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Application of Copyright Law in Libraries and Archives in Nigeria

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Abstract

All over the world, the products of man's intellect are recognized and protected by the intellectual property law. The essence of the recognition and protection is to ensure that man's creativity and ingenuity are not unduly harnessed and exploited. A broad division of intellectual property law is the copyright law which protects, among others, literary and artistic works. Like any other civilized country, Nigeria has a copyright law. Libraries and archives, being the main custodians of and the most prominent intermediaries between users and copyrighted works, it is essential that they should be abreast of copyright law in Nigeria. Unfortunately, not much exposition has been made on the application of copyright law in libraries and archives in Nigeria. This paper, therefore, takes a look at Nigeria's Copyright Act and interprets its provisions for libraries and archives in Nigeria. Making reference to the practice in other countries, particularly the developed world, as well as relevant statutory provisions, the paper defines the obligations of libraries and archives in the enforcement of copyright law. The paper concludes by emphasizing the need for information professionals to be abreast of legislations relating to information provision and to balance the interest of information resources users with that of copyright owners in order to protect intellectual property rights.

Introduction

Man is a creative being. The products of his intellect are aimed at improving and adding value to the society. These products also constitute his intellectual property which the law recognizes and seeks to protect. The intellectual property law is, therefore, an area of law which has evolved and been developed out of the conviction to prevent man's creativity and ingenuity from being unduly harnessed and exploited.

Intellectual property has broadly been categorized into two namely industrial property and copyright. While industrial property is protected through patents, trademarks and designs, copyright protection relates to literary and artistic works. Libraries, archives and information centres are the main custodians of intellectual property, particularly literary works. They acquire, organize and generally provide the avenues by which these works are accessible to the users. Consequently, they are often confronted with copyright issues in the course of discharging their duties. The focus of this paper, therefore, is copyright and the exposition of the law relating to it to libraries, archives and information centres in Nigeria.

Copyright and Copyright Law in Nigeria

Copyright is a subset of intellectual property

law. According to Idris (n.d) it "consists of a bundle of rights given to creators in their literary and artistic works". Colston (1999) described it as "a statutory property right". This is because, unlike most other property rights, copyright is an intangible right which is conferred by statute. Though intangible, the right is assignable and inheritable. The right granted is exclusive and for a certain term of years.

By virtue of its colonial experience, the English Copyright Act of 1911 was first introduced to Nigeria and it governed copyright infringement in the country until 1970 when the Copyright Decree No. 61 (later known as Copyright Act) was promulgated. (Babafemi, 2006). The 1970 Copyright Act was replaced with Copyright Act of 1988 which introduced new provisions, particularly those relating to copyright administration in Nigeria. Today, copyright issues are governed by Copyright Act Cap C28 Laws of the Federation of Nigeria 2004.

Copyright has the following as its essential characteristics:

- (a) It is an intangible property.
- (b) It is conferred by statute (and in the case of Nigeria, the Copyright Act).
- (c) It concerns intellectual property i.e. creativity.
- (d) It has a fixed duration.
- (e) It generally belongs to an individual or group of

individuals and is, therefore, a private right.

The rights conferred by copyright are both economic and moral. Economic right is the right of the copyright owner to realize the fruit of his labour by publishing, reproducing and making copies of the work for distribution for commercial purposes. Moral right is the right to claim authorship and be recognized as the author of the work. While the economic right is for a fixed period, moral right is perpetual. The point must also be made that, unlike other forms of intellectual property, copyright does not require registration. It is automatically conferred by the statute on all eligible works.

Eligible Works

Section 1 of the Copyright Act, 2004 (hereinafter referred to as the "Act") enumerates works that are eligible for copyright. They are literary works, musical works, artistic works, cinematograph films, sound recordings and broadcasts. For a literary, musical or artistic work to be eligible for copyright, the Act requires that it must have an original character and be fixed in a definite medium of expression.

