

EMERGING ISSUES IN COPYRIGHT AS IT RELATES TO INFORMATION AND COMMUNICATION TECHNOLOGY (ICT)

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ABSTRACT

The protection of copyright and its related rights are indispensable to human creativity, as it affords copyright owners protection against the unauthorized use of their works. Copyright violation is an emerging trend that is more prominent in the context of information and communications technology (ICT). Information and Communication Technology (ICT) plays a significant role in our lives, as it offers advantages such as enabling people to stay connected regardless of physical impediments, serving as a catalyst for economic growth and development, being a platform for transacting businesses locally and globally as well as providing access to varieties of services and products. Notwithstanding the benefits of technology as the originator of copyright and copyright-related industries, every technology has posed a potential threat to the copyright-based industries in the areas of computer programmes, databases and works incorporated into websites. These emerging issues ought to be addressed, if copyright protection is to have meaningful application. It is in the light of the foregoing that this paper

addresses copyright as it relates to ICT, the Nigerian Copyright Act, and the drawbacks to the successful implementation of the Copyright Act and recommended amongst others the enactment of data protection laws, utilization of technological protection measures and series of copyright management system.

Introduction

Information and Communication Technology (ICT) is an umbrella term that includes any communication device or application, encompassing: radio, television, cellular phones, computer and network hardware and software, satellite systems and so on, as well as the various services and applications associated with them, such as videoconferencing and distance learning.¹

In today's world, ICT is a fast-evolving global phenomenon, which has become a force to be reckoned with, as it is universally acknowledged as a powerful tool for development and seemingly essential to social development and economic growth.² It is also an instrument for global networking that provides for real time connectivity, widespread use of knowledge, the emergence of individual talent and human capability³. It therefore serves as a faster and expedient platform for transacting business locally and globally as it affords savings on travel cost and provides access to varieties of consumers and products at an affordable price.

Regardless of the enormous benefits of ICT, it brings with it dangers and threats in the form of information security threat, cybercrimes (such as fraud, data/identity theft, phishing scams), infringement of intellectual property rights⁴ (such as piracy, counterfeiting). These problems hamper economic growth and development, expose individuals to injuries, illness, death, cause financial benefit to criminals and have created a threat to intellectual right owners with loss of control over their own intellectual property right. Considering the enormous significance of ICT in today's world and the huge amount of losses globally to theft and infringement of intellectual property rights on ICT, various governments

¹ Margaret Rouse, *ICT (Information and Communications Technology – or Technologies*. Retrieved from <http://www.searchio.techtarget.com> on 11-02-17 at 8:33am

² Hakikur Rahman, *Information and Communication Technologies for Economic and Regional Developments*. Retrieved from <http://www.igi-global.com> on 11-02-17 at 9:11am

³ Haji Ahmad Badawi, *Foundations of the Global Alliance for ICT and Development*. UN Publications (Ed. By Aliye Pekin Celik). Retrieved from <http://www.books.google.com.ng> on 11-02-17 at 9:28am

⁴ Singhania & Partners, *Internet, IT And Software, Copyright and Domain Name Issues – India*. Retrieved from <http://www.hg.org> on 8-02-17 at 9:21pm

have enacted laws to regulate technology in order to boost its positive consequences and reduce or eradicate its negative consequences. It is in the light of the above that this paper examines the emerging issues in copyright as it relates to ICT.

The Definition and Purpose of Copyright Protection

In British legal parlance, 'copyright' is the term used to describe the area of intellectual property law⁵ that regulates the creation and use that is made of a range of cultural goods such as books, songs, films, and computer programs.⁶ In order for a creation to be protected by copyright, it must fall within one of the following eight categories of work: (a) literary works, (b) dramatic works, (c) musical works, (d) artistic works, (e) films, (f) sound recordings, (g) broadcasts, (h) published editions (or typographical works).

The Black's Law Dictionary⁷ defines copyright as:

The right of literary property as recognized and sanctioned by positive law. An intangible incorporeal right granted by statute to the author or originator of certain literary or artistic productions whereby he is vested for a limited period, with the sole and exclusive privilege of multiplying copies of the same and publishing and selling them.

The Nigerian Copyright Act⁸ (hereinafter referred to as the Act) does not expressly define 'copyright'.⁹ However, Section 1(1)(a-f) of the Act mentions works eligible for copyright as literary works, musical works, artistic works, cinematograph films, sound recordings and broadcast. It is imperative to mention that copyright protection is for a limited period and for works to be eligible for copyright protection, they must be original.

