tutor marked assignments before the examination.



## COURSE SCORE DISTRIBUTION

The following table lays out how the actual course marking is broken down.

| Assessment  | Marks   |
|---|---|
| Assignments 1-4 (the best three of all the assignments submitted) | Four assignments. Best three marks of the four counts at 30% of course marks. |
| Final examination   | 70% of overall course score   |
| Total   | 100% of course score.   |

## Course Overview and Presentation Schedule

| Module / Unit       | Title of Work  | Weeks Activity | Assessment (End of Unit) |
|---------------------|--|----------------|--------------------------|
| <b>Course Guide</b> |  |                |                          |
| <b>MODULE 1</b>     | <b>GENERAL INTRODUCTION TO INTELLECTUAL AND INDUSTRIAL PROPERTY</b>          |                |                          |
| Unit 1              | Meaning, objective and justification of intellectual and industrial property | 1              | Assignment 1             |
| Unit 2              | International and Regional Frameworks for Intellectual Property Protection   | 2              | Assignment 2             |
| Unit 3              | The Institutional Framework for Intellectual Property Protection in Nigeria  | 3              | Assignment 3             |
| <b>MODULE 2</b>     | <b>PROTECTION OF COPYRIGHT AND RELATED RIGHTS</b>                            |                |                          |
| Unit 1              | History of copyright protection in Nigeria                                   | 4              | Assignment 4             |
| Unit 2              | Subsistence of Copyright   | 4              | Assignment 6             |
| Unit 3              | Authorship, Ownership and Transfer of Copyright                              | 5              | Assignment 7             |
| <b>MODULE 3</b>     | <b>ENFORCEMENT AND ADMINISTRATION OF COPYRIGHT IN NIGERIA</b>                |                |                          |
| Unit 1              | Copyright Infringement and Enforcement                                       | 6              | Assignment 9             |
| Unit 2              | Exceptions to Copyright  |                |                          |
| Unit 3              | Administration of Copyright  |                |                          |

|                 |  |   |               |
|-----------------|--|---|---------------|
|                 |  |   |               |
| <b>MODULE 4</b> | <b>EMERGING INTELLECTUAL PROPERTY ISSUES</b>                                 |   |               |
| Unit 1          | Traditional knowledge, traditional cultural expression and genetic resources |   |               |
| Unit 2          | Digitization and intellectual property                                       | 8 | Assignment 12 |

### **HOW TO GET THE MOST FROM THIS COURSE**

In distance learning, the study units replace the lecturer. The advantage is that you can read and work through the study materials at your pace, and at a time and place that suits you best. Think of it as reading the lecture instead of listening to a lecturer. Just as a lecturer might give you in-class exercise, you study units provide exercises for you to do at appropriate times.

Each of the study units follows the same format. The first item is an introduction to the subject matter of the unit and how a particular unit is integrated with other units and the course as a whole. Next is a set of learning objectives. These objectives let you know what you should be able to do by the time you have completed the unit. You should use these objectives to guide your study. When you have finished the unit, you should go back and check whether you have achieved the objectives. If you make a habit of doing this, you will significantly improve your chances of passing the course.

Self-Assessment Exercises are interspersed throughout the units. Working through these tests will help you to achieve the objectives of the unit and prepare you for the assignments and the examination. You should do each Self-Assessment Exercise as you come to it in the study unit. Examples are given in the study units. Work through these when you have come to them.

### **TUTORS AND TUTORIALS**

There are 11 hours of tutorials provided in support of this course. You will be notified of the dates, times and location of the tutorials, together with the name and phone number of your tutor, as soon as you are allocated a tutorial group. Your tutor will mark and comment on your assignments. Keep a close watch on your progress and on any difficulties you might encounter. Your tutor may help and provide assistance to you during the course. You must send your Tutor Marked Assignments to your tutor well before the due date. They will be marked by your tutor and returned to you as soon as possible.

Please do not hesitate to contact your tutor by telephone or e-mail if:

- You do not understand any part of the study units or the assigned readings.
- You have difficulty with the self-assessment exercises.
- You have a question or a problem with an assignment, with your tutor's comments on an assignment or with the grading of an assignment.

You should try your best to attend the tutorials. This is the only chance to have face to face contact with your tutor and ask questions which are answered instantly. You can raise any problem encountered in the course of your study. To gain the maximum benefit from course tutorials, prepare a question list before attending them. You will gain a lot from participating actively.

## **TABLE OF CONTENT**

| <b>MODULE/UNIT</b>  | <b>PAGE</b> |
|---|-------------|
| <b>MODULE 1 GENERAL INTRODUCTION TO INTELLECTUAL AND INDUSTRIAL PROPERTY</b>            |             |
| • Unit 1 Meaning, objective, and justification of intellectual and industrial property  | <b>13</b>   |
| • Unit 2 International and Regional Frameworks for Intellectual Property Protection     | <b>26</b>   |
| • Unit 3 The Institutional Framework for Intellectual Property Protection in Nigeria    | <b>38</b>   |
| <b>MODULE 2 PROTECTION OF COPYRIGHT AND RELATED RIGHTS</b>                              |             |
| • Unit 1 History of Copyright Right Protection in Nigeria                               | <b>45</b>   |
| • Unit 2 Subsistence of Copyright   | <b>51</b>   |
| • Unit 3 Authorship, Ownership and Transfer of Copyright                                | <b>72</b>   |
| <b>MODULE 3 ENFORCEMENT AND ADMINISTRATION OF COPYRIGHT IN NIGERIA</b>                  |             |
| • Unit 1 Copyright Infringement and Enforcement   | <b>83</b>   |
| • Unit 2 Exceptions to Copyright  | <b>90</b>   |
| • Unit 3 Administration of Copyright  | <b>103</b>  |
| <b>MODULE 4 EMERGING INTELLECTUAL PROPERTY ISSUES</b>                                   |             |
| • Unit 1 Traditional knowledge, traditional cultural expressions, and generic resources | <b>118</b>  |
| • Unit 2 Digitisation and Intellectual Property   | <b>129</b>  |

## MODULE 1 GENERAL INTRODUCTION TO INTELLECTUAL AND INDUSTRIAL PROPERTY

### **Unit 1: Meaning, objective and justification of intellectual and industrial property**

1.1 Introduction

1.2 Learning Outcomes

#### **1.3 Meaning, objective, and justification of intellectual and industrial property**

1.3.1 Meaning of intellectual and industrial property

1.3.2 Objectives of the protection of intellectual property

1.3.3 Justification of protection of intellectual property

1.4 Summary

1.5 References/Further Reading/Web Sources

1.6 Answers to Self-Assessment Exercises 1

#### **1.1 Introduction**

Intellectual property is everywhere. It finds relevance in every facet of society. It plays a significant role in medicine and health, entertainment and sports, literature and visual arts, broadcasting, business and entrepreneurship, manufacturing and construction. It is also important within the climate change discourse, especially in the area of green technology and agriculture. Further, it occupies a major part of the conversations around the protection of traditional knowledge, traditional cultural expressions and genetic resources. Intellectual property has remained in the heart of technological advances, especially in this era of digitisation. As such, it continues to be relevant within the digital environment and within the conversations around the fourth industrial revolution. Indeed, intellectual property has continuously been touted as linked to national and global development because of its capacity to empower innovators and creators economically and promote societal welfare by making much needed knowledge available to the public.

Therefore, nations around the world have developed, and continue to develop, legal regimes to protect the various forms in which intellectual property manifests. Given the broadness of its reach, intellectual property exists in various forms broadly classified into copyright and related rights, on the one hand, and industrial property on the other hand. Industrial property includes patent, trademarks, industrial designs, geographic indications,

and other special forms such as trade secret, domain name and unfair competition. Traditional knowledge and traditional cultural expressions cannot strictly be classified as intellectual property. However, as will be shown in due course, legal regimes exist that have sought to protect them through the tools offered by intellectual property law or sui generis legislation.

That being said, it is important to note that the main intellectual property laws in Nigeria are the Patents and Designs Act, Cap P2, Laws of the Federation of Nigeria, 2004; the Trademarks Act, Cap T13, Laws of the Federation of Nigeria, 2004 and the Regulations made under it; and the Copyright Act, Cape C28, Laws of the Federation of Nigeria, 2004 and its regulations. The history of intellectual property law, especially in Nigeria, will be discussed when we examine the protection afforded intellectual property under these laws. The term intellectual property has been defined in different ways and such definitions flow from the philosophical leanings of their authors. Implicit in some of the definitions are the objectives of, and justification for, the protection of intellectual property. This unit highlights and discusses some key definitions of intellectual property and examines the objectives and justificatory theories for its protection. The unit is important to lay the foundation for the rest parts of the course.

## **1.2 Learning Outcomes**

At the end of the study in this unit, you should be able to

- 1) Explain the meaning of intellectual property and industrial property
- 2) Explain why the law protects intellectual property
- 3) Explain the theories that have been developed to justify intellectual property protection

## **1.3 Meaning, objective and justification of intellectual and industrial property**

### **1.3.1 Meaning of intellectual and industrial property**

There is consensus on the point that intellectual and industrial property (simply, intellectual property) – intangible or incorporeal property – is a right conferred by law on human innovators and creators, and even entrepreneurs, to protect the fruits or products of their intellect, their innovative and creative efforts and their commercial reputation and goodwill. Such rights are conferred by law in order to promote creativity, innovation and societal good. In this connection, the right

enables creators and innovators to prevent access to the products of their intellect or allow access thereto either freely or for economic gain. The right is not absolute. Rather, it is limited by time and certain exceptions. This way, the law ensures that creators and innovators do not exercise their intellectual property to prevent members of the public unreasonably or unjustifiably from assessing the knowledge, which springs from their creative and innovative efforts.

Adewopo seems to concur with the above conceptualization of intellectual property. According to him, “the expression intellectual property is ... taken to mean the legal rights which may be asserted in respect of the product of the human intellect. That the sum of a man is his intellect, which he holds as his birth right, that he is worthy of the product of his labour as a reward and incentive to further create and innovate for the benefit of the society.” Oyewunmi also shares similar understanding. According to the learned author, “intellectual property may be defined as the legal rights conferred to those who engage in creative, inventive and promotion activities which have resulted in original, useful or other beneficial outputs. Such outcome is classified as a form of property, albeit of the intangible, incorporeal variety. This means that unlike physical property, it is incapable of physically owned or possessed and can therefore be simultaneously enjoyed by different users without being lost to the creator or ‘owner’”.

The World Intellectual Property Organization (WIPO) proffers a broader and more authoritative definition. According to WIPO,

“Intellectual property [...] means the legal rights which result from intellectual activity in the industrial, scientific, literary and artistic fields. Countries have laws to protect intellectual property for two main reasons. One is to give statutory expression to the moral and economic rights of creators in their creations and the rights of the public in access to those creations. The second is to promote, as a deliberate act of Government policy, creativity and the dissemination and application of its results and to encourage fair trading which would contribute to economic and social development. Generally speaking, intellectual property law aims at safeguarding creators and other producers of intellectual goods and services by granting them certain time-limited rights to control the use made of those productions. Those rights do not apply to the physical object in which the creation may be embodied but instead to the intellectual creation as such. [...] intellectual property [includes] rights relating to: literary, artistic and scientific works, performances of performing artists,

phonograms and broadcasts, inventions in all fields of human endeavour, scientific discoveries, industrial designs, trademarks, service marks and commercial names and designations, protection against unfair competition, and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.”

Terms used in the above definition, such as patent, trademark, copyright, industrial design and geographical indications require further definition. Patents are exclusive rights generally granted to last for certain period in respect of an invention, which is a product or process that offers a new or improved way of doing something or a novel or improved technical solution to a problem. The right becomes effective upon registration in the relevant patent registry. Where this is the case, the owner of the right – the patentee – is empowered to exclude others from commercial exploitation of the invention during the validity of the patent.

Industrial designs relate to the visual, aesthetic or ornamental representation of a product. It does not deal with the functionality of the product, but focuses on its visuals and aesthetics. An industrial design would usually contain three dimensional characteristics such as the shape of the product or two-dimensional qualities such as lines, colours and patterns. Industrial designs are referred to as such because of their industrial applicability. They are applicable to a broad array of handicrafts and industrial products including luxury items, jewellery, household wares and electrical appliances, textile, vehicles, watches, shoes, medical and other technical instruments, among others. Industrial designs require registration to be protected and they remain valid only for a particular duration as defined by the relevant law.

Trademarks are relevant within the context of commerce. They are signs capable of identifying and distinguishing the goods and services of an individual or company from those of others in the market. Put differently, trademarks are signs which help consumers to identify and differentiate an individual’s or company’s products from those of others based on the unique qualities and characteristics of the products which is associated with the mark of that individual or company. In essence, trademarks capture and represent the goodwill associated with the goods and services of the individual or company in the marketplace. Trademarks come



into effect upon registration, and they last for a particular period as defined by the relevant law. When a trademark has been registered, the owner of the mark becomes empowered to prevent other persons or companies from using similar marks.

Geographical indications are signs placed on goods to indicate their place of origin. The protection afforded these signs is based on the premise that, in the eyes of consumers, the goods possess certain unique qualities and reputation due to that place of origin. Usually, the signs consist of the name of the place of origin of the product. According to WIPO, geographical indications are often utilised in respect of agricultural products, which “typically have qualities that derive from their place of production and are influenced by specific local geographical factors, such as climate and soil”. However, the deployment of geographical indication is not limited to agricultural products. They may also relate to certain products with unique qualities and reputation drawn from the product’s place of origin. Common examples of geographical indications include Champagne (France) for wine, Tuscany (Italy) for olive oil, and, as proffered by Oyewunmi, Ofada rice and Ijebu garri (Nigeria), etc. Geographical indications require registration under the relevant law to be protected. However, unlike patent, industrial design, trademarks and copyright (discussed below), there is currently no legal framework for the protection of geographical indications in Nigeria.

Copyright refers to the exclusive rights conferred in respect of creative works, such as books and other literary works, music, and artistic works on the authors of the works, usually for a period including the life of the author plus 50 or 70 years from his/her death. This right encompasses the inalienable moral right, and economic or entrepreneurial right associated with the work. There are also other rights referred to as related rights, which are like copyright but often shorter in duration and more limited than copyright. Related rights refer to the right of musicians, actors and comedians, etc. (performers) in their performances; the rights of music producers in their sound recordings; the rights of broadcasting organisations in their television and radio programs; and (in Nigeria) the right in folklore. The works falling under copyright protection include, but are by no means limited to novels, poems, novels, newspapers, computer programs, music, databases, painting, photographs,

sculpture, technical drawings, architecture, maps, musical compositions, films, drawings choreography, plays, etc. Unlike patent, industrial design, trademarks and geographical indication, copyright and related rights do not require registration to be protection. The right is conferred automatically upon creation of the work

### **1.3.2 Objectives of the protection of intellectual property**

From the foregoing discussion, it can be deduced that intellectual property serves two key objectives: the protection of the private interest of creators and innovators by enabling them to gain economic rewards for their innovation and creativity; and the protection of public interest in the promotion of science, arts and societal welfare by ensuring equitable access to creative and innovative works by the public. These key objectives are rooted in international human rights legal frameworks such as the United Nations Declaration on Human Rights, 1948 (UDHR, article 27) and the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR, article 27).

Accordingly, these international human rights regimes guarantee to everyone the right to the moral and economic interest that flow from the scientific, artistic or literary production of which he/she is the author. Intellectual property laws promote this right by conferring innovators and creators with limited exclusive rights over the products of their innovative and creative endeavours. Also, the UDHR and ICESCR guarantee the rights of everyone to participate in the cultural life of their society, to enjoy the arts and to share in the scientific advancements and its benefits. By this stipulation, the international human rights regimes define a collective or communal legal interest for everyone in the advancement of culture, art and science and the benefits that accrue therefrom. Intellectual property achieves this objective by encouraging investment in innovation and creativity through the instrumentality of exclusive rights, and by ensuring the dissemination and disclosure of the fruits of the investment in creativity and innovation through the use of exceptions and limitations.

According to Professor Oyewunmi, “the twin objectives of private protection and public access appear contradictory, because protection gives rise to exclusion of the public from access. However, this is not necessarily so, because in appropriate

cases, protection of private interest helps to foster a conducive environment for creativity, inventive activity, and innovation, which, in the long term, is beneficial to the public”. While this position may not be faulted, it is argued that the twin key objectives of protecting intellectual property will be easily achieved through a legal framework that do not only protect private interest but also march such protection with open and flexible exceptions and limitations that will ensure proper accommodation of the public interest.

### **1.3.3 Justification of intellectual property**

As society keeps developing both technologically and otherwise, the need to protect intellectual property remains fresh because with such rise of technology comes novel ways of using products of the intellect that were hitherto not foreseeable by lawmakers. There is also the “problem of ubiquity” arising from the intangibility of intellectual property. According to Stallberg, intellectual property “can be used simultaneously in multiple ways. The content of a book, for example, can easily be read, told, copied, and so forth by an unlimited number of people. The question therefore arises as to why other people should be legally prevented from using a naturally unlimited good [...]?” Thus, the need to justify the legal protection of intellectual property becomes imperative.

Two broad philosophical underpinnings have been commonly projected in attempting to justify the protection of intellectual property: moral justification and economic justification. Different scholars have categorised these justifications differently. Some adopt a justification on the distinction between individualistic and collectivistic intellectual property models, while others categorise it on the distinction between deontological or consequentialist justification. Whatever the categorisation adopted, the theories advanced to justify the protection of intellectual property are largely similar. The common categorisation of the justification (moral and economic) is adopted here and briefly discussed below.

#### **1) Moral Justification**

The moral justification for the protection of intellectual property can be further broken into the labour and personality theories. The Labour theory is further categorised into natural right and reward theories. According to the natural

rights theory, intellectual property is seen as an inalienable right, which a creator or innovator derives by his/her act of creation or innovation. It is seen as the consequence of a creator's or innovator's labour. The law only steps in to reinforce this right by affording protection not as a privilege or some type of reward, but as an already existing right. According to scholars, the act of creation or innovation may be conceived as having a right-transferring effect in the sense that the act could be seen as possessing a formal property, which enables it to extend the pre-existing right to the intellectual product. Thus, the action may be interpreted as right-constituting in the sense that intellectual property is created the moment the act of creation or innovation commenced. The natural rights theory employed for the justification of intellectual property protection is widely illustrated by reference to the labour theory of private ownership of property developed by John Locke. Although his theory was not directly related to intellectual property, Locke's enunciations as concerned private property are employed in justifying intellectual property protection because they fit the notion of natural rights. Flowing from the natural right theory is the reward theory. Here, innovators or creators are viewed as persons who, by their creativity or innovation and labour, provide goods that are socially beneficial to the society and as such, deserve some form of reward. The reward is conceived, not as incentives to the author for further creation, but as some form of compensation. The reward is seen as moral entitlement flowing from the creative or innovative endeavours.

The personality theory owes its origin to the thinking of Hegel. Other philosophers, like Kant and von Humboldt, have further developed this theory. The theory conceives an intellectual work as a manifestation of its creator's or innovator's personal development and its identity. Thus, by vesting ownership of intellectual property on the creator or innovator, the law is only empowering him/her to protect his/her identity. Put differently, the theory proceeds on the premise that the creation of a work or invention establishes a psychological relation between the creator or inventor and the work or invention. The work or invention becomes part of the creator's or inventor's personality and should be considered an integral part of his/her own identity. The theory sees works or inventions as means through which their makers communicate their

thoughts to the public and that such thoughts can only be communicated authentically by third parties if attribution to the makers remains intact. Thus, intellectual property is merely a normative recognition of what already exists, namely the exclusive relationship between the creator or inventor and their works or invention.

The moral justification for intellectual property protection has a strong influence in the development of author's moral rights under copyright law, for instance, and it was most widespread in Europe, particularly countries with civil law tradition. Attempts at harmonising copyright law at the global level led to the adoption of authors' moral rights in countries with common law tradition. Authors moral rights include the attribution or paternity rights, which is the right of the author to be identified as such in his/her works; and the integrity right, which is the author's right to prevent unauthorised changes of his/her work that are prejudicial to his/her honour and reputation. Authors' moral rights find expression, for example, in section 12 of the Copyright Act, which is discussed in more detail later.

## **2) Economic justification**

Proponents of the economic justification of intellectual property protection hinge their arguments on some key premises. First, intellectual works are seen as socially beneficial. They are also regarded as public goods, as opposed to private goods, and as such everyone can consume them at the same time and at no cost with little or no reduction in their value. Secondly, and flowing from their public good nature, it is difficult to exclude people from consuming intellectual works, thus resulting in free riding. Thirdly, creators and innovators embark on the creative and innovative venture with the view of being remunerated thereby. The effect of the free riding phenomenon is that members of the public will consume the intellectual works without making any payment thereby resulting in a loss of income on the part of creators and innovators, hence a disincentive to further create or innovate. The disincentive to create has the effect of reducing the amount of intellectual works, as public goods available in the market for consumption or to a complete absence. Thus, the supply of such goods will not be able to meet or match the ever-increasing

demand for the goods. This will inevitably lead to distribution conflicts or market failure that can be resolved if intellectual works are used in such a way as to achieve maximum satisfaction for both creators or innovators and members of the public. This is known as efficient allocation of resources.

Therefore, intellectual property law steps in to bring about the efficient allocation of resources by vesting exclusive rights to creators or innovators over the fruits of their innovation or creativity. With such rights, creators or innovators are able to restrain the use of their works or inventions by members of the public and put a price in form of royalties over the use of the works by the public. Consequently, creators of the works are remunerated for their labour in the intellectual creation and thus incentivised to further create or innovate. Intellectual property law resolves the market failure or distribution conflict in the market for intellectual works by making it possible for the works to be available to the public at a cost, while at the same time providing income for creators or innovators as incentive to further create.

Related to the foregoing philosophical underpinning is the Jeremy Bentham's utilitarian theory, which in the context of intellectual property connotes a need for lawmakers and policy formulators to strike an optimal balance between, on one hand, the power of exclusive rights to stimulate the creation of inventions and works of art and, on the other hand, the partially offsetting tendency of such rights to curtail widespread public enjoyment of those creations and inventions in such a way as to ensure the greatest happiness of the greatest number.

### **3) Development theory**

It should be noted that the justification for intellectual property protection does not rest on each of the above-mentioned philosophy standing alone. Instead, intellectual property protection can be properly justified through a unification of the philosophical foundations discussed so far. Put differently, intellectual property protection is not just recognition of moral or economic rights alone. Rather, it is recognition of both. Indeed, modern theories for the justification

of the protection of intellectual property continue to spring forth from the established philosophical underpinnings discussed above.

For instance, there is the development, or what Fisher refers to as the social planning theory, which views intellectual property as not an end in itself, but as a means to social, technological and national development. This theory is important especially from a developing country's perspective as it is useful to gauge the impact of intellectual property protection on the society generally and formulate intellectual property laws in a manner that will ensure that protection leads to the desired development. Further, the development or social planning theory is rooted in the proposition that property rights in general – and intellectual property in particular – can and should be shaped to help foster the achievement of a just and attractive culture of innovation and creativity.

The development theory has greatly shaped law and policy thinking at the global level, especially within the framework of the WIPO where the Development Agenda is now firmly established as part of its work. Initiated by the thinking of countries from the global South, especially Argentina and Brazil, the WIPO Development Agenda was adopted in 2007 with forty-five recommendations grouped into six key clusters. The first cluster requires WIPO's technical assistance to be transparent, driven by demand and focused on development. The second cluster seeks to position WIPO's intellectual property normative formulation to result in balanced and inclusive outcomes. It requires that such rule making activities be supportive of the development objectives as encapsulated within the United Nations (UN) system, inclusive, and driven by member state. The third cluster requires collaboration and cooperation among research and scientific institutions in developed and developing countries for the dissemination of information and technology transfer. The fourth cluster seeks to enhance the capacity of WIPO to undertake objective assessment of the impact of its activities on development. The fifth cluster focuses on WIPO's mandate, its governance structure, and its interaction with other intergovernmental organisations and nongovernmental organisations. The sixth cluster seeks to position WIPO's approach to

intellectual property enforcement to be in the context of broader societal interests.

It is important to note that the WIPO Development Agenda was adopted as a non-binding international instrument (soft law) to facilitate the rethinking of intellectual property globally. Despite its soft law nature, the Development Agenda has kindled the recalibration and appropriate use of the intellectual property system as a means to national development. The Development Agenda continues to influence intellectual property law making and reform by countries in the global south and serves as the basis for their engagement in trade negotiations involving intellectual property with countries from the global north and among themselves.

#### **SELF-ASSESSMENT EXERCISE – 1**

Intellectual and industrial property are private rights with no significance to the public. As such, they should not be protected by law. Do you agree?

#### **1.4 Summary**

We have explained the meaning of intellectual and industrial property such as patent, trademarks, copyright, industrial designs, and geographical indications. We have also discussed the objectives of the protection of intellectual and industrial property, which is the provision of some form of reward for innovators and creators and the promotion of societal welfare. We explained the moral, economic, and other emerging theories that justify the protection of intellectual property both from a global and national perspectives.