The question as to what constitutes the originality of a work has not been given much judicial interpretation in Nigeria. However, the court pronouncements and expert opinions in other jurisdictions have established that originality in this context does not refer to the idea but to the expression of thought. In the English case of *University of London Press Ltd Versus University Press Ltd* cited in Babafemi (2006), it was stated that even the expression need not be in an original or novel form "but that the work must not be copied from another work". It is in the light of this decision that Colston (1999) opined that "works may be regarded as original if an element of skill, labour and judgement" have been expended in their creation, and this remains so even if the work has been derived from other sources".

Like the case with the requirement of originality, the statutory requirement that the work must be fixed in a definite medium of expression has not been well-tested in Nigerian courts. It has, however, been suggested that the essence of this requirement is to ensure the existence of an entity "capable of being regarded as a work in those situations where creation without producing anything external is possible..." (Colston, 1999). This is

particularly so in situations where works are in no tangible form.

Nature of Copyright

The general nature of copyright, according to Section 6 of the Act consists of the exclusive right to control the doing in Nigeria of certain enumerated acts in respect of the work to which copyright relates. These acts which only the copyright owner can carry out or authorize their being carried out in the case of literary or musical work are reproduction, publication and performance of the work or any translation of it. Other acts include distribution of copies of the work to the public for commercial purposes by way of rental, lease, hire, loan etc, broadcast or communication of the work to the public by a loud speaker or any other similar device and making any adaptation of it

Conferment of Copyright

Copyright can be conferred on an eligible work in any of the following ways:

- (a) By virtue of nationality or domicile (Section 2):

For copyright to be conferred on an eligible work under this section, the author of the work or any of the authors (if a work of joint authorship) must be a qualified person. An author is a qualified person, if he is an individual who is a citizen of, or is domiciled in Nigeria or a body corporate incorporated by or under the laws of Nigeria.

- (b) By reference to country of origin (Section 3):

For copyright to be conferred on an eligible work other than a broadcast under this section, the work, if a literary, musical or artistic work or a cinematograph film must be published or in the case of sound recording, be made in Nigeria and it must not have been the subject of copyright conferred under Section 2 of the Act.

- (c) Copyright in works of Government, State authorities and International Bodies (Section 4):

Under this section, copyright is conferred on every eligible work made by or under the direction or control of the Government, a

State authority or a prescribed International body.

(d) By reference to International agreements (Section 5):

Copyright is conferred on an eligible work by reference to international agreement if on the date of its first publication at least one of its authors is a citizen of or is domiciled in, or a body corporate established under the laws of a country that is a party to an obligation in a treaty or other international agreement to which Nigeria is a party. The right is also conferred on a work which is first published in such a country or by the United Nations or any of its specialized agencies or by the Organization of African Unity (now African Union) or by the Economic Community of West African States.

Copyright Ownership

By virtue of Section 10 of the Act which deals with first ownership of copyright, copyright shall vest initially in the author of the work eligible for copyright. Where a work is commissioned by a person who is not the author's employer under a contract of service or apprenticeship or the work, not being so commissioned, is made in the course of the author's employment, the copyright shall belong, in the first instance, to the author except there is a written contract stipulating otherwise. This provision was given judicial interpretation in the case of *Joseph Ikhuoria Versus Campaign Services Limited and Another* where it was held that but for the standard conditions of service which the employee (who was the plaintiff in the case) signed, the employee would have been held to be the copyright owner of the sketch which was the subject matter of the suit.

The position is, however, different in the case of a literary work in a newspaper, magazine or similar periodical if the author is under a contract of service or apprenticeship. The proprietor, for the purpose of publication in such newspaper, magazine or similar periodical shall be the first owner of copyright in the publication of the work unless there is an agreement to the contrary. The provision of Section 10 (3) of the Act concludes that in all other respects, the author shall be the first owner of the copyright in the work.

As for eligible work made by or under the

direction or control of the Government, a State authority or a prescribed International body, Section 10 (5) of the Act stipulates that the copyright is vested initially in the Government on behalf of the Federal Republic of Nigeria, in the State authority on behalf of the State in question, or in the International body in question as the case may be and not in the author.