⁵ Intellectual property law (IPL) is the general area of law that encompasses copyright, patents, designs, and trade marks, as well as a host of related rights. IPL regulates the creation, use, and exploitation of mental or creative labour. While there are a number of differences between the various types of intellectual property, one feature that they share in common is that they establish property protection over intangible things such as ideas, inventions, signs, and information.

⁶ For an analysis of various other perspectives on copyright, see P. Goldstein, 'Copyright' (1990-1) 38 *Journal of the Copyright Society of the USA* 109.

⁷ Garner, B.A., *Black's Law Dictionary*, (8th edition: West Publishers: N.Y.), p.361

⁸ Cap. C28 Laws of the Federation of Nigeria (LFN), 2004

⁹ It defines 'copyright' in the interpretation section of the Act as "copyright under this Act".

Copyright and its related rights are essential to human creativity. Therefore, as a result of the creative skill, significant labour and investment of copyright owners, they are guaranteed protection of their works without fear of unauthorized copying or piracy. This protection not only allows them gain economic rewards for their efforts but also encourages future creativity, development of new ideas and provides access to information.¹⁰

The protection of copyright became imperative as a result of the universal upsurge of monopolies in various fields from which patents and trademarks were born.¹¹ Thus, if the works of copyright owners are not protected, it will afford unscrupulous persons the opportunity of unjustly benefitting from the works of others, it will destroy the zeal of copyright owners to develop new ideas and their goodwill may be affected negatively.

Emerging Issues in Copyright

The copyright law in historical records is known to be the legacy of technology, which has experienced regular changes keeping in view the nature, extent and domain of technology to secure the public interest of originality, novelty and imagination.¹² On the one hand technology was the originator of copyright and copyright-based industries; on the other hand every new technology has posed a potential threat to the copyright-based industries.

For a long time after the emergence of computer programmes, it was contentious whether they qualified as works (and if so, as what kind of work), or whether they should be protected by *sui generis* right or were otherwise outside copyright law.¹³ After considerable debate at both national and international level, it was decided in the 1980s that computer programmes ought to be protected as literary works¹⁴ and the Judiciary were willing to accept that software was protected under the Copyright Act of 1956. Copyright protection of computer software is established in most countries and harmonized by international treaties to that

¹⁰ Retrieved from <http://www.eucopyright.com> on 11-02-17 at 9:14pm

¹¹ Y.O. Alli., *The Nigerian Copyright Act and Criminal Liability*. Retrieved from <http://www.yusufali.net> on 12-02-17 at 8:00pm

¹² Rafiqi, F.A. & Bhat, I.H., (April, 2013). *Copyright Protection in Digital Environment: Emerging Issues*. *International Journal of Humanities and Social Science Invention*, Vol. 2, Issue 4, April 2013. Retrieved from <http://www.ijhssi.org> on 11-02-17 at 12:21pm

¹³ Silke Von Lewinski, *International Copyright Law and Policy*, Oxford University Press, United Kingdom (2008), P.287

¹⁴ Bently, L., & Sherman, B., *Intellectual Property Law*, Oxford University Press Inc., New York, (2009) (3rd edition), P.65

effect.¹⁵ However, the level of protection granted under copyright law isn't as good as a level of protection as patents.¹⁶ The cases of *Gates v. Swift*,¹⁷ *Sega Enterprises v. Richards*,¹⁸ *Thrustcode v. WW Computing*¹⁹ established that 'assembly code'²⁰ was a literary work and literary copyright is capable of subsisting in a computer programme. Also, the definition of computer programme includes instructions permanently wired into an integrated circuit (firmware),²¹ source code²² and object code.²³

Comparably, databases²⁴ have always been commodities of both commercial value and social utility, ranging from their early manifestation as directories by walking door to door (in the eighteenth century) to the late twentieth-century compendiums of millions of items in electronic form.²⁵ The question of whether and how databases should be protected by the law has never been easy, as it necessarily involves finding a balance between two possibly conflicting societal goals: the goal of providing adequate incentives for their continued production, and the goal of ensuring public access to the information they contain.²⁶

The issue of database has been addressed at different points in time, and in different societies. For example in the United States, the issue of 'databases' has taken on new urgency due to changes in the legal, technological and international landscape. The major landmarks among these changes have been the U.S. Supreme Court's 1991 decision in *Feist Publications v. Rural Telephone Service Co.*; rapid developments in the technologies for collecting, organizing, reproducing and disseminating information; and the actions of the European Union in harmonizing the laws of its member states. As a result, 1996 saw the

¹⁵Retrieved from <http://www.eucopyright.com> on 11-02-17 at 9:14pm

¹⁶ *Copyright - Protection for Software*. Retrieved from <http://www.inbrief.co.uk> on 12-02-17 at 3:07pm

¹⁷ (1982) RPC 339-40

¹⁸ (1983) FSR 73

¹⁹ (1983) FSR 502

²⁰ A programming language that is a close approximation of the binary machine code.