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## MODULE 1 GENERAL INTRODUCTION TO INTELLECTUAL AND INDUSTRIAL PROPERTY

### **Unit 2: International and Regional Frameworks for Intellectual Property Protection**

- 2.1 Introduction
- 2.2 Learning Outcomes
- 2.3 Global Intellectual Property Institutions
  - 2.3.1 WIPO
  - 2.3.2 WTO
- 2.4 Regional Intellectual Property Institutions
  - 2.4.1 ARIPO
  - 2.4.2 OAPI
  - 2.4.3 PAIPO
- 2.5 Summary
- 2.6 References for Further Reading

#### **2.1 Introduction**

Global and regional mechanisms exist for the protection and development of intellectual property. These mechanisms help to create a convergence between the territoriality and national treatment principles on intellectual property protection. The territoriality principle means that intellectual property is protected only to the extent as defined by the relevant national law. For instance, one can only claim intellectual property right if such right is protected under Nigerian law. The principle of national treatment complements the territoriality rule. The principle of national treatment means that a foreign copyright owner is required to be accorded equal protection as those enjoyed by citizens of the country in question. The global and regional mechanisms achieve this convergence by adopting harmonisation or unification approach. Harmonization is an option that respects the particularities of the legal systems of member states of an international organisation in the sense that its core approach is the establishment of minimum standards for intellectual property legislation, while unification aims to eliminate the differences in the laws of member states by replacing them with a unique and identical provision for all states.

The WIPO is the main global body responsible for formulating international normative frameworks for intellectual property. However, in terms of the Agreement on the Trade Related Aspects of Intellectual Property Rights, 1994 (TRIPs Agreement), the World Trade Organization (WTO) undertake some normative role concerning intellectual property at the global level. The World Health Organization (WHO) and other UN specialised agencies, such as the United Nations Educational, Scientific and Cultural Organization (UNESCO) also carry out some function that bears relevance within the context of intellectual property, especially in relation to access to medicines and health technologies (WHO) and protection of tangible and intangible heritage (UNESCO). Nigeria is a member of these organisations. Nonetheless, our focus here will be on the WIPO and WTO, which are briefly discussed below.

At the regional level, there exist the African Regional Intellectual Property Organisation (ARIPO), made up mainly by English speaking African countries and African Intellectual Property Organization (known by its French acronym OAPI – *Organization Africaine De La Propriete*), composed of the French speaking parts of Africa. Nigeria is not a member of any of them. It only has observer status in ARIPO. The Pan-African Intellectual Property organisation (PAIPO) is currently being proposed. But it is important to also look at its functions as stipulated in the enabling instrument. Thus, focus will be on ARIPO, OAPI (the two-active regional intellectual property institutions) and the proposed PAIPO, which are briefly discussed below. For purpose of information, it is important to note that negotiations are underway for an intellectual property protocol under the agreement for African Continental Free Trade Area (AfCFTA). From existing studies, the protocol is expected to contain high-level intellectual property principles that will bear relevance on trade in goods and services within the African free trade area.

## **2.2 Learning outcomes**

At the end of the study of this unit, you should be able to

1. identify key global and regional intellectual property institutions
2. explain the roles of the key global and regional intellectual property institutions
3. explain the approaches adopted by the key global and regional institutions in carrying out their intellectual property normative standard setting.

## **2.3 Global Intellectual Property Institutions**

### **2.3.1 World Intellectual Property Organisation (WIPO)**

WIPO is a specialised organ of the United Nations (UN). All members states of the UN are entitled to be members of WIPO, although WIPO membership is not limited to UN members. WIPO currently has 192 members, including Nigeria. It was established in 1970 the year in which the treaty establishing it came into force. WIPO was created by the Convention Establishing the World Intellectual Property Organisation (WIPO Convention), which was signed in Stockholm in 1967. WIPO's headquarter is in Geneva, Switzerland, but it has a number of national offices, including in Abuja, Nigeria. WIPO is the successor to the United International Bureaux for the Protection of Intellectual Property, which was known by its French acronym (BIRPI - *Bureaux Internationaux Réunis pour la Protection de la Propriété Intellectuelle*). BIRPI came into being in 1893 as the single institution saddled with the task of administering the Berne Convention for the Protection of Literary and Artistic Works of 1886 (Berne Convention) and the Paris Convention for the Protection of Industrial Property of 1883 (Paris Convention).

WIPO helps promote intergovernmental cooperation in the administration of intellectual property. In this connection, it has as its mission, the promotion of “the creation, dissemination, use and protection of works of the human mind for the economic, cultural and social progress of all mankind” through international cooperation; and to “contribute to a balance between the stimulation of creativity worldwide, by sufficiently protecting the moral and material interests of creators on the one hand, and providing access to the socio-economic and cultural benefits of such creativity worldwide on the other”. To these ends, WIPO carries out several functions, which includes serving as a platform for member states to develop, establish and harmonise rules and practice relating to the protection of intellectual property. It operates a global registration system for industrial designs, trademarks and geographical indication, and a global filing system for patents. Through its various training and outreach programs, and legal and technical assistance, and information sharing, WIPO assists both developed and developing countries in the formulation and reform of their national intellectual property systems.

WIPO currently administers 26 treaties, which includes the WIPO Convention, the Berne Convention, the Paris Convention, the WIPO Copyright Treaty 1996, the WIPO Performances and Phonograms Treaty 1996, The Beijing Treaty on Audio Visual Performances 2012, the Patent Cooperation Treaty 1970, the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration 1958, the Hague Agreement Concerning the International Registration of Industrial Designs 1925, the Trademark Law Treaty 1994, the Singapore Treaty on the Law of Trademarks 2006, Patent Law Treaty, 2000, Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks 1957, and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled 2013, among others.

### **2.3.2 World Trade Organisation (WTO)**

The WTO was established on 1 January 1995, under the Agreement Establishing the World Trade Organisation 1994 (WTO Agreement), as a culmination of the Uruguay Round of negotiations that took place between 1986 and 1994. Its headquarters is in Geneva, Switzerland and it currently has over 160 member states, including Nigeria. The WTO was conceived and established as the global body concerned with global trade a global system of trade rules. Thus, it is the global forum for the negotiation of trade agreements, the settling of trade disputes between its members and for supporting the needs of developing countries.

Recognising the significant links between intellectual property and trade, the TRIPs Agreement, which was also negotiated during the 1986-94 Uruguay Round, was included as an annex to the WTO agreement. It is the premier agreement introducing intellectual property principles into the system of multilateral trade. The TRIPS Agreement is meant to ease trade in creativity and innovation, aid the resolution of trade disputes among/between member states over intellectual property, and to afford member states the space to pursue and achieve their domestic goals concerning intellectual property. Indeed, the TRIPS Agreement assures member states the latitude to maintain the requisite balance between the long-term benefits of providing incentives for innovation and the creativity and the possible short-term costs of limiting access to intellectual creation. This is made

possible through the minimum standards set by the TRIPS Agreement for the protection of intellectual property and the in-built flexibilities that enable the provision of limitations, exceptions and exclusions to intellectual property. The WTO's dispute settlement mechanism is deployed to resolve trade disputes relating to the application of the TRIPS Agreement. Overall, the TRIPs Agreement deal with five broad issues, namely:

- 1) the general provisions and basic rules of the multilateral trading system applicable to international intellectual property;
- 2) the minimum standards for the protection of intellectual property by member states;
- 3) the intellectual property rights enforcement procedures that member states should provide;
- 4) intellectual property dispute settlement mechanisms between member states; and
- 5) special transitional arrangements for the implementation of TRIPs Agreement provisions.

The TRIPS Council created under the WTO Agreement is the main institution saddled with responsibility to administer the TRIPS Agreement. The Council, which serves as a forum for discussion between member states, monitors the operation of the TRIPS Agreement. In the performance of its duties, the Council is empowered to cooperate with the WIPO and other international organisations focusing on intellectual property issues. In terms of article 3 of the Agreement between the WIPO and the WTO 1995, the cooperation with WIPO covers notifications of laws, technical assistance and implementation of the TRIPS obligations that flow from Article 6*ter* of the Paris Convention. The WTO cooperates with other international bodies with regards to the organisation of training activities, symposia and other events on intellectual property and trade and on the relationship of these issues to other policy dimensions, such as climate change and public health.

## **2.4 Regional Intellectual Property Institutions**

### **2.4.1 African Regional Intellectual Property Organization (ARIPO)**

Midwived by the United Nations Economic Commission for Africa (UNECA) and WIPO, the African Regional Intellectual Property Organization (ARIPO) was established by the Lusaka Agreement which was adopted on 9 December 1976 but came into force on 15 January 1978. ARIPO was originally conceived as English-Speaking African Regional Industrial Property Organization (ESARIPO) because its formation was pushed by some English-speaking African countries. However, to position the organisation as an institution open to all African countries, its original name (ESARIPO) was changed to the African Regional Industrial Property Organisation through an amendment of the Lusaka Agreement in December 1985. This name gives the impression that copyright and related rights does not fall within the purview of the organisation. However, to change this impression, the name was further changed in 2003 by replacing “Industrial” with “Intellectual”, thus giving rise to the current name. Despite the 1985 name change, the organization still has the outlook of a body for English-speaking African Countries because as stated above, its membership is composed of English-speaking African states. The members include, Botswana, The Gambia, Ghana, Kenya, Lesotho, Malawi, Mozambique, Rwanda, Namibia, Sierra Leone, Somalia, Sudan, eSwathini (formerly, Swaziland), Tanzania, Uganda, Zambia, and Zimbabwe. Nigeria and South Africa have observer status. ARIPO’s headquarters is in Harare, Zimbabwe.

The ARIPO was created out of the desire of its members to effectively and continuously exchange information, harmonise and coordinate their laws and activities relating to intellectual property matters. In essence, unlike OAPI discussed below, ARIPO seeks to ensure harmonisation of its members’ laws and practices on intellectual property. To this end, in terms of article III of the Lusaka Agreement, ARIPO strives to achieve the following objectives:

- 1) to promote the harmonization and development of the intellectual property laws, and matters related thereto, appropriate to the needs of its members and of the region as a whole;
- 2) to foster the establishment of a close relationship between its members in matters relating to intellectual property;

- 3) to establish such common services or organs as may be necessary or desirable for the co-ordination, harmonization and development of the intellectual property activities affecting its members;
- 4) to establish schemes for the training of staff in the administration of intellectual property laws;
- 5) to organize conferences, seminars and other meetings on intellectual property matters;
- 6) to promote the exchange of ideas and experience, research and studies relating to intellectual property matters;
- 7) to promote and evolve a common view and approach of its members on intellectual property matters;
- 8) to assist its members, as appropriate, in the acquisition and development of technology relating to intellectual property matters;
- 9) to promote, in its members, the development of copyright and related rights and ensure that copyright and related rights contribute to the economic, social and cultural development of members and of the region as a whole; and
- 10) to do all such other things as may be necessary or desirable for the achievement of these objectives.

To carry out its objectives, ARIPO operates through the Council of Ministers, Administrative Council, Board of Appeal and the Secretariat, which are its main organs. It has also adopted specific protocols to the Lusaka Agreement to address different aspects of intellectual property. The protocols are the Harare Protocol on Patents and Industrial Designs 1982, the Banjul Protocol on Marks 1993, the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore 2010, and the Arusha Protocol for the Protection of New Varieties of Plants 2015. Although ARIPO has no protocol on copyright and related rights currently, it has published survey reports, guidelines, comparative studies and model law on the subject. These include: ARIPO Guidelines for Ratification/Accession and Domestication of International Instruments on Copyright and Related Rights 2019; ARIPO Model Law on Copyright and Related Rights 2019; Survey on the status of Collective Management Organizations in ARIPO Member States 2015; ARIPO Guidelines for the Domestication of the Marrakesh Treaty 2016; Consolidated Comparative Study on Copyright Laws of



ARIPO Member States and their Adherence to International Instruments on Copyright and Related Rights 2018; and the Copyright Awareness Raising Guide for ARIPO member states.

In addition to the foregoing, ARIPO runs an academy, which functions to promote the understanding and development of intellectual property system in the member states and Africa as a whole; to train intellectual property experts and promote the development of human resources in the field of intellectual property; to conduct research and make available information on intellectual property for the general public; and to foster partnerships and cooperation with other intellectual property institutions worldwide. In this connection, the academy conducts short term courses and Masters in intellectual property (MIP) programs in cooperation with WIPO, and partner Universities in ARIPO member states.

#### **2.4.2 African Intellectual Property Organization (OAPI)**

The African Intellectual Property Organization (known by its French acronym OAPI – *Organization Africaine De La Propriete*) was originally referred to as the African and Malagasy Office of Industrial Property (OAMPI – acronym for the French name: *l' Office Africaine et Malgache de la Propriete Industrielle*) in terms of the September 1962 Libreville Agreement signed by twelve (12) Heads of State and Government from the Francophone Africa. The Libreville Agreement was revised by the Bangui Agreement of 2 March 1997, which led to what is now known as OAPI. As stated above, OAPI's membership is composed majorly of French speaking African countries, which include Burkina Faso, Cameroon, Central African Republic, Benin Republic, Chad, Congo, Equatorial Guinea, Gabon, Guinea Bissau, Ivory Coast, Mali, Mauritania, Niger, Senegal and Togo.

In terms of the Bangui Agreement, OAPI's mission is to promote the development of member states through, in particular, the effective protection of intellectual property and related rights and to provide training in intellectual property. In this connection, OAPI pursues major objectives, which include the implementation and application of a common administrative procedure deriving from a uniform system for the protection of industrial property, the provision of international agreements in the field of industrial property to be acceded by member states, and the provision

of services related to industrial property. In essence, OAPI strives towards unification of intellectual property laws amongst its member states. Thus, OAPI runs a common industrial property office which is located in Yaounde, Cameroon and the Bangui Agreement applies directly in each member states.

The Bangui Agreement was later revised in February 1999, with the revision coming into force on 28 February 2002. The revision was meant to strengthen creativity and the protection of intellectual property rights to secure investment, facilitate the transfer of technology and thus contribute to the economic growth of member States. To these ends, it made the provision of the Bangui Agreement compatible with the requirements of intellectual property treaties, such as the TRIPS Agreement, to which its member states are parties. By this revision, issues relating to copyright and related rights, plant varieties, layout-designs of integrated circuits came within the purview of OAPI, which was initially focused on industrial property only. Further, the revision has the implication of waiver of the right to delayed implementation of the TRIPS Agreement (contained in article 66 thereof) by least developed countries (LDCs). The revision also simplified the procedures for the granting of licenses.

### **2.4.3 PAIPO**

The justification for the proposed PAIPO is captured in the following statement by the African Union's (AU) African Ministerial Council on Science and Technology (AMCOST) in 2006:

“The rationale for creating an Africa-wide institution stems from the realization that Africa needs a mechanism to facilitate far-reaching changes in the arena of intellectual property. However, such revolutionary reforms cannot be effected through existing regional arrangements that are currently underpinned by geographical limitations and lack of continental inclusiveness. It would thus be necessary to establish new decision-making machinery that would engage the participation of all member states.”

Based on the forgoing, the AU decided at its general meeting of January 2007 to establish PAIPO and therefore mandated the AU Scientific, Technical and Research Commission (AU-STRC) to come up with a draft statute for the creation of PAIPO which was placed before AMCOST during its fourth conference held in

Cairo, Egypt in March 2010. At that conference, AMCOST created a panel of intellectual property experts to evaluate and thoroughly consider the draft statute and submit same to its fifth conference which held in Congo Brazzaville around November 2012. The draft was further considered at the extra ordinary session of AMCOST held in Congo Brazzaville from 16 to 18 April 2014 and a final draft statute for the establishment of PAIPO was framed. The draft statute was noted by the AU at the twenty-third ordinary session of its General Assembly held in Malabo, Equatorial Guinea on 26 and 27 June 2014, wherein Tunisia's offer to host the headquarters and Secretariat of the proposed PAIPO was endorsed. The AU further requested its Commission to submit the draft statute to the Specialized Technical Committee on Justice and Legal Affairs (AU- STCJLA) for consideration and appropriate recommendations. The statute was eventually adopted at the twenty-sixth ordinary session of the AU assembly in January 2016. However, it has not come into force yet. It will come into force thirty days after the deposition of the fifteenth instrument of ratification/accession. So far, only six countries (Tunisia, Sierra Leone, Guinea, Ghana, Comoros and Chad) have signed the statute and none has either ratified or acceded it.

Upon coming into force, PAIPO will operate as a specialized agency of the AU saddled with intellectual property and related emerging issues in Africa and all AU member states shall be entitled to become its members. Thus, it will have the core mandate to promoting the effective use of the intellectual property system as a tool for the economic, cultural. Social and technological development of Africa; and the setting of intellectual property normative standards that are reflective of the needs of the AU, member states, the existing regional economic communities (RECs), ARIPO and OAPI. To this end, PAIPO will undertake specific functions which include:

- 1) to harmonise intellectual property standards that reflect the needs of the AU, member states, RECs, ARIPO and OAPI;
- 2) to facilitate the harmonisation of national legislations and regional treaties with the continental intellectual property standards;
- 3) to facilitate the use of intellectual property for the promotion of innovation and creativity in Africa;

- 4) upon request, to assist member states in formulating policies and addressing current and emerging intellectual property issues;
- 5) to initiate and facilitate strategies that will promote and develop the African intellectual property system;
- 6) to strengthen existing regional organisations or such other organisations as may be necessary;
- 7) to strengthen existing collective management organisations and assist members in the establishment of such organisations where none exists in the field of copyright;
- 8) to lead the African negotiation on international intellectual property issues and ensure Africa maintains a common position; and
- 9) to support the establishment of continental databases on genetic resources, traditional knowledge, and traditional cultural expressions in order for member to derive regular and maximum benefits.

Other specific functions of the proposed PAIPO includes facilitation of information sharing among members and capacity building in the areas of enforcement, commercialisation, and management of intellectual property in Africa. To operate smoothly, the proposed PAIPO will be composed of the Conference of State Parties, Council of Ministers, the Secretariat and Board of Appeal, which shall be its organs. It is also mandated to establish and maintain working relationships with any intergovernmental, international, regional or national institution that may assist it in achieving its objectives.

### **SELF-ASSESSMENT EXERCISES 2**

What are the main approaches adopted by international intellectual property institutions in carry out their major functions? Explain with key examples.

## 2.5 Summary

We have identified and examined the role and normative setting approach of key global and regional intellectual property institutions. The global institutions include WIPO and WTO, while the regional institutions discussed are ARIPO, OAPI and the proposed PAIPO. Importantly, we explained the two major approaches to intellectual property norm settings, which are harmonization and unification. While Nigeria is a member of WIPO and WTO, it has observer status in ARIPO and does not belong to OAPI. PAIPO is not yet in operation as its enabling Statute has not come into force. Nigeria has not ratified the PAIPO Statute yet.

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## MODULE 1 GENERAL INTRODUCTION TO INTELLECTUAL AND INDUSTRIAL PROPERTY

### **Unit 3: The Institutional Framework for Intellectual Property Protection in Nigeria**

#### 3.1 Introduction

#### 3.2 Learning Outcomes

#### **3.3 The Institutional Framework for Intellectual Property Protection in Nigeria**

3.3.1 Federal Competition and Consumer Protection Commission (FCCPC)

3.3.2 National Office of the Technology Acquisition and Protection (NOTAP)

3.3.3 National Information and Technology Development Agency (NITDA)

3.3.4 National Film and Video Censors Board (NFVCB), National Broadcasting Commission (NBC), National Council for Arts and Culture (NCAC) and Trade Malpractices Investigation Panel (TMIP)

#### 3.4 Summary

#### 3.5 References/Further Reading/Web Sources

### **3.1 Introduction**

As we learnt in Unit 1, the main intellectual property laws in Nigeria are the Patent and Designs Act, the Trademarks Act and the Copyright Act. The institutional frameworks under these Acts will be discussed in more detail in later parts of this course. For now, it suffices to note that sections 3, 4, 15 and 16 of the Patent and Designs Act creates a Registry to be overseen by the Patent and Designs Registrar. Likewise, section 1 of the Trademarks Act establishes a registry administered by the Registrar of Trademarks. Both the Registrar of Patents and Designs, and Trademarks are appointed by the Federal Civil Service Commission. Currently, the Commercial Law Department of the Federal Ministry of Trade and Investment supervises issues of Patents, Industrial Designs and Trademarks in Nigeria. Thus, the Patent, Designs and Trademark Registry is domiciled in the Commercial Law Department of the Federal Ministry of Trade and Investment. On the other hand, the section 34 of the Copyright Act establishes the Nigerian Copyright Commission (NCC) and empowers it to administer and regulate of copyright and related rights in Nigeria.

Apart from the foregoing, other institutions exist, pursuant to other legislations, with functions that bear relevance on the protection and development of intellectual property in Nigeria. The institutions include: the Federal Competition and Consumer Protection Commission (FCCPC) established under the FCCPC Act 2018; the National Office of the Technology Acquisition and Protection (NOTAP) established under the NOTAP Act; the National Information and Technology Development Agency (NITDA) established by the NITDA Act; the National Film and Video Censors Board (NFVCB) established under the NFVCB Act; the Trade Malpractices Investigation Panel (TMIP) created under the Trade Malpractices (Miscellaneous Offences) Act; the National Broadcasting Commission (NBC) created under the NBC Act; and the National Council for Arts and Culture (NCAC) established under the NCAC Act.

### **3.2 Learning outcomes**

At the end of your study in this unit, you should be able to do the following:

- 1) Identify other national institutions that are relevant to the development and protection of intellectual property in Nigeria
- 2) Explain the specific roles of those other national institutions in relation to the development and protection of intellectual property in Nigeria.

### **3.3 The Institutional Framework for Intellectual Property Protection in Nigeria**

#### **3.3.1 Federal Competition and Consumer Protection Commission (FCCPC)**

In terms of section 17 of the FCCPC Act, the FCCPC's functions include to: initiate broad-based policies and review economic activities in Nigeria to identify anti-competitive and anti-consumer protection and restrictive practices which may adversely affect the economic interest of consumers; eliminate anti-competitive agreements, misleading, unfair, deceptive or unconscionable marketing, trading and business practices; regulate and seek ways of removing from the market hazardous goods and services and cause offenders to replace such goods and services with safer and more appropriate alternatives; and to encourage trade, industry and professional associations to develop and enforce quality standards designed to safeguard consumers within their various fields including in the areas of intellectual property.



### **3.3.2 National Office of the Technology Acquisition and Protection (NOTAP)**

Section 4 of the NOTAP Act empowers NOTAP to encourage a more efficient process for the identification and selection of foreign technology; develop the negotiating skills of Nigerians with a view to ensuring the acquirement of the best contractual terms and conditions by Nigerian parties entering into any contract or agreement for the transfer of foreign technology; and to provide a more efficient process for the adaptation of imported technology.

NOTAP is also tasked with the registration of all contracts or agreements having effect in Nigeria for the transfer of foreign technology to Nigerian parties. Every such contract or agreement will be registered if, in NOTAP's opinion, its purpose or intent is wholly or partially for or in connection with the use of trademarks; the right to use patented inventions; the supply of technical expertise in the form of the preparation of plans, diagrams, operating manuals or any other form of technical assistance of any description whatsoever; the supply of basic or detailed engineering; the supply of machinery and plant; and the provision of operation staff or managerial assistance and the training of personnel.

Further, the enabling law enjoins NOTAP to monitor, on a continuous basis, the execution of any contracts or agreements registered by NOTAP; commercialise viable R&D results emanating from both private and public research institutions; promote intellectual property rights and encourage innovation among Nigerian scientists, researchers and inventors; and to establishment network of linkages among researchers, inventors, industry and research institutions. In furtherance to its mandate under the Act, NOTAP has, among others, so far established over 40 Intellectual Property and Technology Transfer Offices (IPTTOS) in tertiary institutions in Nigeria. It also runs very vibrant intellectual property commercialisation and technology transfer services.

### **3.3.3 National Information and Technology Development Agency (NITDA)**

Section 6 of the NITDA Act tasks NITDA to, among others create a framework for the planning, research, development, standardization, application, coordination, monitoring, evaluation and regulation of information technology practices, activities and systems in Nigeria; provide universal access for information

technology and systems penetration in rural, urban and under-served areas; develop guidelines for the standardization and certification of information technology escrow source code and object code domiciliation, application and delivery systems in Nigeria.

In pursuance to its statutory functions, NITDA maintains and operates the .gov.ng domain name in Nigeria. In this connection, NITDA (in cooperation with the Nigerian Internet Registration Association – NiRA) is responsible for the registration of users (mainly Federal, State and Local Government agencies) of the domain name. It is also responsible, as a forum of first instance where parties cannot settle, for the resolution of dispute arising from the use of the domain name.

#### **3.3.4 National Film and Video Censors Board (NFVCB), National Broadcasting Commission (NBC), National Council for Arts and Culture (NCAC) and Trade Malpractices Investigation Panel (TMIP)**

Under section 2 of the NFVCB Act, the NFVCB is empowered, among others, to licence persons to exhibit films and video works in Nigeria; licence premises for the purposes of exhibiting films and video works in Nigeria; censor films and video works in Nigeria; regulate and prescribe safety precautions to be observed in licensed premises; and regulate and control cinematographic exhibitions.

On its part, the NBC is tasked by section 2 of the NBC Act to, among others, regulate and control the Nigerian broadcast industry; undertake research and development in the broadcast industry; receive, process and consider applications for the ownership of radio and television stations, including cable television services, direct satellite broadcast and any other medium of broadcasting and to recommend applications through the Minister to the President, for the grant of radio and television licences. The NBC is also enjoined to promote Nigerian indigenous cultures, moral and community life through broadcasting. In this connection, the NBC's role seems to align with the functions of the NCAC.

Section 3 of the NCAC Act empowers the NCAC, among others, to promote and foster the appreciation, revival and development of Nigerian arts and culture; foster the development of literary, visual and the performing arts in Nigeria; assist the

National Commission for Museums and Monument (NCMM) in the creation, acquisition and preservation of artistic works, cultural monuments and depositories; organise and promote exhibition in visual, performing and literary art; and to promote the development of music, traditional dancing, drama, opera, cinema, films, photography, folklore, oral tradition, literature, poetry, painting, sculpture, architecture, town planning and general arts, woodwork, embroidery, weaving and similar crafts.