Assignment and Licence

By virtue of Section 11 of the Act, copyright is transmissible by assignment, by testamentary disposition or by operation of law as movable property. It then follows that copyright, though an intangible property is also an estate of inheritance. The Act, however, recognizes that an assignment or testamentary disposition of copyright may be limited so as to apply to only some of the acts which the copyright owner has the exclusive right to control, or a part only of the copyright duration or to a specified country or region.

The Act provides for two types of licence namely exclusive and non-exclusive licence. An exclusive licence is defined in Section 51 of the Act as a licence signed by or on behalf of a copyright owner authorizing the licensee to the exclusion of all other persons (including the person granting the licence) to exercise any right which would otherwise be exercisable exclusively by the copyright owner. To be effective, an assignment of copyright or an exclusive licence is required to be in writing. There is no such requirement for a non-exclusive licence which may be written or oral or may be inferred from the conduct of the parties.

However, it is important to note that transfer of copyright ownership by assignment or licence does not divest the author of certain rights. According to Section 12 of the Act, he retains the right to claim authorship of his work and the right to object and to seek relief in connection with any distortion, mutilation or other modification of and any other derogatory action in relation to his work. These rights, in the language of the Act, are perpetual, inalienable and imprescriptible. The court affirmed these rights in the case of *Job2la Nigeria Enterprises Limited Versus Taiwo Kupolati Esquire and Others*.

Compulsory Licence: The Act gives the Nigerian Copyright Commission the power to grant compulsory licence to any qualified person to produce and publish a translation of a literary or dramatic work for the

purposes of teaching, scholarship or research. A qualified person is defined to mean either a citizen of Nigeria or an individual domiciled in Nigeria or a body corporate incorporated under any written law in Nigeria. Research in this context, according to the Fourth Schedule of the Act "shall not include industrial research, or research carried out by bodies corporate (not being bodies corporate owned or controlled by the Government), companies, associations or bodies or persons carrying on any business". The procedure for granting a compulsory licence includes the constitution of a Copyright Licensing Panel under Section 37 of the Act for the consideration of an application.

Duration of Copyright

The duration of copyright in an eligible work is contained in the First Schedule to the Act. For literary works, copyright exists for seventy years after the end of the year in which the author dies. In the case of a work in which a government or a body corporate owns the copyright, the duration is seventy years calculated from the end of the year in which the work was first published. For other types of eligible works like cinematograph films and photographs, sound recordings and broadcasts, copyright expires fifty years after the work was first published or in which the broadcast first took place. Section 2 (3), however, makes special provisions for anonymous or pseudonymous literary, musical and artistic works and stipulates that copyright therein shall subsist until the end of the expiration of seventy year in which the works was first published. The proviso is that when the author becomes known, the term of copyright shall be calculated in accordance with paragraph 1 of the First Schedule of the Act.

Infringement of Copyright

Section 15 of the Act deals with infringement of copyright and enumerates acts that will amount to infringement of copyright in a protected work. In that section, the Act specifically stipulates that copyright is infringed by any person who without the licence or authorization of the owner of copyright –

- (a) does, or causes any other person to do an act, the doing of which is controlled by copyright

- (b) imports or causes to be imported into Nigeria any copy of a work which, if it had been made in Nigeria, would be an infringing copy under this section of this Act;

- (c) exhibits in public any article in respect of which copyright is infringed under paragraph (a) of this subsection;

- (d) distributes by way of trade, offers for sale, hire or otherwise or for any purpose prejudicial; to the owner of the copyright, any articles in respect of which copyright is infringed under paragraph (a) of this subsection;

- (e) makes or has in his possession plates, master tapes, machines, equipment or contrivances used for the purpose of making infringed copies of the work;

- (f) permits a place of public entertainment or of business to be used for a performance in the public of the work, where the performance constitutes an infringement of the copyright in the work, unless the person permitting the place to be used was not aware, and has no reasonable ground for suspecting that the performance would be an infringement of the copyright;

- (g) performs or causes to be performed, for the purposes of trade or business or as supporting facility to a trade or business, any work in which copyright subsists.