²¹ Bently, L., & Sherman, B. Op. cit., P.65

²² A text listing of commands to be compiled or assembled into an executable programme.

²³ Code produced by a compiler or assembler.

²⁴ A database is defined very broadly as 'a collection of independent works, data or other materials which (a) are arranged in a systematic or methodical way, and (b) are individually accessible by electronic or other means'.

²⁵ *U.S. Copyright Office Report on Legal Protection for Databases*, August 2007. Retrieved from <http://www.copyright.gov> on 11-02-17 at 7:33pm

²⁶ Ibid

consideration of proposals for a new form of protection for databases, both in the World Intellectual Property Organization and in the U.S. Congress.²⁷

Similarly, the Database Directive, which was implemented into the United Kingdom on 1 January 1998, amended the definition of literary works to introduce 'databases' as a distinct class of literary works. Insofar as a computer programme encompasses aspects that fall within the definition of a database, it appears that these components may be independently protected as databases (whether under copyright or the *sui generis* database right).²⁸

Multimedia works, which include collections of many diverse types of work in structured and unified format such as a CD-ROM or web resource, may be protected by database copyright, if original, or under the new database right.²⁹

It should be noted that electronic works and websites qualify as 'literary works'. Therefore, they enjoy copyright protection. Storage of original works in electronic format does not alter their status as works as the meaning of writing includes 'any form of notation or code...regardless of the method by which, or medium in or on which, it s recorded.'³⁰ While the meaning of 'electronic' as 'actuated by electric, magnetic, electro-magnetic, electro-chemical or electro-mechanical energy' is actually wide (although it is not clear whether this would extend to nanotechnology computers³¹).³²

Works incorporated into websites retain their characteristics as copyright works, and normal copyright principles apply to them. Also, a website as a whole may constitute a copyright work as a typographical arrangement of a published edition. It was held in a 1997 Scottish case of *Shetland Times v. Wills*, where a website was found to be a cable programme service³³ or a cable programme.³⁴

The digital age being the trademark of the present millennium is a witness to yet

²⁷ Ibid

²⁸ Bently, L & Sherman, B., Op. cit, P.66

²⁹ Ibid

³⁰ Colston, C. & Galloway, J., *Modern Intellectual Property Law*, Routledge, (2010) (3rd edition), P.299

³¹ Nanotechnology, or, as it is sometimes called, molecular manufacturing is a science and technology where dimensions and tolerances in the range of 0.1 nanometer(nm) to 100 nm play a critical role. It holds promise in the quest for ever-more-powerful computers and communication devices.

³² Ibid

³³ A category of work subsumed under the definition of broadcast after implementation of the Information Society Directive. This removes internet transmissions from broadcasts.

³⁴ Colston, C., & Galloway, J., Op. cit. P.300

another era expanded by the Internet³⁵ and has a remarkable effect on the creation, dissemination and protection of copyright works. Therefore, the phrase “New and Emerging Technologies” (NET) is used in relation to the digital age. It encompasses the most novel, advanced, and prominent innovations that are developed within various fields of current modern technology such as zero-emission cars that run on hydrogen, the internet, 3D printing, social networking, next-generation robotics, nanotechnology, social networking, etc.³⁶ Regardless of their benefits to humanity and type, NET have grave social, legal and economic consequences.

The copyright issues arising related to NET can be categorized into the following three categories:³⁷

1. Unlawful use of user-generated content created by NET;
2. Unlawful publication of copyright content on social networks; and
3. Unlawful collection of copyrighted content from social networks.