Finally, in terms of section 2 of the Trade Malpractices (Miscellaneous Offences) Act, the TMIP is established to investigate offences under the Act and report its finding to the Attorney General of the Federation for prosecution. By virtue of section 1 of the Act, the offences include the labelling, packaging, selling, offering for sale, or advertising of any product that is false or misleading or likely to create a wrong impression as to the character, quality, brand name, value, composition, merit or safety of the product.

### **SELF-ASSESSMENT EXERCISE 3**

The Nigeria Copyright Commission and the Registrar of Patents, Designs and Trademarks are the only agencies responsible for the development and promotion of intellectual property in Nigeria. Do you agree?

### **3.4 Summary**

In this unit, we have learnt about the Other national institutions that are relevant to the development and protection of intellectual property in Nigeria, apart from those created under the Patent and Designs Act, the Trademarks Act and the Copyright Act. The specific roles of those other national institutions in relation to the development and protection of intellectual property in Nigeria. Further, in this Unit, we have identified and discussed other key institutions in Nigeria that are saddled with responsibilities that relate to the development and protection of intellectual property in Nigeria, apart from those established under the Patent and Designs Act, the Trademarks Act and the Copyright Act. These institutions include the Federal Competition and Consumer Protection Commission (FCCPC); the National Office of the Technology Acquisition and Protection (NOTAP); the National Information and Technology Development Agency

(NITDA); the National Film and Video Censors Board (NFVCB); the Trade Malpractices Investigation Panel (TMIP); the National Broadcasting Commission (NBC); and the National Council for Arts and Culture (NCAC).

### **3.5 References/Further Reading/Web Sources**

- 1) Adejoke Oyewunmi, *Nigerian Law of Intellectual Property* (Unilag Press, 2015)
- 2) Chijioke Okorie, 'An analysis of the IP-related provisions of the Nigerian Federal Competition and Consumer Protection Act 2019' (2019) 14(8) *Journal of Intellectual Property Law and Practice*, 613-621
- 3) NCAC, 'About us', <https://www.ncac.gov.ng/about-us/>
- 4) NITDA/NIRA 'Gov.Ng Domain Management Guide', [https://www.nira.org.ng/images/pdf/Government\\_Domain\\_Guidlines.pdf](https://www.nira.org.ng/images/pdf/Government_Domain_Guidlines.pdf)
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## MODULE 2 PROTECTION OF COPYRIGHT AND RELATED RIGHTS

### **Unit 1: History of Copyright Protection in Nigeria**

1.1 Introduction

1.2 Learning Outcomes

1.3 History of Copyright Protection in Nigeria

1.4 Summary

1.5 References/Further Reading/Web Sources

#### **1.1 Introduction**

The protection of copyright and related rights is provided for under the Copyright Act, Cap C28, Laws of the Federation of Nigeria. You have already learnt about the meaning of copyright and related rights in Module 1. As such, we will not repeat the discussion here. In this module, we will be focusing on specific issues such as the substance of copyright; qualifying factors for copyright protection; nature, scope and duration of copyright; authorship and ownership of copyright; copyright infringement and remedies; defences to copyright infringement suits; and administration/management of copyright in Nigeria.

Copyright law concerns the right of authors or creators of books, music, visual arts, movies, etc., and the related rights of performers, producers of sound recordings and broadcasts, among others. It lays down the conditions for conferral and enforcement of the rights and exceptions and limitations to these rights. Copyright law provides the mechanism for protecting the private interests of the authors or creators, while at the same time preserving the public interest in the promotion of arts, culture and science and the overall societal welfare. In this unit, we discuss the history of copyright protection in Nigeria.

#### **1.2 Learning outcomes**

At the conclusion of your study in this unit, you should be able to do trace and explain the history of copyright protection in Nigeria

### **1.3 History of Copyright Protection in Nigeria**

- 1) The body of laws relating to copyright in Nigeria developed over time and is still developing. There are two views on how this body of law developed in Nigeria. The first view traces it to the influence of foreign political and economic forces. By this, reference is made to the extension of the English Copyright Act 1911 to Nigeria under the colonial government. The other view has it that copyright is part of our traditional concept and has been in existence for as long as our culture exists. The proponents of this view draw their support from the practice where dancers and singers pay tribute to their predecessors in the trade before they commence performance. It seems, however, that the first view enjoys more support as the authorities point more to the fact that Nigerian copyright law has its roots in Britain. Indeed, the story of the history of copyright law and policy in Nigeria cannot be complete without linking it to the development of copyright law in Britain. This is so because of the historical link that Nigeria, as a formal colony of Britain, and Nigerian law generally have with Britain.
  
- 2) The first copyright legislation in Britain was a censorship law. It was not about protecting the rights of authors or encouraging them to produce new works. Authors' rights were in little danger in the sixteenth century Britain and the arrival of the printing press was, if anything, energising to writers. The English government then became concerned about too many works being produced by the writers. The new technology was making seditious reading material widely available for the first time and the government urgently needed to control the flood of print matter, censorship being as legitimate an administrative function then as building roads. For this purpose, the English Crown found a formidable ally in the Guild of Stationers and the censorship law was in the form of a Charter granted to the stationers by the Crown. In the early days, the stationers had through their practices developed certain usages and customs which were made to ensure exclusivity of rights over books they had acquired from authors, in order to prevent copying by persons who were not members of their guild. Thus, in 1534, the Stationers secured protection against the importation of foreign books and in 1556, Mary Tudor, with her acute concern about religious opposition, granted the Stationers' Company a charter. This gave a power, in addition to the usual supervisory authority over the craft, to search out and destroy books printed in contravention of statute or proclamation. The company was enabled

to organise what was in effect a licensing system by requiring lawfully printed books to be entered in its register. The right to make an entry was confined to company members, this being germane to the very purpose of the charter.

- 3) This system continued until 1662 but lapsed in 1679. King James II revived it for seven years in 1685 until 1694 when Parliament finally refused to renew the charter. The Stationers, who had argued forcefully against their loss of protection, were left with such claim to “copy-right” as they could make out of their own customary practices surrounding registration. As they also lost their search and seizure powers, and equity had not yet begun to grant injunctions to protect any interest they might establish, their only hope was common law and this they put to no decisive test. Thus, the stationers needed definite substantive rights and effective procedures to enforce them. So, they approached parliament and offered the then novel argument that authors had a natural and inherent right of ownership in what they wrote, and that furthermore, such ownership could be transferred to other parties by contract, like any other form of property. This argument paid off and saw the birth of the first recognisable modern copyright law – and in fact the first Intellectual Property Law – the Copyright Act of 1710 also known as the Statute of Anne.
- 4) Interestingly, the Act was concerned with interest in books and other writings. It granted sole right and liberty of printing books to authors and their assigns, but this right stemmed, nonetheless, from commercial exploitation rather than literary creation. Enforcing the right depended upon registering the book’s title before publication with the Stationers’ Company and this was enforceable by seizures and penalties. The right has a life span of 14 years subject to extension for another 14 years if the author was alive at the time of the first expiration.
- 5) Soon after the passage of the Act, other creative arts started yearning for protection of their works, particularly the visual arts. Protection was first extended to engravings in 1735-1777; sculptures in 1798-1814; and paintings, photographs and drawings in 1862; performing rights in 1833-1842. In the early twentieth century, parliament saw it fit to bring all these measures into a single code since they all deal with the same subject – copyright, hence the enactment of the Copyright Act of 1911. The 1911 Act was also influenced by international concerns regarding copyright –

need for foreign works to be afforded protection outside their shores and the need to set some form of international standards. The result of this was the Berne Convention, under which either the personal connection of the author with a Member State, or first publication in a Member state, was to secure copyright in others, under the principle of national treatment. At the Berlin revision of the Convention in 1908, Britain was obliged to accept the majority consensus on two matters: protection was to arise out of the act of creation itself, without any condition of registration or other formality – which obliged Britain to abandon the traditional requirement of Stationers’ Company registration before suing; and the period of protection for most types of work was put to at least the author’s life and 50 years.

- 6) Being a colony of Britain, and in order to protect the interests in creative products from Britain, Britain extended the 1911 Act to Nigeria through Order-in-council No. 912 of 24 June 1912 which was made under section 25 of the 1911 Act. It is important to note that although a new Copyright Act was passed in England in 1956, Nigeria still continued to apply the 1911 Act until 1970 when the first indigenous Copyright Act was promulgated as Decree No. 61 of 1970, ten years after independence. According to Adewopo,

“The impact of the (1911 Act) was limited probably due to what many described as the paucity of facility to generate copyright materials. Moreover, it did appear that the modern concept of individual proprietary right forged by the new Act was at variance with the traditional notion of communal ownership and free access.”

- 7) The 1970 Decree came into force on 24 December of that year. It was however found to be very defective in many aspects. For instance, under the Decree, copyright for literary, musical and artistic works, cinematograph films and photographs lasted for only 25 years after the end of the year in which the author died. In the area of administration, there was no effective structure under the Decree. The Decree only made provisions for civil suit at the instance of the copyright owner with regards to enforcement and the criminal sanction was very minimal as the maximum penalty was ₦0.05K (Five kobo) per item seized up to a maximum of ₦10 (Ten Naira), with a possible prison sentence of 2 months for a second offence. In essence, enforcement was largely left in the hands of rights owners. It was these lapses and more that led to the promulgation of the Copyright Decree No. 47 of 1988. That Decree, now an



Act has been amended twice in 1992 and 1999. Observers have described the present Copyright Act as the most progressive in our legislative effort and the reason is not unconnected with the fact that the Act was fashioned after the World Intellectual Property Organisation (WIPO) Tunis model which incorporated standard provisions reflecting trends in global copyright legislation at that time. Specifically, the NCC was established under the new Act with a governing board serving as the institutional framework for the administration and regulation of copyright in Nigeria. There is also a stronger regime for criminal sanctions. While retaining the mechanism for civil enforcement by individual right owners, the Act makes provisions for the approval of collective management organisations (CMOs) for the collective management and enforcement of copyright on behalf of right owners.

- 8) It is important to note that in the face of digitisation and its impact on the copyright landscape and to bring Nigeria's law in tune with its international obligations, actions have been commenced to review the Nigerian copyright law. The exercise led to the production of the Draft Copyright Bill, which was open for comments from relevant stakeholders. After the reception and examination of public comments, the Draft Copyright Bill was revised by the NCC. The revised draft was approved by the Federal Executive Council in 2017 and still awaits being forwarded to the National Assembly for consideration and passage.

**SELF-ASSESSMENT EXERCISE 4**

In what ways did the development of copyright legislation in Britain influence Nigerian copyright law?

**1.4 Summary**

We have learnt the history and origins of copyright protection and copyright law and policy formulation in Nigeria. Moreover, in this Unit, we have discussed the history of copyright law in Nigeria, tracing its origin to copyright law making in Britain. This approach is founded on the uncontested premise that as a former colony of Britain, copyright protection in Nigeria framework has roots in the British copyright regime premiered by the Statute of Ann.

## 1.5 References/Further Reading/Web Sources

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- 5) William Cornish and David Llewelyn, *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights* (Sweet and Maxwell, 2007)
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- 8) Draft Copyright Bill 2015, [http://graduatedresponse.org/new/wp-content/uploads/2016/02/DRAFT\\_COPYRIGHT\\_BILL\\_NOVEMBER-\\_2015.pdf](http://graduatedresponse.org/new/wp-content/uploads/2016/02/DRAFT_COPYRIGHT_BILL_NOVEMBER-_2015.pdf)

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<sup>1</sup> Parts of the discussion in this unit are excerpts drawn from the paper

## MODULE 2 PROTECTION OF COPYRIGHT AND RELATED RIGHTS

### **Unit 2: Subsistence of Copyright**

#### 2.1 Introduction

#### 2.2 Learning Outcomes

#### 2.3 Nature and duration of copyright in eligible works

##### 2.3.1 Eligible Works

##### 2.3.2 Nature of Copyright in Eligible Works

##### 2.3.3 Duration of Copyright

#### 2.4 Originality

#### 2.5 Fixation

#### 2.6 Other Qualifying Factors

##### 2.6.1 Status of the Author

##### 2.6.2 The Place of First Publication

##### 2.6.3 Reference to International Agreements

##### 2.6.4 The Work of Government or an International Body

#### 2.7 Summary

#### 2.8 References/Further Reading/Web Sources

### **2.1 Introduction**

Unlike patent, designs and trademarks (discussed in second semester) that require registration for their protection, copyright protection is automatic upon creation of the work and is not contingent on any form of registration. However, the subsistence of copyright in a work depends on whether the work is an eligible subject matter, it meets the requirements of originality and fixation and it bears appropriate link with its maker who must be a qualified person under the Copyright Act. Accordingly, in terms of section 1 of the Copyright Act, the eligible subject matter or works for protection are literary works, musical works, artistic works, cinematograph works, sound recordings and broadcast. In terms of sections 26 and 31 of the Copyright Act, neighbouring or related rights, such as performers rights and expressions of folklore can also be regarded as eligible subject matter.

Section 1(2) provides further eligibility requirements. It stipulates that literary, musical or artistic works shall not be eligible for copyright unless (a) sufficient effort has been expended on making the work to give it an original character; (b) the work has been fixed in any definite medium of expression now known or later to be developed, from which it can be perceived, reproduced or otherwise communicated either directly or with the aid of any machine or device. These provisions form the bases for the concepts of originality and fixation. Indeed, the concepts of originality and fixation are core threshold standards for qualification for copyright protection in Nigeria.

In this unit, we will be examining the requirements for subsistence of copyright in eligible works under the Copyright Act. In particular, we will be discussing originality, fixation, the nature and duration of eligible works, and other qualifying factors.

## **2.2 Learning Outcome**

At the end of study in this unit, you should be able to do the following:

- 1) Identify the works eligible for protection under the Copyright Act
- 2) Explain the nature and duration of copyright in the eligible works under the Copyright Act
- 3) Discuss the requirements for subsistence of copyright in an eligible work under the Copyright Act, such as originality, fixation and other qualifying factors

## **2.3 Nature and Duration of Copyright in Eligible Works**

According to Ghosh, the boundaries of copyright are far from clear and difficult to discern as copyright law lacks analogous limits on the scope of the copyright owner's property interest, except for the boundaries imposed by the exceptions and limitations (discussed below). But, statute can highlight specifically what the right includes. Thus, even though it may be difficult for the purpose of quantification to determine the exact extent of copyright owners' property interest, the nature of the right protected by law can be deciphered from the law itself. For instance, section 6, 7 and 8 of the Copyright Act stipulates the general nature of copyright in eligible works. We will return to this shortly.

For now, it should be noted that section 51(1) of the Copyright Act defines "work" in a descriptive manner to include translations, adaptation, new versions, or arrangements of pre-existing works, and anthologies or collection of works which, by reason of the

selection and arrangement of their content, present an original character. Specifically, the eligible works under protection are listed in section 1 of the Copyright Act (copyright) and in sections 26 and 31 of the Copyright Act (neighbouring or related rights).

### **2.3.1 Eligible Works**

Section 1 of the Copyright Act lists literary works, musical works, artistic works, cinematograph films, sound recordings and broadcasts as eligible works. These works are specifically defined under section 51 of the Copyright Act. Thus, while broadcast is defined as sound and television broadcast by wireless telegraphy or wire or both by satellite or cable programmes including re-broadcast, sound recording is defined as the first fixation of a sequence of sound capable of being perceived aurally and of being reproduced, but does not include a soundtrack associated with a cinematograph film. A cinematograph film is defined to include the first fixation of a sequence of visual images capable of being shown as a moving picture and of being the subject of reproduction including the records of a sound track associated with it. Furthermore, musical works mean any musical composition, irrespective of musical quality and includes works composed for musical accompaniment, while artistic works include, irrespective of quality, paintings, drawings, etchings, lithographs, woodcuts, engravings and prints, maps, plans, and diagrams, works of sculpture, photographs not comprised in a cinematograph film, including architectural works in form of building models, etc. It should be noted that in terms of section 1(3) of the Copyright Act, an artistic work will not be eligible for copyright protection, if at the time when the work is made, it is intended by the author to be used as a model or pattern to be multiplied by any industrial process. Asein and Oyewunmi are in accord on the point that this provision necessarily excludes such models or patterns because of their possible protection under section 12 of the Patent and Designs Act as industrial designs. That being said, literary work is defined to include novels, stories, poetic works, plays, stage directions, film scenarios, broadcasting scripts, choreographic works, computer programmes, written tables or compilations (databases), etc.

The major concern of copyright in these works is not the idea but the manner in which the idea is represented or expressed. In other words, copyright does not

protect ideas but the manner in which the ideas are represented or expressed. It should also be noted that protection extends to works irrespective of their content, length, purpose, form or even quality. But copyright cannot be ascribed to a single word. This principle was upheld in the English case of *Exxon Corp v. Exxon Insurance Consultant* (52[1981] All E.R. p.241). In that case, the claimants objected to the use by the defendant of “Exxon” as part of their corporate name. They secured relief against passing off; but on the claim for infringement of copyright in the word, they failed before the court of first instance and on appeal to the Court of Appeal, the court held, per *Stephenson L.J.*, relying on a section in the repealed English Copyright Act 1956 similar to section 1 of our Copyright Act, as follows,

“[...] that for which protection is sought in the instant case does not appear to me to have any of the qualities which common sense would demand. It conveys no information; it provides no instruction; it gives no pleasure that I can conceive; it is simply an artificial combination of four letters of the alphabet which serves a purpose only when it is used in juxtaposition with other English words, to identify one or other of the companies in the claimant group”.

### **2.3.2 Nature of Copyright in Eligible Works**

Sections 6 of the Copyright Act defines the nature of copyright in the eligible works. In this connection, and in terms of section 6, copyright in a work shall be the exclusive right to control the doing in Nigeria of any of the acts listed under it in respect of a substantial part or the whole of a work either in its original form or in any form recognisably derived from the original. Commenting on section 6, Asein had argued that the

“concept of right generally connotes the legal power or liberty to do something, but in the case of copyright, the right conferred on the owner is the power to “stop others from doing something,” i.e. to prevent the exploitation of a work by unauthorised persons. Put differently, copyright is a negative right, or more appropriately, an exclusionary right, to exclude others from the unauthorised use rather than a positive right entitling the owner to exploit the work in question. For instance, the right conferred does not authorise the copyright owner to distribute or publish the work but rather gives him the exclusive right to control and exclude others from its distribution and publication”

While the foregoing appears as a sound reasoning, it should however be carefully scrutinised against the backdrop of the entire provision of section 6. Granted copyright is exclusive and negative in nature, its negativity does not arise from the fact that it does not confer the owner with the right to do any of the acts listed in section 6 of the Copyright Act, as Asein would have us believe. Rather, the negative nature of copyright inheres in the fact that third parties are prevented from doing those acts in respect of the works, which the copyright owner is empowered to do, without the copyright owner's authority. Indeed, it appears unusual for a person who has a right to authorise or exclude the doing of any act in respect of his/her property (copyright) to not be able to do same act him/her self in respect of such property. Moreover, the power of a copyright owner over his/her work is not limited to the right stated in sections 6 (discussed below). It extends to the moral right of the author of a work as enshrined in section 12 of the Copyright Act. In terms of that section, authors (including their heirs and successors in title) of a work in which copyright subsists have a perpetual, inalienable and imprescriptible right to claim authorship of the work, be named as authors of the work and to object and seek relief in connection with any distortion, mutilation or other modification of or any other derogatory action in relation to the work, where such action would be or is prejudicial to their honour or reputation. This right is otherwise referred to as authors' paternal and attribution rights.

That being said, section 6(1) of the Copyright Act provides that copyright in the case of literary or musical works is the exclusive right to do or authorise the doing in Nigeria of the reproduction, publication, public performance, translation and its reproduction, recording or making into a film, commercial distribution (by way of rental, hire, lease, or loan, etc.), broadcast or communication to the public, adaptation, etc. of such works. In the case of artistic works, it extends to the reproduction, publication, adaptation, inclusion in films, etc. of the artistic works. Also, owners of cinematograph films have the exclusive rights to do, or authorise, the making of a copy of the film, causing of the film to be seen and/or heard in public as the case may be, making of any recording of the sound track of the film, and commercially distributing the film (by way of rental, lease, hire, loan, etc.). Further, section 7 of the Copyright Act provides that copyright in sound recording shall be the exclusive rights to control in Nigeria the reproduction, broadcast or

communication to the public, and commercial distributing (by way of rental, lease, hire, loan, etc.) of the film. Finally, section 8 of the Copyright Act confers on the owner of the copyright in broadcasts the exclusive right to control in Nigeria the recording and re-broadcasting, the communication to the public, and commercially distribute the film (by way of rental, lease, hire, loan, etc.) of such broadcast.

Part II of the Copyright Act introduced a different class of works falling under copyright protection. These works are termed neighbouring rights. They are also known as related rights. According to Adewopo, the neighbouring rights concept was imported into the Nigerian copyright law in keeping with the international intellectual property architecture in the context of extending protection to related rights such as live performances. The protection of performers rights was already captured in international instruments such as the Rome Convention for Protection of Performers, and Producers of Phonograms and Broadcasting Organisations 1961, the WIPO Performances and Phonograms Treaty 1996, and the Beijing Treaty on Audio-visual Performances 2012.

Specifically, the work of performers and folklore forms neighbouring rights under the Copyright Act. The protection of folklore in Nigeria is discussed in Module 3. For now, it should be noted that performers' rights are not copyright properly so called. They are rights so closely related to copyright that need some form of protection, hence they are called neighbouring rights. Even though performers engage in activities which are more immediately artistic and creative than those of entrepreneurs who enjoy copyrights in sound recordings, films and broadcast, it took so long, in most jurisdictions, for performing rights to gain any form of protection. For instance, it was not until 1958 that performers were allowed the right to some civil action against infringers of their right through the Performers Protection Act of that year in the UK. The reason for this, according to Cornish and Llewellyn, was that it was claimed that performers were protected indirectly by the entrepreneurial rights of producers; that those financially responsible were best placed to pursue imitators; and that to give copyright to all performers in a play, a film or an orchestra would lead to quite unnecessary complexity.



The Rome Convention influenced the protection of performers' rights in Nigeria. By virtue of section 26 of the Copyright Act, a performer in Nigeria shall have the exclusive right to control, in relation to his/her performance, the performing, recording, live broadcast, reproduction in any material form, and the adaptation of the performance. Performance for this purpose includes a dramatic performance (which includes dance and mime), a musical performance, and a reading or recitation of literary act or any similar presentation which is or so far as it is, a live performance given by one or more individuals.

### **2.3.3 Duration of Copyright**

A work that qualified for copyright protection does not enjoy such protection in perpetuity. In other words, the author of, and/or owner of copyright in, such work will not enjoy copyright forever. The enjoyment of the right is limited by time, among others. This right usually begins to run from the time of creation of the work, or in some cases the moment in which the work was published. Under the Berne Convention, the duration for copyright is the life of the author and not less than 50 years from his death. The Berne Convention also establishes periods of protection for works in respect of which the duration cannot be based on the life of a single human author, for example, cinematographic works or sound recordings. The Berne Convention applies, as a guide, to countries who are parties to it in the sense of defining minimum standards of protection below which the national copyright legislation of member states cannot fall.

Under the Copyright Act, literary, musical and artistic works have a duration of the life of the author and 70 years after the end of the year in which the author dies and in the case of such works authored by government or a corporate body, the duration is 70 years after the end of the year in which the work was first published. For anonymous or pseudonymous works, the duration is 70 years from the end of the year in which the work was first published provided that when the author becomes known, the term of the right will run through the life of the author and for 70 years after the end of the year in which he died. Where the work is under a joint authorship, 70 years will begin to run from the end of the year in which the last author died. For cinematograph films, photographs, and sound recordings, the duration is 50 years after the end of the year in which the work was first published,

while broadcasts also have 50 years term after the end of the year in which the broadcast first took place (generally, see section 2 of, and item 1, 2, 3 and 4 of the 1st Schedule to, the Copyright Act).

Performers' right enjoys protection for a term of 50 years from the end of the year in which the performance first took place (section 27 of the Copyright Act). It has been rightly posited, by Adewopo, that the effect of the term exceeding the life of the author is that copyright law anticipates and makes allowance for the heirs and successors of an author to derive benefit accruing from the proprietary interest of an author as much as the same way he could have been entitled to enjoying the benefits of inheriting physical property. We should note that once the term of protection under the Copyright Act lapses, the work falls into the public domain and therefore allows for free usage.

## **2.4 Originality**

International copyright treaties do not define the scope of originality. But, the requirement of originality for protection may simply be presumed from the treaties. For instance, after defining the literary and artistic works falling under its ambit, the Berne Convention provides that “translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work” (article 2(1) and (3)). Thus, it appears the definition of the scope of originality was reserved for national legislators.

Even so, most national copyright laws do not define the concept. They stop at expressly requiring originality as a criterion, among others, for copyright subsistence. Nonetheless, there have been judicial attempts at defining the scope of the concept. Such attempts have led to the existence of two schools of thoughts: the objective school and the subjective school. The objective school has its roots in the common law tradition led by Britain and it is established in a long line of cases (See for instance, *University of London Press v University Tutorial Press* [1916] 2 Ch. 601; *Ladbroke (Football) v William Hill* [1964] 1 All ER 465; *Exxon Corp v Exxon Insurance Consultants* [1982] RPC 69; *Express Newspapers v Liverpool Daily Post* [1985] FSR 306; *Sawkins v Hyperion* [2005] RPC (32) 808).