Copyright infringement, therefore, occurs when a restricted act is carried out without the permission of the copyright owner.

A copyright owner, assignee or an exclusive licensee can initiate legal action in the Federal High Court having jurisdiction in the place where the infringement occurred. In the case of *Musical Copyright Society (Nig.) Limited/GTE Versus Adeokin Records and Another*, the Court of Appeal, interpreting Section 15 of the Act, held that the right of action is conferred on owners, assignees and exclusive licensees of copyright works and that it is only these legally authorized or accredited owners that can seek redress in the court of law.

Remedies

The remedies available to a plaintiff upon successfully establishing copyright infringement are

an award of damages, injunction and conversion rights. By conversion rights, a successful plaintiff is deemed to be the owner of all infringing copies of his work or any or substantial part thereof as well as all plates, master tapes, machines, equipment or contrivances used or intended to be used for the production of infringing copies (Section 18 of the Act).

In addition to civil remedies, there is also criminal liability on the part of the violator for copyright infringement. Section 20 of the Act enumerates specific acts that constitute criminal offences and the penalties for contravention. The provisions of Sections 21 to 23 also contain necessary safeguards against copyright infringement. The Act allows both civil and criminal actions to be taken simultaneously in respect of the same act of infringement.

Collecting Society

Section 39 (1) of the Act makes provision for a Collecting Society which "may be formed in respect of anyone or more rights of copyrights owners for the benefit of such owners and the society may apply to the Commission for approval to operate as a collecting society for the purpose of this Act". A collecting society is defined in Section 39 (8) to mean an association of copyright owners which has as its principal objectives the negotiating and granting of licenses, collecting and distributing of royalties in respect of copyright works.

The conditions to be fulfilled by a collecting society before being approved by the Commission are contained in Section 39(2). They are that:

- (i) It is incorporated as a company limited by guarantee.
- (ii) 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.
- (iii) It represents a substantial number of owners of copyright in any category of works protected by the Act (owners of copyright being defined here to include owners of performing rights).
- (iv) It complies with the terms and conditions prescribed by regulations made by the

Commission under this section.

The approval of the Commission is obligatory for the duties of a collecting society to be performed. To do so without such approval is unlawful under Section 39 (4) of the Act and any person found guilty of contravention may incur criminal liability. Failure to obtain an approval or certificate of exemption from the commission also limits the right of action of a collecting society for copyright infringement as was held by the Court of Appeal in *Musical Copyright Society (Nig.) Limited/GTE Versus Adeokin Records and Another*. The court also considered the question whether a collecting society is the same as owner, assignee or exclusive licensee of copyright and held that, going by the definition of a collecting society, it is not the same as the owner, assignee or exclusive licensee of copyright.

In some countries, it is not unusual for authors to come together and form themselves into a collecting society. In 1977, the Writers' Action Group founded the UK Authors' Licensing and Collecting Society (ALCS) whose main objective is to ensure that writers receive fair compensation for their works copied, broadcast or recorded. ALCS not only collects and distributes royalties for photocopying of authors' works but generally protects and promotes the rights of authors.

Exceptions from Copyright Control

In stating the general nature of copyright in its Section 6, the Act makes reference to its Second Schedule as specifying the exceptions from copyright control. These exceptions are probably born out of the need to take certain acts out of the purview of copyright protection in the overall interest of the public. Thus, doing such acts will not constitute copyright infringement. In some other countries, these exceptions are regarded as valid defences to alleged cases of copyright infringement. Specifically, the Second Schedule of the Act states that the right conferred in respect of a work by Section 6 of the Act does not include the right to control the acts listed in the schedule. Although the exceptions listed in the schedule are overwhelming, the focus here is on those relevant to the field of information provision.

(a) Fair Dealing

The Act permits the doing of any of the acts in

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 acknowledgement of the title of the work and its authorship except where the work is incidentally included in a broadcast”. The implication is that there is no copyright infringement when a work is reproduced for any of the purposes stated in this and other exceptions.