Unlawful Use of User-generated Content created by Net: User-generated content can be defined as content created by the users of online services. User-generated content include: advertisements, audio, blogs, chats, forums, podcasting, posts, tweets, video, etc. The popularity of user-generated content is an outcome of the emergence of the second phase of development of the World Wide Web, namely, Web 2.0. In the first phase (i.e., Web 1.0), the users were simply consumers of content, while in the second phase users are active creators of content.³⁸

Under the Berne Convention, an international copyright treaty applicable in more than 160 countries, copyrights for creative works are automatically in force upon their creation.³⁹ Under the laws of most countries, authors automatically obtain the copyright in their user-generated content upon its creation. The authors do not need to (1) assert the copyright in the user-generated content (e.g., by adding the © symbol) or (2) register their copyrighted content (e.g., by using the

³⁵ Mittal, R. (2006). *From Printing Press to the Internet: The Stride of Copyright along with Technology*, Intellectual Property and Technology Law Journal, 1, 21-46

³⁶ Dimov, D & Juzenaite, R, *Legal Issues of New and Emerging Technologies*. Retrieved from <http://www.resources.infosec.com> on 11-02-17 at 1:34pm

³⁷ Ibid

³⁸ Ibid

³⁹ The Berne Convention for the Protection of Literary and Artistic Works can be accessed at <http://www.wipo.int/treaties/>

services similar to the services provided by the United States Copyright Office):⁴⁰

If a person uses the whole or a substantial part of a copyrighted work without permission, that person is liable for a copyright infringement. The copyright holder may commence court proceedings in order to: (1) stop the infringement; (2) receive compensation for damages suffered as a result of the infringement; and (3) order the infringer to give up the infringing materials to the copyright holder. However, since court proceedings may take a long time, it is preferable if the copyright holder tries to resolve the matter with the infringing party (out of court).⁴¹

Unlawful Publication of Copyrighted Content on Social Networking Platforms: The publication of copyrighted content on social networking platforms without the permission of the copyright holder establishes a copyright infringement except such a publication falls within the scope of the “fair use” doctrine. Nevertheless, there is no a clear-cut distinction between fair use and copyright infringement. Hence, the users keen to post copyrighted content on social networking platforms need to consult an intellectual property lawyer before the publication of such copyrighted content. Otherwise, they may be liable for a copyright infringement. The sanctions for a copyright infringement include, without limitation, fines, and imprisonment.⁴²

Unlawful Collection of Copyrighted Content from Social Networks: The unlawful collection of copyrighted content from social networking platforms establishes a copyright infringement unless such a collection falls within the scope of the “fair use” doctrine. The automatic collection of a large amount of data from social networking platforms may constitute a severe copyright infringement, punishable by fines and imprisonment.⁴³

International and Regional Instruments for the Protection of Copyright

Legal experts and other individuals had advocated the introduction of copyright

⁴⁰ Dimov, D & Juzenaite, R, at Op. cit

⁴¹ Ibid

⁴² Dimov, D & Juzenaite, R, at Op. cit

⁴³ Ibid

protection long before the first treaties addressed the international protection of authors' rights in their works. One of the earliest examples was the proposal for an international treaty on the protection of authors' rights by the law professor Johann Rudolf Thurneysen of the University of Basel, who published his book in 1738, titled *De recursion librorum fortiva*.⁴⁴ This was twenty-eight years after the adoption of the first copyright act ever enacted, the Statute of Anne of 1709. The most significant international and regional treaties that impact upon copyright law are the Berne Convention (1886-1971),⁴⁵ Rome Convention (1961),⁴⁶ Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),⁴⁷ World Intellectual Property Organization (WIPO) Copyright Treaty (1996),⁴⁸ Computer Programs Directive (1991),⁴⁹ Database Directive (1996),⁵⁰ Information Society Directive (2001).⁵¹

Having considered the above, it is imperative to examine the Nigerian laws on copyright protection as it relates to ICT.

The Nigerian Copyright Act

Prior to 1970, copyright matters in Nigeria were governed by the rules of Common Law and the provisions the Copyright Act 1911⁵². The Copyright Act was promulgated in 1988 as the Copyright Decree (No. 47) of that year. It

⁴⁴ Silke Von Lewinski, Op. cit., P.13

⁴⁵ The Berne Convention on the Protection of Literary and Artistic Works was drawn up in 1886 as a small treaty allowing for mutual rights amongst few largely European countries. Since then, the treaty has been revised on a number of occasions and its membership expanded.

⁴⁶ The Rome Convention recognized the rights of phonogram producers, performers, and broadcasters

⁴⁷ There are a number of provisions in TRIPS that relate to copyright. Some of these are responses to new technologies that have given rise to new sorts of work and new modes of distribution.

⁴⁸ The WIPO Copyright Treaty is intended to supplement existing Conventions to reflect, in particular, technological changes and changes in practice.

⁴⁹ The Computer Program Directive addressed the question on whether computer programmes should be protected by copyright, patents, or a *sui generis* right. The Directive also harmonized the criteria for protection.

⁵⁰ The Database Directive attempted to harmonize the laws of copyright in the field of databases.