The objective school is otherwise known as the “sweat of the brow” or “industrious collection” school. According to this school, for a work to be original, it is necessary to show that sufficient skill and labour or industry was expended in making the work. It is not necessary to show creative input in making the work (see *Newspaper Licensing Agency Ltd v. Marks and Spencer Plc* [2002] RPC 4; *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2001] 1 All ER 700; *SAS Institute Inc. v World Programming Ltd* [2013] EWCA Civ 1482; *Kelly v. Morris* (1866), L.R. 1 Eq. 69; *U & R Tax Services Ltd. v. H & R Block Canada Inc.* (1995), 62 C.P.R; *CCH Canadian Ltd. v. Law Society of Upper Canada* [2002] FCA 187); *CCH Canadian Ltd v Law Society of Upper Canada* ([2004] 1 SCR 339; *Desktop Marketing Systems Pty Ltd v. Telstra Corporation Ltd* [2002] FCAFC 112; *Emerson v Davies* 8 F Cas 615 (Mass CC, 1845); *Sands & McDougall Pty Ltd v Robinson* (1917) 23 CLR 49; *Ice TV Pty Ltd v. Nine Network Australia Pty Ltd* ((2009) 239 CLR 458).

Under the subjective or creativity school it is impossible to find originality in the absence of creativity. The standard of originality requires at least minimal creativity. The form of creativity required here is not the novelty standard required under patent law. It is the creativity, which connotes that the work in question is not merely a copied work but one that involves labour, skill and some independent judgment or intellectual activity on the part of the author. This school of thought is now firmly established in the US following the US Supreme Court decision in the case of *Feist Publication Inc. v Rural Telephone Service* (499, U.S. 340 (1991)).

Like other copyright laws, the Copyright Act makes originality a criterion for copyright subsistence. Accordingly, section 1(2)(a) provides that “literary, musical or artistic work shall not be eligible for copyright unless sufficient effort has been expended on making the work to give it an original character”. This provision gives an inkling as to the concept of originality under the Copyright Act. It requires “sufficient effort” be expended in the making of a work for it to be regarded as original. The line of cases on subsistence of copyright in Nigeria confirms this assertion.

First, there is the case of *Offrey v Ola* (Suit No. HOS/23/68), wherein the plaintiff designed and put out for sale a school record book known as “New Era Scheme of Work and Record Books”. The plaintiff’s labour in producing the book mainly consisted in the

drawing of several horizontal and vertical lines. He later discovered that the defendants were producing and selling some record books, which were materially the same as his own especially at pages 1 to 52 of the alleged infringing book. Consequently, he sued for damages and injunctions. The court dismissed the plaintiff's claim and held that,

[...]there was no evidence that the plaintiff had put into its production some substantial amount of labour. The record book merely showed a neat layout of vertical and horizontal columns on pages 1 to 52. Such a layout could not be called an original literary work or an original compilation for giving ready, convenient and accurate information to people who needed such information. The plaintiff had therefore not established that the record book in question is an original literary work or compilation being the result of his labour and skill.

There is also the case of *Yemitan v Daily Times & Anor.* ([1977-1989] 2 IPLR 141-156), where the plaintiff alleged that the copyright in his article titled "The day the Lagoon Caught Fire" was infringed by the defendant. According to the plaintiff, the defendants in their magazine called the "Headlines" reproduced his said article without authorisation. Thus, the plaintiff sued for damages and injunctions against the defendants. The court, while deciding in favour of the plaintiff held that copyright in a work "belongs to the author, who is the one that actually expended the work, labour, knowledge and skill".

The foregoing cases were decided before the coming into force of the Copyright Act. They were decided under the repealed Copyright Decree, No. 61 of 1970 (section 1(2)(a)), which provision on originality was simply rehashed under the extant Copyright Act. Little wonders, therefore, the pronouncements therein reflect the attitude of the court on the issue of originality under the extant Copyright Act.

This assertion is confirmed by the more recent case of *Sprevision Ltd & Anor. v Nestle Nigeria Plc & Ors* (Suit No.: FHC/IKJ/CS/183/2012, unreported ruling of 10 September 2013 per Yinusa J). In that case, the plaintiffs claim that they built a concept for the development of digital kiosk pavilion, which they stored in a compact disk and flash drive and sent to the defendants. They further alleged that the defendants asked them to build a kiosk for demonstration based on the concept for inspection. According to the plaintiffs, they did not hear from the defendants again but discovered later that the defendants had gone ahead to develop the kiosk and displayed it at the premises of

Universities of Lagos and Ibadan respectively. Consequently, the plaintiffs sought to enforce the copyright in their concept for the development of digital kiosk pavilion as an artistic work through this suit. The defendants filed a motion of preliminary objection to the suit on the ground, among others, that the plaintiffs possess no copyright in the subject matter of the suit. According to the defendants, the plaintiffs admitted in paragraphs 7, 8 and 14 of their statement of claim that the subject matter of the suit was intended to be used as a model or pattern to be multiplied by industrial process. As such, the defendants rightly contended that on the basis of section 1(3) of the Copyright Act the plaintiffs have no copyright in the alleged artistic work. By virtue of section 1(3) of the Copyright Act, an artistic work is ineligible for copyright protection if, at the time of its creation, it is intended by the creator to be used as model or pattern to be multiplied by any industrial process.

The court upheld the defendants' objection and in so doing commented on the subsistence of copyright under section 1(2) as follows,

[r]ecognition of copyright is premised on some sufficient effort having been expended on the work to give it an original character [...] for a work to be eligible for copyright protection, it must be original. The essence of originality is that the author of the work must have devoted skill and labour to its creation.

The court's position in *Spreevision* (above) on the standard of originality under the Copyright Act is supportable. In this regard, there is also the case of *Ifeanyi Okoyo v Prompt and Quality Services & Anor* ([2003-2007] 5 IPLR 117-135), wherein the plaintiffs sought to enforce their copyright in their architectural drawings, which the defendant allegedly infringed. The defendants filed a notice of preliminary objection to the suit on the ground that the plaintiffs lack *locus standi* to institute the suit because they are not registered architects under the Architects (Registration, etc) Act. In considering the objection, the court had to determine the criteria for enforcement of copyright in Nigeria. Of present relevance is the ruling of the court on originality. After reproducing section 2(1) above, the court stated that

it is pertinent to observe that a literary or musical work is not eligible for copyright unless sufficient effort has been expended in making it in order to give it an original character. This is a matter of facts which must be proved by evidence. Save as above, the author of an artistic, particularly, work of Architecture, is not required to fulfil any other conditions to make his work eligible for Copyright.

The concluding part of the above pronouncement should be understood within the context of the above case alone. It must not be taken as a general provision of the law regarding copyright protection in Nigeria. This is so because originality is only one of the conditions for copyright eligibility under the Copyright Act. The conditions include fixation, which will be discussed below, among others. That being said, the court's position in the case of *Yeni Anikulapo-Kuti & Ors. v Iseli & Ors* ([2003-2007] 5 I.P.L.R. 53-73), which involves the issue of authorship and copyright subsistence in a musical work, should be noted. In that case, the court held that a musical work must originate from its author who has expended special skill, and labour in producing it.

In essence, a determination of originality under the Copyright Act will involve a definition of the term "sufficient effort". The question of what is "sufficient effort" is obviously a matter of degree, which would be determined on a case-by-case basis. And it appears the courts will not settle for some trivial amount of labour and skill or "sweat of the brow" when determining the question of originality. Also, the question of "sufficient effort" simply means determining the amount of "sweat of the brow" or "labour and skill" and not the creativity expended in making a work. Thus, the determination of whether a work is original under the Copyright Act would require an objective test. Also, the Copyright Act protects literary, artistic and musical works irrespective of their literary, artistic or musical quality. Further, although copyists are not protected under the Copyright Act (*ICIC (Directory Publishers) Ltd v Ekko Delta (Nig) Ltd* [1977-1989] 2 IPLR 32), a work shall not be ineligible for copyright protection merely because the making of the work involved an infringement of copyright in some other work (section 1(4) of the Copyright Act). This underscores the fact that the Copyright Act does not seek to protect copyright arising from a novel work. It seeks to protect copyright in a work, which originates from sufficient effort or "sweat of the brow" or "labour and skill" of the author.

## **2.5 Fixation**

Not all countries require fixation as part of the condition for copyright protection. In fact, the TRIPs agreement does not contain any express provision in that regard. Even the Berne Convention, which the TRIPS agreement (Article 1) incorporates, does not state any minimum standard for fixation. It merely states that copyright shall subsist in literary

and artistic works whatever may be the mode or form of its expression (Berne Convention, article 2(1)). Regarding the mode or form of expression, the Berne Convention (article 2(2)) states that it “shall be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form”. In essence, the Berne Convention left fixation issues to be determined by the legislature of respective members of the Union. According to White, the absence of fixation requirement in the Berne Convention “is meant to allow the Convention’s [...] member nations to determine individually whether they wish to impose a requirement that the work seeking protection be fixed in a tangible format, that it need not be fixed at all, or that it must meet some other standard in between these extremes”.

The fixation requirement serves very useful purposes, the most fundamental of which, According to Adewopo, is the evidentiary purpose. Even in countries like France where the copyright law is silent on the fixation requirement, the evidentiary purpose of fixation has been established. Perzanowski provides a lucid explanation of the evidentiary purpose of fixation. According to the author, by the fixation requirements, copyright law “avoids problems of proof that would otherwise stymie enforcement efforts. Fixation clarifies questions of authorship and ownership, and it defines the bounds of copyright grant through reference to a stable instantiation that can be compared to alleged infringements.” Another purpose of fixation, as suggested by Carpenter and Hetcher, is that it acts as “check on the capaciousness of the originality requirement”. The point being made is that without fixation requirement, the amount of works coming under copyright protection may be open-ended since the only requirement for eligibility would be originality. In the authors’ view, “the fixation requirement cabins the writ of copyright, as a range of original works would be copyrightable but for fixation”. A third purpose is proffered by Gordon to the effect that fixation allows third parties to interact appropriately with intellectual works. According to this author, fixation requirement provides tangibility for copyright works thus enabling authorised and fair use of the works. Perhaps, a fourth purpose would be that fixation of a work makes it easy to determine when the work was made when considering copyright duration. It has also been regarded as serving the purpose of notice to other creators and users of work as to rights existing in a work.

Under the Copyright Act, a literary, musical or artistic work will not be eligible for copyright protection unless the work has been fixed in any definite medium of expression now known or later to be developed from which it can be perceived, reproduced or otherwise communicated either directly or with the aid of any machine or device (Section 1(2)(b)). This provision was briefly pronounced upon in the case of *Yeni Anikulapo-Kuti & Ors. v Iseli & Ors* (supra). The case involves claims for injunctions against the defendants by the plaintiffs as administrators of the estate of the late Nigerian music icon Fela Anikulapo-Kuti (Fela) on the ground that the defendants were about to record and sell certain pieces of music composed by Fela during his lifetime. As a defence, the defendants averred that the pieces of music upon which the plaintiffs' claims rests are not in any fixed medium. The defendants did not present any evidence. They merely rested their case on that of the plaintiffs'. After reviewing the evidence presented by the plaintiffs, the court found that the plaintiffs sufficiently showed the existence of the pieces of music in issue. In reaching the conclusion, the court held – per Aliyu J. – that the expression “fixed in any medium of expression now known or later to be developed” as stated above does not need any technical interpretation. According to the court, the “words are clear and unambiguous and they should be given their ordinary natural meaning. The phrase simply means that the [...] work to be eligible for copyright, must be in tangible medium without specifying the form in which it must be”.

Thus, it could be argued that any medium that makes perception, reproduction and/or communication of a work possible would be sufficient to satisfy the fixation requirement in the Copyright Act. In this regard, the fixation requirement under the Copyright Act shares similarity with the USA fixation provision contained in section 102(a) of the US Copyright Act (USCA). However, both legislation differ at the point where USCA requires fixation for a period of not more than “transitory duration” as an additional fixation requirement. That notwithstanding, the Copyright Act may be interpreted, according to Adewopo, to the effect that the type of “fixation required to vest protection is beyond the transient projection. The medium must allow for some sustained presence of permanent nature”.

A further reading of the provision in the Copyright Act shows that mention is not made of cinematograph films, sound recordings and broadcast. This creates an impression that those works do not require fixation for copyright eligibility in Nigeria. Indeed, According



to Adewopo, a broadcast is “exempted from [fixation] requirement as it may be protected even if it is unfixed in form. For instance, a live broadcast to the public is for this reason not required to be simultaneously recorded in order to gain protection”. The definition of broadcast under the Copyright Act confirms this position. According to the section 51(1) of the Copyright Act, broadcast means sound or television broadcast by wireless telegraph or wire or both, or by satellite or cable programmes and includes re-broadcast. However, the same cannot be said of cinematograph film and sound recording. Cinematograph film is defined to include the first fixation of a sequence of visual images capable of being shown as a moving picture and of being the subject of reproduction, and it includes the recording of a sound track associated with the cinematograph film (section 51(1) of the Copyright Act). Similarly, sound recording means the first fixation of a sequence of sound capable of being perceived aurally and of being reproduced, but does not include a sound track associated with a cinematograph film (section 51(1) of the Copyright Act).

The effect of the foregoing is that cinematograph film and sound recordings require some form of recording which makes them capable of being perceived, reproduced and communicated. In respect of performers’ rights, the Copyright Act does not make fixation of performances as a requirement for enforcement. After stating the acts over which a performer has exclusive control in respect of his performance, the Copyright Act defines performance to include a dramatic performance, musical performance and a reading or recitation of literary or any similar presentation which is or so far as it is a live performance given by one or more individuals (section 51(1) of the Copyright Act).

## **2.6 Other Qualifying Factors – connection between the maker, an eligible work and Nigerian territory**

The Copyright Act makes provisions relating to appropriate linkages that must exist between an eligible work, the maker of the work and the territory of Nigeria. The point has been made earlier that intellectual property, including copyright, protection is territorial. As such, copyright Nigeria is protected only to the extent stipulated under the Copyright Act. Thus, apart from compliance with the requirements of originality, fixation and eligibility of the work, the Copyright Act also requires that the maker of the work must be linked to the Nigerian territory in the ways defined by the Copyright Act. Indeed,

according to Asein, it is “correct to assert that copyright does not subsist in a work under the Act unless such a work or its author is in some way linked to Nigeria [and] the mere fact that there is an international obligation to which Nigeria is bound does not entitle a work to protection under the [...] Act”. In this connection, and as stipulated in sections 2, 3, 4, and 5 of the Act, the required connection can be established through the status of the author; the place of first publication; reference to international agreements; or the work of government or an international body.

#### **2.6.1 Status of the Author**

Section 2 of the Copyright Act determines status of the author of the work either as a citizen of Nigeria, or a person domiciled in Nigeria, or a corporate entity incorporated in Nigeria and this is important for the conferral of copyright on the work. Specifically, the section vests copyright on every eligible work of which the author or, in the case of joint authorship, any of the authors is, at the time the work is made, a Nigerian citizen, or domiciled in Nigeria or is a body corporate incorporated under the laws of Nigeria. It is important to note that where an author satisfies this requirement in respect of an eligible work that is original and fixed in the appropriate medium, the court cannot accept extraneous factors to deprive such author of his/her copyright. This position was reached in the case of *Ifeanyi Okoyo v Prompt and Quality Services & Anor* (supra), wherein the plaintiffs sought to enforce their copyright in their architectural drawings, which the defendant allegedly infringed. The defendants filed a notice of preliminary objection to the suit on the ground that the plaintiffs lack *locus standi* to institute the suit because they are not registered architects under the Architects (Registration, etc) Act. Rejecting the defendant’s objection, the court held that the “author of an artistic, particularly, work of Architecture, is not required to fulfil any other conditions to make his work eligible for Copyright”.

#### **2.6.2 The Place of First Publication**

Section 3 of the Copyright Act relates to eligible works which author does not fall within the categories in section 2. In this connection, literary, musical, artistic and cinematograph works, if they are first published in Nigeria, and sound recordings made in Nigeria are conferred with copyright. For purpose of this section, according to section 51(2), a work is deemed to have been published if copies of it have been made available in a manner sufficient to render the work assessable to

the public. Also, where only a part of a work has been published, that part will be treated as a separate work under the Copyright Act. Moreover, a work will still be regarded as published in Nigeria regardless of the fact that it has been published in another country insofar as the two publications occurred within a period of thirty days. Further, it is important to note that section 3 expressly excludes broadcasts from its ambit. Thus, according to Asein, this means that broadcast can only enjoy copyright protection in Nigeria its author is a Nigerian citizen, is domiciled in Nigeria, or is a cooperate entity incorporated in Nigeria, or is a government work or the work of an international body.

### **2.6.3 Reference to International Agreements**

Section 5 of the Copyright Act takes care situations where a work is made outside Nigeria by an author who does not fall under the categorisation in section 2 and the work is not covered by section 3 provided the country from where the work or author originates is party to an obligation in a treaty to which Nigeria is also a party, among others. According to Asein, section 5 seeks to “address the various obligations arising from Nigeria’s accession to international treaties, and particularly to ensure that it complies with the principle of national treatment,” which requires that foreign works do not receive less favourable treatment as that given to Nigerian works. Oyewunmi seems to agree with Asein when she stated that “as a party to a number of international treaties,” Nigeria “extends reciprocal protection to works emanating from citizens of member countries of such international agreements or treaties”.

Accordingly, section 5 confers copyright on a work, if on the date of publication, the maker is a citizen of or domiciled in, or a corporation of a country that is party to an obligation in a treaty or international agreement to which Nigeria is also a party. It also confers copyright on works first published in a country which is a party to an obligation in a treaty or other international agreement to which Nigeria is a party. Section 41 is important when discussion protection of copyright in Nigeria by reference to international agreements. As such, it must be read along with the foregoing provisions. In terms of section 41, where a country is a party to a treaty or other international agreement to which Nigeria is also a party and the Minister (of Justice) is satisfied that the country in question provides for protection

of copyright in works which are protected under the Copyright Act, the Minister may be Order in the Federal Gazette extend the application of the Act in respect of any or all the eligible works under the Act to individuals who are citizens of or domiciled in that country; corporations established under the law of that country; works, other than sound recordings or broadcasts, first published in the country; and to broadcast and sound recordings made in that country. Further, section 5 confers copyright on works published by the United Nations (UN) or any of its specialised agencies; or by the African Union (AU) or by the Economic Community of West Africa (ECOWAS).

However, where the question arises as to whether a country is a party to an obligation in a treaty or other international agreement to which Nigeria is also a party, a certificate from the NCC to that effect shall be conclusive proof of that fact. Also of relevance in this regard, is the Copyright (Reciprocal Extension) Order, I. N. 32 of 1972, which was made pursuant to section 14 of the repealed 1970 Copyright Decree. The Order was saved by section 3(3) of the Fifth Schedule to the extant Copyright Act. The Order extended copyright protection under the Act to citizens, residents, corporations of, and works published or made in countries, such as the US, Canada, Ghana, Brazil, France, Japan, Norway, etc., who are parties to the Universal Copyright Convention (UCC). Nigeria ratified the UCC in November 1961 before the repealed 1970 Copyright Decree came into force. However, as Oyewunmi observed, Nigeria has since, after and before the coming into force of the extant Copyright Act, ratified a number of copyright treaties. As such, there is need to amend the Order by including countries not mentioned therein but who are parties to the new treaties. The treaties include the Berne Convention, Rome Convention, WIPO Convention, the TRIPs Agreement, the WIPO Copyright Treaty, WIPO Performances and Phonograms Treaty, Beijing Treaty of Audio-visual Performance, and the Marrakesh Treaty for the Blind, Visually Impaired or Otherwise Print Disabled.

The Nigerian courts have had opportunities to pronounce upon the protection of copyright in Nigeria by reference to international agreements. For instance, there is the case of *Microsoft Corporation v Franike Associates Ltd* ((2012) 3 NWLR [pt1287] 301) wherein the claimant/appellant, a US company, instituted a

copyright infringement action to enforce the copyright on its Windows Operating System or software (computer program) against the defendant/respondent in Nigeria. The defendant objected to the suit on the ground that the court lacked jurisdiction because there is absence of reciprocal protection agreement between Nigeria and the US. The defendant made this claim because the claimant did not tender a certificate of reciprocity from the NCC or a reciprocity Order from the federal Gazette. The objection was upheld at both the trial court (the Federal High Court) and on appeal by the Court of Appeal. Oyewunmi has rightly pointed out that the court would have reached a different position if it had averted its mind to the reciprocal Order mentioned above. However, according to Olubiye, the

“implication of this decision is that it is necessary for a claimant who wishes to successfully enforce a foreign copyright to obtain a certificate from the NCC stating that the country through which it is entitled to copyright protection is a party to an international agreement to which Nigeria is also party. In addition to this, such a claimant should furnish a copy of the *Federal Gazette* in which an order by the Minister extending protection to such a country is made”.

#### **2.6.4 The Work of Government or an International Body**

Section 4 of the Copyright Act confers copyright on every eligible work that is made by or under the control of the of the government, a state authority or a prescribed international body. It is important to read this section along with section 10(5) of the Copyright Act, which expressly states that copyright in such works shall vest initially in the government on behalf of the Federal Republic of Nigeria, on the state authority on behalf of the state concerned, or in the international body in question, as the case may be, and not on the author of the work. It appears that section 4 leaves prescription of the relevant international body for purpose of this Act to the NCC or the Minister. However, as Asein and Oyewunmi pointed out, it appears that the UN and its specialised agencies, the AU and ECOWAS mentioned in section 5 above would qualify as such bodies for purposes of section 4.

One major issue that remains to be determined under section 4 is when can it be said that a work has been “made by or under the control of the of the government, a state authority or a prescribed international body”. To resolve this question, it is important to keep in mind that section 4 of the Copyright Act has its roots in the

concept of Crown copyright enshrined in the copyright law of the UK (section 163 of the Copyright, Designs and Patents Act, 1988). Similar provisions have found their way into the copyright of other common law countries with historical colonial ties with the UK. These countries include Canada (section 12 Copyright Act (R.S.C., 1985, c. C-42)) and South Africa (sections 5 and 21(2), Copyright Act, No 98 of 1978). While there has not been any case law on the point in Nigeria, both the Canadian Supreme Court and the South African Supreme Court of Appeal (SCA) have pronounced on similar provisions in their respective copyright statutes. Accordingly, the position is that “the production of the work needs to be the principal object of State direction and control and not merely an incidental or peripheral consequence of some generalised governmental licensing or monitoring power; the direction and control should be directly and specifically expressed with respect to the work in question, and should not be inferred from the fact of some residual or ultimate government veto” (see *Biotech Lab. (Pty) Ltd v Beecham Group Plc & Anor.* [Case No. 494/2000, delivered on 25 March 2002 – South Africa]; and *Keatley Surveying Ltd v Teranet Inc.* [2019 SCC 43 – Canada]).

#### **SELF-ASSESSMENT EXERCISE 5**

1. Copyright is exclusive and negative in nature. What is your understanding of exclusive and negative right?
2. An eligible work does not require any form of registration for the author to be conferred with copyright. However, certain requirements must be satisfied under the Copyright before copyright can vest in an eligible work. What are the requirements?

### **2.7 Summary**

We have discussed the subsistence of copyright and other qualifying factors for copyright protection under the Copyright Act. Adopting a comparative approach, we examined the notion of eligible works, nature and duration of eligible works, the concept of originality and fixation under the Copyright Act. We also highlighted and explained other factors that qualifies a work and its author for protection under the copyright Act. In this regard, we discussed issues around the status of the author, the place of first publication of a work, the work of government or an international body, and works protected by reference to international agreements under the Copyright Act.

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<sup>2</sup> Parts of this unit were drawn from excerpts of the paper.

<sup>3</sup> Parts of this unit were drawn from excerpts of the paper

## MODULE 2 PROTECTION OF COPYRIGHT AND RELATED RIGHTS

### **Unit 3: Authorship, Ownership and Transfer of Copyright**

3.1 Introduction

3.2 Learning Outcomes

3.3 Authorship

3.4 Joint Authorship

3.5 Ownership of Copyright

3.6 Transfer of Copyright

3.7 Summary

3.8 References/Further Reading/Web Sources

#### **3.1 Introduction**

Authorship is an important concept in copyright jurisprudence. The notion of originality as a requirement for copyright subsistence rests on the existence of an author who is expected to exercise requisite the skill and labour in the creation of an eligible work. Indeed, the author is the foundation for copyright ownership and the reference point for copyright duration in most cases. A work may have a single author or joint authors, as the case may be. The idea of author envisages a natural or juristic person (corporate body) as such. The author or owner of the copyright in a work is empowered to transfer the copyright either by assignment, license (exclusive or non-exclusive), testamentary disposition or by operation of law. However, given the rise of digital technology, the notion of the author as a natural or juristic person is being challenged. In this Unit, we discuss the concept of authorship (and joint authorship), ownership and transfer of copyright under the Copyright Act.

#### **3.2 Learning outcomes**

At the completion of this unit, you should be able to do the following:

- 1) Explain the concept of authorship and determine whether a non-juristic or unnatural person can be an author under the Copyright Act.
- 2) Explain the implications of the joint authorship under the Copyright Act.



- 3) Determine who can claim ownership of copyright in respect of the eligible works under the Copyright Act.
- 4) Determine when/how copyright can be transferred.

### **3.3 Authorship**

At some point in the evolution of copyright law, authorship was viewed as a process of inspiration or motivation of creativity by some forces on the author. It was seen as the expression of the author's personality and identity through the works produced by the author. According to this view, authors are geniuses who create works without drawing from the existing culture and knowledge in the society in which they live. However, the modern view sees authorship as a creative process that flows from facts, experiences and knowledge existing in the author's society. A discussion of the concept of authorship must of necessity involve answering the question: who is an author?