The question to address, however, is what is fair dealing or what will amount to fair dealing? Babafemi (2006) defined fair dealing to mean dealing that is genuine and reasonable. He also asserted, relying on the decisions in English cases on the point, that the critical factor to consider is how substantial the portion taken, substantiality not only being in relation “to the quantity taken but also in relation to the value of the portion taken to the work”. What will amount to fair dealing, however, depends on the circumstances of the case and each case is to be treated on its own merit.

(b) Educational Purposes

Another notable exception relates to the use made of a work in an approved educational institution for the educational purposes of the institution. The condition, however, is that if a reproduction is made for any such purpose, it shall be destroyed before the end of the prescribed period. In the absence of any such prescribed period, destruction of the reproduction shall take place before the end of the period of twelve months after it was made.

(c) Public Interest

The Act permits any use made 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 therefrom and no admission fee is charged for the communication, if any, to the public of the work so used. The implication is that the exception is meant to promote public good while not taking pecuniary benefits to the detriment of the copyright owner.

(d) Public Library

The making of not more than three copies of a book (including a pamphlet, sheet music, map, chart or plan) is permitted if made by or under the direction of the person in charge of a public library for the use of the library and if such book is not available for sale in Nigeria. The unavailable book so copied must be for the purpose of use of the library (Crews, 2015).

(e) Research/Private Study

Reproduction is permitted for the purpose of research or private study of an unpublished literary or musical work kept in a library, museum or other institutions to which the public has access.

(f) Braille for the Visually Impaired Person

Lastly, the Act permits the reproduction of published work in braille for the exclusive use of the visually impaired and sound recordings made by institutions or other establishments approved by the Government for the promotion of the welfare of other physically challenged persons for the exclusive use of such visually impaired or physically challenged person.

The Third Schedule of the Act makes provisions for special exceptions in respect of a sound recording of a musical work but these are beyond the scope of this paper. A critical consideration of most of the exceptions made by the Act reveals that the economic and moral rights of the copyright owners are not comprised. The exceptions, generally, do not permit commercial exploitation of a work while the acknowledgement of its title and authorship is required in deserving cases. The basic philosophy informing the exceptions, it seems, is to remove any road block or impediment that copyright may constitute to research, educational advancement and public goods.

Libraries/Archives and Copyright Enforcement

Libraries and archives have an important role to play in ensuring compliance with the provisions of the copyright law. Under the Nigerian Copyright Act, there is no clear cut role assigned to these institutions in the enforcement of the provisions of the Act. Their role may, however be inferred from the provisions of the Second Schedule

which exempt certain acts from copyright control. For instance, under the fair use principle, reproduction of copyrighted work must be only for purposes of research, private use, criticism or review or the reporting of current events. A public use must be accompanied by an acknowledgement. Libraries, archives and documentation centres, therefore, bear the responsibility of monitoring the use to which reproduction of copyrighted materials is put. They must also supervise reproduction to ensure that there is no infringement.

In the United States of America, there is a code governing the making of photocopies and general reproduction of a material in which copyright subsists. The code stipulates conditions under which libraries and archives can furnish a photocopy or other reproduction. One of such conditions is that the photocopy or reproduction must not be "used for any purposes other than private study, scholarship, or research" (Stanford University Libraries and Academic Information Resources (SULAIR)). A user that violates the "fair use" condition may be held liable for copyright infringement. A library or archives also reserves the right to refuse a copying or reproduction request that is capable of violating the copyright law. In appropriate cases, copyright warning notice must be printed on the order form while copying a complete work may not be permitted except when "the work is not available at a fair price".

Under the US Code, according to SULAIR, copying, whether performed by the library or whether, unsupervised, by the patron, must not be for commercial advantage. A library will, however, not be liable for copyright infringement resulting from unsupervised copying by a patron. If a copy of a work is made by the library for the patron, copyright notice i.e. the symbol "©" from the material so copied must be included. In Canada, collections with use/reproduction restrictions are clearly marked and notice is given of the need to obtain written permission to reproduce or obtain copies of such material (Library and Archives Canada, n.d.).