⁵¹ The Information Security Directive, which is often referred to as the Copyright Directive is intended to implement the two WIPO Treaties agreed in Geneva in 1996. However, the Directive goes much further in responding to the perceived changes brought about by digital technology to the environment in which copyright law operates.

⁵² Copyright Act of United Kingdom, 1911.

repealed the Copyright Decree (No. 61) of 1970. With the revision of all existing federal legislation, the Decree was re-designated the Copyright Act and contained in Cap. 68, Laws of the Federation of Nigeria (LFN), 1990. The Act was amended by the Copyright (Amendment) Decree (No. 42) of 1999. It became part of the codification of Nigerian Law done in 2004 and is presently referenced as Cap. C28 LFN, 2004.⁵³

The Nigerian Copyright Commission (NCC) is saddled with the responsibility of monitoring, administering and enforcing copyright laws and ensuring proper implementation of the Copyright Act.⁵⁴ Notwithstanding the role of NCC in ensuring proper implementation of the Act, Nigeria is ranked among countries where piracy⁵⁵ is prevalent;⁵⁶ with the entertainment industry being the worst hit losing billions of naira yearly. Remarkably, the NCC has secured many convictions against copyright violators in cases such *NCC v. Paragone Nig. Ltd.*,⁵⁷ *NCC v. Chubby Ononuju*⁵⁸ and *NCC v. Ebenezer Ogundele*⁵⁹. However, it has been confronted with various challenges.

The Drawbacks to the Successful Implementation of Copyright Laws in Nigeria

1. The absence of data protection and privacy laws⁶⁰ has been creating obstacles to the successful implementation of copyright laws in relation to ICT.
2. Inaction by regulators.
3. Inadequate measures for the adequate protection of consumers.
4. Inadequate funding and lack of expertise in ICT.

⁵³ *Nigerian Copyright Act*. Retrieved from <http://www.ccfanigeria.org> on 12-02-17 at 8:19pm

⁵⁵ Piracy is the unauthorized public distribution of materials protected by copyright, patents and trademarks law.

⁵⁶ Nwogu, M.I.O. (December 2014). *The Challenges of the Nigerian Copyright Commission (NCC) in the Fight against Copyright Piracy in Nigeria*. Global Journal of Politics and Law Research, Vol. 2, No. 5, P.25. Retrieved from <http://www.eajournals.org> on 13-02-17 at 8:57pm

⁵⁷ FHC/L/367C/11

⁵⁸ FHC/IL/1C/13

⁵⁹ FHC/L/459C/11

⁶⁰ The only legislation that provides for the protection of the privacy of Nigerian citizens in general terms is contained in section 37 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

5. Lack of synergy among all stakeholders.
6. Lack of proper enforcement of the provisions of laws against copyright infringers.
7. Low penalties provided for copyright violators.
8. Difficulty in enforcing copyright infringement.

Recommendations

1. Utilizing information security measures to protect the confidentiality, integrity and availability of computer system data form from those with malicious intentions.
2. Enactment of Data Protection laws.
3. Stakeholders in the ICT such as the Internet Corporation for Assigned Names and Numbers (ICANN), the Nigerian Internet Registration Association (NIRA), the Institute of Software Practitioners of Nigeria (IPSON), government and its agencies such as NCC, the National Information Technology Development Agency (NITDA), internet service providers, software companies, Copyright Society of Nigeria (COSON), entertainment companies etc. should come together to sensitize the public on their roles in combatting copyright infringement as it relates to ICT.
4. Utilizing technological protection measures such as encryption and similar access controls, which encode works so that only those with legitimate keys can obtain access, and copy controls, which allow users access to works but operate to prevent the subsequent making of copies.⁶¹
5. The government should provide adequate legal protection to consumers.
6. Utilizing Content Scrambling System to protect Digital Video Disc (DVDs).
7. Utilizing Series of Copyright Management System
8. Enacting Computer Use Policies

Conclusion

Digital technology has made it much easier to manipulate, reproduce and distribute protected works thereby giving rise to global piracy, with estimates of global losses running into billions of dollars for copyright holders and government. Also, digital technology has made copyright enforcement difficult and in some cases impossible to succeed because of the existence of a global

⁶¹Bently, L., & Sherman, B., Op. cit. P.318

computer-based network system, where works from databases can either be posted, (without prior authorization from copyright holders) from any location in the world or made accessible by Internet Service Providers to subscribers situated throughout the world.

It therefore becomes imperative for the government and all stakeholders in the copyright/ICT sector to come together, with a view to addressing the challenges posed by new technologies in an effective and appropriate way.