The author is the foundation and the heart of modern copyright law. The subsistence and life span of copyright is determined by reference to the author. Entitlements to copyright are rooted in the author. The right to first and subsequent ownership of a work generally derives from the author. The author and owner of a copyright work are often the same person. The author is generally regarded as the first owner of a copyright work, but the author is not always the owner of a work. The distinction lies in the difference between one who expresses an idea in a material form and the other who invests in the trading of the material form in which an idea is expressed.

There is no generally accepted answer to the author question. Although authors are recognised as the centrepiece of copyright protection at the international level, copyright treaties appear to reserve the author question for determination in national laws. Article 7 of the Berne Convention recognises the author as the reference point for the determination of the duration for copyright protection. However, the Berne Convention merely states in Article 15 that the appearance of a person's name on a work is sufficient to regard such person as an author in order to cloth him/her with the entitlement to institute copyright infringement proceedings. WIPO attempted to answer the author question in 1990. WIPO's draft model copyright law attempted a definition, which would incorporate the divergent views of what would amount to authorship. Although the attempt failed due to disagreements among member states, the definition proffered by the

expert committee on the draft law provides some insights on answering the question. According to the expert committee, an author is “the physical person who has created the work. Reference to 'author' includes, in addition to the author, where applicable, also the successors in title of the author and, where the original owner of the rights in the work is a person other than the author, such person”.

From a critical look at this definition, it would be easy to guess why WIPO's attempt failed. First, it seems to conflate authorship with ownership by including successors in title of the copyright in a work within the scope of its definition. One does not become an author merely by being a successor in title to a deceased author. Authorship, as will be shown shortly, requires some positive acts. Secondly, it also tends to include juristic persons within its definitional scope without limiting the extent to which and the particular works for which juristic persons may properly be clothed with authorship. However, it appears the above definition formed the basis for the provisions in sections 12(3) and 13(5) of the Copyright Act. Those sections define authors to include their heirs and successors-in-title for purposes of the enforcement of moral (section 12(3)) and resale rights (section 13(5)) respectively.

Dean regards an author as a "person who is responsible for the creation of the material embodiment" of a work through an activity, that involves the "application of intellectual effort or skill". He contends further that while only natural persons can be regarded as authors in relation to some works like literary, artistic and musical works, it is possible to have juristic persons as authors in relation to cinematograph films and sound recordings. This definition seems to accord with that of Asein, who believes that "the author of a work is the person who created the work or made the production of the work possible and he need not always be a human beneficiary". However, Ginsburg prefers to look at author differently as follows:

“an author is (or should be) a human creator who, notwithstanding the constraints of her task, succeeds in exercising minimal personal autonomy in her fashioning of the work. Because, and to the extent that, she moulds the work to her vision [...], she is entitled not only to recognition and payment, but to exert some artistic control over it”.

By Ginsburg's definition, there is no room for juristic persons in the definition of authors. She takes this stance because according to her it would lead to considerable incoherence as regarding juristic persons, as authors will mean equating authorship with ownership.

The Copyright Act does not generally define the term author but merely proffer pointers on whom an author is in relation to particular works. Under the section 51(1) of the Copyright Act, the author of a literary, artistic or musical work is the person who creates the work. The section defines the author of a cinematographic film as the person who arranges for the making of the film. However, the parties to the making of the film may, by agreement, confer authorship on another person. Similarly, section 15(1) of the Copyright Act defines author in respect of a sound recording to mean the person who made arrangement for making of the sound recording. However, where the sound recording is from a musical work, the author means the artist in whose name the recording was made. According to Asein, "this is a pro-author provision" and it is aimed at protecting a performer who is also the composer of the musical work contained in the sound recording. In either case, the parties to the making of the sound recording may, by agreement, confer authorship of the sound recording on a person who is neither the artist nor made arrangement for making the sound recording. Furthermore, under section 51(1) of the Copyright Act, the author of a broadcast means the person by whom arrangements for the making of the broadcast or transmission were undertaken. Computer program is protected under the Copyright Act as a literary work. Thus, the definition of author of a literary work applies to computer programs in Nigeria.

The foregoing definitions still do not completely resolve the authorship question within the Nigerian context. For instance, it seems easy to determine the author of a cinematographic film or sound recording. This is so because arrangements for the making of a cinematographic film or sound recording have been held to essentially relate to financial arrangements (see *Century Communications Ltd v Mayfair Entertainment UK Ltd* [1993] EMLR 335; *Adventure Film Productions v Tully* [1993] EMLR 376). Thus, the person who makes financial arrangements will be regarded as the author of such work. However, it would not be easy to determine how a person qualifies as a maker or creator of a literary or musical work under the Copyright Act.

Indeed, the Copyright Act does not provide concrete criteria for a general definition of the concept of authorship. However, it is clear from the definitions, and this is confirmed

by case law, that the authorship question is generally limited to natural and juristic persons (See *David Feldman v EMI Music [2009] ZASCA 75*; *Haupt t/a Soft Copy v BMI (Pty) Ltd* 2006 SCA 39). In addition, the authorship question is a matter of law and fact, and a copyist would not be regarded as an author (*ICIC (Directory Publishers) Ltd v Ekko Delta (Nig) Ltd* 1977-1989 2 IPLR 32). To be ascribed as an author, a person must show that the copyright work in question is original to him. The question of originality is already discussed above.

The foregoing analysis is important as it helps us understand how to determine the authorship question. However, that question does not seem simple enough in the face of digitisation, which has given rise to the possibility of the creation of eligible works by artificial intelligence. This will be discussed in Module three below. It suffices now to note that the author question was at the heart of the famous Monkey Selfie case recently concluded in the US - *Naruto v David Slater* (case number 16-15469, ID: 10845881, DktEntry: 62-1 of 23 April 2018). In that case, an animal rights group – People for the Ethical Treatment of Animals (PETA) – attempted to enforce copyright on behalf of a monkey named Naruto in respect of a photograph accidentally taken by the Monkey when a professional photographer – David Slater – was on a photographing expedition in an Indonesian forest. The monkey clicked the shutter of the camera after the photographer had set it down and left it unattended. The US court, from trial to the appellate level, refused to confer copyright on the monkey because the concept of authorship under the US law (which is similar to Nigerian law) cannot be extended to unnatural and/or non-juristic persons.

### **3.4 Joint authorship**

In our discussion of the concept of authorship above, reference was made mainly to the author of a work as a single person. However, it is possible for an eligible work to be made or created by two or more persons who have exerted either equal or varying amounts of skill and labour to the production of the work. Under the Copyright Act, both persons or group of persons would be regarded as joint authors of that work. The concept of joint authors finds expression in section 51(1) of the Copyright Act under the definition of “work of joint authorship”. Accordingly, a “work of joint authorship” means a work produced by the collaboration of two or more authors in which the contribution of each author is inseparable from the contribution of the other author or authors”.

From the forgoing provision, for there to be joint authorship of a work, first, there must be two or more persons who have collaborated or cooperated or worked jointly towards producing the eligible work in question (see *Beckingham v Hodgens* [2003] All ER 247). Secondly, the contribution towards production of the work of one of the persons must be inseparable, indivisible, or indistinguishable from the those of the other persons. It is of no moment if their contributions are equal or of varied degrees. *Hadley v Kemp* [1999] EMLR 859, *Bamgboye v Reed* [2004] EMLR 5). However, contributors of mere general ideas, facts, and direction; and those who acted as mere literary or research assistants or constructive critics towards improving the quality of the work will not qualify as joint authors for this purpose (*Tate v Fullbrook* [1908] 1 KB 821, *Brighton v Jones* [2005] FSR 16).

It is important to note that it is possible to have a composite work, such as a musical work comprising lyrics (literary work) and the rhythm (musical composition or work), in which the component works (lyrics and rhythm) are created by different persons and in which the contributors of the persons can be separable and distinguishable. Although, not expressly provided under the definition of “work of joint authorship”, such persons would be regarded as “joint owners” under section 11(6) of the Copyright Act. Section 11(6) the Copyright Act stipulates that for purposes of transfer of copyright, persons shall be deemed co-owners if they share a joint interest in the whole or any part of a copyright; or if they have interests in the various copyrights in a composite production, that is to say, a production consisting of two or more works. However, according to Oyewunmi, it is not out of place to refer to such persons as co-authors in respect of the composite works. Whatever the case may be, Asein has rightly posited that “joint authors do not hold their interests as joint tenants but as tenants-in-common, with each of them having the power to maintain an action against a stranger for an infringement of the entire copyright”. The effect of this, according to Asein, is that each joint author holds similar,

“but independent interest in the copyright work and is able to authorise the use of work to third parties or to his successors without reference to [his/her joint authors]. In the event of the death intestate of one of the [joint authors], they being as tenants in common, the share of the deceased does not merge with that of his surviving partners but passes to his estate”.

The foregoing accords with section 11(5) of the Copyright Act, which provides that an assignment or license granted by one copyright owner shall have effect as if granted by his co-owner also, and, subject to any contract between them, fees received by the grantors shall be divided equitably between all co-owners.

### **3.5 Ownership of Copyright**

Copyright ownership has both internal and external effects. The internal effect of copyright ownership reflects in the power of authors to control the integrity of their works and benefit from their exploitation. On the other hand, the external effect is manifest in the ability to control the manufacture and distribution of a copyright work, which in turn attracts investments and helps to optimise the economic benefits from exploitation of the work.

The inquiry into the concept of copyright ownership would lead to an analysis of the Copyright Act. This is so because these statutes determine the extent of ownership of copyright in a work. Even so, as has now been already over-flogged, the author is generally vested with first ownership of copyright in a work (section 10(1) of the Copyright Act). However, in the case of cinematograph film or sound recording, the author is obliged to conclude, prior to making of the work, written contracts with all those whose works are to be used in making such cinematograph film or sound recording. That being said, every other person derives ownership from the author. Ownership may be vested by agreement in form of assignments, and exclusive or non-exclusive licenses between the author and the subsequent owner. Also, ownership of copyright may pass by way of succession: that is from the author to the beneficiaries of his estate (section 11 of the Copyright Act).

Furthermore, ownership may vest depending on the relationship between the author and the person deriving ownership from the author. Such relationship may be that of employer/employee or commissioner/independent contractor. In such circumstances, the vesting of ownership varies from jurisdiction to jurisdiction. For instance, the Anglo-American approach is to vest ownership of works created by an author in the course of his employment or in the course of carrying out a commissioned work, on the author's employer or the person who commissioned the work, except where the author has agreed otherwise with his employer or the person who commissioned the work as the case may be (for instance, see section 11 UK Copyright, Designs and Patents Act 1988; section

201 US Copyright Act 17; sections 35(5) and (6) Australian Copyright Act No. 63 of 1968; and section 13(3) Canadian Copyright Act, c. C-42, RSC 1985). Historically, Nigeria used to adopt the Anglo-American approach as seen in section 9 of the defunct Copyright Decree of 1970 (see *Sonora Gentil v Tabansi Agencies Ltd* [1977-1989] 2 IPLR 1-31; *Joseph Ikhuoria v Campaign Services Ltd & Anor.* [1977-1989] 2 IPLR 316-335).

It may be said that in the jurisdictions with this approach, placing ownership of copyright in works made in the course of employment or pursuant to a commission on the employer or commissioning party seems to be the general rule. The justification of this approach may be found in the presumption that in such circumstances, the employer or commissioning party is the person who bears the risks involved in the creation, production, aggregation, marketing and presentation of the work and, as such, should be conferred with ownership. However, Asein has dismissed the approach as unfair to the author because it "goes against the spirit of creativity and could result in a veiled rip-off on the author who is supposed [...] to be the primary object of the protection provided by the copyright system". Even so, According to Dean, the approach does not affect the moral rights of authors; neither does it change the fact that subsistence of copyright must be determined in relation to the author.

The extant position in Nigeria is different from the Anglo-American approach. Here, the pre-eminence of the author as far as copyright ownership goes seems to be maintained. Put differently, author-ownership of copyright seems to be the general rule under the Copyright Act. Accordingly, in Nigeria, ownership of copyright in both commissioned works and works authored in the course of employment vests in the author. The author may waive this right by a written stipulation in the contract between him and his employer or the party commissioning the work (section 10(2) of the Copyright Act).

Apart from the foregoing distinction, Nigeria has similar approach with other common law countries, such as South Africa, on the ownership of copyright in literary, musical or artistic works published in newspapers, magazines and periodicals. In such circumstances, the proprietor of the newspaper, magazine or periodical is conferred with the ownership of the copyright in the work in so far as the copyright relates to publication of the work in any newspaper, magazine or similar periodical or to reproduction of the work for the purpose of its being so published, but in all other respects the author shall

be the owner of any copyright subsisting in the work (see section 10(3) of the Copyright Act. See *Peter Obe v. Grapevine Communications Ltd.* [2003-2007] 5 IPLR 354-384). Another similarity shared by the copyright systems of both countries relates to the ownership of copyright works created under the direction or control of the government or prescribed international bodies. In such circumstances, ownership of copyright vests in the government of the respective countries or the particular prescribed international body as the case may be (section 10(5) of the Copyright Act).

### **3.6 Transfer of Copyright**

Copyright is regarded as moveable property under the Copyright Act. As such, copyright is transmissible or transferable by the copyright owner through assignment, license (exclusive and non-exclusive), by testamentary disposition or by operation of law. An assignment or exclusive license must be in writing for it to be effective. But a non-exclusive license need not be in writing as it may be oral or inferred from contract. In terms of the Copyright Act, an assignment, license or testamentary disposition of copyright may be in respect of the whole copyright in the eligible work. Such assignment, license or testamentary disposition may be limited to apply to some of the rights (public performance, reproduction, publication, etc.) covered by the copyright, to a specific time, to a specific country or geographical area. Further, the assignment, license or testamentary disposition may be granted over a future work or an existing work in which copyright does not yet subsist and the prospective copyright in such work will be transmissible by operation of law. Concerning testamentary dispositions, the Copyright Act provides a presumption of transfer of copyright or prospective copyright in a work where the material embodying the work is transferred by testamentary disposition without any contrary indication by the testator (generally, see section 10 of the Copyright Act).

#### **SELF-ASSESSMENT EXERCISE 6**

- 1) With the aid digital technology, machines and non-human animals would qualify as authors under the Copyright Act. Do you agree?
- 2) Apart from the author of an eligible work, no other person can claim ownership of the work. Is this a correct assertion?



### 3.7 Summary

We have examined the concept of authorship under the Copyright Act. Drawing from case law in other jurisdiction, such as the US, we found that only natural and juristic persons can be regarded as author under the Copyright Act. Further, the point was made that depending on the nature of the work in question, an author under the Copyright may be regarded as the person who exerted the requisite skill and labour in the making of the work or the person who made both the financial and material requirement for the making of the work. We also made the point that in some cases, two or more persons may be joint authors in respect of a work. The notion of ownership and when/ how may lay claims to ownership of copyright was equally discussed. The unit also examined transfer of copyright under the Copyright Act.

### 3.8 References/Further Readings/Web Sources

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<sup>5</sup> Parts of this Unit were drawn from the paper.

## MODULE 3 ENFORCEMENT AND ADMINISTRATION OF COPYRIGHT IN NIGERIA

### Unit 1: Copyright Infringement and Enforcement

#### 1.1 Introduction

#### 1.2 Learning Outcomes

#### 1.3 Copyright Infringement and Enforcement

##### 1.3.1 Infringement of Copyright

##### 1.3.2 Enforcement of Copyright

#### 1.4 Summary

#### 1.5 References for Further Reading

### 1.1 Introduction

Under the Copyright Act, an owner, assignee or exclusive licensee of copyright is entitled to bring an action for damages, injunctions, accounts, or other such reliefs as are available to owners of other proprietary rights, for infringement of copyright. The court vested with jurisdiction on such matters in Nigeria is the Federal High Court exercising jurisdiction at the place where the infringement is alleged to have occurred (sections 16 and 46 of the Copyright Act).

### 1.2 Learning Outcomes

At the completion of your study in this unit, you should be able to do the following:

1. Identify and explain when copyright is said to have been infringed upon and when a copyright owner's right of action accrues under the Copyright Act
2. Highlight and explain the civil remedies available to the copyright owner in copyright infringement suit under the Copyright Act
3. Explain the criminal remedies available against copyright infringement under the Copyright Act.

### 1.3 Copyright Infringement and Enforcement

#### 1.3.1 Infringement of Copyright

Infringement of copyright is said to occur where any person, without the license or authorisation of the owner, does or causes any other person to do an act, the doing of which is controlled by copyright; 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 Copyright Act; exhibits in public any copyright infringing article; distributes by way of trade, offers for sale, hire or otherwise or for any purpose prejudicial to the owner of the copyright, any copyright infringing article; makes or has in their possession plates, master tapes, machines, equipment or contrivances used for the purpose of making infringed copies of copyrighted works; permits a place of public entertainment or of business to be used for a performance in the public of the copyrighted work, where the performance constitutes an infringement of the copyright, 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 copyright; or performs or causes to be performed, for the purposes of trade or business, any work in which copyright subsists (generally, see section 15 of the Copyright Act. For infringement of performers rights, see section 28 and 29 of the Copyright Act. For expressions of folklore, see section 32 of the Copyright Act).

Although there are generally not many judicial activities bordering on the copyright system in Nigeria, there appears to be a plethora of cases where an owner's right of action for infringement of copyright has been examined (for instance, see *Ukaoha v Broad-Based Mortgage Finance Ltd* (1997) FHCLR 477; *Ifeanyi Okoye v Prompter Quality Services* (1996) FHCLR 814; *Masterpiece Investments Ltd v Worldwide Business Media Ltd* (1977) FHCLR 496; *Plateau Publishing Ltd v Adophy* (1986) 4 NWLR (Pt. 34) 205; *Island Records Ltd v Pandum Technical Sales and Services Ltd* (1993) FHCLR 318; *Married Media Ltd v Lawrence Akapa* (1990-1997) 3 IPLR 202).

There is the very instructive court of appeal case of *Adenuga v Ilesanmi* ((1991) 5 NWLR (Pt. 189) 82). In that case, the appellant, as plaintiff at the high court, claimed damages for infringement of his book titled "West African School Certificate Examination: Objective Chemistry", an order for delivery up of all copies of the said book, which were in the respondent's possession, and an injunction restraining the respondent from reproducing or authorising the reproduction of his book. The appellant's case was that in 1977 he submitted the manuscript of the book to the respondent for printing. Although there was no

written agreement between them in relation to publication of the book, he discovered during 1980 that the respondent had published the book and copies of it were being sold to members of the public. However, there was evidence of a letter written to the respondent by the appellant asking for royalties. The trial judge, dismissing the appellant's claim, held that it could be inferred from his conduct that he had given a non-exclusive license to the respondent to publish the book, hence an appeal was lodged. The court of appeal, after considering relevant provisions under the defunct 1970 Decree, allowed the appeal and thereby upheld the right of the appellant to enforce his copyright in the work.

The plaintiff did not succeed in the recent case of *Raconteur Productions Limited v. Dioni Visions Entertainment Limited and Others* (Suit No. FHC/L/CS/740/2017 delivered 2 May 2019). In that case, the plaintiff claimed copyright in the screenplay (literary work) of the popular Nollywood movie: "Okafor Law". In summary, the plaintiff's case was that the screenplay used by the defendants in its movie (Okafor Law) was a copy of a similar screenplay it (the plaintiff) acquired from a third party. The plaintiff had initially successfully obtained an *ex parte* injunction against the release of the movie. The injunction was eventually vacated by the court in the course of the trial for the perpetual injunction and damages claimed by the plaintiff. After hearing of the parties, the court dismissed the plaintiff's claim for lack of merit. According to Okorie, what "foiled the finding of copyright infringement and the granting of the claims for general damages was the absence of any physical or documentary evidence of the allegedly infringed screenplay. The Court stated that in the absence of the plaintiff tendering the allegedly infringed work in evidence during trial, there was no basis upon which a consideration of the evidence and arguments of infringement may be made".

### **1.3.2 Enforcement of Copyright**

Where infringement of a copyright is proved to have been committed by an employee in the course of their employment, the position is that the employer, as well as the employee who committed the act, are both liable. In such a situation, the copyright owner has the right to sue both or either of them (*American Motion Picture Export Co. (Nig) Ltd v Minnesota (Nig) Ltd* (1981) FHCLR 64). Further, where an action for infringement of copyright brought by the copyright owner or

an exclusive licensee relates to an infringement, in respect of which they have concurrent rights of action, the copyright owner or the exclusive licensee may not, without the leave of court, proceed with the action unless the other is either joined as a plaintiff or added as a defendant (section 16 of the Copyright Act). It should also be noted that where, in an action for copyright infringement, an infringement was proved or admitted, but with the excuse that at the time of the infringement the defendant was not aware and had no reasonable grounds for suspecting that copyright subsisted in the work to which the action relates, the plaintiff shall not be entitled to damages, but to an account of profits in respect of the infringement against the defendant (section 16 of the Copyright Act). It appears that in such circumstances, the plaintiff will, in addition to an account, be entitled to an injunction (*Plateau Publishing Ltd v Adophy*, supra). But no injunction shall be issued in a copyright infringement suit which requires a completed or partly completed building to be demolished or prevents the completion of a partly completed building (section 16 of the Copyright Act).

Under the Copyright Act, the owner's right of action for infringement of copyright exists, whether the infringement was intentional, malicious or innocent; whether the right to property is real or personal, corporeal or incorporeal. It has been held that the defence of innocent infringement recognised under the Copyright Act (section 16(3)) is not for the publisher of the infringing material, but for the author of the infringing material. In an action for infringement of copyright, there is no need to prove actual or specific damages as the issue of damages flows from the fact of infringement. The fact that a defendant is facing criminal prosecution for infringement of copyright does not prevent an owner from instituting a civil action against the defendant in respect of the infringement. This is so because under the Copyright Act, criminal and civil suits can run simultaneously in respect of an infringement (section 24 of the Copyright Act, *Plateau Publishing Ltd v Adophy*, supra). As a matter of law, upon proof or admission of infringement and if the court is not satisfied that effective relief would otherwise be available to the plaintiff, and having regard to the flagrancy of the infringement and the benefits that have accrued to the defendant by reason of the infringement, the court, in assessing damages for the infringement, shall have the power to award such additional damages as it may consider appropriate in the circumstances (section 16 of the

Copyright Act). According to Babafemi, the courts have, in exercising this power, awarded exemplary and punitive damages. It should also be noted that copyright infringement also constitutes a criminal offence that is liable to be punished on conviction by fine or imprisonment or both (sections 20, 30 and 33 of the Copyright Act).

For purposes of proof in an infringement action, the Copyright Act raises some presumptions in favour of the copyright owner. Thus, in the absence of any evidence to the contrary, it is presumed that copyright subsists in a work which is the subject matter of an alleged infringement; that the plaintiff is the owner of the copyright in the work; that the name appearing on a work purporting to be the name of the author is the name of such author; that the name appearing on a work purporting to be that of the publisher or producer of a work is the name of such publisher or producer; where the author is dead, that the work is an original work; and that it was published or produced at the place and on the date appearing on the work (section 43 of the Copyright Act).

The interest of the owners of copyright is further fortified by the powers vested in them to take proceedings for recovery of possession of pirated copies, among others, of their work. For this purpose, all infringing copies of any work in which copyright subsists, or of any substantial part thereof, and all plates, master tapes, machines, equipment or contrivances used, or intended to be used for the production of such infringing copies, shall be deemed to be the property of the owner of the copyright (section 18 of the Copyright Act).

In addition, the Copyright Act makes provisions for the granting of a conservatory order in the form of an *Anton Piller* injunction. This is expressed in section 25 of the Copyright Act, which empowers the courts to grant a copyright owner an order, *ex parte*, to enter the premises or house of the defendant for inspection, photography and seizure of the infringing materials in the possession and control of the defendant. Accordingly, in an action for infringement of copyright, where an application supported by affidavit is made to the court that there is reasonable cause for suspecting that there is in any house or premises any infringing copy or any plate, film or contrivance used or intended to be used for making infringing

copies or capable of being used for the purposes of making copies or any other article, book or document by means of or in relation to which any infringement has been committed, the court may issue an order upon such terms as it deems just, authorising 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 to seize, detain and preserve any such copy or contrivance; and inspect all or any documents in the custody or under the control of the defendant relating to the action. It should be noted, however, that if an owner of copyright gives false information to the court in order to obtain an order, he or she will be guilty of an offence and on conviction be liable to a fine of one thousand naira (₦1,000).

The foregoing provision has its roots in the often cited English case of *Anton Piller KG v Manufacturing Processes Ltd* ((1976) 1 All ER 789), wherein their lordships laid down the conditions for the granting of the order as follows: (a) that the plaintiff must show a very good prima facie case; (b) that the damage, actual or potential, to the plaintiff must be extremely serious; and (c) that there must be clear evidence that the defendant(s) had in their possession incriminating documents or things and there is a real possibility of destruction of such materials if they are put on notice.

#### **SELF-ASSESSMENT EXERCISE 7**

What are the available remedies for copyright infringement under the Copyright Act?

#### **1.4 Summary**

In this unit, we have discussed when and how copyright infringement may occur under the Copyright Act the remedies available to the copyright owner. When copyright infringement occurs, the owner may pursue a civil claim for damages, injunctions, accounts, delivery up and preservative reliefs such as the Anton Piller injunction. The owner may choose to report the case to the NCC for criminal prosecution. However, nothing stops both a civil and criminal trial from running concurrently in respect of a single infringement claim.