The case of archival materials that are in the form of primary source materials in the National Archives of Nigeria seems to be governed by somewhat different considerations. Since most of these materials emanated from the public domain and are, invariably, the by-products of the administration of public affairs, their copyright status seems to be

nebulous. Besides, most archival materials are unique and unpublished (Dooley, 2015). Their reproduction and publication are, therefore, essentially governed by Section 29 of the National Archives Act, 1992. Subsection (1) of the Section stipulates that subject to subsection (2) of the Section, any person may make or cause the National Archives to make at his own expense copies of or extracts from any public archives which have been made available to him in the National Archives. Subsection (2) of the Section, however, prohibits the publication of the whole or part of any public archives without the written permission of the Director of National Archives or the written consent of the depositor or his representatives in the case of archives voluntarily deposited by private bodies or individuals. Subsection (3) of the Section makes it mandatory for a person who issues any publication based on the archives he has used in the National archives to deposit a copy of such publication in the National Archives Research Library.

In so far as there are copyrighted materials in the archives, it is submitted that the provisions of Section 29 of the National Archives Act exist without prejudice to the interest of the copyright ownership of such materials. Subsection (4) of the Section even makes the position clear by stating that nothing in the Section is to be construed as affecting or extending the law relating to copyright. It is, therefore, imperative that once it is established that copyright subsists in archival materials, the custodian institution has the responsibility to uphold the copyright protection and allow the exploitation of the materials within the limit permitted by the law.

Copyright and Electronic Resources

Advancement in information technology (IT) has taken library collections beyond the traditional paper materials that are housed within the confines of the library building. Modern libraries now subscribe to electronic information resources (e-resources) which form an important part of their collections. License agreement is a veritable legal means by which providers of these resources control the use of the products. A license agreement has been defined by the United States Special Library Association (2009) (Quoting Black's Law Dictionary, 6th Edition) as "a promise or set of promises constituting an agreement between parties that gives

each a legal duty to the other and also the right to seek a remedy for the breach of these duties". A license agreement is, therefore, a legal contract which parties are bound to obey and a breach of which is actionable by the aggrieved party. In most cases, a breach of the terms of a license agreement on the part of the licensee may result in sudden termination of the contract. The fact is that a publisher has the discretion to discontinue subscription services for justifiable reasons and thus disrupt access to the resources (Prilliman, 2008).

Licensing electronic resources, is, therefore, guided by certain principles which require a license agreement to contain certain basic terms. These, according to US Special Libraries Association (2009) include:

- (i) the recognition of the rights of the licensee or its user community under the copyright law;
- (ii) the recognition of the intellectual property rights of both the licensee and the licensor;
- (iii) institutionalization by the licensee of reasonable and appropriate measures to enforce the terms of access to a licensed resource;
- (iv) exclusion of licensee from liability for unauthorized uses of a licensed resource by its users as long as the licensee has taken reasonable and appropriate steps to intimate its user community with use restrictions; and
- (v) obligation on the part of the licensor to give the licensee notice of any suspected or alleged license violations that the licensor may be aware of and allow the licensee reasonable time to investigate and rectify the anomalies.

The implication, therefore, is that libraries, in addition to their obligations to ensure that users behave responsibly within the limit allowed by the copyright legislation in the exploitation of copyrighted resources must also put necessary safeguards in place to ensure that nothing is done to violate the terms of a license agreement as it relates to licensed electronic resources.

Conclusion

The need to safeguard man's intellectual property against undue exploitation has informed the evolution of intellectual property right. Specifically, copyright protects literary and artistic works. Libraries, archives and information centres, by virtue of their status as custodians of works in which

copyright subsists, owe a duty of ensuring compliance with the provisions of the copyright legislation in the process of facilitating access to the information resources in their custody. They must balance the interest of information needs of their patrons with that of fair use of copyright holders' works. Librarians, archivists and other information professionals must, therefore, be abreast of legislations relating to information provision, particularly the Copyright Act, and assist in their enforcement to ensure that the materials in their custody are not unduly exploited. It is only by doing so that man's intellectual property right can be safeguarded.

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