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## MODULE 3 ENFORCEMENT AND ADMINISTRATION OF COPYRIGHT IN NIGERIA

### **Unit 2: Exceptions to Copyright**

2.1 Introduction

2.2 Learning Outcomes

#### **2.3 Exceptions to Copyright**

2.3.1 Fair Dealing (and Fair Use)

2.3.2 Persons with Disabilities

2.3.3 Use by Government, Public Libraries and Archives

2.3.4 Educational Use

2.3.5 Other Exceptions

2.4 Summary/Conclusion

2.5 References for Further Reading

#### **2.1 Introduction**

Exceptions to copyright are creations of copyright legislation in favour of copyright users. The exceptions are regarded as users' rights in some quarters because of the balancing role, which copyright law is meant to play between authors' rights to a just reward and public interest for the promotion of creativity, culture and social welfare. The argument is that for copyright law to effectively play this role, copyright exceptions should be regarded as users' rights. Nonetheless, copyright exceptions under the Copyright Act have been regarded by Adewopo as defences, which users of copyright works may put up or plead in a claim for copyright infringement by copyright holders. Whether viewed as user rights or defences, exceptions to copyright are important in that they have been regarded as tools for striking the required balance between the rights of copyright owners and public interest. Research shows that the more open and flexible they are, the more they contribute to developing high technology industries and scholarly publication.

Copyright exceptions are part of major international copyright treaties like the Berne Convention and TRIPs agreement. While the Berne Convention contains minor exception provisions (Article 10 of the Berne Convention), it generally sets basic principles or standards that national legislatures may consider when making exceptions

provisions in their respective copyright laws. These basic principles, widely known as the ‘three-step test’, are also meant to serve as guide in the interpretation and application of exception provisions. Accordingly, exceptions to copyright should be allowed in (a) certain special cases that (b) do not conflict with the normal commercial exploitation of the copyright work and (c) do not unreasonably prejudice the legitimate interests of the copyright holder (article 9(2) of the Berne Convention; article 13 of the TRIPs Agreement; article 10 of the WIPO Copyright Treaty 1996).

The Copyright Act provides a number of copyright exceptions, to which we turn shortly below. It suffices, however to note at this point that the exceptions, which are mainly contained in the Second Schedule to the Copyright Act, are introduced by sections 6(1), 7(2) and 8(3). Gleaned from those sections, while all the exceptions in the Second Schedule apply to literary, music, artistic and cinematograph works with equal force, only those contained in paragraphs (a), (h), (k), (l) and (p) apply to sound recordings. Also, only those contained in paragraphs (a), (h), (k), (n) and (o) apply to broadcasts. The rationale for banishing the copyright exceptions to the schedule of the Copyright Act is unclear. Nonetheless, it does not detract from the legal force of the exceptions contained therein. It is trite that provisions in a schedule are of equal legal force as the provisions in the main body of an Act. Finally, special exceptions in respect of sound recordings of a musical works are contained in the Third Schedule to the Copyright Act, while those relating to compulsory licenses are found in the Fourth Schedule. We shall focus on the exceptions contained in the Second Schedule.

## **2.2 Learning outcomes**

At the end of the study in this Unit, you should be able to do the following:

- 1) Identify and explain the exceptions to copyright or defences to copyright infringement suit under the Copyright Act.

## **2.3 Exceptions to Copyright**

### **2.3.1 Fair Dealing (and Fair Use)**

Although there is no specific international standard concerning fair dealing and fair use exceptions, it has been rightly argued that – with proper adjustment to fit local milieu – the three-step test can guide interpretation and application of the exceptions, especially in countries, such as Nigeria, where their fair dealing

provisions have not properly developed. Fair dealing and fair use are the most widely adopted copyright exceptions. They are regarded as affirmative defence to an allegation of copyright infringement. They enable copying without the copyright-holder's consent in certain, limited circumstances. The exceptions are fundamentally based on the belief that not all copying should be banned, particularly in socially important endeavours such as criticism, news reporting, teaching, and research, etc. They are regarded as capable of safeguarding the fundamental rights of free speech and freedom of expression in a democratic society.

Fair dealing and fair use are statutory enactments of the common law fair use doctrine developed by English courts as equitable rule of reason. The common law doctrine of fair use is enacted in the US Copyright Act, 17 USC (USCA). Under section 107 of the USCA “the fair use of a copyrighted work, including such use by reproduction in copies [...] for purposes such as criticism, comment, news reporting, teaching [...] is not an infringement of copyright”. This fair use provision is generally viewed as an open-ended flexible regime, which allows courts to determine – on a case-by-case basis – what qualifies as fair use within certain criteria fixed by the USCA and developed by US courts. In other words, uses of a copyright work that may qualify as fair use are not limited to those mentioned in the provision. Other countries with similar fair use provision as those of the US include Israel, Taiwan, Malaysia, Singapore and the Philippines.

On the other hand, UK enacted the doctrine as fair dealing with seemingly rigid and restrictive and close-ended effect. Under sections 29 and 30 of the UK Copyright, Designs and Patent Act, 1988 (CDPA), purposes falling within the purview of the fair dealing defence are research for non-commercial purpose and private study, criticism or review and reporting current events. The position in the UK is that only purposes enumerated in the CDPA as fair dealing can qualify as such. A UK judge held that fair dealing “is the dealing which is fair for the approved purposes and not dealing which might be fair for some other purpose or fair in general”. The judge also declared that “public interest as such is outside the purpose of [...] fair dealing. It is not of itself justification for infringement of copyright” (Ungoed Thomas J in *Beloff v Pressdram* [1973] 1 All E. R. 241).

However, the English courts appear to have adopted a liberal approach in construing the fair dealing purposes enumerated in the CDPA and in so doing, they are applying an objective test, which have made it reasonably easy to prove that some dealing fits in one of the enumerated purposes (for instance, see *Hubbard v Vosper* [1972] 2 QB 82, *PSM AG v Carlton Television Ltd* [1998] FSR 43, *Ashdown v Telegraph* [2002] Ch. 149). Although the UK fair dealing provision is inflexible, its strength lies in its certainty as to the purposes that fall within its ambit. As will be seen shortly, Nigeria have similar fair dealing provisions with the UK. The same is true of Canada, where their Supreme Court recently held, in the case of *CCH Canadian Ltd v Law Society* (supra), that the fair dealing provision in section 29 of the Canadian Copyright Act should not be construed restrictively and that the enumerated purposes should be accorded large and liberal interpretation. Section 40 of the Australian Copyright Act (No. 63 of 1968), which is modelled after the UK fair dealing, goes further to include similar factors as the USCA (fair use) in determining what is fair in a copyright litigation involving the defence of fair dealing in Australia. The factors include (a) the purpose and character of the use; (b) the nature of the work; (c) the amount and substantiality of the portion of the work used; (d) the effect of the use on the copyright's holder's potential market; and in the case of Australia alone, (e) the possibility of obtaining the work within a reasonable time and at an ordinary commercial price (section 107 of the USCA and section 40(2) of the Australian Copyright Act). The Australian fair dealing provisions, like its UK counterpart, are still interpreted as a close-ended regime allowing only the fair dealing purposes provided for by the Australian Copyright Act. However, it can be distinguished from the UK fair dealing on the ground that while the factors to be considered when determining fairness of a use is left to the courts in UK, the Australian legislators have made provisions for such factors. The Australian fair dealing may be regarded as a hybrid fair dealing: exhaustive in fair dealing purposes yet liberal in the factors to be considered in determining fairness.

One major merit of fair use is its flexibility and adaptability. Such that it can be applied to instances not mentioned in the law in so far as such instances fits within the spectrum of the expressly mentioned uses (*ejus dem generis*) and what is fair in the circumstance. This flexibility makes it possible to apply the doctrine to

modern use of copyright works made possible by growth in computer technology and the Internet. Thus, according to Katz, it will allow the unauthorised use of copyright works “in a manner that promotes the public interest in the encouragement and dissemination of works of the arts and intellect, when the [use] does not seriously undermine the copyright owner’s opportunity to obtain a just reward”.

Fair dealing lacks such flexibility. Another merit of fair use, according to Samuelson, is that “it is a concept ordinary people can understand” thereby easily discerning what is “fair and unfair uses” and adapting their behaviour accordingly. Also, fair use “can avert a proliferation of specific exemptions that can make copyright laws read like the tax code” and also saves legislative time that may be used in amending copyright laws to include possible instances to existing fair dealing list. Further, “fair use engenders respect for copyright law, for it avoids the rigidity that grants of exceptionally broad rights, tempered only by a few exceptions, can cause”. Despite these merits, the greatest disadvantage of the fair use exception is that it sacrifices certainty of fair use purposes on the altar of uncertainty as to what use can come within its ambit. This may result in an unbridled fair use regime, which would greatly prejudice the interest of copyright owners. It is this certainty of purpose that the fair dealing variant brings that seems to make it attractive to protectionist jurisdictions and those without a developed copyright enforcement framework, such as Nigeria.

Fair dealing provision in Nigeria is contained in paragraph (a) of the Second Schedule to the Copyright Act. That paragraph states that the right conferred in respect of a work by section 6 of this Copyright Act does not include the right to control the doing of any of the acts mentioned in the said section 6 by way of fair dealing for purposes of research, private use, criticism or review or the reporting of current events, 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 authorship except where the work is incidentally included in a broadcast.

The above provisions apply only to rights conferred in respect of a work by section 6 of the Copyright Act. The section relates to literary, musical, artistic works and

cinematograph film. This gives the impression that the fair dealing exception applies only to those works. But a deeper peek into the Copyright Act will reveal that the fair dealing exception also applies to sound recordings and broadcasts. The fair dealing exceptions will apply only to uses for the purposes mentioned in the said paragraph (a) and not for any other purpose. In other words, the Copyright Act fair dealing is close-ended. Provision is not made in paragraph (a) of factors to be considered when determining whether the use of a work for any of the enumerated purposes is fair. Neither is fair dealing defined anywhere in the Copyright Act. It appears the lawmakers have left this task for the courts. Where a court has determined that a use is for any of the enumerated purposes and that such use is fair, the court still has a further duty. If a work is used publicly for any of the listed purposes, the court shall consider whether its title and authorship are acknowledged. The exception to this condition is when the work is accidentally included in a broadcast.

The Copyright Act fair dealing shares similarity with that of the UK CDPA. The Copyright Act fair dealing has not attracted much judicial attention. According to Ekpa and Kure, this may be because the fair dealing defence is rarely raised in Nigeria. Academic literature on the subject have relied on the UK jurisprudence in interpreting the specific fair dealing purposes listed in the Copyright Act and majorly on the US jurisprudence in finding out when a use can be termed fair. This approach does not seem alien. India has similar fair dealing provision as the Copyright Act (see section 52 of the Indian Copyright Act, 1956). The emerging jurisprudence on fair dealing from India shows similar trend of reliance on the UK and US jurisprudence in the interpretation and application of the fair dealing exception. Thus, Nigerian courts may adopt similar approach.

However, an opportunity to interpret the Copyright Act fair dealing was botched by the Federal High Court in the case of *Obe v. Grapevine Communications Ltd* ([2003-2007] 5 IPLR 354-384). In that case, the defendant published a picture from the plaintiff's book titled "Nigeria: A Decade of Crisis in Pictures" which was essentially, a photo documentary about the Nigerian Civil War. When sued for copyright infringement, the defendant contended, among others, that the photographs were used "to depict a story of a historical matter of importance and

of high public interest”. The defendant thus claimed the copyright exception of fair dealing. The defendant further asserted that it adequately acknowledged the disputed photograph in the following terms. The court failed to consider whether the use of the photograph is for any of the purposes enumerated in paragraph (a) and if so, whether such use qualified as fair dealing. Instead, the court went straight to consider the ancillary issue of the acknowledgement of the photograph by the defendant and concluded that there was no proper acknowledgement. Based on this, the court held that the defence of fair dealing would have availed the defendant if it had adequately acknowledged the photograph as required by paragraph (a). Asein rightly criticized the judgment as follows:

“the fundamental issue of whether the defendant’s use qualified, in the first place as fair dealing should have been the paramount issue for consideration; the question of adequate acknowledgment being only of secondary importance. The court should have pronounced that there is no such defence as fair dealing based on historical importance or high public interest and that the defendants did not establish use of the photograph under any of the four activities specifically mentioned in that paragraph”.

### **2.3.2 Persons with Disabilities**

Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, 2013 (Marrakesh VIP treaty) is the international normative framework for copyright access enabling provisions for persons with disabilities. The Marrakesh VIP treaty came into force June 2016. It was envisioned to align with the human rights principles stipulated in the United Nations Declaration on Human Rights (UNDHR) and the Convention on the Rights of Persons with Disabilities (UNCRPD). These human rights principles include civil and socio-economic rights, such as the right to education and information, the right to freedom from discrimination, among others. The Marrakesh VIP treaty requires member states to introduce a standard set of limitations and exceptions to copyright rules in order to permit reproduction, distribution and making available of literary and artistic works in formats designed to be accessible to the blind, visually impaired and otherwise print disabled persons (VIPs), and to permit exchange of these works across borders by organisations that serve the interest of VIPs (see articles 1-12 of the Marrakesh VIP treaty).



Before the adoption and coming into force of the Marrakesh VIP treaty, however, Nigeria already enacted copyright exceptions for use of eligible works by persons with disability. In this connection, paragraph (s) of the Second Schedule to the Copyright Act allows the “reproduction of published works in braille for the exclusive use of the blind, and sound recordings made by institutions and other establishments approved by the Government for the promotion of the welfare of other disabled persons for the exclusive use of such blind or disabled persons”.

To bring the Copyright Act in tune with the Marrakesh VIP treaty and other WIPO internet treaties, which Nigeria ratified in 2017, the Draft Copyright Bill (DCB) proposes some special exceptions that will also be applicable in the digital environment. The exceptions include the Marrakesh VIP treaty-style exceptions for the blind and VIPs proposed in clause 22 of the DCB. Among others, Clause 22 seeks to permit, without authorisation from the author or copyright owner, the making, procurement and supply of accessible format copy of a copyright work for the benefit of the blind, visually impaired or otherwise print disabled, or persons who “are otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading; regardless of any other disabilities”. Such making, procurement and supply may be done by any means, including by non-commercial lending or by electronic communication by wire or wireless means, subject to the following conditions:

- 1) the person wishing to undertake the said activity has lawful access to that work or subject matter, or a copy of that work or subject matter;
- 2) the work or subject matter is converted to an accessible format copy, which may include any means needed to navigate information in the accessible format, but does not introduce changes other than those needed to make the work accessible to the beneficiary person;
- 3) such accessible format copies are supplied exclusively to be used by beneficiary persons;
- 4) the activity is undertaken on a non-profit basis; and
- 5) indication of the source and the name of the author on the copy as far as practicable, and maintaining the integrity of the original work, without

prejudice to changes needed to make the work accessible in the alternative format and of the accessibility needs of the relevant disabled persons.

As gleaned from the forgoing, clause 22 of the DCB is distinguishable from the already existing exception for the disabled in paragraph (s) of the Second Schedule to the Copyright Act. First, the proposal in clause 22 of the DCB will apply both offline and in the digital environment while the disability exception in the Second Schedule to the Copyright Act does not extend to the digital environment. Secondly, whereas clause 22 of the DCB is open-ended in terms of the accessible format copies that may be produced for the blind and VIPs, the Second Schedule to the Copyright Act specifically mentioned braille and sound recordings. Another distinction between clause 22 of the DCB and the Second Schedule to the Copyright Act is that while the proposal in clause 22 of the DCB will cover only the blind and VIPs, the exception in the Second Schedule to the Copyright Act is applicable to persons with other disabilities. However, the drafters of the DCB appear intent on making the DCB whole in terms of protection of the rights of disabled persons. This is gleaned from clause 20(1)(q) of the DCB, which seeks to permit, “without prejudice to [clause] 22 [...]”, the use of a work “for the benefit of people with disability, which is directly related to the disability and of a non-commercial nature, to the extent required by the specific disability”. From its wordings, the clause may be interpreted to extend to disabilities not covered by clause 22 and it will be applicable both offline and in the digital environment unlike the extant exception in the Second Schedule to the Copyright Act which is only applicable online. It will also position Nigerian copyright law as a model on how to go beyond the standards set out in the Marrakesh VIP treaty for the promotion of the interest of persons with disabilities.

### **2.3.3 Use by Government, Public Libraries and Archives**

The general exception in respect of national archives public records of states in section 15(2) of the Copyright Act is relevant here. Under that section, the possibility of storing copyright protected works in the national archives pursuant to the Public Archives Act or the public records of states pursuant to the relevant state’s law is recognised. In this connection, copyright in such works is not infringed by the making or the supplying to any person of any reproduction of the

work pursuant to the Public Archives Act or the relevant state's law. In addition, paragraph (k) of the Second Schedule to the Copyright Act allows any use of a work by or under the direction or control of the government, or by such public libraries, non-commercial documentation centres and scientific or other institutions as may be prescribed, where the use is in the public interest, no revenue is derived from the use and no admission fee is charged for the communication to the public of the work. Also, paragraph (q) of the Second Schedule to the Copyright Act permits the making of not more than three copies of a book (including pamphlet, sheet music, map, chart or plan) by or under the direction of the person in charge of a public library if such a book is not available for sale in Nigeria. Finally, paragraph (r) of the Second Schedule to the Copyright Act allows the reproduction, for purposes of research or private study, of unpublished literary or musical works kept in libraries, museums, or other institutions open to the public.

#### **2.3.4 Educational Use**

The Copyright Act recognises the importance of copyright protected works within the context of education and that certain uses in such context would need to be excluded from the control and power of the copyright owners. Accordingly, paragraph (h) of the Second Schedule to the Copyright Act allows the use of a work in an approved educational institution for the educational purposes of that institution, subject to the condition that, if a reproduction is made for any such purpose it shall be destroyed before the end of the prescribed period, or if there is no prescribed period, before the end of the 12 months after it was made. Also, the Copyright Act permits the production of course packs for educational purposes in this connection, paragraph (f) of the Second Schedule to the Copyright Act allows the inclusion in a collection of literary or musical works of not more than two excerpts from the work if the collection bears the statement that it is designed for educational use and includes an acknowledgement of the title and authorship of the work (see *The Chancellor, Masters and Scholars of the University of Oxford & Ors v Rameshwari Photocopy Services & Ors* ((2016) RFA(OS) 81/2016 where similar provision in 52(1)(i) of the Indian Copyright Act was interpreted). Finally, paragraph (g) of the Second Schedule to the Copyright Act allows the broadcasting of a work in the broadcast is approved by the broadcasting authority as an educational broadcast.

### 2.3.5 Other Exceptions

Other copyright exceptions under the Second Schedule to the Copyright Act related to the use of copyright protected works by way of parody, pastiche, or caricature (paragraph (b)); reproduction of artistic works and their inclusion in cinematograph film or broadcast (paragraphs (c) and (e)); sound recording of a literary or musical work (paragraph (i)); and the public non-commercial reading, recitation, communication or broadcast of copyright protected works (paragraphs (j), (o), (n), (m), and (p)).

#### **SELF-ASSESSMENT EXERCISE 8**

- 1) Given the labour, skill and investment involved in the making of copyright works, such as a book, do you think there should be any exceptions to copyright under the Copyright Act?
- 2) What are the relevant are the possible defences to copyright infringement claims under the Copyright Act?

### 2.4 Summary

In this Unit, we have discussed the exceptions to copyright under the Copyright Act. While there is a movement to identify these exceptions as users' rights, the prevailing view is that the exceptions are regarded as mere defences to copyright infringement claims under the Copyright Act. Nonetheless, the exceptions play very important role in ensuring the requisite equitable balance between the private interest of copyright owners in gaining economic rewards for their investment in creativity and the public interest in promoting access to knowledge, culture, creativity and societal welfare. The exceptions provided for under the Copyright Act includes fair dealing, use by persons with disabilities, educational use, use by government, public libraries, archives and museums, among others.

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## MODULE 3 ENFORCEMENT AND ADMINISTRATION OF COPYRIGHT IN NIGERIA

### Unit 3: Administration to Copyright

- 3.1 Introduction
- 3.2 Learning Outcomes
- 3.3 The Nigerian Copyright Commission (NCC)
- 3.4 Copyright Inspectors
- 3.5 Collective Management Organisations (CMOs)
  - 3.5.1 Definition of CMOs
  - 3.5.2 History of CMOs in Nigeria
  - 3.5.3 Regulation of CMOs
- 3.6 Duty of Publishers, etc to Maintain Register
- 3.7 Summary/Conclusion
- 3.8 References/Further Reading/Web Sources

#### 3.1 Introduction

Aside enabling individual authors and copyright owners to enforce their copyright, the Copyright Act also creates institutional frameworks for the administration and management of copyright in Nigeria. In this regard, the Copyright Act established the Nigerian Copyright Commission (NCC) with the task to administer its provisions and to regulate the activities of other private players, such as collective management organizations (CMOs, also known as collecting societies) in the management of copyright in Nigeria. The Copyright Act also imposes duties on publishers to maintain register of published works and empower the NCC to appoint Copyright Inspectors who will also play a role in the administration and enforcement of copyright in Nigeria. In this unit, we discuss the role of the NCC, CMOs, Copyright Inspectors and publishers under the framework of the Copyright Act in Nigeria.

#### 3.2 Learning Outcomes

At the completion of your study in this unit, you should be able to do the following:

1. Highlight and explain the role the NCC in the administration of copyright in Nigeria
2. Highlight and explain the role of CMOs in the management of copyright, and their regulation under the Copyright Act

3. Highlight and explain the role of Copyright Inspectors in the administration and enforcement of copyright under the Copyright Act.
4. Highlight and explain the role of publishers under the Copyright Act.

### **3.3 The Nigerian Copyright Commission (NCC)**

The 1970 Copyright Decree did not create a body for the administration of copyright in Nigeria. Rather, it leaves the administration of certain aspects of its provisions, such as the appointment of the competent authority for the regulation of CMOs, to the then Federal Commissioner for Trade who was in charge of the then Federal Ministry of Trade. However, the administration of other copyright issues, such as related to the development of the cultural industry and the importation of printed copyright works, were handled by the Copyright Unit of the then Department of Culture and the Federal Ministry of Finance respectively.

As a result of the incoherent structure for copyright administration under the 1970 Copyright Decree and the increased pressure from the creative industry for a better copyright regime, the then Federal Military Government promulgated the Copyright Decree No. 47 of 1988, which created the Nigerian Copyright Council with the mandate to administer, promote, and enforce copyright issues in Nigeria. The Nigerian Copyright Council's status was changed to the Nigerian Copyright Commission (NCC) in 1996, and was then confirmed through the amendment of the 1988 Decree made possible by the Copyright (Amendment) Decree, No. 42 of 1999.

Another innovation introduced by the 1988 Decree was the transfer of supervisory powers over copyright issues to the Ministry of Culture with the effect that the NCC was placed under its supervision. However, this was changed following an executive directive by the then President (Olusegun Obasanjo) that conferred supervisory powers over copyright issues on the Federal Ministry of Justice. This move has been declared lawful by the courts on the ground that section 148(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) empowers the President to assign any governmental business to any ministry. (see *COSON v MCSN & Ors* [unreported Suit No.: FHC/L/CS/1259/2017 delivered 13 February 2018], *PMRS v NCC* [unreported Suit No. FHC/L/CS/61/2007 delivered 4 June 2009]).



The NCC is now firmly established under section 34 of the Copyright Act as a body corporate, with perpetual succession and a common seal, that may sue or be sued in its corporate name. However, section 47 of the Copyright Act placed some limitations against suits that may be filed against the NCC and any member of its staff. Accordingly, no suit shall be initiated against the NCC, its members of staff for an act done in pursuance or execution of his/her lawful duties or in respect of any alleged neglect or default in the execution of such duty unless the suit is commenced within twelve months from the action, neglect or default complained of or where the damage or injury continues, within twelve months from when the damage or injury ceased. Even so, a three months pre-action notice is required to be served on the NCC by any plaintiff seeking to commence a suit against the NCC or any member of its staff. Such pre-action notice must state clearly the cause of action, the particulars of the claim, the name and place of abode of the plaintiff and the relief to be sought. The requirement of pre-action notice has been the subject of a number of cases. For instance, the Federal High Court reduced the required three months to 7 days on the ground that waiting for the three months' notice to lapse before initiating the suit will unreasonably prejudice the business of the plaintiff. This was in the case of *MCSN v NCC* (Suit No. FHC/L/CS/678/10) wherein the plaintiff sought to challenge the refusal of the NCC to grant it approval to operate as a CMO. Another instance occurred in the case of *MCSN v NCC* (Suit No. FHC/L/CS/35/08) where it was held that the requirement of pre-action notice does not apply to suits for the enforcement of fundamental rights (see also, *Metro-Digital Nigeria Ltd v NCC* [Suit No. FHC/PHC/CS/225/08]).

The Copyright Act confers the NCC with both general and specific tasks. The general tasks set out in section 34 of the Copyright Act requires the NCC to (a) be responsible for all matters affecting copyright in Nigeria under the Copyright Act; (b) monitor and supervise Nigeria's position in relation to international conventions and advise government on same; (c) advise and regulate conditions for the conclusion of bilateral and multilateral agreements between Nigeria and any other country; (d) enlighten and inform the public on matters relating to copyright; (e) maintain an effective data bank on authors and their works; and (f) be responsible for such other matters as relate to copyright in Nigeria as the Minister may direct from time to time.

The NCC's specific tasks are gleaned from sections 5, 10, 13, 17, 21, 31, 37, 38, 39, 40, and 50 the Copyright Act. In this regard, the NCC is required to issue certification of countries that are parties to treaty obligations for the purpose of determining whether an eligible work may be enjoy copyright by virtue of such international obligation. The certificate will be conclusive proof of the fact. Also, the NCC has the duty to regulate the conditions for the exercise of authors' resale rights in respect of graphic works, three-dimensional works and manuscripts; issue exemption certificates to enable an unapproved CMO to commence action for the infringement of copyright or any right under the Copyright Act; and regulate, including granting approvals for, the operation of CMOs under the Copyright Act. Further, the NCC has the task to prescribe anti-piracy devices for use on, or in connection with an work in which copyright subsists; administer the use of expression of folklore by third parties outside their traditional or customary contexts; grant compulsory licences pursuant to the Fourth Schedule of the Copyright Act and establish and regulate the Copyright Licensing Panel for this purpose; receive and disburse funds arising from the imposition of compulsory levy on copyright materials; to appoint copyright inspectors (discussed below); and to regulate the conditions necessary for the operation of a business involving the production, public exhibition, hiring or rental of any copyright protected work. In this connection, the NCC has made a number of regulations including the Copyright (Levy on Materials) Order 2012, Copyright (Collective Management Organization) Regulations 2007, Copyright (Optical Disc Plants) Regulations 2006, Copyright (Video Rental) Regulations 1999, Copyright (Security Devices) Regulations 1999, and the Copyright (Dispute Resolution Panel) Rules, 2007.

Furthermore, the NCC is charged under section 50 of the Copyright Act to execute directives of a general or special nature issued to it by the Minister in respect of the its functions under the Copyright Act. Such directive was issued by the Minister to the NCC for the immediate approval of the Musical Copyright Society Nigeria (MCSN) as a CMO in 2017. The directive and consequential approval of the MCSN was challenged by the Copyright Society of Nigeria (COSON) on the ground that the Minister of Justice who issued the directive was not the designated Minister under the Copyright Act. The court rejected COSON's contention. It held that the Minister of Justice validly issued the directive having been designated by the President to oversee copyright regulation in Nigeria pursuant to section 148(1) of the Constitution. The court also held that

compliance by the NCC with the directive under section 50 of the Copyright Act is mandatory (see *COSON v MCSN & Ors*, supra).

To carry out its general and specific functions effectively, a governing board is created for the NCC under section 36 of the Copyright Act and the board is to consist of (a) the chairman who must be a person knowledgeable in copyright matters to be recommended by the Minister for appointment by the president; (b) the Director General (DG); (c) one representative each of the Federal Ministry of Justice and Ministry of Education who must not be below the rank of director, the Nigeria Police Force not below the rank of a Commissioner of Police, and the Nigeria Customs Services not below the rank of Comptroller of Customs; and (d) six other persons to be appointed by the Minister who shall represent as far as possible the authors in literary, artistic, musical, and cinematograph works, sound recordings and broadcasts. The governing board is empowered to adopt rules to govern its procedures and methods of operation. It is important to stress that the role of the Chairman (and other board members, except the DG) is merely ceremonial and he/she serves not as a full-time staff of the NCC.

In terms of section 37 of the Copyright Act, the day-to-day administration of the NCC is the responsibility of the DG who is appointed by the President on recommendation of the Minister. To assist the DG in this regard, the NCC is empowered to appoint other staff and to determine their remuneration and allowances from time to time. The NCC is also empowered to pay its staff such pension and gratuity payable to persons of equivalent rank in the public service of the Federation. To this end, service under NCC is declared pensionable for purposes of the Pensions Act. However, the NCC may appoint any person to any office subject to terms which precludes such person from the grant of pension, gratuity or any other retirement benefit in respect of the office.

### **3.4 Copyright Inspectors**

Under section 38 of the Copyright Act, the NCC is empowered to appoint copyright inspectors as it deems fit. When appointed, a copyright inspector is vested with all the powers, rights and privileges of a police officer as defined under the Police Act and under any other relevant enactment pertaining to the investigation, prosecution or defence of a civil or criminal matter under the Copyright Act. Accordingly, the copyright inspector is vested with the following specific powers:

- 1) to enter, inspect and examine any building or premises upon reasonable suspicion that such building/premises is being used for copyright infringement-related activities;
- 2) to arrest upon reasonable belief that an offence has been committed under the Copyright Act;
- 3) to examine or inquire for the purpose of ascertaining compliance with the Copyright Act;
- 4) to require production of, inspect, examine or copy the register referred to under section 14 of the Copyright Act;
- 5) to enquire for necessary information from persons found in building/premises suspected as being used for infringement of copyright;
- 6) to examine, test or analyse the premises suspected of being used for infringement of copyright including the power to take photographs of necessary evidence. The outcome of such examination, test or analysis is however required to be endorsed by the occupier of the premises or his agent. Where the occupier or his agent however refuses to endorse, this will not affect the validity of the documents so removed from the premises;
- 7) to prosecute, conduct or defend before a court any charge, information, complaint or other proceedings arising under the Copyright Act
- 8) to exercise such other powers as the Commission may delegate to it to give effect to the provisions of the Act.

The powers of copyright inspectors under the Copyright Act was tested in the case of *NCC & Ors v MCSN & Ors* (Suit No. CA/L/350/13 delivered 19 October 2016), wherein the respondent challenged the search and seizure exercise and arrest carried out by copyright inspectors in its premises and against its officers. In that case, the Court of Appeal determined the specific issue of whether copyright inspectors can arrest without a warrant for alleged offences committed under the Copyright Act. This question was resolved in the negative by the trial court, hence the appeal. In allowing the appeal, the Court of Appeal did not only confirm the arresting powers of copyright inspectors, it also upheld their powers to arrest without warrant in deserving cases. The Court of Appeal spoke through Nimpair JCA as follows:

“I do not think that the question is really as to the power of arrest by inspectors; it is whether they can arrest without warrant. [...] I [...] do not agree that the [NCC’s]

inspectors cannot arrest without a warrant. Section 38 of the Copyright Act does not also infringe on the Constitution. [...] The clear provisions of the Copyright Act give the Inspectors power similar to that of Police Officers and I therefore fail to see how the trial court arrived at the conclusion that the Inspectors required a warrant before they can arrest the respondents.”

Further, the powers of copyright inspectors to institute criminal proceedings as provided under section 38(3) was confirmed in the case of *NCC v MCSN* ([Suit No. FHC/L/43C/99]). However, it must be noted that the powers of the copyright inspectors to arrest and prosecute does not extend to offences outside the purview of the Copyright Act. The powers are strictly limited to offences prescribed under the Copyright Act (see *Ayika v NCC* [Suit No. FCT/HC/M/5222/2011]). Also, only copyright inspectors who have a right of audience in superior courts, such as the Federal High Court, in the sense of being called to the Nigerian Bar, can prosecute any crime under the Copyright Act before that court (see *FRN v Osahon* [2006] 5 NWLR (Pt. 973) 261. Contrast with *NCC v Nigerian American Merchant Bank* [Suit No. FHC/L/118C/2003]). Finally, it should be noted that obstruction of the copyright inspectors in the performance of their lawful duty is an offence punishable by a fine of N500 or to 3 months imprisonment or both (section 38(4) of the Copyright Act).

### **3.5 Collective Management Organizations (CMOs)**

Piracy of copyrighted works has put on the toga of ubiquity making it possible for copyright owners to suffer loss in terms of material wellbeing even though they enjoy fame from the popularity of their works through acts of piracy. Put differently, the rise in the mass media, communication systems and entertainment centres, airlines, etc., and the internet has made it possible for copyrighted works to be exploited without due authorisation from copyright owners. Individual owners cannot possibly enforce their rights in respect of such widespread infringement because they cannot be everywhere at the same time and in most cases, are not equipped with the resources to go after infringers or grant licenses to user wishing to exploit their works. This state of affairs, which did not start today, gave birth to CMOs with established merits and demerits as far as copyright management and enforcement are concerned.

### **3.5.1 Definition of CMOs**

The Copyright Act recognises the right of copyright owners to initiate civil proceedings for infringement of their copyright. It further recognises, under section 39, the existence of CMOs and empowers them to manage the copyright on behalf of copyright owners. It also enables CMOs to enforce the copyright in their repertoire on behalf of individual owners (their members) through, *inter alia*, the initiation of civil proceedings. CMOs are referred to under section 39(8) of the Copyright Act as collecting societies, which mean associations of copyright owners having as their principal objectives the negotiating and granting of licenses, collecting and distributing of royalties in respect of copyright works. While this definition seems to capture the basic functions of CMOs, it is too restrictive in defining its scope thus limiting it to association of copyright owners. This is so because CMOs may function as agents of right holders who voluntarily entrusted the licensing of one or more uses of their works to a collective. They may also function as assignees of copyright same way as they may function as an association of right holders. Thus, for a proper definition, it will be better to emphasise the role CMOs play instead of defining it in terms of its make-up. These roles include the monitoring of the use of copyright works on behalf of the owners; negotiating terms of license with prospective users of copyright works; granting licenses against appropriate remunerations on the basis of a tariff system and under appropriate conditions; collecting such remunerations and distributing same among the copyright owners on whose behalf they were collected; and other socio-cultural functions through which they take care of members' welfare, promote creativity and fight piracy, among others.

### **3.5.2 History of CMOs in Nigeria**

Generally, the origin of CMOs can be traced to 3 July 1777 when Pierre Augustin Caron de Beaumarchais (Beaumarchais) gathered twenty-two authors, some of the most creative writers at that time arising from a complaint lodged by him of his dissatisfaction regarding the remuneration from *Comedie Francaise* in respect of performances of his "*Barbier de Seville*". Prior to the said complaint, other writers whose works had been performed and who were displeased by their remuneration had made similar complaints that were not attended to by the authorities, but Beaumarchais' influence with the French leadership, at the time, induced the

performers (comedians) to heed his complaint and negotiated with him resulting in a review of the Royal Theatre Regulations. The gathering of authors assembled by Beaumarchais led to the birth of the first CMO, *Societe des Auteurs et Compositeurs Dramatiques* (SACD), a professional association for creative writers based in France, which was followed by *Societe des gens de letters* (SGDL) in the field of literary works constituted by notable French authors. However, it was about 1847 that the concept of modern CMO evolved through the suit initiated by Ernest Bourget (a writer), Paul Henrion and Victor Parizot (composers) supported by their publisher Jules Colmbier against a Paris “*Café Ambassadeurs*” (a restaurant) for claims of royalties for the public performance of their works, which ended in their favour. This development goaded the establishment of *Societe des Auteurs, Compositeurs et Editeurs de Musique* (SACEM) in 1851 and similar CMOs across Europe, particularly in United Kingdom where the Performing Right Society (PRS) was founded in 1914 at which time Nigeria was under British colonial rule and at which time the Copyright Act of 1911 was already in force in UK and by extension, Nigeria.

The effect of the foregoing is that PRS’s activities as a CMO extended to Nigeria until about 1970 when the first indigenous Copyright law was promulgated in Nigeria. Flowing from this, PRS appointed a law firm, Giwa & Atilade and Co. as their Nigerian Agent with a mandate to get Nigerian composers to join them and to commence licensing and collection of royalties from Nigerian users on their behalf. Although the law firm succeeded in getting some prominent Nigerian Composers at that time to join PRS, it found it difficult to license and collect royalties from Nigerian users who were not comfortable with the foreign status of PRS. This led Alhaji Giwa, a partner in the firm, to set up Musical Copyright Society of Nigeria (MSCN) registered on 20 July 1984 as a company limited by guarantee, as the first CMO to administer rights in music and sound recordings in Nigeria. Other CMOs operating in Nigeria currently are Copyright Society of Nigeria (COSON) also in respect of music and sound recordings, and Reproduction Right Society of Nigeria (REPRONIG) approved in 2001 by the NCC to represent right holders in literary works, and the Audio Visual Rights Society of Nigeria (AVRS) established and approved in 2014 to cater for copyright management in the audio-visual industry.

### 3.5.3 Regulation of CMOs

Section 39 of the Copyright Act forms the foundation for the regulation of CMOs in Nigeria. Historically, however, it has not always been the case that our copyright law made such provisions. Under the 1970 Decree, there was no direct provision for CMO other than, *inter alia*, the provision for the Federal Commissioner of Trade to appoint a competent authority comprising three persons to review the grant of licenses by a licensing body. Unfortunately, there was total absence of a regulatory framework under the 1988 Decree, which repealed the 1970 Decree. This situation continued until the promulgation of Copyright (Amendment) Decree, No. 98 of 1992, which ushered in a new set of comprehensive rules for the regulation of CMOs in Nigeria.

Under the Copyright Act, a CMO may be formed in respect of any one or more rights of copyright owners for the benefit of such owners, and the CMO may apply to the NCC for approval to operate as such for the purpose of the Act (section 39(1)). It constitutes a crime for any group of persons to purport to perform the duties of a CMO without approval of the NCC and such a crime is punishable with a fine of N1, 000 on first commission and N2, 000 and six months jail in case of individuals; and N10, 000 and N2, 000 for each day in case of continuous offence in case of commission by a body corporate (section 39(4), (5) and (6)). The NCC may approve a CMO if it is satisfied that it is incorporated as a company limited by guarantee; its objects are to carry out the general duty of negotiating and granting copyright licenses and collecting royalties on behalf of copyright owners and distributing same to them; it represents a substantial number of owners of copyright in any category of copyright protected works; and it complies with the terms and conditions prescribed by the regulations made by the NCC (section 39(2)). In this connection, the NCC shall not approve another CMO in respect of any class of copyright owners if it is satisfied that an existing approved CMO adequately protects the interests of that class of copyright owners (section 39(3)). The Copyright Act further empowers the NCC to make regulations specifying conditions necessary for the supervision of CMOs (section 39(7)).

Pursuant to the foregoing, the NCC made the Copyright (Collective Management Organisations) Regulations, 2007 (the CMO Regulation) and the Copyright (Dispute



Resolution Panel) Rules, 2007 (DPR Rules). The Regulation, which contains 23 paragraphs, makes provisions for application, revocation and renewal of licenses of CMOs; membership and management of CMOs; licensing and distribution of royalties by CMOs and other miscellaneous issues, such as ethical practices, among other. On its part, the DPR Rules comprise 17 paragraphs, which prescribes issues relating to general procedures and constitution of the DPR. Generally, the DPR is meant to afford an alternative dispute resolution mechanism for parties to dispute relating to collective management in Nigeria. In this regard, the DPR is required to apply relevant provisions of the Arbitration and Conciliation Act, Cap A18, Laws of the Federation of Nigeria, 2004. Finally, the NCC is empowered, where it finds it expedient, to assist in establishing a CMO for any class of copyright owners Section 39(9).

The requirement for approval to operate as a CMO under section 39 of the Copyright Act have been challenged on the grounds that it would take away CMOs' right to freedom of association and right to own property; that it runs against the no formality rules under the Berne Convention; and that it will take away CMOs' existing rights protected under section 52(3) of the Copyright Act. However, it has been judicially settled that the requirement for approval does not violate human rights to freedom of association and own property; neither does it infringe the no formality rule under the Berne Convention; and that it also does not jettison existing rights acquired before commencement of section 39 (*MCSN v CBS*, Appeal No CA/L/576/2014, Court of Appeal, 29 December 2015).

The effect of section 17 of the Copyright Act has been a recurring issue relating to the regulation of CMOs in Nigeria. Section 17 seeks to prevent a CMOs unapproved by the NCC under section 39 from instituting any action for the enforcement of any rights under the Copyright Act. The section raises the issue of locus standi of an unapproved CMO to sue for the enforcement of a right under the section 16 of the Copyright Act. This issue has reoccurred in a plethora of cases, and was recently resolved by the Supreme Court (Generally, see *MCSN v Compact Disc Technology Ltd & Ors.*, SC. 425/2010 (14 December 2018); *Adeokin Records v MCSN*, SC. 336/2008, Supreme Court, 13 July 2018; *MCSN v CBS*, Appeal No CA/L/576/2014, Court of Appeal, 29 December 2015; *PMRS v Skye Bank* (2017) LPELR-43198;

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In terms of the Supreme Court's judgement on the *locus standi* question in the case of *MCSN v Compact Disc Technology Ltd* (supra), CMOs may initiate copyright infringement claims as (a) owner, (b) assignee and (c) exclusive licensee of copyright. This is so because, under sections 10 and 11 of the Copyright Act, copyright ownership may vest in natural persons (humans) and juristic persons (corporate entities, for instance). As earlier discussed, copyright ownership is acquired through authorship, assignments, or exclusive licenses. Also, as a condition to obtaining the NCC's approval, CMOs are required to be incorporated as companies limited by guarantee in Nigeria. The incorporation makes them juristic persons such that they can and usually do obtain copyright ownership via assignments and/or exclusive licenses. Thus, CMOs may initiate copyright infringement actions in their personal capacity as owners, assignees and exclusive licensees of copyright in terms of section 16 of the Copyright Act without the need for approval by the NCC. Furthermore, based on the aforesaid Supreme Court's judgment, CMOs may initiate copyright infringement actions as (d) persons involved in the business of negotiating, granting of licences, collection and distribution of royalties for not more than fifty owners of copyright in any class of works. They may also initiate actions as (e) associations of copyright owners established in terms of section 39 of the Copyright Act. CMOs falling under both categories (d) and (e) can only commence copyright claims in representative capacities. Aside suing in representative capacities, CMOs coming under category (d) will not require approval of the NCC to enjoy the right of action in terms of the Copyright Act. However, CMOs acting for more than fifty copyright owners will fall under category (e) and will most likely face the *locus standi* challenge under section 17 of the Copyright Act, especially if the copyright they seek to enforce was assigned or exclusively licensed to them after the commencement date of section 17 (i.e. 10 May 1999).

### **3.6 Duty of Publishers, etc., to Maintain Register**

In terms of section 14 of the Copyright Act, publishers, printers, producers and manufacturers of copyright protected works are enjoined to keep a register of all works produced by them. The register must show the name of the authors, the title of the works, the year of production and the quantity of the works produced. Failure to keep such register, or, where the register is kept, the inclusion of false entry in the register, is a crime under section 23 of the Copyright Act. Also, the section criminalises the production, tendering, or causing the production or tendering, as evidence any entering in the register knowing such entry to be false. Punishment for the crime is a maximum of ten thousand naira (N10,000). Where such offence is committed, both the company and its responsible official will be liable for prosecution under the Copyright Act, except the officer is able to show that the offence was committed without his/her knowledge or that he/she exercised all due diligence to prevent the offence from being committed (see section 22 of the Copyright Act).

### **3.7 Summary**

In this unit, we have discussed the role of the NCC, CMOs, Copyright Inspectors, and publishers, etc., in the administration, regulation and enforcement of copyright under the Copyright Act. The Copyright Act did not leave the development and promotion of the copyright in Nigeria to private individuals only. It also created public institutional framework for this purpose.

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## MODULE 4 EMERGING INTELLECTUAL PROPERTY ISSUES

### **Unit 1: Traditional Knowledge, Traditional Cultural Expression and Genetic Resources**

- 1.1 Introduction
- 1.2 Learning Outcomes
- 1.3 Definition of TK, TCEs and GRs
  - 1.3.1 TKs and TCEs
  - 1.3.2 Genetic Resources
- 1.4 The work of the Intergovernmental Committee on Intellectual Property and GRs, TK and Folklore (the IGC)
  - 1.4.1 Challenges of Facing the IGC
  - 1.4.2 Successes of the IGC
- 1.5 Protection of TK, TCEs and GRs at national level
- 1.6 Summary
- 1.7 References/Further Reading/Web Sources

#### **1.1 Introduction**

In this module, we focus on key cross-cutting emerging intellectual property issues, such as the protection of traditional knowledge, traditional cultural expressions and genetic resources, and digitisation and intellectual property. These issues are important because of their global and national perspectives and the fact that they are at the core of current discourse around the global and national intellectual property systems.

Particularly, in this unit, we discuss the meaning traditional knowledge, traditional cultural expressions and genetic resources (TK, TCEs and GRs), attempts at the global and regional level within the framework of WIPO to formulate international normative framework(s) for the protection of TK, TCEs and GRs, and the approaches to the protection of TK, TCEs, and GRs at the national level, especially in Nigeria.

#### **1.2 Learning outcomes**

At the completion of your study in this unit, you should be able to do the following:

- 1) Define TK, TCEs and GRs.

- 2) Discuss the history, development, initiatives and approaches around the protection of TK, TCEs and GRs at the global and regional levels.
- 3) Explain the approaches to the protection of TK, TCEs and GRs at the national levels.
- 4) Discuss the protection of TK, TCEs and GRs in Nigeria

### **1.3 Definition of TK, TCEs and GRs**

#### **1.3.1 TK and TCEs**

According to WIPO, TK can be viewed from a narrow sense which refers to knowledge, know-how, skills, innovation and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity. It can be found in a wide variety of contexts including agricultural, scientific, technical, ecological and medicinal knowledge as well as biodiversity-related knowledge. In a general sense, however, TK encompasses TCEs, which WIPO defines as the forms that traditional culture forming part of the identity and heritage of a traditional or indigenous community passed down from generation to generation, are expressed. Also known as expressions of folklore, TCEs include music, dance, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives, or many other artistic or cultural expressions.

Gleaned from the above, TK and TCEs bear their origin to particular indigenous community to which they are linked; are communally owned by that community; are perpetual in the sense that they are not limited by time; and are passed down from one generation to the next via oral tradition and as such, are often times not fixed in any particular medium. Given their nature, therefore, it is difficult to find protection for TK and TCEs under conventional intellectual property systems. Thus, WIPO has been involved in a decade-long negotiation aimed at formulating normative standards for TK, TCEs and GRs (discussed below). The negotiation is taking place at the Intergovernmental Committee on Intellectual Property and GRs, TK and Folklore (the IGC). We will discuss the journey so far briefly below.

For now, it should be noted that scholars have argued that innovations derivable from TK can find protection through the instrumentality of patent, trademark, geographical indication or as trade secret or confidential information; whereas, TCEs

may be protected through the copyright and related rights, geographical indication, and trademark (collective and communal marks) systems. In this connection, two strategies can be adopted: the defensive and positive protection. Defensive protection refers to a set of strategies to ensure that third parties do not gain illegitimate or unfounded intellectual property rights over the TK and TCEs. For instance, countries, such as India, are developing TK databases which may be used as evidence of prior art to defeat a claim to a patent on such TK. Positive protection involves strategies aimed at ensuring active exploitation of TK and TCEs by the originating community and preventing unauthorised uses of by third parties.

### **1.3.2 Genetic Resources**

GRs refer to genetic materials of plants, animals, microbial or of other origin containing functional units of heredity with actual or potential value, such as medicinal plants, agricultural crops and animal breeds. According to WIPO, GRs are encountered in nature and are not creations of the human mind and thus they cannot be directly protected as intellectual property. However, there are still associated intellectual property issues within the context of GRs. For instance, inventions or plant varieties based on or developed from genetic resources linked with TK (or not) may find protection under laws relating to plant breeders' rights or may be patentable. But questions continue to arise as to how to protect the rights or interests of the communities from which the GRs are found. In other words, how do we ensure that the communities share in the benefit arising from commercial exploitation of invention or the plant variety by the inventors or developers of the plant variety as the case may be?

The United Nations Convention on Biological Diversity 1992 and its Nagoya Protocol 2010, and the International Treaty on Plant Genetic Resources for Food and Agriculture 2001 adopted under the auspice of the Food and Agricultural Organization have provided frameworks for access and benefit-sharing to take care of the interest of the communities vis-à-vis the inventors or developers of plant varieties. These treaties do not, however, fall within the global intellectual property system which the WIPO oversees. Thus, like TK and TCEs, the member states of WIPO are still negotiating an appropriate normative treaty that will best cater for the interest of the communities from which the genetic resources originate and those of



intellectual property rights owners. WIPO's work in this regard is aimed at complementing the treaties identified above.

#### **1.4 The work of the Intergovernmental Committee on Intellectual Property and GRs, TK and Folklore (the IGC)**

The IGC was established in the year 2000 by WIPO General Assembly with the task to develop international legal instruments on intellectual property and GRs, TK and TCEs. The mandate of the IGC is determined by the General Assembly every two years. The latest mandate is to run from 2020-2021 with the objective of “finalizing an agreement on an international legal instrument(s), without prejudging the nature of outcome(s), relating to intellectual property (IP) which will ensure the balanced and effective protection of genetic resources, traditional knowledge and traditional cultural expressions”. The IGC's work is coordinated through the WIPO Traditional Knowledge Division. The Director of the Division acts as the secretary to the IGC. Although the legal instrument(s) has(ve) not been finalised, the IGC has made remarkable progress despite facing tough challenges.

##### **1.4.1 Challenges Facing the IGC**

The challenges faced by the IGC centres around the nature of TK, TCEs and GR which the IGC has to address, the modus operandi of the IGC, and the broader multilateral framework (WIPO) within which the IGC is carrying out its mandate. We have seen from the discussions in (3.1.1) above that by their nature of TK, TCEs and GRs do not fit properly within the framework of conventional intellectual property systems. Thus, according to Wendland, developing an international instrument for their protection would require an “unusually high degree of substantive competence as well as domestic coordination and policy coherence within participating countries”. Unfortunately, there is not enough regional and national models for negotiators at the IGC to draw from in achieving their mandate.

Also, there is little interdependence between the issues being addressed by the IGC and other matters on the global intellectual property itinerary. This is further complicated by the disintegrated nature of the treatment of the issues at different international settings, such as the UNESCO and the FAO. In effect, WIPO member states pushing for a normative framework for TK, TCEs and GRs (usually countries from the global south) are left with slim chances of obtaining concessions from

member states that are against such frameworks (usually countries from the global north). This is made worse by the persisting divergent views and political willingness on the part of member states and the fact that the broader WIPO system requires consensus among member states for the finalisation and adoption of international instruments. Moreover, there is not enough pressure from members of the public and civil society for quick completion of the IGC's work.

#### **1.4.2 Successes of the IGC**

Despite the foregoing challenges, the IGC has recorded commendable positive outcomes. In the early days, the IGC's work combined technical analyses, exchanges of practical experiences, policy debates and fact-gathering, which led to practical outcomes such as the enhanced recognition of TK as prior art that forms the basis for the defensive protection of TK. The IGC also commenced work on technical standards for TK documentation and IP clauses for use in access and benefit-sharing agreements.

However, there was some sought of interregnum on the normative work of the IGC between 2003 and 2009, arising from disagreement among member states on whether or not there is need for an international instrument/what form or shape such instrument will take if at all. However, things changed in late 2009 when the WIPO General Assembly determined the IGC's mandate for 2010 to 2011 with the objective to of embarking on a text-based negotiation on all three aspects (TK, TCEs and GRs) and for the possible convening of a Diplomatic conference. This led to the development of new methodologies by the IGC, such as the convening of intersessional working groups, ad hoc expert groups, friends of the Chair, expert drafting groups, informal meeting formats, seminars, etc., which draws upon the technical and practical competences of experts and representatives of indigenous communities, with the aim, according to Wendland, of balancing "inclusiveness and transparency, on the one hand, and efficiency and effectiveness, on the other" hand.

Further, some clarity emerged in the negotiations on GRs. A single consolidated text emerged with options around a new patent disclosure requirement relating to GR. In fact, the first WIPO publication on "*Key Questions on Patent Disclosure Requirements for Genetic Resources and Traditional Knowledge*" was published in

2017 based on this development. Another milestone was recorded in 2019 with the preparation of a draft international instrument on GR and associated TK by the IGC Chair, Ian Goss, which is now known as the Chair's draft. This draft now forms part of the documents to be considered by member states in their negotiation towards achieving the IGC's mandate.

The global debates also led to the development, in 2014, of the still evolving concept of the tiered or differentiated approach to the protection of TK and TCE within an international legal regime. The main rationale for developing this approach includes the advancement of legal certainty and clarity of TK and TCEs. According to Professor Okediji, the "approach sought to provide a structure for distinguishing categories of traditional knowledge and corresponding rights", and the tiers proposed are distinguished "along various degrees of publicness". The "degrees of publicness" of each tier are important in determining the strength and exclusivity of the legal rights attached to each tier. The proposed tiers are "secret traditional knowledge," "sacred traditional knowledge," "closely held traditional knowledge" and "widely diffused traditional knowledge."

The "secret and sacred traditional knowledge" would be those that are closely held by a given community as knowledge forming the essence of, and integral to, the existence of that community to which access should be strictly restricted. As such, they may be regarded as rights protectable under the principles of trade secret, patent and unfair competition law. The "closely held traditional knowledge" may be seen as the knowledge maintained by subgroups (such as tribal elders) within an indigenous community, but which is "still highly integrated into the cultural heritage" of the community. According to Okediji, such class of TK may be afforded same protection as the "sacred or secret traditional knowledge", even though access to it may not be strictly limited. The "widely diffused traditional knowledge" represents those traditional or cultural practices that have become so widely disseminated that their origin or roots are highly contestable. To illustrate, Okediji gave the example of Yoga, which is widely known to be associated with India. However, the dissemination of Yoga and its "gradual, albeit incomplete, disconnect from Indian cultural identity make the full panacea of IP rights both impracticable and unjustifiable". According to the expert, such traditional or cultural expressions

may be protected by mere attribution rights under international intellectual property legal frameworks with the allowance for more protection under national intellectual property regimes.

With its achievements so far, scholars, such as Oguamanam, believe that in the event the IGC does not reach a consensus on appropriate international instrument(s) for GR, TK and TCEs, it cannot really be regarded as a failure because its work in the last decade has produced enough motivation, model and technical knowledge, including proper conceptualisation of the issues, required for national and regional legal instruments for the protection of GR, TK and TCE at those levels.

### **1.5 Protection of TK, TCEs and GRs at National Level**

Ncube and du Plessis identified four schools of thoughts that have developed in relation to the quest for developing legal regimes for TK, TCEs and GR. According to the authors, there is

“a group that believes that indigenous knowledge can be protected in existing legislation; secondly, a group that believes that indigenous knowledge can be protected differently but in existing legislation; thirdly, a group that believes that what is required is sui generis legislation, but still in the framework of ownership and private property; and lastly a group that advocates for sui generis legislation not necessarily based on private ownership”.

Existing regional and national regimes adopts one of two broad approaches. First, the direct protection of TK, TCEs and GRs through existing intellectual property law. Examples for this approach can be found in Nigeria (discussed below) and South Africa in terms of the Intellectual Property Laws Amendment Act, No. 28 of 2013. There is also the enactment of new laws that adopt the tools of intellectual property law. The Protection of Traditional Knowledge and Cultural Expressions Act, N0. 33 2016 of Kenya provides an example of this. The problem with this approach is that the concepts of exclusivity, fixation, ownership, individualism and time limitation that underpin conventional intellectual property law do not accommodate the nature of TK, TCEs and GRs already highlighted above. The second approach is the protection of TK, TCEs and GRs through sui generis legal frameworks which take cognizance, and are tailor-made to align with the peculiarities, of the nature of TK, TCEs and GRs, but may or may not borrow from existing intellectual property regimes. This form of protection is found in regional mechanisms

such as the African Union’s Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources 2001, and ARIPO’s Swakopmund Protocol on the Protection of Traditional Knowledge and Expression of Folklore 2010. The Protection, Promotion, Development and Management of Indigenous Knowledge Systems Act 6 of 2019 of South Africa is an example of a national sui generis legislation for the protection of TK, TCEs and GRs.

As stated above, Nigeria adopted the approach of direct protection under an existing intellectual property statute. Even so, the protection does not extend to TK and GR. It is limited to TCEs, which fall under neighbouring rights in part II of the Copyright Act. Specifically, section 31 of the Copyright Act regards TCEs as expressions of folklore, which is defined as

“group oriented and tradition-based creation of groups or individuals reflecting the expectation of the community as an adequate expression of its cultural and social identity, its standards and values as transmitted orally, by imitation or by other means, including – (a) folklore, folk poetry, and folk riddles; (b) folk songs and instrumental folk music; (c) folk dances and folk plays; (d) productions of folk art in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalwork, handicrafts, costumes, and indigenous textiles.”

The Copyright Act protects expressions of folklore against reproduction; communication to the public by performance, broadcasting, distribution by cable or other means; adaptation, translation and other transformations, when such expressions are made either for commercial purposes or outside their traditional or customary context.

The NCC is vested with the power to authorise the exploitation of the expressions of folklore in Nigeria by third parties. However, the NCC’s powers are limited by stipulated exceptions such as fair dealing, educational use, use for illustrations, incidental uses and the borrowing of expressions of folklore for creating an original work. The Copyright Act requires the community of origin of an expression of folklore to be duly acknowledge in all printed matters that the expression of folklore is being utilised, especially where such printed matter is being communicated to the public. Further, in terms of section 32 of the Copyright Act, infringing uses of expressions of folklore are breach of statutory duty against which damages, injunctions and any other remedies may be granted by the court at the suit of the NCC. The Copyright Act also provides criminal sanctions for

infringement of expressions of folklore. In this connection, an infringer would be liable upon conviction to a fine not exceeding N100,000 or 12 months imprisonment or both in the case of an individual and a fine of N500,000 in the case of a corporate entity.

### SELF-ASSESSMENT EXERCISE 9

There is no need to search for or develop a specific legal framework for the protection of TK, TCEs and GRs because they can safely be protected under existing intellectual property regimes. Do you agree with this claim?

## 1.6 Summary

In this Unit, we have defined TK, TCEs and GRs and surveyed the developments, strategies, and approaches to their protection both at the global, regional and national levels, especially in Nigeria. In particular, we identified the challenges and successes of the WIPO IGC in its quest to develop an international normative framework for the protection of TK, TCEs and GRs. We also examined the protection of TK, TCEs and GRs in Nigeria, find that only TCEs finds some sought of protection in Nigeria, particularly under the Copyright Act.

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## MODULE 4 SELECTED EMERGING INTELLECTUAL PROPERTY ISSUES

### **Unit 2: Digitization and intellectual property**

- 2.1 Introduction
- 2.2 Learning Outcomes
- 2.3 Patent law
- 2.4 Trademark law
- 2.5 Copyright law
- 2.6 Duty of Publishers, etc to Maintain Register
- 2.7 Summary
- 2.8 References Further Reading/Web Sources

#### **2.1 Introduction**

Digitisation affords both challenges and opportunities within the context of intellectual property. The challenges and opportunities of digitisation are underpinned by the borderless nature of the Internet, the geographic limitations of intellectual property rights enforcement, the fragmentation of licensing practices, the proliferation of distribution channels for creative and innovative works, and the disruptive nature of the internet that has brought about the possibility of quick, easy and efficient ways of creating, managing and infringing intellectual property. Digitisation has greatly enabled technologies such as 3D printing, blockchain and artificial intelligence (AI). Studies show that the impact of digitisation is most acutely felt within the copyright sector. This is not to contend that the impact of digitisation is not felt within other intellectual property sectors, such as patent and trademarks. We discuss the impact of digitisation on specific intellectual property in this unit.

#### **2.2 Learning Outcome**

At the completion of this Unit, you should be able to explain the challenges and opportunities of digitisation within intellectual property (patent, trademark and copyright) systems.

### 2.3 Patent law

In the area of patent law, for instance, the impact of digitisation is felt in the opportunities and challenges it offers inventors, especially in the development and use of AI in inventive activities. AI has been broadly defined as “the ability of digital computer or computer-controlled robot to perform tasks commonly associated with intelligent beings. The term is frequently applied to the project of developing systems endowed with intellectual processes characteristic of humans, such as the ability to reason, discover meaning, generalise or learn from past experiences”. It is also described as “the theory and development of computer systems able to perform tasks normally requiring human intelligence, such as visual perception, speech recognition, decision making, and translation between languages”. The smart phones and other smart devices in use today are AI powered. Examples include, Google Assistance, Google GPRS device, Alexa, Siri and Bixby, to mention a few.

The first challenged here is to determine whether AI qualifies as patentable subject matter under patent law. In terms of section 1 of the Patent and Designs Act (PDA), inventions are patentable in Nigeria if they are new or novel, results from inventive activities and are capable of industrial application; or if they are new or novel improvement on an existing patentable invention that arose from an inventive activity and capable of industrial application. In this connection, section 1(4) and (5) of the PDA specifically excludes from patentability, inventions relating to plant or animal varieties, or essentially biological process for production of plants or animals (other than microbiological processes and their products); inventions the publication or exploitation of which would be contrary to public order or morality; and principles and discoveries of a scientific nature are not inventions for the purposes of the PDA.

It is not clear from the foregoing whether this provision can be stretched to exclude AI, which, as shown above, can be regarded as a mere computer program or software, as a patentable subject matter under the PDA. This is so because, the PDA does not expressly exclude computer programs or software from its ambit unlike section 25(2) of the South African Patent Act, No. 56 of 1978, which clearly excludes computer programs or software and methods of doing business, among others from patentability. It can, however, be argued that the non-express exclusion of computer program or software as patentable subject matter under the PDA may be interpreted to mean patents can be

granted over AI inventions in Nigeria. This argument finds support in the recent treatise of Adewopo where he stated that the patentability requirements in the PDA

“define the standard test which every invention must pass thoroughly in order to be patentable under Nigerian patent law and this applies *mutatis mutandis* to software. In other words, there is no specific or separate provision on patentability or otherwise of software once it satisfies the general criteria. Software is not expressly excluded or prohibited from being patentable under the PDA. It is important to note that in satisfying the patentability criteria, particularly the inventive step and its application, the patent will protect elements of function, technical solutions and how the software behaves in meeting those criteria.”

Aside AI being a patentable subject matter (or not), it offers enormous opportunities for intellectual property. For instance, it is possible to deploy AI into certain use cases within the intellectual property framework, such as in the areas of enforcement, monitoring, evaluation or assessment of patent applications, and even in the creation of patentable inventions. Indeed, the major issue in modern times are centred around AI-generated inventions: that is, inventions autonomously and solely developed by AI. It is now possible for innovators to develop AI devices that will play a major role in their inventive activities. The consequence of this is that such innovators are now naming the AI devices as co-inventors in their patent application related to the inventions which they developed with the aid of the AI, and, as such, are challenging the established norms around inventorship (the foundation of patent law centres around the “human inventor”).

Put differently, with the development and deployment of AI in inventive activities, questions are now being asked as to whether patent law cannot be stretched to accommodate the “non-human or AI inventor”. Such issue has not arisen in Nigeria yet. Nonetheless, there is a case that recently arose involving the naming of an AI as the autonomous and sole inventor, with the developers of the AI as the patent applicant and owners of the prospective patent, in international patent filings in August 2019 under Patent Cooperation Treaty system. The applications were also filed in jurisdictions including the European Patent Office (EPO) and the United Kingdom Intellectual Property Office (UKIPO). The AI, developed by Dr Stephen Thaler, was christened “Device for the Autonomous Bootstrapping of Unified Sentience” (DABUS).

Both the EPO and UKIPO did not hesitate to refuse the respective applications. In the case of the UKIPO (see UKIPO Decision BL O/741/19 of 4 December 2019 in Stephen L Thaler Application), the Hearing Officer actually agreed that the invention subject of the application was created by DABUS, but that since DABUS was an AI (a machine) and not human, it does not qualify as an inventor under UK patent law. As such, DABUS could not also validly transfer ownership of the invention to members of the team who sought the patent grant.

Similarly, the EPO ruled that the patent applications do not meet the required of article 81 and Rule 19 of the European Patent Convention, which requires that an inventor designated in a patent application has to be a human being and not AI (a machine) (see Grounds for the EPO decision of 27 January 2020 on EP 18 275 163 and Grounds for the EPO decision of 27 January 2020 on EP 18 275 174). It is important to note that the team members have indicated their willingness to appeal against these ruling. This signifies that the end is yet to be reach as to status of AI in respect of ownership of intellectual property rights. Indeed, both the WIPO and the United States Patent and Trademarks Office (USPTO) are already seeking to develop, through public consultations, issues of focus concerning AI and intellectual property law and policy that will shape future discussions.

#### **2.4 Trademark law**

As the issue has not arisen in Nigerian courts, Two South African cases can be used to illustrate the impact of digitisation on trademarks: *New Media v Eating Out* 2005 (5) SA 388 and *Laugh it Off v SAB* [2005] ZACC 7. The *New Media* case considered whether the respondents domain names [www.eating-out.co.za](http://www.eating-out.co.za) and [www.eatingout.co.za](http://www.eatingout.co.za) infringed the applicant's registered trademark, EAT OUT GUIDE. Here, the South African High Court Held that the domain names in dispute are capable of deceiving users of the applicant's restaurant guide.

Importantly, the *Laugh it Off* case relates to the use of the respondent's well-known respondent trademark (CARLING BLACK LABEL) on the applicant's T-Shirt (by way of parody) advertised on the internet, and it relates to the interface between the right to freedom of expression on the internet and the exercise of the trademarks. In the case, the Constitutional Court of South Africa had to determine the question of when a trademark

can be said to have been infringed under section 34 of the South African Trade Marks Act, No. 194 of 1993. The court determined this question against the backdrop of the exercise of the right to freedom of expression (on the internet) guaranteed under section 16 of the Constitution of the Republic of South Africa 1996. In holding that no infringement occurred because the use does not occasion any likelihood of economic detriment to the respondent, the South African Constitutional Court made the following pronouncement:

“section 34 [of the Trade Mark Act] serves a vital purpose in preserving trade and commercial interests of owners of trade marks which have a reputation. This it does by prohibiting use which, although it may not confuse or deceive, materially undermines the repute of well renowned trademarks ordinarily harnessed to sell goods and services. The protection must be seen to extend beyond the traditional and primary function of a trademark, which is to signify the origin of goods and services on offer. Rather, the section aims at more than safeguarding a product’s “badge of origin” or its “source-denoting function”. The section strives to protect the unique identity and reputation of a registered trade mark. Both of these attributes underpin the economic value that resides in the mark’s advertising prowess or selling power. As it is often said the mark sells the goods and therefore its positive image or consumer appeal must be saved from ruin. [...] section 34 falls to be construed bearing in mind the entrenched free expression right under section 16 [of the Constitution]. [...] Plainly, the right to free expression in our Constitution is neither paramount over other guaranteed rights nor limitless. [...]. In appropriate circumstances authorised by the Constitution itself, a law of general application may limit freedom of expression. [...] section 34 [Trade Marks Act] seeks, in effect, to oust certain expressive conduct in relation to registered marks with repute. It thus limits the right to free expression embodied in at least section 16(1)(a) to (c) of the Constitution. We are however not seized with the adjudication of the constitutional validity of the section. We must assume without deciding that the limitation is reasonable and justifiable in an open and democratic society to which our Constitution is committed. That in turn impels us to a construction of section 34 most compatible with the right to free expression. The anti-dilution provision must bear a meaning which is the least destructive of other entrenched rights and in this case free expression rights. The reach of the statutory prohibition must be curtailed to the least intrusive means necessary to achieve the purpose of the section. Courts must be astute not to convert the anti-dilution safeguard of renowned trademarks usually controlled by powerful financial interests into a monopoly adverse to other claims of expressive conduct of at least equal cogency and worth in our broader society.”

## 2.5 Copyright Law

The challenges thrown up by digitisation in relation to copyright and related rights include questions of the nature of rights associated with digital contents, protection of the rights, the extent and manner of enforcement of such rights, and the extent to which foundational concepts such as authorship and ownership of copyright can be stretched to accommodate non-human creators such as AI since, as pointed out above, AI also independently create protectable works. The challenges of digitisation also include questions of applicable law in respect of rights infringement on the internet and questions around data ownership and protection under copyright law.

Negotiations at the international level led to attempts to answer the question of the nature of rights for digital contents. In 1996, two WIPO treaties – WIPO Copyright Treaty (WCT) and WIPO Performance and Phonograms Treaty (WPPT) – were adopted. The Beijing Treaty on Audiovisual Performance (BTAP) was also adopted in 2012. Nigeria ratified these treaties in October 2017. Under the treaties, the main exclusive rights that are relevant in the digital environment are the reproduction rights and the rights of communication to the public including the right of making available to the public (WCT, Article 8; WPPT Articles 7, 10, 11 and 14; BTAP, Articles 7, 10 and 11). The BTAP includes the rights of broadcasting and communication to the public as exclusive rights, but allows member states the liberty to reduce such rights to equitable remuneration rights. Performers and producers of phonograms are also entitled, in addition to the exclusive rights, the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public. It appears that state parties are allowed to choose whether to include these rights as exclusive or mere remuneration rights in their national legislation (BTAP, Article 11). The treaties further attempt to answer the question of rights protection in the digital sphere by making provisions relating to technological protection measures (TPM) and rights management information (RMI). RMI help to identify a work and its owner, among others, and can help to track usages of a work and distribute collected revenues. On the other hand, TPM help to prevent unauthorised uses of works either through access control mechanism (passwords or encryption) or copy control mechanisms (limiting number of authorised copies) (WCT, Articles 11 and 12; WPPT, Articles 18 and 19; BTAP, Articles 15 and 16). The Draft Copyright Bill, which

seeks to domesticate the WCT, WPPT and BTAP, among others, contains similar provisions.

A major issue with regards to enforcement of rights in the digital sphere is the conditions under and the extent to which Internet Service Providers (ISPs) can be held liable for infringement of rights, especially those caused by users of their services. Related to this is the issue of how to safeguard the rights to privacy and freedom of speech of Internet users in the course of copyright enforcement. The WIPO Internet treaties do not provide for enforcement of copyrights in the digital sphere against ISPs. According to the Agreed Statement on the WCT, it “is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention”. The conditions and extent of liability of ISPs is the concern of national legislatures. At the national level, different approaches exist. There are those that adopt the graduated response approach (the so called three-strike law) or those that merely place obligation on ISPs to reveal information about Internet users hiding behind anonymous IP-addresses to infringe copyright works. There are countries wherein industry agreements govern, or complement national legislation in, the enforcement of rights against ISPs, and those who adopt the more widely used notice-and-down approach.

The extent Copyright Act does not contain any of these approaches. However, the notice-and-down approach is currently being proposed in clauses 47 and 48 of the DCB as follows:

“47 (1) The owner of copyright in a work in respect of which copyright has been infringed, may issue notice of such infringement to the relevant service provider requesting the service provider to take down or disable access to any infringing content or link to such content, hosted on its systems or networks.

(2) To be effective under this section, a notification of an alleged infringement must be made in writing to the service provider or his designated agent and must include substantially the following—

(a) a physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed; (b) identification of each work claimed to have been infringed; (c) identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient

to permit the service provider to locate the material (d) information reasonably sufficient to permit the service provider to contact the complaining party, such as an electronic mail address, telephone number, or a location address at which the complaining party may be contacted; (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; and (f) a statement that the information in the notification is accurate, and that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(3) As used in this Act, the term —service provider means a provider of online services or network access, or the operator of facilities therefor, and includes an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received.”

“48(1) A service provider, upon receiving notice of infringement under section 47 shall promptly notify the subscriber responsible for the content for which the notice relates informing him of the content of the notice;

(2) If within 10 days of having notified the subscriber, the subscriber fails to provide any information justifying the continued keeping of the content complained about, the service provider shall take down or disable access to the infringing content or links to such content hosted on its systems or networks, and thereafter, notify the owner of copyright accordingly.

(3) Where a subscriber has provided information justifying the keeping of the content complained about, or the service provider is otherwise convinced that the complaint of the owner of copyright is without merit, he shall promptly inform the owner of copyright of his decision not to take down the content.

(4) The service provider may resume access to or restore removed content or a link, if he receives a written counter notice from the subscriber which he has forwarded to the owner of copyright immediately upon receipt; and he did not receive, within 10 days, a notice from the owner of copyright, indicating that no authorization has been granted for the subscriber to make the content available.

(5) Any person dissatisfied with a determination or action by the service provider or owner of copyright under this section may refer the matter to the Commission for determination.

(6) A service provider shall not be liable to any person for any action taken under this section in good faith.”

Another area where the opportunities and challenges of digitisation manifests in the copyright sector is in relation to the AI technology. As already now over-flooded, AI are capable of creating protectable works either autonomously or in conjunction with a



human author. Indeed, evidence abound of paintings, music, novels, pictures, sound recordings, among others created by AI and these qualify as works under the Copyright Act. As already pointed out earlier in this course, the Copyright Act only recognises human authors in respect of authorial works such as literary, musical and artistic works. Authorship in respect of other works such as cinematograph films, sound recordings and broadcast vest in human or artificial (corporate) persons who invests or bore the economic expense in creating the works. Thus, the challenge, is whether the concepts of authorship and ownership of copyright under the Copyright Act can be interpreted to extend to non-human authors, such as AI in respect of a protectable work. This issue has not been answered in a Nigeria court. Even so, it is highly doubtful whether the Nigerian courts will rule in favour of vesting authorship on AI in view the existing precedence on authorship in Nigeria. However, the Nigerian courts may draw guidance from other jurisdictions, such as China, when such issues arise before them.

The question whether copyright law should extend protection to works created by AI recently attracted judicial attention in of the Beijing Internet Court (BIC), China, in the case of *Beijing Feilin Law Firm v Baidu Corporation*, No 239 [2019], Civil First Instance, 25 April 2019. A review of the case by Ming Chen is available in the *Journal of Intellectual Property Law & Practice* (2019) 14(8) 593 – 594. Gleaned from the review, the plaintiff claimed that the defendant (an ISP) infringed its right of communication of information on networks” (similar to the making available right). The claim related to a report published by the plaintiff on its’ *WeChat* account. The report was a summary of some data about judicial [decisions] on the film industry in Beijing. The data was drawn from an electronic database (Wolter Kluwer legal database) containing graphics and Chinese texts providing information such as the total number and trend, the workload of every court in Beijing, the rate to hire lawyers among others, relating to judgments on the Beijing film industry. Without authorisation of the plaintiff, the report was posted on the defendant’s internet platform by a third party. In its defence, the defendant argued that the report in issue was not copyright protected because it was created by AI.

In its judgment, the BIC distinguished the texts of the report itself and those in the electronic database which formed the foundation for the report. The BIC found that the texts in the report were indeed expressed by the plaintiff and, consequently, subject to

copyright protection. However, the BIC refused to extend protection over the texts and graphics contained in the electronic database. The judgment of the BIC turned on whether the relevant texts and graphics in the electronic database were sufficiently original under the Copyright Law of the Peoples' Republic of China. In this regard, the BIC held that the graphics were not original to the plaintiff because the graphics were created by AI based on data inputted by the plaintiff. Also, the court reasoned that the variation of [the] graphics was attributable to the change in the data and different users of the database would get the same result if they used exactly the same data. Moreover, it was held that the plaintiff did not provide extra evidence to prove that they had done some additional choices in relation to the lines and colours in order to show originality. Concerning the texts in the electronic database, the BIC held that they were sufficiently original. However, the BIC held that the texts were generated by AI. As such, they cannot be protected because under Chinese copyright law, protection does not extend to works created by AI. Article 11 of Chinese copyright law only accommodates works created by humans, or legal persons and entities without legal personality.

#### **SELF-ASSESSMENT EXERCISE 10**

What are the impacts of digitisation on the global and national intellectual property systems?

## **2.6 Summary**

In this Unit, we have discussed the impact of digitization on intellectual property. In this connection, attention was paid to the challenges and opportunities which digitization affords specific intellectual property such as patent, trademark and copyright. The discussion focused on the global developments in this regard before situating the discussion within the Nigerian context.

## **2.7 Further readings and acknowledgement**

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